

32721

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32721



WEIRTON HEIGHTS VOLUNTEER FIRE DEPARTMENT, INC. and
WEIRTON VOLUNTEER FIRE DEPARTMENT COMPANY NO. 1, INC.,

Appellants,

v.

STATE FIRE COMMISSION,

Appellee.

REPLY BRIEF

Appeal from the Order of Judge Recht entered on September 14, 2004 in the Circuit
Court of Hancock County, West Virginia, at Civil Action No. 03-AA-1.

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ARGUMENT

- I. WITHOUT ANY STATUTORY OR REGULATORY AUTHORIZATION, THE STATE FIRE COMMISSION COULD NOT WITHDRAW RECOGNITION OF THE APPELLANT FIRE DEPARTMENTS.

In their opening brief, the appellants demonstrated that the State Fire Commission could not withdraw their recognition absent any statute or regulation authorizing it to take such extreme action. It must be kept in mind that the appellants were volunteer fire companies long before the legislature created the Commission and empowered it to grant certifications. Moreover, these grandfathered volunteer fire companies were viable and functioning providers of emergency services to their community when the City of Weirton began its all-out attack upon them in order to misappropriate their equipment for the City's own use. By capitulating to the City's request to withdraw recognition from the appellant fire companies, the State Fire Commission became a willing co-conspirator in the City's aggrandizement scheme. In doing so, the State Fire Commission acted ultra vires.

The legislature did not give the State Fire Commission any authority to withdraw recognition from a pre-existing fire company. The first sentence of W.Va.Code § 29-3-9(e) authorized the Commission to recognize new fire departments. The legislature's directive, in the second sentence of that code section, to "develop a method of certification which can be applied to all fire departments and volunteer fire

departments" should be construed by this Honorable Court to apply to new departments. Id. The court below adopted and the Commission now advances a broader interpretation of that second sentence so that the Commission would gain the power to recognize all fire departments, both new and pre-existing ones. This was an erroneous construction of the statute because nothing granted the Commission that power to recognize pre-existing fire departments. Further, nothing in the code empowered the Commission to withdraw recognition of any such pre-existing fire departments. This Honorable Court should not grant the Commission such devastating powers by implication if, as here, the legislature did not expressly grant them to the Commission.

Even if the second sentence of section 29-3-9(e) were to be construed to imply a power to withdraw recognition from a pre-existing fire department, it is also important to note that the State Fire Commission never promulgated any regulations which carried out such an implied directive. The Commission simply cannot act in a vacuum. Before it could purport to exercise a grant of power from legislature, it had to promulgate rules or regulations in order to give the affected fire departments some reasonable advance notice of the criteria by which their recognition or certification would be judged. It would be and it was grossly unfair to allow the State Fire Commission to judge these appellant fire departments by standards or criteria which have never been formally adopted by the State Fire Commission. The utter absence of any such regulations allows the Commission to engage in ad hoc determinations which appear to be and are both arbitrary and capricious.

Even if the list of requirements posted on the Commission's website were elevated to the status of legitimate regulations, these standards are silent as to the requirement of a running zone in order to obtain or retain recognition. By making a running zone a required element of the recognition process, the State Fire Commission was, once again, acting in a legal void.

The State Fire Commission could not withdraw recognition from a pre-existing fire department absent a statute conferring that power. The State Fire Commission could not exercise that power (even if it were implied) in a careful and reasoned manner if it never announced the rules or regulations in advance because a fire department facing the risk of withdrawal of certification would have no idea of the standards or criteria it must meet to retain or regain its recognition. The State Fire Commission could not impose a requirement of a running zone if its internet guidelines were silent on the subject. If the Commission could do these things without a statute or at least a regulation delineating its authority, what would stop the Commission from conjuring up some new standard or criterion which a fire department targeted for extinction did not or could not meet?

This Honorable Court can and should prevent the State Fire Commission from exercising powers not granted by the legislature, especially when there are no articulated standards to guide the Commission in its exercise of such authority.

II. THE CROSS-ASSIGNMENTS OF ERROR WOULD BE MOOT IF THIS HONORABLE COURT WERE TO ACCEPT APPELLANTS' ARGUMENTS REGARDING THE STATE FIRE COMMISSION'S LACK OF AUTHORITY TO WITHDRAW RECOGNITION UNDER THE CIRCUMSTANCES OF THIS CASE.

The State Fire commission urges this Honorable Court to reverse the decision of Judge Recht to permit the appellant fire departments to retain their certification or to be certified under certain terms and conditions directed by the court. There would be no need for their Honorable Court to address any of those cross-assignments of error if it were to agree with the appellants that the State Fire Commission had no authority under any statute or regulation to withdraw their certification or recognition. For if there were no authority to withdraw recognition, then the appellants would be restored to their status as it existed before the State Fire Commission acceded to the request of the City of Weirton to withdraw recognition from the appellants. It would then be a moot point whether Judge Recht properly modified the decision of the State Fire Commissioner in the manner in which he did. Accordingly, if this Honorable Court were to agree with the appellants that the State Fire Commission lacked any authority to withdraw cognition under the circumstances presented here, then the cross-assignments of error should be dismissed as moot.

III. THE CROSS-ASSIGNMENTS OF ERROR
SHOULD BE REJECTED UNDER THE
INVITED ERROR DOCTRINE.

It is settled law that a judgment will not be reversed for any error in the record introduced by or invited by the party asking for reversal. See, e.g., State v. Bosley, 159 W.Va. 67, 218 S.E.2d 894 (1975). In that case, this Honorable Court refused to consider the merits of an evidentiary objection because the line of interrogation which allegedly brought the defendant's character in issue was instigated by defense counsel. Id. at 71-72, 218 S.E.2d at 897.

In this case, the State Fire Commission complains on appeal that Judge Recht erred in declaring that the appellant fire companies were certified under certain conditions. However, an examination of the record will reveal that it was the State Fire Commission itself which initiated that process or approach. It should not now be allowed to argue that Judge Recht erred in adopting that position.

The following colloquy took place between Judge Recht and Attorney Burrell, counsel for the State Fire Commission, at the hearing held on January 13, 2004:

Let me just get right to the heart of it. Mr. Burrell, let me just ask a few questions so I can be sure that I understand basically the position of the State fire Commission.

MR. BURRELL: Very well, sir.

THE COURT: As I indicated, we are working from a letter dated December 13, 2002, one letter from Mr. Bostar to a Michael Morin, M-O-R-I-N, who is the fire chief of the Weirton Volunteer Fire Department Company No. 1, and then another letter for the same date, December 13, 2002, to a Wayne Bonovich, Fire Chief of the Weirton Heights Volunteer Fire Department Company No. 3, both dated December 13, 2002. That really, I believe, is the heart of the reason why the State Fire Commission did what it did. Let's just see what it did.

What the Fire Commission did in its letter was to withdraw recognition of the Weirton Volunteer Fire Department No. 1 and Weirton Heights Volunteer Fire Department Company No. 3 as a fire department for what is referred to as operational purposes within the State of West Virginia, and that was effective 12:00, noon, December 13, 2002, in regard to both companies.

As I understand it, what that means is that the two fire departments in question -- I won't keep repeating the names -- does not have the authority, as contained in West Virginia Code, Chapter 29, Article 3A, Section 1 -- possible, section 1, possibly, Section 2, possibly, Section 3. In other words, that really -- if you look at this, that is really the kind of guts of what a fire department can or cannot do at a fire. 29-3A-1 is rather broad -- in terms of the authority that a fire department that is recognized or approved by the State Fire Commission, what it can do at a fire scene, it is pretty broad, and they have a substantial amount of authority, all as an adjunct to addressing the fire.

Now, that was withdrawn. Nothing else. Both fire departments structurally remain the same. They simply do not have the authority under 29-3A-1, 2 and 3. Now, does that mean, as far as the State Fire Commission, that if they are requested by another entity that is approved to assist in fighting a fire, that they can do that; is that your position?

MR. BURRELL: Yes, Your Honor, it would be.

(Transcript of Hearing, January 13, 2004, at 3-5 (emphasis added)). Later, in the same hearing, the following exchange took place:

THE COURT: So you are saying that Mr. Burrell, in his papers, is saying you can go out and still fight fires, you just don't have operational authority, but once you take away and strip you of these emergency permits, you are totally emasculating the department, you can't do anything?

MS. ROTH: We can exist for whatever --

THE COURT: You can't do anything.

MS. ROTH: We can't do anything.

THE COURT: Mr. Burrell, you say you can. How do you do that without taking away their emergency permits? How do you, on one hand, say they are still allowed to go out and still function, albeit under the control -- they don't have any authority under 29-3A-1, but if you take away their emergency vehicle permits -- and I looked at that, and I don't know what an emergency vehicle permit is, but logic tells me that that is something important to go out on the road and fight these fires. What you have done is that you have made them impotent. You say on one hand that they can do it; yet, on the other hand, you take away their ability to do it. Now, is that fair?

I really wouldn't put you -- because, in your papers, you suggest, what are they complaining about, they are still - - we are not really doing too much to these folks. They still have their equipment. They are still not dissolved. They can go out and fight fires, do good things. If it weren't for that third paragraph, I would tend to agree with you. Why don't you simply remove that from the letter?

MR. BURRELL: Although it was not specifically addressed either in the proceedings below or in the counsel's brief -- so, in order to fully respond, I can't say that I am completely prepared to meet that argument.

I would say, however, that when we were talking with the broad powers of Article 3A, a lot of that has to do with -- there is reference to essentially things that would allow them to take actions that might otherwise be contrary to the vehicle laws, the traffic laws of the State, to direct things at the scene, and so forth.

THE COURT: Well, let me ask you. Maybe we better -- if they -- if these two departments turn in their emergency vehicle permits -- I can tell you the truth, if somebody offered me a bet, I couldn't tell you what an emergency vehicle permit is. I presume it is self-explanatory.

MS. ROTH: I believe it is, Your Honor.

THE COURT: Can they still go out on the roads and fight these fires with this equipment if they don't have one of these emergency vehicle permits; do you know?

MR. BURRELL: Your Honor, I would contend they could. They wouldn't be able to do things like run emergency lights and sirens to go pass, to go through stoplights, and --

THE COURT: Well, they would not be considered emergency vehicle under the motor vehicle laws that -- well, isn't that really in effect -- you are really giving them -- it is kind of a hollow authority, I mean, isn't it, to say you can't go out and fight, but you really can't get there. I mean, that sounds a little strange, doesn't it?

MR. BURRELL: I wouldn't agree they couldn't get there, Your Honor.

THE COURT: I mean, they could get there like I could get there, like anybody else would get there. As a matter of fact, I think it probably is going to tend to confuse things more than anything else, because you are going to have a fire truck out there and people pulling over and -- I mean, that is going to be anarchy, because everybody is -- you have almost a Pavlovian reaction to an emergency vehicle, or you should. As soon as you hear it, you just pull over.

MR. BURRELL: Presuming they have their lights and sirens --

THE COURT: Oh, sure. Although I dare to say -- there if no testimony -- if someone sees a fire truck, you look at it, then you tend to want to pull over, at least, you are looking, I don't know. But there is no testimony here on any of this. See, I guess that is really the point.

If, in fact, you are saying they still can go ahead and fight fires and do anything they want to, but without any operational authority, and, yet, really, are stripping them of their ability to effectively fight -- I am not talking about giving orders and all the rest, just do their -- isn't that really -- isn't that a little arbitrary?

MR. BURRELL: I would point out, as Ms. Roth referred to in these mutual aid agreements, many of those are still in effect. They are responding, or they can respond to -- she represented that some of those extend beyond the borders of the State of West Virginia, where the Fire Commission has no authority.

(Transcript of Hearing, January 13, 2004, at 13-16). The issued recurred again:

THE COURT: Well, he represents the State Fire Commission, and, basically, he is saying that you can do everything other than 29A-3-1. That is how I read it.

MR. BURRELL: That is my understanding from my client, that they are effectively a mutual aid society at this point.

(Transcript of Hearing, January 13, 2004, at 24).

Based upon those arguments and concessions by counsel, Judge Recht fashioned his ruling as follows:

THE COURT: Courts have no armies, and we don't have the power of the purse, but we sure do have the power of the pen. so that is how we address that.

I look at what has happened here simply within a very confusing record, a letter dated December 13th, that says what that means. It says that we are withdrawing your authority under 29-3A-1, 2, and 3, authority of local fire departments.

Now, the next sentence, as well as duties, authorities, and responsibilities, or privileges that may be found elsewhere, I am just going to eliminate that. That is so

vague that that is totally unenforceable. What it does, as far as I am concerned, is define what it can and cannot do under 29-3A-1, 2, and 3.

Now, I think that may be emasculated by the next paragraph that requires the return of the emergency attorney, and that I think I can modify.

(Transcript of Hearing, January 13, 2004, at 26). Later, Judge Recht stated:

I have no desire to let this matter linger longer. The only way I know how to deal with it within the four corners of the record that we have to deal with is this:

Is that I believe that based on what I understand is the law of the State of West Virginia, that the State Fire Commission does have implicit or inherent authority within which to determine who has operational control at a fire. That withdrawing recognition, limited only to operational control at a fire because a department does not have a fixed territory, is not an arbitrary or capricious decision on the part of the Fire Commission.

That the departments involved in this case are still permitted to, in essence, fight fires. What they do not have the authority to do is be in control of the fire at the scene.

That based upon the representations of Mr. Burrell, that the Fire Commission wants to permit the departments to still be able to go under and fight fires without operational control authority under 29-3A --

MR. BURRELL: I would say it is not a matter of what we want, it is what -- they simply can't do it.

THE COURT: All right. Fine. Either way.

But, in order to do that, I find that it is an arbitrary, capricious decision to require the two departments to return their emergency vehicle permits. You cannot permit them to continue to fight a fire without the ability to get there in an efficient, I think, safe manner, quite frankly. I think it is really unsafe if you put these folks out on the road -- I mean, you are going to have bumper cars out there.

That will be the decision. What that does to what is going on now, I don't know, I really don't know. If you want to -- I mean, I could send this back to the Commission and say, here, conduct hearings, and we will be here for another year, and, if you want me to do that, I will be happy to do that. I am just basing a decision on what I have right here, which, unfortunately -- and maybe because this is the first time this ever happened. This is all new stuff here. I appreciate the good work you have done now, that is, your briefs were very helpful, but that just led me to where we are right now.

So that will be the decision. In essence, the decision of the Fire Commission is affirmed as modify [sic] in terms of the emergency permit.

(Transcript of Hearing, January 13, 2004, at 30-31).

The State Fire Commission reiterated its position at the hearing conducted on June 11, 2004, as follows:

MR. BURRELL: Thank you, Your Honor. I concur with the Court and Ms. Roth that that is exactly what occurred on the 13th. My answer to the Court on that specific question, I even have notes on that question about whether they still would be able to fight fires if requested. My answer was conditioned on if requested by a recognized fire department.

As the Court has observed, the fire commission does not have legal authority to tell these people to stop being -- fighting fires. Unlike a lot of other certification schemes in the state code under Chapter 29 and 30, there are enforcement provisions that say, if they're not certified, the certifying agency can enjoin or take some other court action to prevent them. That doesn't exist here.

It is the position of the fire commission that they are essentially a fraternal organization; that the fire commission cannot dissolve them. Even though they were requested to do so, they don't have that authority. They can't tell them to stop going to fires.

However, there are certain things under Chapter 29-3 and Chapter 29-3(a) governing the relationship between the fire commission and the local fire departments.

One of them is the authority vested for responding at the scene, being in control at the scene of the fire. That are a few other things now, working with local fire departments.

Fire marshal has the ability to deputize members of local fire departments. The state fire marshal, under Article 17(c), has the authority to designate who -- what -- how many vehicle permit, emergency vehicle permits, and who gets motor vehicle permits.

It's the position of the fire commission that, having withdrawn recognition of an agency, it is inconsistent and simply does not make sense for them to take other acts which connote recognition of them. They cannot tell them no, you guys cannot do this. But on the other hand, they don't have and are not compelled by the code to take other acts that say we do recognize you.

That's -- if that position was not made clear, I can only fault myself for lack of responding.

(Status Conference, June 11, 2004, at 10-12 (emphasis added)).

Once again, Judge Recht recognized the Sate Fire Commission's agreement that the appellants could, despite the withdrawal of recognition, continue to fight fires when requested by a certified fire department and the Commission's counsel agreed. (Status Conference, June 11, 2004, at 13-14). It logically follows from that that the Commission could not strip the appellants of their emergency vehicle permits. (See Transcript of Hearing, January 13, 2001, at 26, 30-31).

Thus, the record makes it abundantly clear that it was the State Fire Commission which advocated the position ultimately adopted by the court below. The Commission cannot now disavow this position and argue that Judge Recht erred in adopting it as his ruling.

IV. THE COURT BELOW HAD THE POWER TO
MODIFY THE DECISION OF THE STATE
FIRE COMMISSION.

The State Fire Commission concedes that W.Va. Code § 29A-5-4(g) gives the court the power to modify an order or decision of the Commission under certain circumstances. (Brief of Appellee, at 13). The statute provides for such relief when the substantial rights of the aggrieved party have been prejudiced because the agency's decision was affected by an error of law or if it was arbitrary or capricious. *Id.* § 29A-5-4(g)(4), (6). It is the appellants' position that Judge Recht had the authority to modify the Commission's order in the manner that he did.

The court below ruled that the Commission did not have the authority to compel the return of the emergency vehicle permits and that it was arbitrary and capricious for the Commission to require that the permits be returned. (Transcript of Hearing, January 13, 2004, at 26, 30-31). Judge Recht was well within the statutory prerogative when he made that ruling.

Moreover, the Sate Fire Commission has seized upon a small sound bite when it criticizes Judge Recht for his use of the terminology "judicial fiat." All that Judge Recht did was to fashion a ruling which he felt was fair and equitable under the unique circumstances of the case. In doing so, Judge Recht used the flowery language as a shorthand phrase to describe the judicial process from which the result was wrought. Clearly, the court below had the power under section 29A-5-4(g) to modify the Commission ruling. Judge Recht should not be faulted for the verbiage of his ruling which was, as noted above, invited by the State Fire Commission itself.

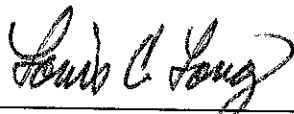
CONCLUSION

For the reasons set forth in the appellants' brief and in this reply, appellants respectfully request this Honorable Court to reverse the rulings below which permitted the State Fire Commission to withdraw recognition of these volunteer fire departments. The Court should order the State Fire Commission to reinstate their recognition or certification.

Further, the cross-assignments of error should be dismissed, however, if this Honorable Court were to reach them, then the appellants would request, in the alternative, that the decision below be affirmed:

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing document was served by first class mail on the following:

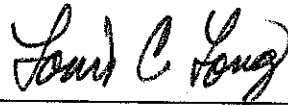
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Dated: October 6, 2005

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