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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

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GASP

v.

Jefferson County Board of Health et al.

Appeal from Montgomery Circuit Court
(CV-17-901677)

DONALDSON, Judge.

GASP, an Alabama not-for-profit corporation, appeals from an order of the Montgomery Circuit Court dismissing its petition for judicial review of a decision of the Jefferson County Board of Health ("the Board"), which GASP filed

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pursuant to §§ 41-22-11(b) and 41-22-20, Ala. Code 1975. For the reasons discussed below, we affirm the judgment of the circuit court.

Facts and Procedural History

The Board is a county board of health established pursuant to § 22-3-1 et seq., Ala. Code 1975. The Alabama Air Pollution Control Act of 1971, § 22-28-1 et seq., Ala. Code 1975 ("the Air Control Act"), provides for a "coordinated statewide program of air pollution prevention" through the implementation of local air-pollution-control programs. § 22-28-3(c), Ala. Code 1975; see also § 22-28-23, Ala Code 1975. The Air Control Act provides that "each county board of health shall have the authority to establish, and thereafter administer, within their jurisdictions, a local air pollution control program." § 22-28-23(b), Ala. Code 1975. Pursuant to the Air Control Act, the Board established the Jefferson County Department of Health Air Pollution Control Program ("the Air Program") in 1972. Section 22-28-23(d) of the Air Control Act provides the Board with the authority to "adopt and enforce any ordinance, regulation, or resolution requiring the control or prevention of air pollution"

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On February 19, 2017, a "Notice of Public Hearing" before the Board regarding proposed revisions to Chapter 12 of the Jefferson County Air Pollution Control Rules and Regulations ("Chapter 12") was published in The Birmingham News. The Board conducted a public hearing on March 21, 2017. On April 19, 2017, at a Board meeting, the Board adopted revised rules and regulations in place of Chapter 12. More specifically, the Board deleted Chapter 12 in its entirety and incorporated by reference the Alabama Environmental Management Commission's "Rules of Procedure for Hearing Appeals of Administrative Actions of the Alabama Department of Environmental Management" contained in Chapter 335-2-1 of the Alabama Administrative Code.

On July 26, 2017, GASP submitted a petition to the Board seeking an administrative decision that the repeal of certain rules -- i.e., Chapter 12 -- and the adoption of new rules by the Board were invalid. In the petition, GASP described itself as an "Alabama non-profit, membership corporation" composed of members who "live, work, and recreate in Jefferson County." GASP asserted, in part, that actions of the Board were invalid because the Board did not comply with the notice and hearing

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requirements of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala. Code 1975 ("the AAPA").

On September 6, 2017, the Board denied GASP's petition. As a basis for the denial, the Board found that the AAPA did not apply because the Board and the Air Program are not state agencies as defined by the AAPA but, rather, are local governmental units not subject to the AAPA. The Board also found that it had complied with the rule-making procedures set forth in the Air Control Act in repealing and replacing Chapter 12. On October 6, 2017, GASP filed a notice of intent to appeal with the Board. On October 27, 2017, GASP filed a petition in the circuit court seeking judicial review of the Board's decision pursuant to §§ 41-22-11(b) and 41-22-20 of the AAPA. In its petition, GASP named as defendants the Board and various board members in their official capacities.

On December 4, 2017, the Board filed a motion seeking to dismiss GASP's petition or, in the alternative, to transfer the action to Jefferson County. The Air Program filed a motion to intervene in which described itself as "the group of individuals who enforce and apply the Regulations [enacted by the Board] on a day-to-day basis" and asserted that it "has

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specific interests that are distinct from the Board." ABC Coke also filed a motion to intervene. On January 4, 2018, the circuit court granted the motions to intervene filed by the Air Program and ABC Coke.

On January 24, 2018, after a hearing, the circuit court entered an order granting the Board's motion to dismiss. In its order, the circuit court found that the Air Program and the Board are not state agencies subject to the provisions of the AAPA and that the declaratory-judgment provision of the AAPA is not the proper procedural avenue for the relief sought by GASP. GASP filed a notice of appeal to this court on February 15, 2018. We have jurisdiction over this appeal pursuant to § 12-3-10 and § 41-22-21, Ala. Code 1975.

Standard of Review

As we have previously explained, this court reviews the judgment of a circuit court reviewing a decision of an administrative agency "without any presumption of its correctness, since that court was in no better position to review the order of the [agency] than we are." State Health Planning & Res. Dev. Admin. v. Rivendell of Alabama, Inc., 469

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So. 2d 613, 614 (Ala. Civ. App. 1985) (citing Vann Express, Inc. v. Bee Line Express, Inc., 347 So. 2d 1353 (Ala. 1977)).

More particularly, GASP appeals from the dismissal of its petition for judicial review of the Board's decision. It is well settled that

"[a] ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). [An appellate court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299."

Newman v. Savas, 878 So. 2d 1147, 1148-49 (Ala. 2003).

Discussion

GASP argues that the Board is a local agency of the state and, therefore, is subject to the notice and comment requirements for rule making in § 41-22-5, Ala. Code 1975, a part of the AAPA. The Board argues that the Air Program, which is administered by the Board, and the Board are not "agencies" subject to the AAPA.

Regardless of whether the Board is a state agency subject to the AAPA, we must determine whether the provisions of the

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AAPA are applicable to the Board when it is performing its rule-making function in the administration of the Air Program pursuant to the Air Control Act. GASP agreed at the January 4, 2018, hearing in the circuit court that, if the AAPA is inapplicable, its petition for judicial review was due to be dismissed.

As explained above, the Air Control Act provides for a "coordinated statewide program of air pollution prevention" through the implementation of local air-pollution-control programs. § 22-28-3(c); see also § 22-28-23. Section 22-28-23(d) of the Air Control Act provides the Board with the authority to "adopt and enforce any ordinance, regulation, or resolution requiring the control or prevention of air pollution" With regard to the Board's rule-making authority under the Air Control Act, § 22-28-23(b)(2) provides, in part, that

"each county board of health establishing a program under this section may advertise and adopt all rules and regulations in accordance with the same procedure provided in this chapter for the adoption of rules, regulations, and standards by the commission, and all judicial remedies provided by this chapter and Chapter 22A of this title shall be available and enforceable by ... the county board of health."

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Section 22-22A-8 (part of Chapter 22A referenced in the quote above) details the procedures for the adoption of rules, regulations, and standards pursuant to the Air Control Act. There is no dispute that the Board followed the procedures required by § 22-22A-8 in repealing and replacing Chapter 12.

Section 22-28-23(a) of the Air Control Act provides that "it is the intention of this chapter to occupy by preemption the field of air pollution control within all areas of the State of Alabama." Accordingly, based on the determination by the legislature that the Air Control Act preempts the field, the specific rule-making procedures provided for in § 22-28-23(b)(2), of the Air Control Act, and by extension § 22-22A-8, control, and the Board was not required to comply with the rule-making provisions of the AAPA under the facts of this case.¹

¹Even though we hold that § 22-28-23(a) of the Air Control Act preempts the applicability of the AAPA with regard to the Board's rule-making procedures, we note that that section also provides: "[N]othing in this section shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction, or prevention of air pollution or restitution for damage resulting therefrom." Accordingly, that section does not limit GASP's right to seek judicial review of the Board's actions under the AAPA.

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Accordingly, the circuit court's judgment, insofar as it dismissed GASP's petition for judicial review on the basis that the notice and comment requirements of the AAPA are inapplicable to the Air Program, is due to be affirmed. Because we hold that the provisions of the AAPA regarding the Board's rule-making authority are not applicable to the Board when it is administering the Air Program and because GASP agreed that its petition in the circuit court should be dismissed if the AAPA is inapplicable, we pretermitt discussion of GASP's remaining arguments. See, e.g., Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983) (citing Sterling Oil of Oklahoma, Inc. v. Pack, 291 Ala. 727, 287 So. 2d 847 (1973)) (explaining that an appellate court "will affirm the judgment appealed from if supported on any valid legal ground").

AFFIRMED.

Thompson, P.J., and Pittman and Moore, JJ., concur.

Thomas, J., concurs in the result, without writing.