

ENVIROCLEAN, INC., Enviroclean Acquisition
Corporation, and Biomedical Waste Systems, Inc. v.
ARKANSAS POLLUTION CONTROL AND ECOLOGY
COMMISSION

92-1290

858 S.W.2d 116

Supreme Court of Arkansas
Opinion delivered July 19, 1993

1. ADMINISTRATIVE LAW & PROCEDURE — STANDARD OF REVIEW. — Review of administrative decisions, both in the Circuit Court and on appeal, is limited in scope; such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion.
 2. ADMINISTRATIVE LAW & PROCEDURE — WHEN ACTION ARBITRARY — REVIEW DIRECTED TOWARD AGENCY DECISION. — Administrative action may be regarded as arbitrary and capricious only when it is not supportable on any rational basis; the appellate court's review is directed, not toward the circuit court, but toward the decision of the agency because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies.
 3. ADMINISTRATIVE LAW & PROCEDURE — DETERMINING SUBSTANTIAL EVIDENCE. — To determine whether a decision is supported by substantial evidence, the record is reviewed to ascertain if the decision is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion.
 4. ADMINISTRATIVE LAW & PROCEDURE — REVOKING PERMIT — VIOLATION. — Appellee may revoke a permit for violation of any condition of the permit or when the permit is obtained by misrepresentation or failure to disclose fully all relevant facts, Ark. Code Ann. § 8-4-204 (Repl. 1991); Ark. Code Ann. § 8-4-217(a)(3) (Repl. 1991) makes it unlawful to violate any provision of a permit.
 5. CORPORATIONS — WHEN CORPORATE FACADE DISREGARDED. — In special circumstances the court will disregard the corporate facade when the form has been illegally abused.
 6. ADMINISTRATIVE LAW & PROCEDURE — SUFFICIENT EVIDENCE TO SUPPORT REVOCATION OF PERMIT. — Giving the evidence its
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strongest probative force in favor of the administrative agency as required, where a review of the record revealed substantial evidence that appellants sought to abuse the corporate form to achieve a transfer of the permitted facility in violation of the permit, along with their failure to disclose information as to the change in ownership and control of the company, there was substantial evidence to support appellee's revocation of the permit.

7. ADMINISTRATIVE LAW & PROCEDURE — DECISION COULD NOT BE ARBITRARY AND CAPRICIOUS IF SUPPORTED BY SUBSTANTIAL EVIDENCE. — Whether the Commission's revocation was arbitrary or capricious was not decided since it automatically followed that where substantial evidence was found, a decision could not be classified as unreasonable or arbitrary.
8. ADMINISTRATIVE LAW & PROCEDURE — TRANSFER PROHIBITED BY PERMIT — SUBSTANTIAL EVIDENCE OF TRANSFER — NO RULE REQUIRED TO AUTHORIZE REVOCATION. — Where the permit itself prohibited transfer of the permitted facility, and substantial evidence supported the finding that a transfer did occur in violation of the permit, no rule or regulation was required to authorize the revocation; moot issues are not decided.
9. ESTOPPEL — ESTOPPEL NOT AVAILABLE AGAINST GOVERNMENT AGENCY WHERE PARTY SEEKING TO ESTOP AGENCY WAS NOT FORTHCOMING. — Men must turn square corners when they deal with the government; where appellant was not completely truthful with appellee in obtaining its assurance that the sale of stock would not affect its permit, estoppel was not available to appellant.

Appeal from St. Francis Circuit Court; *Henry Wilkinson*, Judge; affirmed.

The Rose Law Firm, A Professional Association, by: *William H. Kennedy III* and *Brian Rosenthal*, for appellants.

Steve Weaver, Anne Roberts Bobo, and William A. Eckert III, for appellee.

DONALD L. CORBIN, Justice. This is an appeal from an order of the St. Francis Circuit Court affirming Minute Order 92-27 of the Arkansas Pollution Control and Ecology Commission (the Commission). Minute Order 92-27 required the termination of an air permit issued to appellant EnviroClean, Incorporated (EnviroClean). EnviroClean now appeals the circuit court's decision to this court, which has jurisdiction of appeals from the Commission. Ark. Sup. Ct. R. 1-2(a)(4). The question presented for our review is whether the Arkansas Department of Pollution Control and Ecology (ADPC&E) correctly construed and ap-

of EnviroClean, ADPC&E issued a notice of permit expiration to EnviroClean on August 9, 1991, revoking the permit for violation of its condition prohibiting a transfer of the permitted facility. ADPC&E later issued an amended notice of permit expiration on November 26, 1991, adding allegations that EnviroClean obtained the permit through misrepresentations and failure to fully disclose information relating to ownership of the permit and the permitted facility. EnviroClean appealed the notices of termination and waived a hearing. The case was submitted to the Commission's hearing officer who recommended that ADPC&E's decision to revoke and terminate the permit be upheld. The Commission adopted the findings of the hearing officer in its Minute Order 92-97. EnviroClean then appealed the Commission's order to the Circuit Court of St. Francis County which affirmed the Commission's order.

EnviroClean now appeals to this court asserting two broad points of error. First, EnviroClean claims the circuit court erred in affirming the revocation of the permit because ADPC&E's decision is not supported by substantial evidence and is contrary to the law of corporations. Second, EnviroClean claims the circuit court erred in affirming the revocation of the permit because ADPC&E's decision was arbitrary, capricious, and an abuse of discretion; made upon unlawful procedure in excess of statutory authority; and violates constitutional rights and statutory provisions.

STANDARD OF REVIEW

[1, 2] We have recently set out the standard of review in an appeal from the Arkansas Pollution Control and Ecology Commission:

Review of administrative decisions, both in the Circuit Court and here, is limited in scope. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. Administrative action may be regarded as arbitrary and capricious only when it is not supportable on any rational basis. It has been said that the appellate court's review is directed, not toward the circuit court, but toward the decision of the agency. That is so because administrative agencies are better equipped by specializa-

who owns the stock. EnviroClean's argument continues with the assertion that ADPC&E erroneously pierced the corporate veil in concluding the permit was transferred. ADPC&E responds with the claims that there is substantial evidence to support its actions without applying concepts of corporate law, and alternatively, that the form of the corporate entity may be disregarded on the facts of this case.

We agree with the foregoing rules of corporate law enunciated in *Atkinson* and *Red Bird Realty*, regarding the separate ownership of property by a corporation and its shareholders. However, corporate law is not the only area of law to be considered here. To the contrary, this is a case in which corporate law collides head-on with administrative law and its underlying public policies.

[4] ADPC&E administers the Arkansas Water and Air Pollution Control Act, which has a legislative intent of maintaining the purity of the air resources of the state so that the least possible injury should be done to human, plant or animal life consistent with the public enjoyment of the state and the state's economic and industrial well-being. Ark. Code Ann. § 8-4-301 (Repl. 1991). As the agency charged with administering the Water and Air Pollution Control Act, ADPC&E is given authority to issue, modify, and revoke permits regulating the emission of air pollutants. Ark. Code Ann. §§ 8-4-203, -304 (Repl. 1991). ADPC&E may revoke a permit for violation of any condition of the permit or when the permit is obtained by misrepresentation or failure to disclose fully all relevant facts. Ark. Code Ann. § 8-4-204 (Repl. 1991). Moreover, Ark. Code Ann. § 8-4-217(a)(3) (Repl. 1991) makes it unlawful to violate any provision of a permit.

[5, 6] This court has stated that in special circumstances the court will disregard the corporate facade when the form has been illegally abused. *Black and White, Inc. v. Love*, 236 Ark. 529, 367 S.W.2d 427 (1963). Giving the evidence its strongest probative force in favor of the administrative agency as we are required to do, *Arkansas Contractors Licensing Bd. v. Butler Constr. Co.*, 295 Ark. 223, 748 S.W.2d 129 (1988), our review of the record reveals there is substantial evidence that BioMed and EnviroClean sought to abuse the corporate form to achieve a

the Securities and Exchange Commission for its initial public offering of common stock. The prospectus states in pertinent parts:

BioMedical Waste Systems, Inc. is a development stage company organized to develop, construct, and operate medical waste incinerators and transfer stations. . . . On May 31, 1991[,] the Company's wholly owned subsidiary, EnviroClean Acquisition Corporation purchased the stock of EnviroClean, Inc., a company formed in 1990 to open and operate an 18 ton per day incineration facility in St. Francis County, Arkansas. (References in the Prospectus to the Company include the Company and its subsidiary EnviroClean Acquisition Corp.) EnviroClean has not commenced construction of any facilities and currently has no operations. However, it has been granted a permit by the Arkansas Department of Pollution Control and Ecology to construct and operate an incineration facility. . . .

. . . .
The Company, through the acquisition of EnvironClean [sic], has obtained a permit from the Arkansas Department of Pollution Control and Ecology for the construction of its first incinerator. . . . In addition, the permit for the St. Francis facility are [sic] subject to continued review by the Director of the Arkansas Department of Pollution Control and Ecology, and no assurance can be given that the permit will not be modified or even revoked in the future.

The evidence also reveals that EnviroClean and BioMed sought to abuse the corporate form by misrepresenting the change in ownership and control to ADPC&E. On behalf of EnviroClean, Johnson wrote to the chief of ADPC&E's air division and requested ADPC&E's opinion as to the effect of a sale of stock on the permit. ADPC&E assured EnviroClean that a sale of stock would have no effect on the permit. However, EnviroClean's request did not fully disclose the particular sale of 100% of the stock and the accompanying change in control of EnviroClean that actually occurred in this case; rather, Johnson's written request referred to a mere "change in shareholders."

Without question, there was more than a simple sale of stock

sions are within ADPC&E's police power and statutory authority and that such decisions of an executive agency are thus entitled to judicial deference on appeal. *Land Developers, Inc.*, 284 Ark. 179, 680 S.W.2d 909. We need not decide whether the Commission's revocation was arbitrary or capricious since it automatically follows that where substantial evidence is found, a decision cannot be classified as unreasonable or arbitrary. *Wright*, 311 Ark. 125, 842 S.W.2d 42.

[8] EnviroClean argues its due process rights were violated in three respects: (1) there was no promulgated rule or regulation requiring the disclosure of a change in ownership or control of a permittee; (2) the existing rules and regulations are void for vagueness; and (3) because ADPC&E's amended notice of revocation for misrepresentation and failure to fully disclose information amounted to a post-revocation attempt to supplement the initial basis for the revocation — a transfer in violation of the permit. These claims are moot. The permit itself prohibited transfer of the permitted facility and we have just held there was substantial evidence to support the finding that a transfer did occur in violation of the permit. Therefore, no rule or regulation is required to authorize the revocation. We do not decide moot issues. *Arkansas Dep't. of Human Servs. v. M.D.M. Corp.*, 295 Ark. 549, 750 S.W.2d 57 (1988).

[9] Also under this broad assertion of error, EnviroClean includes a claim that because ADPC&E assured EnviroClean that a sale of stock would not affect the permit, ADPC&E is estopped from revoking the permit. EnviroClean relies on *Foote's Dixie Dandy v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980) for the proposition that state agencies may be subject to estoppel in certain situations. However, EnviroClean overlooks that part of *Foote's Dixie Dandy* stating that "[m]en must turn square corners when they deal with the government." *Foote's Dixie Dandy*, 270 Ark. at 824, 607 S.W.2d at 327 (quoting *Rock Island, Arkansas & Louisiana R.R. v. United States*, 254 U.S. 141, 143 (1920)). The hearing officer found that estoppel was not available to EnviroClean because it was not completely truthful with ADPC&E. We cannot say the hearing officer erred in making this finding.

SUMMARY

As the agency charged with enforcing the public policy of the

state to protect the environment, and the public's health, safety, and welfare, ADPC&E must be able to know the true identity of the persons or entities which own and control its corporate applicants and permittees. There was substantial evidence to support ADPC&E's conclusion that EnviroClean transferred its permitted facility to BioMed, as those terms are used in and prohibited in the permit. Again, given this substantial evidence, we cannot say ADPC&E acted arbitrarily or that it abused its discretion in revoking EnviroClean's permit.

The judgment is affirmed.

BROWN, J. concurs.
