

FILED
Court of Appeals
Division III
State of Washington
9/10/2019 3:39 PM

NO. 366693

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ANNETTE HOLDINGS LLC D/B/A SUPER DUPER FOODS,

Appellant,

v.

NORTHWEST CLEAN AIR AGENCY,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANAGAN COUNTY

Okanagan County Cause No. 18-2-00026-4

The Honorable Henry A. Rawson, Judge

APPELLANT'S OPENING BRIEF

ZIAD YOUSSEF
TODD ANDERSON
Law Offices of Ziad I Youssef, PLLC
1828 Franklin St, Ste D
Bellingham, WA 98225
Ph: (360) 734-0908
FX: (360) 734-2248

TABLE OF CONTENTS

Page

I. ASSIGNMENT OF ERROR	1
1. THE POLLUTION CONTROL HEARINGS BOARD (“PCHB”) ERRED IN UPHOLDING THE NWCAA’S IMPOSITION OF PENALTIES BECAUSE THE NWCAA ACTED OUTSIDE ITS STATUTORY AUTHORITY OR JURISDICTION.	1
II. ISSUES PRESENTED ON APPEAL.....	1
1. DID THE NORTHWEST CLEAN AIR AGENCY (“NWCAA”) EXCEED ITS STATUTORY AUTHORITY OR JURISDICTION WHEN: (A) IT SERVED THE NOTICE OF VIOLATION TO SUPER DUPER FOOD, WHICH IS NOT A “PERSON” OR “PARTY” UNDER RCW 70.94.030(19) AND WAC 371-08-306(7) AND (B) BY THE TIME THE NWCAA CORRECTLY SERVED THE NOTICE OF VIOLATION 4174 ANNETTE HOLDING, LLC WAS IN COMPLIANCE WITH ALL LAWS?	1
III. INTRODUCTION.....	1
IV. STATEMENT OF THE CASE.....	2
A. PROCEDURAL HISTORY	2
B. SUBSTANTIVE FACTS.....	3
V. ARGUMENT.....	6
A. STANDARD OF REVIEW.....	6
B. THE PCHB ERRED IN UPHOLDING THE IOP FOR NOV ^s 4112 AND 4174 BECAUSE THE NWCAA ACTED OUTSIDE ITS STATUTORY AUTHORITY OR JURISDICTION.	7
VI. CONCLUSION	12

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>ASARCO, Inc. v. Puget Sound Air Pollution Control Agency</i> , 51 Wn. App. 49, 751 P.2d 1229 (1988).....	7
<i>Beatty v. The Fish and Wildlife Commission</i> , 185 Wn. App. 426, 443, 341 P.3d 291 (2015).....	7
<i>Chelan County v. Nykreim</i> , 105 Wn. App. 339, 360, 20 P.3d 416, 427-28 (2001).....	9
<i>Deschenes v. King County</i> , 83 Wn.2d 714, 716, 521 P.2d 1181, 1182 (1974).....	9
<i>Franklin Cy. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 323, 646 P.2d 113 (1982)), <i>aff'd</i> , <i>ASARCO, Inc. v. Puget Sound Air Pollution Control Agency</i> , 112 Wn.2d 314, 771 P.2d 335 (1989).....	7
<i>In re Impoundment of Chevrolet Truck</i> , 148 Wn.2d 145, 156, 60 P.3d 53 (2002).....	8
<i>Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Authority</i> , 98 Wn.App. 121, 123-124, 989 P.2d 102, 103 (1999).....	9
<i>Okanogan Wilderness League, Inc. v. Town of Twisp</i> , 133 Wn.2d 769, 788-89, 947 P.2d 732 (1997)	8
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 402, 858 P.2d 494 (1993)....	7
<u>Statutes</u>	
RCW 35.05.570(3).....	7
RCW 35.05.570(3)(b)	7
RCW 43.21B.010.....	8
RCW 43.21B.170.....	8
RCW 7.94.431(1).....	8
RCW 70.94	8, 9, 10
RCW 70.94.030(19).....	1, 8
<u>Administrative Code</u>	
WAC 371-08.....	8
WAC 371-08-305(8).....	8
WAC 371-08-306(7).....	1, 8
<u>Regulations</u>	
NWCAA Regulation 133	8

I. ASSIGNMENT OF ERROR

1. The Pollution Control Hearings Board (“PCHB”) erred in upholding the NWCAA’s imposition of penalties because the NWCAA acted outside its statutory authority or jurisdiction.

II. ISSUES PRESENTED ON APPEAL

1. Did the Northwest Clean air Agency (“NWCAA”) exceed its statutory authority or jurisdiction when: (a) It served the Notice of Violation to Super Duper Food, which is not a “person” or “party” under RCW 70.94.030(19) and WAC 371-08-306(7) and (b) by the time the NWCAA correctly served the Notice of Violation 4174 Annette Holding, LLC was in compliance with all laws?

III. INTRODUCTION

The Northwest Clean Air Agency (“NWCAA”) issued a notice of violation (NOV) against Super Duper Foods, which is not a legal entity. The NOV was served to a store that is outside the NWCAA’s jurisdiction. When the NWCAA realized it did not serve the correct entity it re-served the NOV to Annette Holdings, LLC at the correct address. However, by the time the second notice was served Annette Holdings was in

compliance and no violation existed. Thus, the NWCAA exceeded its statutory authority to impose a penalty against Annette Holdings, LLC.

IV. STATEMENT OF THE CASE

A. Procedural History

The Northwest Clean Air Agency (“NWCAA”) issued two Notices of Violation (“NOV”) to Super Duper Foods, owned and operated by Annette Holdings, LLC. NWCAA served NOV 4112 on November 20, 2014 and NOV 4174, on August 24, 2015. AR at 5, 14. Hana Youssef, who owns Annette Holdings, LLC, argued, *pro se*, that the notice of violation was defective because it listed the violator as Super Duper Foods – Chevron 306936, which is not a legal entity, so Youssef was not properly notified of the violation. AR 36, 121, 180, 187. The NWCAA re-issued NOV 4174 on February 19, 2017. AR at 20. The NWCAA issued an Imposition of Penalty based on NOV 4174 on February 23, 2017 but back-dated the NOV to 2016. AR at 234, 240. The NWCAA did not re-issue NOV 4112.

The PCHB heard Annette Holdings’ appeal on September 28, 2017. AR at 363. In its findings of fact, conclusions of law, and order issued on December 20, 2017, the PCHB affirmed the penalties imposed by the NWCAA. AR at 383-384.

Annette Holdings appealed the PCHB order to the Superior Court for Okanagan County. The superior court upheld the PCHB order. Annette Holdings timely appeals.

B. Substantive Facts

Annette Holdings, LLC is owned by Hanna Youssef and his wife, Paraskevi Stamati. AR at 63. Its registered trade name is Super Duper Foods. AR at 71. Annette Holdings owns three gas stations in Washington State. Two stations are located in Mount Vernon and one is located in Oroville. AR at 363. The station at issue here is a Chevron located at 18729 Fir Island Road, Mount Vernon, WA. The store is also identified by its Chevron store number, which is 306936. AR at 5.

In November 2014 the NWCAA issued undated NOV 4112, which stated that Super Duper foods failed to submit a notice of construction application prior to commencing construction and to submit the required initial notification or compliance status. AR at 14. The NWCAA issued a notice of imposition of penalty (“IOP”) on February 19, 2016. AR at 12. Pierre Youssef filed a Notice of Construction application on November 13, 2014, which the NWCAA alleged was incomplete. AR at 367. The NWCAA issued NOV 4112 again on November 20, 2014 and mailed it certified mail to Pierre Youssef at the 306936 store and to Hana Youssef at

the Annette Holding LLC address in Oroville. No signed post card was returned to NWCAA for the Oroville address. AR at 367-8.

The NOC application was completed on April 20, 2015. AR at 369. The NWCAA issued an Order of Approval to Construct (“OAC”) on May 5, 2015, which required installation of Stage 1 enhanced vapor recovery (EVR) equipment within 60 days of issuance and completion of testing within 90 days of issuance of the OAC. AR at 369. The NWCAA inspected the facility on July 21, 2015 and found the EVR had not yet been installed. AR at 371. On August 24, the NWCAA issued NOV 4174 to Super Duper Foods – Chevron 306936 (violator) and Annette Holding LLC (owner) for failure to comply with OAC 1204. AR at 319.

On August 27, 2015 Skagit County Sheriff served NOV 4174 on Pierre Youssef at 17800 SR 536, Mt. Vernon, WA. AR at 319. On August 29, 2015 the NWCAA mailed NOV 4174 by certified mail to Hana Youssef at the Oroville address. AR at 371.

The Conway facility had all required tests on January 18, 2016. AR at 371. The NWCAA then required an additional test, which the facility passed on July 11, 2016. AR at 371. Prior to completing the additional test, the NWCAA issued an IOP for both NOVs 4112 and 4174 on February 19, 2016. AR at 373.

The two IOPs were personally served on Pierre Youssef by the Skagit County Sheriff and mailed certified mail on February 23 to Annette Holdings, LLC at its Oroville address. AR at 373. The IOPs listed the violator as Super Duper Foods/Chevron 306936. AR at 6; 12. Youssef appealed and the caption on the appeal was Super Duper Foods – Chevron 306936. AR at 1.

On December 9, 2016, NWCAA filed a motion to the Pollution Control Hearings Board (PCHB) to join Annette Holding LLC as an additional appellant on the grounds that it is the corporate entity doing business as Super Duper Foods and therefore, Super Duper was “not actually a person under the Board’s rules.” AR at 188.

In response Super Duper Foods filed a document titled “Motion for dismiss the penalty’s for case number P16-033c Penalty #4112 and 4174.” AR at 185. The Board denied both motions finding that “[I]f Super Duper Foods – Chevron 306396 is not a legal entity and the penalties were not issued to the proper entity, the Board can provide complete relief to Super Duper Foods by invalidating the penalties. Annette Holding need not be joined to reach such a result.” AR at 188. When Annette Holding LLC appealed the IOP, Annette Holdings became a party to the action despite the Board denying the NWCAA’s motion to join it.

After NWCAA's motion for joinder was denied, it issued another IOP on February 23, 2017, this time listing Annette Holding LLC d/b/a Super Duper Foods as the violator. AR at 20. The February 23, 2017 IOP stated it was issued on February 23, 2016. AR at 20. NWCAA did not issue another NOV prior to the IOP against Annette Holding LLC.

When NWCAA realized it back-dated the IOP it filed a motion to amend its IOP on May 12, 2017. The Board denied the NWCAA's motion stating that the Board did not have authority to amend an IOP. AR at 233.

NWCAA issued yet another IOP on June 27, 2017. AR at 31. Super Duper Foods and Annette Holdings appealed all NOV's and IOP's. After a hearing, the Board found that "Hanna Youssef also argued that the last two Notices of Imposition of Penalty mailed to Oroville were imposed on the Oroville gas station owned by Annette Holding LLC which is outside the jurisdiction of NWCAA. Youssef Testimony. The Board concludes that Hanna Youssef was confused about which gas station was affected by the Notices of Imposition of Penalty mailed to Oroville." AR at 332.

The Board upheld the IOP for \$3,000 for NOV 4112 and \$6,154 for NOV 4174. AR at 333.

V. ARGUMENT

A. **Standard of Review.**

When reviewing an agency's action, this Court sits in the same position as the superior court. *Beatty v. The Fish and Wildlife Commission*, 185 Wn. App. 426, 443, 341 P.3d 291 (2015) (Citing *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)). Appellate review is on the record of the administrative tribunal itself, not that of the superior court. *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 51 Wn. App. 49, 751 P.2d 1229 (1988) (Citing *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 323, 646 P.2d 113 (1982)), *aff'd*, *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 771 P.2d 335 (1989). The reviewing court shall grant relief only if the challenging party shows that the agency's order is invalid for one of the reasons enumerated in RCW 35.05.570(3). *Beatty*, 185 Wn. App. at 443. Here, Annette Holdings challenges the agency's order as outside of its statutory authority or jurisdiction as conferred by any provision of law. RCW 35.05.570(3)(b).

B. The PCHB erred in upholding the IOP for NOVs 4112 and 4174 because the NWCAA acted Outside its Statutory Authority or Jurisdiction.

The PCHB erred in upholding the IOP for NOVs 4112 and 4174 because the NWCAA acted Outside its Statutory Authority or Jurisdiction.

An agency has only those powers expressly granted to it by statute or necessarily implied therein. *In re Impoundment of Chevrolet Truck*, 148

Wn.2d 145, 156, 60 P.3d 53 (2002). An administrative review board has only the jurisdiction conferred by its authorizing statute. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 788-89, 947 P.2d 732 (1997). RCW 43.21B.010 created the PCHB, which is authorized to create Board rules and regulations. RCW 43.21B.170. Those rules and regulations are codified in WAC 371-08. The Clean Air Act, codified at RCW 70.94, authorized creation of the multi-county agency known as Northwest Clean Air Agency and the NWCAA publishes regulations to enforce the Clean Air Act. RCW 70.94.030 (19) defines “person” as an “individual, firm, public or private corporation, association, partnership, political subdivision of the state, municipality, or governmental agency.” The Board’s rules define “party” as a “person”. WAC 371-08-306(7). A “person” is “any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.” WAC 371-08-305(8).

RCW 7.94.431(1) provides:

Any person who fails to take action as specified by an order issued pursuant to this chapter shall be liable for a civil penalty of not more than ten thousand dollars for each day of continued noncompliance.

NWCAA Regulation 133 also authorizes the agency to impose a civil penalty on a person who has violated any provision of RCW 70.94.

Only a “person” who fails to comply with any provisions under RCW 70.94 or any Board regulation can incur a civil penalty. Even assuming the Board’s findings were correct, the NWCAA issued NOV 4112 and 4174 to a non-entity, which is not a “person” subject to the Board’s rules. NWCAA conceded that Super Duper Foods was not a legal entity and thus not a person under the Board’s rules. AR 103. Nor is Super Duper Foods a person under RCW 70.94 or NWCAA Regulation 133.

If the statutory procedural prerequisites are not satisfied, the court lacks subject matter jurisdiction over the action and can do nothing but enter an order of dismissal. *See, e.g., Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181, 1182 (1974) (“A court lacking jurisdiction may do nothing more than enter an order of dismissal”); *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Authority*, 98 Wn.App. 121, 123-124, 989 P.2d 102, 103 (1999) (“without subject matter jurisdiction, a court may do nothing other than enter an order of dismissal”); *Chelan County v. Nykreim*, 105 Wn. App. 339, 360, 20 P.3d 416, 427-28 (2001).

NWCAA attempted to correct this deficiency by issuing a new IOP for NOV 4174 to Annette Holdings on June 27, 2017. This was insufficient for two reasons. First, the June 27 IOP is based on the NOV showing the violator was Super Duper Foods, which is not a person and

cannot violate any provision of RCW 70.94 or any regulation. AR 31. The NWCAA cannot rely on the original NOV 4174 because the alleged violator must be served with written notice of the violation at least 30 days prior to commencement of any formal enforcement action, which includes imposition of a civil penalty. NWCAA 131. And a violator must be a “person,” as argued above. On June 27, 2017 there was no valid written NOV apprising Annette Holdings that it violated any provision of RCW 70.94. Therefore, the NWCAA was required to serve a new, valid NOV. However, when the imposition of penalty was correctly addressed on June 27, 2017 Annette Holdings was in compliance with all required testing, was in compliance with NWCAA regulation 300.15, which was the basis for the original NOV, and had not been served with a valid written NOV at least 30 days prior.

It is undisputed that the testing was completed on July 11, 2016. The NWCAA did not attempt to cure the defective notice until almost a year after Annette Holdings was in compliance. Although NOV 4112 also improperly named Super Duper Foods as the violator, the NWCAA did not attempt to re-issue the IOP based on NOV 4112. Again, when the IOP was issued on February 19, 2016 Annette Holdings, LLC had already completed its NOC application and therefore, was not violating any state

or federal law requiring a NOC. AR 12.

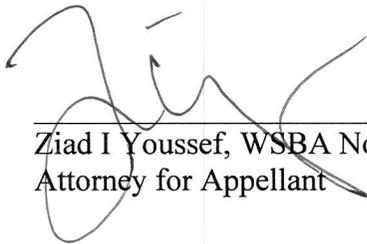
The Board's order imposing a penalty on Annette Holdings for NOV 4174 punished Annette Holdings even though they were in compliance at the time the IOPs for NOVs 4112 and 4174 were issued on February 19, 2016 and June 27, 2017 respectively. Therefore, the NWCAA and the Board acted outside their statutory authority by imposing a penalty on Annette Holdings when the agency did not strictly comply with the statutory prerequisites.

Even if this court finds that the NWCAA can retroactively apply the NOV to Annette Holdings, the Notice of Imposition of Penalty issued on June 27, 2017 is still deficient. It was issued to Annette Holding, LLC d/b/a Super Duper Foods 33607 US Hwy 97 Oroville, WA 98844, which is not in Okanogan County. The Board concluded that Hanna Youssef was simply confused about which gas station was affected by the Notices of Imposition of Penalty mailed to Oroville, but this is incorrect. AR at 332. Because the notice does not identify the store number, the only distinguishing identifier between the Conway store and the Oroville store was the address. The address on the June 27 IOP refers to the Oroville store, which is outside the jurisdiction of the NCWAA.

VI. CONCLUSION

Annette Holdings, LLC respectfully requests that this Court reverse the PCHB's order upholding the NWCAA's Imposition of Penalty issued to Super Duper Foods for \$3,000 for NOV 4112. Annett Holdings, LLC further requests that this Court reverse the PCHB's order upholding the NWCAA's Imposition of Penalty issued to Annette Holding LLC d/b/a Super Duper Foods for \$6,154 for NOV 4174.

Respectfully submitted this 10th day of September 2019



Ziad I Youssef, WSBA No. 34352
Attorney for Appellant