

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CIVIL ACTION NO. 89-CP-40-0150

WILLIAMSBURG COUNTY COUNCIL ON AGING, INC.,)
)
) Plaintiff,)
)
) v.)
)
) SOUTH CAROLINA PROCUREMENT REVIEW PANEL,)
) Hugh K. Leatherman, Sr., Grady L.)
) Patterson, Jr., Luther L. Taylor, Jr.,)
) Nikki G. Seltzer, J. J. Hesse, Roy E. Moss,)
) Gus J. Roberts, Carol Baughman,)
) Kiffen R. Nanney, and SOUTH CAROLINA)
) HEALTH AND HUMAN SERVICES FINANCE)
) COMMISSION,)
)
) Defendants.)

IN RE: PROTEST OF
WILLIAMSBURG COUNTY
COUNCIL ON AGING

ORDER

90 SEP -6 PM 4:32
DAVID A. SCOTT
C.C.C. & G.S.

FILED

This matter comes before the court on a summons and complaint in which the plaintiff, Williamsburg County Council on Aging, Inc. (hereinafter "WCCOA"), seeks judicial review of a final administrative decision reached by the defendant South Carolina Procurement Review Panel, (hereinafter "Review Panel"), dated December 12, 1988. The jurisdiction of the Review Panel is found in Section 11-35-4410, South Carolina Code of Laws, 1976, and the jurisdiction of this court to review the decision is found in Section 1-23-380, South Carolina Code of Laws, 1976. The Review Panel and the South Carolina Health and Human Services Commission, (hereinafter "HHSFC") filed separate answers.

The matter came on for a hearing before me at the non-jury term of Common Pleas Court in Columbia, S. C. on October 6, 1989, at which time counsel representing the parties appeared and made

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arguments to support their positions. I find that the parties are properly before the court and that the court has jurisdiction in the premises.

The plaintiff WCCOA is a corporation which was organized for the purpose of serving the needs of low-income elderly persons in Williamsburg County. Two of the programs which WCCOA has administered over the past several years have been funded by the Department of Social Services Block Grant (hereinafter "Block Grant") monies through contracts with HHSFC. It is alleged by the plaintiff that on or about July 26, 1988, WCCOA submitted proposals to HHSFC for contracts to provide homemaker services and home delivered meals to low-income elderly persons in Williamsburg County for the fiscal year 1988-1989.

On August 9, 1988, HHSFC notified WCCOA that its 1987-88 contract for home delivered meals was terminated because of an alleged breach of one of the provisions of the contract between HHSFC and WCCOA. Although no breach of contract was alleged to have occurred, HHSFC also notified WCCOA that its contract for homemaker services was also terminated because "an agency with a single administrative structure cannot be responsible and accountable in one program and not in the other".

On or about September 14 and 15, 1988, HHSFC notified WCCOA that its proposals for a contract for home-delivered meals and homemaker services for fiscal year 1988-89 would not be considered. This decision not to consider proposals by WCCOA was appealed to the Chief Procurement Officer and, after a hearing, the appeal was denied by an order signed by James J. Forth, Jr.

Hearing Officer, dated October 28, 1988.

Appeal was taken by WCCOA to the South Carolina Procurement Review Panel, which resulted in an order reversing the decision of the Honorable James A. Forth, Jr. "as to everything but result--". This appeal from the Review Panel's decision states twelve (12) allegations of error. The first ground of appeal alleged in the complaint is as follows:

(a) The plaintiff was denied due process of law under the Constitution of the State of South Carolina (Article 1, Section 3) and the First and Fourteenth Amendments to the Constitution of the United States of America in that it was not allowed to present evidence to refute or impeach the testimony of the witnesses presented by the South Carolina Health and Human Services Finance Commission.

This court is of opinion that the decision of the Review Panel should be set aside on this ground and therefore it is not necessary to pass upon the other grounds stated in the complaint for the reasons stated herein.

At the hearing before the Review Panel, Chairman Leatherman ruled that when the appellant (WCCOA) closed its case in chief, it would then be precluded from putting up any witness in reply to the testimony offered by the respondent. Prior to putting up its final witness in its case in chief at the hearing before the Review Panel, WCCOA, through its counsel made an objection to the ruling which precluded any right to respond to the testimony offered by the respondent. Objection was made to this ruling before the appellant offered its last witness. In the exchange between counsel for WCCOA and the Chairman of the Review Panel

the reasons for objecting to this irregular proceeding was given as follows:

MR. ZEIGLER: Do I understand, Mr. Chairman, that we are precluded from any reply to their testimony? Did I misunderstand you? (T. p. 178, L. 19-21).

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MR. ZEIGLER: Okay. No, I was talking about when they finish putting up their case. I thought you said that ended it. We do not have a chance to go back.

CHM. LEATHERMAN: That is correct, sir.

MR. ZEIGLER: So issues that we don't originate ourselves, even though they're not at stake in this case, we have to bring them up ourselves?

CHM. LEATHERMAN: Well, unless you think they're going to bring them up, then you can cross-examine them. (T. p. 179, L. 3-13).

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MR. ZEIGLER: But that puts the burden on me to initiate putting up the testimony.

CH. LEATHERMAN: Well, that depends. I mean, if their witness brings up something that you sort of prefer they don't bring up, I think you have the right through cross-examination to---

MR. ZEIGLER: Yes. I understand. But the question is, do we put up -- do we anticipate the evil day of their putting up testimony we don't like in order to protect ourselves by not being able to reply? (T. p. 179, L. 17-25; p. 180, L.1-2).

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MR. ZEIGLER: I can't put up a witness that we haven't already put up in reply to their testimony?

CHM. LEATHERMAN: That's true. Well, you can't even put the witness back up. When you finish your case, then you're finished. That's the

rules of the Panel. You have every opportunity to put up any witness you choose.

MR. ZEIGLER: All right.

CHM. LEATHERMAN: But when you finish your case, you're finished, other than cross-examining their witness.

MR. ZEIGLER: Okay. I want to except to that because I think it puts an undue burden on us-

CHM. LEATHERMAN: Right.

MR. ZEIGLER: --to have to introduce testimony on something they might not put up, but we have to anticipate that they are going to put up.

CHM. LEATHERMAN: You have every right in the world to except to that, except the Statute is very clear, and this was tested. And it went to the Supreme Court and the Supreme Court upheld it.

The Panel has the right to develop our own rules. Those, of course are the rules of the Panel, and that's sort of the way we run it. We, you know, we honor your exception that you make, except that's the rules.

MR. ZEIGLER: Well, the usual custom is --

CHM. LEATHERMAN: Yes, sir.

MR. ZEIGLER: --that you're always allowed to reply to the other side's testimony.

CHM. LEATHERMAN: Yes, sir.

MR. ZEIGLER: You don't have to anticipate what the other side's going to put up.

CHM. LEATHERMAN: We understand. Maybe we're a little bit different, but that's the rules of this Panel.

(T. p. 180, L. 8-25; p. 181, L.1-24).

Witnesses who had testified were excused at this point. (T. p. 182, L.18-20). An important witness, David Smith, was called and examined under the Panel's ruling that no reply testimony

would be allowed. When Mr. Smith stated that he would like to be excused from further attendance, Mr. Zeigler stated to the Review Panel, "I understand I wouldn't be able to recall him, any how. To which Chairman Leatherman replied, "That's correct". (T. p. 209, L. 13-15). It was at this point that Mr. Hepfer, counsel for HHSFC, joined in the motion that WCCOA be allowed to reply to testimony which might be presented by it, making a statement as follows:

MR. HEPFER: Mr. Chairman, with the greatest respect to you and to your attorney, I would like to join in Mr. Zeigler's Motion, if it is such a motion, to allow him to present witnesses in reply to any material that we bring up. I don't believe there'll be that much. I understand people take a different view to that, and mean no disrespect to you, but I would like to join in that motion. (T. p. 209, L.16-23).

The response of Chairman Leatherman was to the effect that only "if someone springs something unknown or something extraordinary on Mr. Zeigler, then, of course, we would allow that. But the normal course of action, no, we will not." (T. p. 210, L.4-7). Mr. Zeigler, however, pointed out to the Review Panel that it was impossible for him to know whether the respondents were going to spring something on appellant, and witnesses had already been excused. (T. p. 210, L.12-14).

At the conclusion of the testimony presented by respondent HHSFC, counsel for WCCOA again moved to be allowed to offer reply testimony. The following exchange transpired between counsel and the chairman of the Review Panel.

MR. ZEIGLER: You're sticking by your ruling of not letting us put up any reply?

CHM. LEATHERMAN: Yes, sir, that's correct. I didn't see any earth-shattering things from the other side, Mr. Zeigler.

MR. ZEIGLER: Well, it may not be earth-shattering, but we would like to, and we have - we're prepared to put up Ms. McCabe and Mr. Smith in reply, and we just want the record to show that.

CHM. LEATHERMAN: Okay. Let the record reflect that Mr. Zeigler is offering Ms. McCabe and Mr. Smith. (t. p.417, L. 7-18).

Counsel for HHSFC again joined in the request that WCCOA be allowed to reply to testimony offered by HHSFC. This too was denied. (T. p. 417, L. 19-22). The Chairman then directed counsel of WCCOA to outline what testimony it would offer by way of reply. This was done. The chairman then repeated his ruling that reply testimony would not be allowed and stated as follows:

CHM. LEATHERMAN: Mr. Zeigler, the Panel is going to refuse to allow you to put them up in rebuttal. And the reason for that, you had ample opportunity to develop your case as you went along, and I understand that there may have been some testimony from the other side that you want to respond to. And I don't see anything in what you've mentioned there that is new other than maybe the internal controls, or audit controls, and quite frankly, we will be taking a lot of that into consideration, but right now I don't see where that's relevant to the charging of fees.

So, we'll let the record show that you requested that and was not allowed to do that. (T. p. 419, L. 14-25; p.420, L.1-2). (Emphasis supplied).

The plaintiff's primary argument in this case on appeal from the South Carolina Procurement Review Panel is that it was denied a fair hearing and therefore denied due process under the provisions of Article I, Sec. 3 of the Constitution of the State of South Carolina which guarantees due process. In particular, it

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is the position of the plaintiff that Section 1-23-320 (e) of the State's Administrative Procedure Act provides in all contested matters, parties to an administrative hearing shall, among other things, be provided with an "Opportunity --- to respond and present evidence and argument on all issues involved". (Emphasis supplied).

The general law with regard to the right of a party to an administrative hearing is as follows:

A party's right to defend the right involved in a quasi-judicial proceeding, or under the requirement of a full hearing, included the right to make argument, to make proof or introduce evidence, to meet the claims of the opponent, and to deny, explain, impeach, controvert, and rebut; and to cross-examine witnesses. (Emphasis supplied). 2 Am Jur 2d, Administrative Law, Sec. 419, p. 230.

The defendant Review Panel takes the position that Section 11-35-4410, South Carolina Code of Laws, 1976, exempts the Panel from the provisions of the state's Administrative Procedures Act, citing the provision of that act which is as follows:

(5) Jurisdiction. Notwithstanding the provisions of Sec. 1-23-10 et seq. or any other provision of law, the panel shall be vested with the authority to interview any person it deems necessary, review all written decisions rendered under Sec. 11-36-4210, 11-35-4220, and 11-35-4230, and record all determinations. The panel shall establish its own rules and procedures for the conduct of its business, including the holding of necessary hearings.

The Review Panel cites the case of Tall Tower v. S. C. Procurement Review Panel, 294 S. C. 225, 363 S.E.2d 683 (1987), as authority for its cutting off reply testimony in the present case. I disagree that Tall Tower supports that ruling. Certain fundamental principals of due process are so well

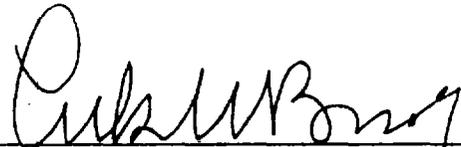
integrated into the judicial process that they may not be ignored. Among these principals is the right to respond, present evidence, and rebut evidence presented against one's position. It is spelled out in both the State's and the Federal Administrative Procedure Act (5 USC Sec.1006(e)), and it is a fundamental part of the constitutional right to due process of law.

In the case of NLRB v. Indiana & M. Electric Co., 318 US 9, 87 L ed 579, 63 S Ct 394 (1943), the Supreme Court speaking through Mr. Justice Jackson states as follows: "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights re finally foreclosed his case has been fairly heard. Findings cannot be said to have been reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed". S. Ct. at page 405. (Emphasis supplied).

I find that the refusal of the Review Panel to allow rebuttal testimony in this case was a violation of the due process clause of the State and Federal Constitutions and that the plaintiff was materially prejudiced thereby. I therefore find that it is not necessary to pass upon the other exceptions which WCCOA has argued in this matter, and they are not passed on in this order.

It is therefore,

ORDERED, that the decision of the South Carolina Procurement Review Panel dated December 14, 1988, in the above entitled matter, be and it is hereby set aside and the matter is remanded to the South Carolina Procurement Review Panel for proceedings consistent with the opinions expressed in this order.



Luke N. Brown, Jr.
Presiding Judge

Columbia, SC

Sept. 4, 1990