

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE**

GENERAL MOTORS CORPORATION,)	
Appellants,)	
)	Appeal No. 98-04
)	
v.)	
)	
SECRETARY OF DEPARTMENT OF)	
NATURAL RESOURCES & ENVIRONMENTAL)	
CONTROL, STATE OF DELAWARE,)	
Agency-below,)	
Appellee.)	

FINAL ORDER AND DECISION

Robert W. Whetzel, Esq. of Richards, Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899 Attorney for General Motors Corporation.

Kevin P. Maloney, DAG of Department of Justice, State of Delaware, 820 N. French St., 6th Flr., Wilmington, Delaware 19801 Attorney for the Secretary.

Before Chairman Clifton H. Hubbard, Jr., Robert S. Ehrlich, Robert I. Samuel, Diana Jones, Charles Morris and Joan Donoho, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for October 13, 1998. Both the Appellant, General Motors Corporation, ("GM") and Appellee, Department of Natural Resources and Environmental Control, ("DNREC") submitted pretrial memoranda and asked the Board to waive an evidentiary hearing and enter a ruling based upon consideration of the pre-hearing memoranda. The Board met on the date noted and entered into executive session to consider the memoranda. The following is the Order of the Environmental Appeals Board. ("EAB").

STATEMENT OF THE CASE

On August 6, 1998, General Motors Corporation filed its notice of appeal in a timely manner and in accordance with 7 *Del.C.* § 6008. The appeal is regarding the issuance of seven (7) permits by the Secretary of DNREC. The construction permits were issued on August 28, 1996. After receiving a request from GM for amendments to their permits, DNREC issued the final permits on July 10, 1998.

GM disagrees with the following conditions to these permits: Permit APC 96/0889 Construction, Condition #7; APC 96/0889 Operation, Condition #5; APC 89/0045 Construction, Condition #8, APC 89/0045 Operation, Condition #6; APC 96/0890 Operation, Condition #5, APC 82/1224 Operation, Condition #6; and APC 98/0519 Operation, Condition #5. GM objects to these conditions as they all require GM to "not cause or allow the emission of odorous air contaminants in such quantities as to interfere with any person's enjoyment of life and properties". GM alleges this condition is "overly broad, arbitrary and capricious, and otherwise not in accordance with law." (GM Statement of Appeal p. 2)

It is the position of DNREC that 7 *Del.C.* Chapter 60 authorizes the Secretary to impose

permit conditions more stringent than the regulations mandate. DNRECE argues the issuance of such permits advances the policies of Chapter 60 by reducing or eliminating the impact of air pollution on the public health and welfare. DNREC argues the Board need only determine whether the condition is rational and not examine whether there is a "basis in the record" for the imposition of such a condition. DNREC further argues the Appellant was afforded the requisite procedural and substantive statutory and constitutional rights in the imposition of the permit conditions.

Pursuant to 7 Del.C. § 6008 (b), "[w]hen a final decision of the Secretary concerning any case decision, including but not limited to any permit or enforcement action is appealed, the Board shall hold a public hearing in accordance with Chapter 101 of Title 29. The record before the board shall include the entire record before the Secretary". As pointed out by DNREC in its Answering Memorandum, the hearing scheduled before the Board regarding the permit conditions was the initial full adversarial opportunity for the Appellant.

Under circumstances where the initial full adversarial hearing is before the Board, the Board is permitted to receive additional evidence than presented to the Secretary and there is less apparent need for explicit deference to the Secretary's expertise. *Tulou v. Raytheon Service Co.*, 659 A.2d 796, 805 (1995). When the initial hearing is before the Board, the burden on the Appellant is not as heavy as there is no record before the Secretary to be considered. *Raytheon* at 806. The Appellant must prove the decision of the Secretary is not supported by the evidence on the record below. 7 Del.C. § 6008 (b). In the case *sub judice*, there is no record below as well as no evidence before the Board. The parties have relied strictly on their Memoranda, the permits and the statement of appeal.

Pursuant to *Raytheon*, "[i]t is the Secretary's function to enforce [Chapter 60]. 7 *Del.C.* § 6005 (a). These powers are broad in the pursuit of giving full force and effect to the legislative mandate of the Environmental Control Act". *Id.* at 802. An administrative official must be given adequate standards to guide them in exercising their discretion. *Carroll v. Tarburton*, 209 A.2d 86, 89 (1965). "Adequate safeguards and standards to guide discretion must be found in or be inferable from the statute, but the standards need not be minutely detailed, and the whole ordinance may be looked into in light of its surroundings and objectives for purposes of deciding whether there are standards and if they are sufficient." *Carroll* at 89.

The Board looked to both Chapter 60 and the DNREC Regulations regarding the term "air pollution". Both Chapter 60 and the Regulations state in the relevant portion, "the presence in the outdoor atmosphere of 1 or more air contaminants in sufficient quantities and of such characteristics . . . which unreasonably interferes with the enjoyment of life and property within the jurisdiction of this State. . .". Both the Legislature and the Secretary through the DNREC Regulations, intended air pollution to be that which was "unreasonable".

DNREC argues that despite the definition of "air pollution" in both the Statute and the Regulations, the Secretary has the discretion to impose reasonable permit conditions. There is no record before the Board of the Secretary's consideration or in the form of evidence to support the reasonableness of this condition. DNREC argues the permit condition is reasonable if it advances the goals and policies of Chapter 60 and if it is designed to assure compliance with the odor regulation. (See DNREC Answering Memoranda p. 7) This argument however, ignores the mandate of the statute to "[control] to assure their reasonable . . . use". 7 *Del.C.* § 6001 (b) Likewise, the regulations state that the standards ". . . shall be paramount in matters pertaining to

the control of air pollution throughout the state" and the emission requirements are selected as minimum controls necessary to ensure a reasonable quality of air throughout the state".

(DNREC Regulation sections 3, 3.1 and 3.2) Both the statute and the regulations were designed to protect the citizens from air contamination that is "unreasonable" and thereby defined as "air pollution".

By issuing the permits to GM as written, the Secretary has made it virtually impossible for GM to remain in compliance with the terms of the permits. The discretionary powers of the Secretary "must be accompanied by safeguards to protect against capricious or whimsical policy-making by the Department staff". *Butler v. Insurance Commissioner*, 686 A.2d 1017, 1022 (1997). The DNREC argues GM has misapplied the holding in *Butler*. DNREC argues instead that *Butler* refers to a "policy" or unwritten regulation and attempts to differentiate that from the decision of the Secretary to include this condition in the permits. The Board disagrees.

The Board has no evidence before it in support of the broad condition imposed by the Secretary. There is no basis to be found in support of a requirement that GM accommodate the sensitivity, either reasonable or unreasonable, of every possible passerby of its facility.

"[W]here the Department cannot refer to a written regulation as policy adhered to uniformly throughout the Department, the Department cannot subject individual applicants to such a policy, especially when, as in this case, noncompliance is followed by the severe result of license revocation." *Bulter* at p. 1022 The Secretary seeks to impose such a severe result on GM through this permit condition.

The Courts have recognized the broad and pervasive powers of the Secretary, however such powers require procedural safeguards and fairness to mark the difference between rule by

law and rule by whim or caprice. *Formosa Plastics Corp v. Wilson*, 504 A.2d 1083 (1986). An agencies action must be set aside if the action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *C.K. v. New Jersey Dept. Of Health & Human Services*, 92 F.2d 171, 182 (3d Cir. 1996) The Administrative Procedures Act requires a finding that the decision was neither arbitrary nor capricious. This entails a review of the full administrative record before the Secretary and the relevant factors considered. *C.K.* at 182. As stated earlier, this is the first hearing on this matter and the parties chose to proceed based on the memoranda without an evidentiary proceeding.

The Board finds no evidence to support the Secretary's decision to incorporate such a broad and vague condition in the permit, and no statute or regulation supporting such a condition. The Board has determined that the decision of the Secretary was not rational and was arbitrary and capricious. There is no reasonable basis for deviating from the Legislative intent and the DNREC Regulations. Both the statute and the regulations protect against "unreasonable" interference of life and property and the reasonable use of air resources. The condition as written would provide GM with no ability to gauge its compliance and would subject GM to numerous violations at the whim of the most sensitive of people. Without any justification to support such a broad condition the Board must and hereby does **REVERSE** the decision of the Secretary striking the above conditions as set forth in the permits. The Board further **REMANDS** the matter back to the Secretary with instructions to conduct a full hearing on the permits, if necessary, and to incorporate into the permits any additional conditions necessary to meet the mandates of 7 *Del.C.* Chapter 60 and the applicable regulations.

Environmental Appeals Board
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IT IS SO ORDERED.

The following Board members concur in this decision:

Clifton H. Hubbard, Jr.

Clifton H. Hubbard, Jr.
Chairman

4/20/98

Date

Environmental Appeals Board
Appeal No. 98-04

Robert S. Ehrlich

Robert S. Ehrlich
Member

November 18, 1998

Date

Environmental Appeals Board
Appeal No. 98-04

A handwritten signature in black ink, appearing to read "Robert I. Samuel", written over a horizontal line.

Robert I. Samuel
Member

NOV 19, 1998
Date

Environmental Appeals Board
Appeal No. 98-04

Diana Jones
Diana Jones
Member

11/28/98
Date

Environmental Appeals Board
Appeal No. 98-04

Charles E. Morris

Charles Morris
Member

11/20/98
Date

Environmental Appeals Board
Appeal No. 98-04

Joan Donoho
Joan Donoho
Member

11/19/98
Date