

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002253-MR

HARLAN SEALS, MAYOR AND
THE CITY OF FLEMING-NEON

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 03-CI-00381

FLEMING-NEON WATER UTILITIES
COMMISSION

APPELLEE

OPINION AND ORDER
(1) AFFIRMING
AND
(2) DENYING MOTION TO DISMISS

** ** * * *

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This appeal decides whether or not a city has authority to delegate the daily operations of a city's combined water and sewer department to a utility commission that is subject to the city's oversight. We are of the opinion that the ordinances in question delegate only ministerial duties and do not violate the "nondelegation doctrine" which prohibits the delegation of legislative powers. Therefore, we affirm the

circuit court's issuance of injunctive relief to prohibit the mayor from interfering with the commission's work.

Fleming-Neon, Kentucky, is a municipal corporation of the fifth class (the City). Harlan Seals (the Mayor) was elected Mayor for a term that expires in 2006. The Fleming-Neon Water Utilities Commission (the Commission) was established by ordinance enacted July 29, 1985, as amended August 15, 1996 (the Ordinance), to operate, or run, the City's water and sewer departments. The assets remain City property and the city commission retains oversight on the Commission. Only the daily operations and maintenance were delegated to the Commission.

The Commission alleged that the Mayor was interfering with the daily operations of the water and sewer departments and sought (and received) injunctive relief. The city commission then ousted the Mayor and that action is the subject of another appeal.¹ This appeal is by the Mayor of the injunctive relief.

There are a number of issues raised in the appeal, one of which is also the subject of a motion to dismiss before this Court. In the motion to dismiss, the Commission seeks to dismiss the appeal as moot because the Mayor no longer has standing to pursue this appeal. The removal is the subject of a separate action. However, under City of Pineville v. Collett, 294 Ky. 853, 172 S.W.2d 640 (1943) and Cornett v. Judicial

¹ Letcher Circuit Court No. 04-CI-156.

Retirement and Removal Commission, 625 S.W.2d 564 (Ky. 1981), the Mayor's removal is not final. Therefore, the Mayor still has standing and we deny the motion to dismiss.

The Mayor contends that sections 162 and 164 of the Kentucky Constitution prohibit the City from entering into contracts, or a franchise, that would bind the City for more than twenty years. The Ordinance does no such thing. Under the Ordinance, the water and sewer departments remain City departments, and City assets. Only the daily operations are assigned to the Commission, with the City retaining oversight. (The Mayor does not contend that the City does not have the power to establish a water or sewer district.) The Mayor's argument is that the Commission is an illegal entity exercising the legislative powers of the City. The question before this Court is whether the City may create a Commission to oversee the daily operations of the City water and sewer departments.

The Mayor alleges the Ordinance illegally delegates legislative power to the Commission because control of water and sewer departments is vested in the legislative body of the City, citing City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981). We agree that the "nondelegation doctrine" prohibits the improper delegation of legislative authority. Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Commonwealth of

Kentucky, 132 S.W.3d 770, 781 (Ky. 2003). However, in our increasingly complex society, there has to be an ability to delegate some duties. Id. (citing Mistretta v. United States, 488 U.S. 361, 372, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989)). Diemer v. Commonwealth, Transportation Cabinet, 786 S.W.2d 861, 865 (Ky. 1990), recognized administration may be delegated while policy may not. Louisville and Jefferson County Planning Commission v. Schmidt, 83 S.W.3d 449, 455 (Ky. 2001). “[B]road grants of power to administrative agencies in the area of public health have been generally upheld.” Watson v. Kentucky Board of Nursing, 37 S.W.3d 788, 791 (Ky.App. 2000) (citing Adams, Inc. v. Louisville and Jefferson County Board of Health, 439 S.W.2d 586, 589 (Ky. 1969)). In City of Maysville v. Brooks, 145 Ky. 526, 140 S.W. 665, 668 (1911), the Court distinguished the obligation to establish and open sewers, a legislative function, from keeping them in repair, a ministerial function. We interpret the daily operations of the Commission to be ministerial duties in the area of public health which may be delegated without violating the “nondelegation doctrine”.

For the foregoing reasons, the motion to dismiss is denied and the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

ENTERED: March 24, 2006

/s/ Wil Schroder
JUDGE, COURT OF APPEALS

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