

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION INTO POSSIBLE)	
VACANCIES ON THE BOARD OF)	
COMMISSIONERS OF CUMBERLAND COUNTY)	CASE NO.
WATER DISTRICT)	2023-00234

ORDER

On February 23, 2024, Cumberland County Water District (Cumberland District) filed a motion pursuant to KRS 278.400, requesting reconsideration of the Commission’s January 5, 2024 and February 8, 2024 Orders finding a vacancy on the Cumberland District’s board of commissioners (Board) for the position last filled by Sandy Hieneman.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”¹ An order can only be unlawful if it violates a state or federal statute or constitutional provision.²

¹ *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

² *Public Service Comm’n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm’n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

Pursuant to KRS 74.020(4), the Commission shall fill vacancies on boards of local water districts if the appropriate county judge executive, with approval of the fiscal court, has not filled the vacancy within 90 days following the vacancy.³ Generally, the county judge/executive has authority to appoint the members of the board of commissioners of a water district subject to the approval of the fiscal court.⁴ However, if the county judge/executive, with approval of the fiscal court, fails to fill “a vacancy resulting from the expiration of a term or the death, resignation, or removal of the incumbent . . . within ninety (90) days following the vacancy,” then the vacancy “shall be filled by the Public Service Commission.”⁵

Commission regulation 807 KAR 5:001, Section 4(7)(a), provides that “in computing a period of time prescribed or allowed by order of the commission or by 807 KAR Chapter 5 or KRS Chapter 74 or 278, the day of the act, event, or default after which the designated period of time begins to run shall not be included.” Further, 807 KAR 5:001, Section 4(7)(b), states that “the last day of the period so computed shall be

³ KRS 74.020(4).

⁴ See KRS 74.020(1)(a) (“Members of the board . . . shall be appointed by the county judge/executive with the approval of the fiscal court.”); see also KRS 74.020(4) (“Vacancies [on a board of commissioners] shall be filled by the same appointing authority [the county judge executive/fiscal court in appropriate county] which is empowered to make the original appointment.”).

⁵ KRS 74.020(4).

included, unless it is a Saturday, a Sunday, a legal holiday, or other day commission offices are legally closed, in which event the period shall run until the end of the next day that is not a Saturday, a Sunday, a legal holiday, or other day commission offices are legally closed.”

DISCUSSION AND FINDINGS

On August 8, 2023, the Commission established this case to determine whether a vacancy exists on the Board following evidence reviewed by the Commission in Case No. 2022-00244⁶ and in Case No. 2022-00291⁷ that the Board may not be in compliance with KRS 74.020.

On September 20, 2023, Commission Staff asked questions relating to changes to the Board since April 4, 2023, including any proof of appointment by the Cumberland County Fiscal Court.⁸ Staff’s First Request also stated that “Cumberland District shall make timely amendment to any prior response if Cumberland District obtains information that indicates the response was incorrect or incomplete when made or, though correct or complete when made, is now incorrect or incomplete in any material respect.”⁹

On September 29, 2023, and November 22, 2023, Cumberland District responded to requests for information from Commission Staff with information and documents

⁶ Case No. 2022-00244, *Electronic Alleged Failure of Cumberland Water District and Its Officers, Eric Carver, Sandy Hieneman, Troy Norris, Mark Vibbert, and Jay Cary and Its Manager, Matthew Dyer, to Comply with a Commission Order, KRS 278.990* (Ky. PSC July 5, 2023).

⁷ Case No. 2022-00291, *Electronic Application of Cumberland County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, Cumberland District’s Response to Commission Staff’s First Request for Information* (filed Nov. 3, 2022).

⁸ Commission Staff’s First Request for Information (Staff’s First Request), Items 3 and 4.

⁹ Staff’s First Request at 2.

regarding the appointments to the Board. Cumberland District's provided no information relating to the vacancy of Sandy Hieneman's position.

On January 5, 2024, the Commission entered an Order declaring two seats on the Board vacant for the positions of Mark Vibbert and Sandy Hieneman. At the time of this Order, the Commission had received no information from Cumberland District relating to the appointment of J.R. Thacker.

On January 25, 2024, Cumberland District filed a motion, pursuant to KRS 278.400, requesting reconsideration of the Order entered January 5, 2024, for the two vacancies on the Board and requested an extension of time to provide notice of these vacancies. As part of that motion, Cumberland District provided proof that the Cumberland County Fiscal Court appointed J.R. Thacker at its regular meeting of October 9th, 2023.¹⁰

On February 8, 2024, the Commission entered an Order denying the request to reconsider the two vacancies on the Board and granting the request for an extension of time. Specifically, the Commission found that the vacancy still existed as J.R. Thacker was appointed more than 90 days from when Sandy Hieneman resigned.¹¹

Cumberland District argued in its motion to reconsider that J.R. Thacker was timely appointed pursuant to 807 KAR 5:001, Section (7)(a).¹² Cumberland District argued that the 90th day following Sandy Hieneman's resignation was October 8, 2023.¹³ October 8,

¹⁰ Cumberland District's Motion to Reconsider, Exhibit 3.

¹¹ Order (Feb. 8, 2024) at 4.

¹² Cumberland District's Motion to Reconsider (filed Feb. 23, 2024) at 1. The Commission notes that the cited section was incorrect, and the text cited comes from 807 KAR 5:001, Section 4(7).

¹³ Cumberland District's Motion to Reconsider at 1.

2023, was a Sunday; accordingly, the last day for timely appointment fell on the following day, October 9, 2023.¹⁴ Cumberland District noted that October 9, 2023, was when J.R. Thacker was appointed as a commissioner by the Cumberland County Fiscal Court.¹⁵

Having considered the motion and the material at issue, the Commission finds that Cumberland District's motion for rehearing should be granted. The Commission is concerned that Cumberland District did not notify the Commission of J.R. Thacker's appointment in a timely manner, and notes that Cumberland District failed to provide the Commission with information the Commission needed to make a proper decision on January 5, 2024. However, the Commission agrees that 807 KAR 5:001, Section 4(7)(b), applies, and therefore, the seat would not be considered vacant. The Commission notes that this case is differentiated from past cases in which the Commission has denied a second motion for rehearing, as in this case the record has not been closed and no final Order entered. Furthermore, as the vacancy was timely filled, the Commission did not have jurisdiction to declare the position vacant pursuant to KRS 74.020(4).

IT IS THEREFORE ORDERED that:

1. Cumberland District's motion for reconsideration is granted.
2. J.R. Thacker was timely appointed to the Board on October 9, 2023.
3. The remainder of the January 5, 2024 and February 8, 2024 Order not in conflict with this Order remains in effect.

¹⁴ Cumberland District's Motion to Reconsider at 2.

¹⁵ Cumberland District's Motion to Reconsider at 2.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ENTERED
MAR 12 2024
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KENTUCKY PUBLIC
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