

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JACKSON COUNTY RURAL ELECTRIC)
COOPERATIVE CORPORATION, INC.)
) CASE NO. 10094
)
_____)
)
ALLEGED FAILURE TO COMPLY WITH)
THE COMMISSION REGULATION 807)
KAR 5:041, SECTION 3)

O R D E R

PROCEDURAL BACKGROUND

On October 30, 1987, the Commission Staff ("Staff") submitted an Accident Investigation Report to the Commission which alleged that Jackson County Rural Electric Cooperative Corporation ("Jackson County") had failed to comply with Commission Regulation 807 KAR 5:041, Section 3.

On December 3, 1987, the Commission ordered Jackson County to respond to the Accident Investigation Report and further to show cause why it should not be subject to the penalties of KRS 278.990 for its alleged failure to comply with Commission Regulations. Jackson County responded on December 17, 1987, denying any failure on its part to comply with Commission Regulations.

Prior to responding to the Accident Investigation Report, Jackson County filed a motion to dismiss this case for lack of jurisdiction. In its motion, Jackson County argued that the

Commission did not have jurisdiction to assess a penalty against a rural electric cooperative corporation ("RECC"). After receiving written arguments from Jackson County and the Staff, the Commission denied this motion on March 2, 1988.

On April 4, 1988, Staff and representatives of Jackson County¹ held an informal conference to discuss this case and agreed to stipulate the facts of this case. A stipulation of facts was filed with the Commission on May 23, 1988. Under the terms of the stipulation, Jackson County waived any right to an evidentiary hearing and requested that the Commission proceed to decide this case. On May 23, 1988, counsel for Jackson County also submitted a letter outlining its position in this case.

After reviewing the evidence of record, the Commission on July 11, 1988, found that Jackson County had failed to comply with Commission Regulation 807 KAR 5:041, Section 3 and assessed it a penalty of \$750.

On July 25, 1988, Jackson County submitted an application for rehearing on two issues -- the Commission's jurisdictional authority under KRS 278.990(1) to assess a penalty against an RECC and the amount of the penalty. Jackson County contended that the Commission lacks jurisdiction to assess a penalty under KRS 278.990(1) against an RECC. It further contended that the penalty assessed was "arbitrary and capricious" given the facts of this case.

¹ Representing Jackson County were: Lee Roy Cole, general manager of Jackson County, Lewis Ray Norris, safety director of Jackson County, and Peter J. Flaherty, III, Jackson County's legal counsel.

On August 12, 1988, the Commission granted Jackson County's application for rehearing. As the issues raised were legal, and not factual, in nature, the Commission ordered Jackson County and the Staff to submit written briefs on these issues. The Commission also ordered both to address the Commission's authority under KRS 278.990(1) to assess a penalty based solely on an employee's negligent act.

Briefs were filed on August 23, 1988.

FACTS

On September 25, 1987, a Jackson County work crew repaired a damaged 3-phase 7200 volt overhead distribution line in London, Kentucky. Herman Gray, superintendent for Jackson County's Laurel County District, supervised the work crew.

After repairs were completed, Gray ordered Kendall Gabbard, an apprentice lineman, to energize the distribution line. As Gray watched, Gabbard climbed a utility pole and, with a hot stick, energized the top phase of the repaired line. Energizing the top phase also energized a three-phase transformer bank down line. Backfeed from this transformer bank effectively energized the middle phase.

Unaware of the backfeed, Gabbard reached out and grabbed the middle phase hotline clamp. At the time he was not wearing the rubber gloves or sleeves provided to him. As a result of his contact with the hotline clamp, Gabbard suffered serious burns on his hands, chest, and feet. He was hospitalized for his injuries and was unable to return to work until December 10, 1987.

Gabbard's and Gray's actions violated the provisions of the National Electric Safety Code ("NESC").² Gabbard's failure to wear his rubber gloves while working around energized equipment violated NESC Section 42 (420H) which requires that employees use the protective equipment and devices provided for work. By failing to require Gabbard to wear his rubber gloves, which the NESC and Jackson County operating procedure³ required, Gray failed to comply with NESC Section 42 (421B) which directs a foreman to "see that the safety rules and operating procedures are observed by employees under his direction."

Jackson County acknowledges that Gabbard and Gray failed to comply with the provisions of the NESC at the time of the incident. It further acknowledges that both men were its employees and were acting within the scope of their employment at the time of the incident.

DISCUSSION

Assessment of a Penalty Based on an Employee's Negligence

In our previous Order, the Commission found that Jackson County had failed to comply with Commission Regulation 807 KAR 5:041, Section 3 by imputing Gabbard's and Gray's failures to Jackson County. KRS 278.990(1) states that "[e]ach . . . failure by [a] person employed by a utility and acting within the scope of

² All references to the NESC are to the 1981 edition.

³ Jackson County Policy Bulletin No. 8-18 requires all Jackson County employees to wear rubber gloves when working on any energized primary voltage structure or any energized secondary or service structure or using hotsticks of any kind or energized equipment.

his employment shall be deemed to be the failure of the utility." Because Gabbard and Gray were its employees and were acting in the scope of their employment at the time of the incident, their failure to comply with the provisions of the NESC was deemed as Jackson County's failure. Accordingly, the Commission found that Jackson County had failed to comply with Commission Regulation 807 KAR 5:041, Section 3,⁴ which requires a utility's compliance with the NESC, and assessed a penalty against Jackson County.

In its brief, Jackson County suggests that the Commission has incorrectly applied KRS 278.990(1) to the facts of this case. Jackson County characterizes the acts of its employees as "momentary lapses of memory," not willful acts of misconduct.⁵ KRS 278.990(1), it argues, was not intended to be used to punish a utility for the isolated acts of negligence by its employees, but only to punish willful violations of Commission Regulations. Jackson County, however, offers no legal authority or policy argument to support its interpretation.

Our review of the applicable law reveals that the authority of any administrative agency to assess a civil penalty against an employer for his employee's negligent acts is limited. Unless the statute imposing the civil penalty expresses a contrary intent, an employer can be held liable in such cases only where some culpable

⁴ "Acceptable Standards. Unless otherwise specified by the Commission, the utility shall use the applicable provisions in the following publications as standards of accepted good engineering practice for the construction and maintenance of plant and facilities, herein incorporated by reference: . . . National Electric Safety Code; ANSI C-2. 1981 Edition;"

⁵ Brief for Jackson County at 6.

fault or omission on his part is found. Davis v. Missouri Real Estate Commission, 211 S.W.2d 737 (Mo. 1948).

Courts, however, have permitted penalties to be assessed against an employer based solely on an employee's negligent acts where such a statutory intent is found. In Vann v. District of Columbia Board of Funeral Directors, 480 A.2d 688 (D.C. 1984), the District of Columbia Court of Appeals upheld an administrative agency's decision to revoke an undertaker's license for his employee's negligent handling of human corpses. Upon reviewing the agency's regulations, the Court found that these regulations expressly held an undertaker liable for the conduct of his employees insofar as such conduct related to the performance of his undertaking services. The regulation had, in the Court's opinion, codified the rule of respondeat superior.⁶

The Commission is of the opinion that KRS 278.990(1) also codifies the rule of respondeat superior. Our opinion is based upon the plain meaning of the statute's language. The statute states in part:

Each act, omission or failure of an officer, agent or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed the act, omission, or failure of the utility.

⁶ See also Camacho v. Loude, 157 Cal. Rptr. 26 (1979) (wherein the California Court of Appeals held an employer's agricultural pest control license could be suspended because of an employee's negligence); Perry v. Oregon Liquor Commission, 177 P.2d 406 (Ore. 1947) (wherein the Oregon Supreme Court sustained the suspension of liquor license based upon the acts of the licensee's employee under a regulation which held a licensee responsible for his employee's acts).

As the statute's language is not limited to intentional or willful acts, but covers any act, omission, or failure, it certainly intended for the assessment of penalties against utilities for their employee's negligent acts.

Sound policy considerations also support this finding. A utility employee's failure to comply with a Commission Order or regulation may have disastrous results -- property may be damaged, persons injured or killed. Whether an employee's act is intentional or negligent, its results are the same. The Commission believes that a utility by placing a person in a position of responsibility is under an obligation to ensure that person properly discharges the duties of that position. See, e.g., State v. Chicago M. & St. P. Ry. Co., 96 N.W. 904 (Iowa 1903). By penalizing a utility for its employees' acts, the Commission prompts the utility to see that the corporate business is conducted so as not to injure others or infringe upon the public good. As a utility has extensive control over its employees -- it selects, trains, and supervises them, it is in the best position to take responsibility for them.⁷

Jurisdictional Authority to Assess a Penalty Against an RECC

Pursuant to KRS 278.990(1), the Commission has the authority to penalize utilities "that are private corporations" which fail to obey any lawful requirement or Order of the Commission. Throughout this case, Jackson County has argued that RECCs are not

⁷ The U.S. Supreme Court has recognized this approach as an acceptable means of maintaining accountability for the public safety. See, e.g., U.S. v. Dotterweich, 320 U.S. 277 (1943).

private corporations and, therefore, cannot be assessed a penalty for their failure to comply with a Commission Regulation.

Corporations have generally been recognized as being of two classes: public and private. Trustees of Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518, 668 (1818) (Story, J., concurring); 18 Am.Jur.2d Corporations §30 (1985); Fletcher, Cyclopedia on Corporations §57 (1978). A public corporation is an instrumentality of the state, founded and owned by the state in the public interest, supported by public funds and governed by managers chosen by the state. A private corporation is organized by individuals for private purposes, supported by member contributions, and managed by officers and directors chosen by its members. The property of a private corporation belongs solely to its members.

RECCs have been held to be private corporations.⁸ In City of Paris, Kentucky v. Federal Power Commission, 399 F.2d 983 (D.C. Cir. 1968), the U.S. Court of Appeals of the District of Columbia, in ruling on whether an RECC was a governmental instrumentality for the purposes of the Federal Power Act, declared:

[C]ooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in

⁸ But see, O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971) (states in dicta that a RECC is a public corporation, but fails to provide any analysis for such statement).

rural electrification is also served thereby is not enough to make the cooperatives themselves instrumentalities.

REA-financed cooperatives are private non-profit corporations organized for the benefit of their consumer owners. They are neither operated or controlled by any government, federal, state or local. Nor are they operated or controlled by the Rural Electrification Administration or any other government agency [emphasis added].

Id., at 986. The RECC at issue in that case was East Kentucky RECC, an RECC organized under the laws of this Commonwealth.⁹

Any RECC organized under the provisions of KRS Chapter 279 has the attributes of a private corporation. It is created for a private purpose -- to provide electricity to its members.¹⁰ Private individuals, not the Commonwealth or any other political entity, are responsible for its creation. KRS 279.020. It is governed by a board of directors elected by its members. KRS 279.080. Only its members have an ownership interest in it. KRS 279.100(1).¹¹

Jackson County seeks to distinguish RECCs from private corporations by emphasizing an RECC's non-profit nature. This

⁹ East Kentucky RECC has since changed its name to East Kentucky Power Cooperative Corporation. It remains, however, organized under the provisions of KRS Chapter 279.

¹⁰ Only persons using electric energy supplied by an RECC may become a member. KRS 278.090. An RECC may supply electric energy to non-members, but no more than twenty-five percent of its business may be with non-members. KRS 279.120.

¹¹ KRS 278.180(4). In the event a cooperative corporation is dissolved, the cooperative's assets are distributed to its members after all outstanding obligations have been satisfied.

argument, however, runs counter to a large body of case law.¹² Courts have viewed a corporation's ability to manage its own affairs, not its lack of a profit motive, as the controlling factor in its classification. In Moore v. Andalusia Hospital, Inc., 224 So.2d 617 (Ala. 1969), for example, the Alabama Supreme Court declared that any corporation incorporated under Alabama's Nonprofit Corporation Act was a private corporation by virtue of its authority to elect its own officers and directors. In Edson v. The Griffin Hospital, 144 A.2d 341 (Conn. 1956), a Connecticut court refused to hold that a nonprofit corporation operating a charitable hospital was not a private corporation. After declaring that the absence of a profit motive was irrelevant to its decision, the Court stated: "The test is whether, under the charter or corporate powers granted, they [corporations] have the right to elect their own officers and directors, with the power to manage their own affairs." Id., at 344. Only private corporations have this authority.

RECCs have the authority to manage their own affairs. Each RECC has a board of directors elected by its members. KRS 279.080(1). The board manages and conducts the cooperative's business. KRS 279.080(2). It also adopts the rules and regulations which govern the cooperative's daily operations.

¹² See, e.g., Miller v. Davis, 150 S.W.2d 973 (Texas 1941); State ex rel Sams v. Ohio Valley General Hospital Association, 140 S.E.2d 457 (W.Va. 1965); Van Campen v. Olean General Hospital, 147 N.E. 219 (N.Y. 1925); Hughes v. Good Samaritan Hospital, 158 S.W.2d 159 (Ky. 1942).

In its brief, Jackson County also seeks to characterize an RECC as a quasi-public corporation -- a corporation which "is neither private nor public, but has features resembling both."¹³ Such a characterization ignores long recognized legal principles. Quasi-public corporations have always been held to be a class of private corporations which provide goods and services necessary to the welfare of the general public. 18 Am.Jur.2d Corporations §31 (1985); Fletcher, Cyclopedia on Corporations §63 (1978). If an RECC is a quasi-public corporation, it is also a private corporation and, therefore, subject to the penalty provisions of KRS 278.990(1).

Jackson County refuses to accept these generally recognized legal principles and instead argues that KRS Chapter 278 recognizes quasi-public corporations as a "distinct, different, and separate" class of corporation. It bases its argument on the inclusion of the term "quasi-public corporation" in the Chapter's definition of "corporation."¹⁴ It, however, produces no evidence or legal authority to support its argument.

The Commission finds little merit to Jackson County's argument. KRS 278.010(1) states:

"Corporation" includes private, quasi-public and public corporations, and all boards, agencies and instrumentalities thereof, associations, joint-stock companies and business trusts.

While it is possible that the drafters of this statute intended to recognize quasi-public corporations as a distinct form of

¹³ Brief for Jackson County at 3.

¹⁴ Id. at 3.

corporation it is more likely, the Commission believes, that the drafters merely intended its language to be as inclusive as possible so as to cover all corporate forms which a utility might take.

Furthermore, if the Commission accepts Jackson County's argument, the Commission renders KRS 278.990(1) meaningless. Every utility organized as a corporation, even those which Jackson County describes as private corporations, meets the traditional definition of a quasi-public corporation.¹⁵ If quasi-public corporations are not subject to the penalties of KRS 278.990(1), then no utility organized as a corporation is. As a statute is presumed to be enacted for the furtherance of a purpose and is to be construed so as to accomplish that purpose, Commonwealth ex rel. Martin v. Tom Moore Distillery Co., 152 S.W.2d 962 (Ky. 1941), the Commission must reject Jackson County's argument.

Amount of the Penalty

In our prior Order, the Commission assessed a penalty of \$750 against Jackson County for its failure to comply with Commission Regulation 807 KAR 5:041, Section 3. Our action was based in large measure on the consequences of Jackson County's failure -- an employee was seriously injured -- and the fact that these

¹⁵ "Quasi public corporation. This term is sometimes applied to corporations which are not strictly public, in the sense of being organized for governmental purposes, but whose operations contribute to the comfort, convenience, or welfare of the general public, such as telegraph and telephone companies, gas, water, and electric light companies, and irrigation companies. More commonly and more correctly styled "public-service corporations."

Black's Law Dictionary 309 (rev. 5th ed. 1979).

consequences could have easily been avoided if the crew supervisor, a management employee of Jackson County, had complied with our Regulations.

In that Order, however, the Commission failed to give the appropriate weight to several facts of this case. These facts include: Jackson County's swift disciplining of its employees,¹⁶ its initiation of an inspection program to ensure that all utility foremen and supervisors observe and enforce the NESC rules, and Jackson County's overall safety record.¹⁷ Though these factors do not relieve Jackson County of its responsibility to ensure a safe work place for its employees, they do mitigate against the imposition of a large penalty. Accordingly, the Commission is of the opinion that the amount of the penalty should be reduced by one-third.

FINDINGS AND ORDER

After review of the evidence of record and being advised, the Commission is of the opinion and finds that:

1. The Commission has the authority to assess a penalty under KRS 278.990(1) against a utility for the negligent acts which its employees perform in the scope of their employment.

¹⁶ Jackson County reprimanded both Gabbard and Gray. It also relieved Gray of his responsibilities as Laurel County District Superintendent and demoted him to the position of Service Man, which has no supervisory responsibility.

¹⁷ Prior to this case, Jackson County had never been called before the Commission for any violation of Commission Regulations regarding safety.

2. An RECC is a private corporation and is, therefore, subject to the penalties of KRS 278.990(1) for its failure to comply with Commission regulations.

3. Jackson County should be assessed a penalty of \$500 for its failure to comply with 807 KAR 5:041, Section 3.

IT IS THEREFORE ORDERED that:

1. Jackson County be, and it hereby is, assessed a penalty of \$500 for its failure to comply with Commission Regulation 807 KAR 5:041, Section 3.

2. This fine shall be paid within 20 days of the date of this Order by certified check or money order made payable to Treasurer, Commonwealth of Kentucky. Said check or money order shall be mailed or delivered to the Office of General Counsel, Public Service Commission, P.O. Box 615, Frankfort, Kentucky 40602.

3. All other provisions of our Order of July 11, 1988, not inconsistent or in conflict with the terms of this Order be, and they hereby are, affirmed.

Done at Frankfort, Kentucky, this 24th day of October, 1988.

PUBLIC SERVICE COMMISSION

Richard D. Herman, Jr.
Chairman

Robert M. Davis
Vice Chairman

ATTEST:

Executive Director

Spencer N. Williams, Jr.
Commissioner