

ATTACHMENT F

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA ex rel.
GEORGE OLDROYD and
KIRKLAND T. BYARS,

Plaintiffs,

v.

PAT BYINGTON,

Defendant.

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CV 2004-3178

FINAL ORDER AND JUDGMENT

This cause having come before the Court on the parties' motions for summary judgment, and the Court having received briefs and heard oral argument by the parties, the Court hereby Orders, Adjudges, and Decrees, as follows:

The present action seeks a writ of quo warranto declaring that Defendant Pat Byington ("Byington") is not eligible to serve in his current office as a member of the Alabama Environmental Management Commission (the "Commission").

Count I: Conflict of Interest

Count I of the Plaintiffs' Complaint is entitled "Holding Commission Office in Violation of Clean Water Act Guidelines." According to the Plaintiffs' Complaint, Defendant Byington is "usurping, intruding into or unlawfully holding or exercising" the office of Commissioner because he has allegedly failed to comply with the requirement imposed by Ala. Code § 22-22A-6(j) that members of the Commission "meet all requirements of the state ethics law and the conflict of interest provisions of applicable federal laws and regulations." According to the Plaintiffs, Byington has

allegedly failed to comply with the conflict of interest provisions of the federal Clean Water Act. The Plaintiffs allege that Byington violated 33 U.S.C. § 1314(i)(2)(D) by allegedly receiving a "significant portion of [his] income" from entities that have been issued or are seeking a discharge permit from the Alabama Department of Environmental Management under the federal National Pollutant Discharge Elimination System ("NPDES").

In particular, the Plaintiffs' Complaint alleges that Byington's 2003 income from the Southern Environmental Center ("SEC"), a division of Birmingham-Southern College ("BSC"), violates the Clean Water Act's conflict of interest rules because BSC holds an NPDES permit for the discharge of treated storm water. The primary problem with the Plaintiffs' argument, however, is that Byington's income from BSC never constituted "a significant portion of [his] income." As a consequence, Byington is entitled to summary judgment on Count I of the Plaintiffs' Complaint.

As this Court has previously recognized in this case:

The federal statute relied on by the Plaintiffs (33 U.S.C. § 1314(i)(2)(D)) does not itself create rules to govern conflicts of interest under the Clean Water Act. Instead, the statute merely authorized the Administrator of the Environmental Protection Agency ("EPA") to "promulgate guidelines" for such conflict of interest rules. Those guidelines were subsequently promulgated and codified at 40 C.F.R. § 123.25.

(State of Ala. ex rel. Oldroyd v. Byington, Order of June 21, 2005, at 2-3).¹

¹ This Court previously relied on the applicable regulations to hold that Byington's receipt of income from Auburn University could not serve as the basis for a violation of 33 U.S.C. § 1314(i)(2)(D) because Auburn is a state agency or department, expressly exempt from the conflict of interest rules on which the Plaintiffs rely. (See Order entered June 21, 2005).

The applicable federal regulation establishing the conflict of interest rule provides:

State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

40 C.F.R. § 123.25(c). The controlling federal regulations expressly define "significant portion of income" as follows:

"Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

40 C.F.R. § 123.25(e)(1)(iii).

In support of his summary judgment motion, Byington submitted an affidavit from CPA William Richardson establishing that Byington's income from BSC never equaled or exceeded 10% of his gross personal income for any calendar year. Because Byington's income from BSC never equaled or exceeded the established 10% threshold, Byington's income from BSC did not violate the Clean Water Act's conflict of interest rules.

Alternatively, the Plaintiffs have asserted that Byington's income from BSC should be increased to include \$1000 that Byington was paid by the Alabama Urban Forestry Association ("AUFA") in 2003. Byington has submitted substantial evidence, however, in the form of affidavits from himself and Shelley Green, which establishes that the AUFA is not a part of BSC and that the income that Byington received from that

entity cannot be imputed or added to the income that Byington received from BSC. The Plaintiffs failed to submit substantial evidence to refute Byington's position.

Byington is also entitled to summary judgment on this claim because the alleged violation of 33 U.S.C. § 1314(j)(2)(D) does not constitute legal grounds for holding that Byington has usurped, intruded into, or unlawfully holds the office of Commissioner of the Alabama Environmental Management Commission. The evidence submitted by Byington establishes that the established remedy for any alleged conflict of interest is recusal, not disqualification from office. The Plaintiffs' claim, therefore, is outside the permissible scope of a quo warranto action. Ala. Code § 6-6-591(a).

As a result, Byington is entitled to a judgment as a matter of law on Count I of the Plaintiffs' Complaint.

Count II: Qualification as an Ecologist

Count II of the Plaintiffs' Complaint asserts that Byington does not possess the necessary qualifications to serve in his position on the Commission. The position on the Commission to which Byington was appointed is established by § 22-22A-6(b)(6). That position, sometimes referred to as the "biologist/ecologist" position, is described as follows:

One member shall be a biologist or an ecologist possessing as a minimum a bachelor's degree from an accredited university and shall have training in environmental matters.

§ 22-22A-6(b)(6). Byington was appointed to serve in the "biologist/ecologist" position on the Commission by the Governor in 2001 and unanimously confirmed by the Alabama Senate in 2002.

The Plaintiffs' position is that the phrase "ecologist possessing ... a bachelor's degree" can only mean "ecologist possessing a bachelor's degree *in ecology*." Because Byington's college degree from the University of Alabama is in Environmental Studies, the Plaintiffs argue that he does not have the required college degree for the "biologist/ecologist" position on the Commission.²

Byington, on the other hand, argues that § 22-22A-6(b)(6) is susceptible to more than one reasonable interpretation and is, therefore, ambiguous. Byington contends that the plain language of § 22-22A-6(b)(6) does not mandate that the ecologist position be filled by someone with a college degree in the precise field of ecology.

Neither § 22-22A-6(b)(6), nor any other provision of the Alabama Environmental Management Act defines the word "ecologist." "[W]hen a term is not defined in a statute, the commonly accepted definition of the term should be applied." Bean Dredging, L.L.C. v. Alabama Dept. of Revenue, 855 So.2d 513, 517 (Ala. 2003). "In determining legislative intent [a court] will give words and phrases the same meaning they have in ordinary, everyday usage." Fuller v. Associates Commercial Corp., 389 So.2d 506, 507 (Ala. 1980). Further, in order "to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." Anderson v. UNUM Provident Corp., 369 F.3d 1257, 1264 (11th Cir. 2004).³

² The Plaintiffs have conceded that Byington has "a bachelor's degree from an accredited university" and that he has "training in environmental matters" as required by § 22-22A-6(b)(6).

³ The Dictionary of Occupational Titles (Fourth ed. 1991) defines "ecologist" as "[a] term applied to persons who study plants or animals in relation to the effect of environmental influences, such as rainfall, temperature, altitude, and kind and quantity of food." The Merriam-Webster's Medical Dictionary defines "ecologist" as "a person who specializes in ecology."

There actually appears to be no dispute that Byington is an ecologist. Byington has submitted his own affidavit, as well as those of two university professors, attesting to Byington's qualifications, training and experience as an ecologist. For their part, the Plaintiffs contend that Byington's training and experience as an ecologist is irrelevant because § 22-22A-6(b)(6) unambiguously requires a college degree in the specific field of ecology.

Unfortunately, both the term "ecologist" and the term "ecology" are ambiguous terms susceptible to a number of reasonable interpretations. See Zitterow v. Nationwide Mut. Ins. Co., 669 So.2d 109, 112 (Ala. 1995) (stating that "language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time"). "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Sutherland Statutory Construction § 45:2 (6th ed. 2005).

Having carefully read and analyzed § 22-22A-6(b)(6), this Court concludes that the statute is ambiguous as to whether a degree in the specific field of ecology is required. Because the "plain meaning" of the statute cannot be discerned from its language, this Court must interpret the statute "according to traditional rules of statutory construction." Ex parte Jackson, 881 So.2d 450, 452 (Ala. 2003).

Application of the traditional and well-established rules of statutory construction to § 22-22A-6(b)(6) leads to the conclusion that the Legislature did not intend to require a degree in the specific field of ecology in order to qualify for the ecologist position on the Commission. Among the rules of statutory construction supporting this conclusion are the following: (1) This interpretation of the statute is

consistent with that of the Governor and the Alabama Senate, the government officials charged with carrying out the statute's directives. In appointing and approving Byington, these government officials obviously did not believe that a degree in ecology was required; (2) This interpretation of the statute properly considers the circumstances and history surrounding the statute's enactment. Byington established that it was impossible to obtain a degree in ecology from any Alabama college or university (and very difficult to obtain one anywhere) at the time of the statute's enactment; (3) This interpretation of the statute avoids a construction that would render the statute meaningless and produce an irrational result. Requiring a degree in ecology would mean that the Legislature was imposing a requirement that was almost impossible to meet; (4) This interpretation of the statute avoids a construction that would render the Legislature's chosen language redundant and superfluous; and (5) This interpretation of the statute is consistent with the Alabama Environmental Management Act as a whole.

Finally, this Court has considered and rejected Attorney General Opinion No. 2005-013, relied on by the Plaintiffs. "[A]n attorney general's opinion is only advisory; it is not binding on this Court and does not have the effect of law." Farmer v. Hypo Holdings, Inc., 675 So.2d 387, 390 (Ala. 1996); see also State Dept. of Revenue v. Arnold, 909 So.2d 192, 194 (Ala. 2005) (Attorney General "opinions are not controlling, but merely advisory, and serve to offer protection from liability only to 'such officer' to whom that opinion is directed."); J.M.R. v. County of Talladega, 686 So.2d 209, 210 n.1 (Ala. 1996) ("Attorney general opinions [do] not hav[e] the force of law.").

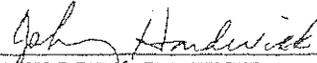
This Court concludes that the Attorney General's opinion is not persuasive authority in this matter. For example, while the Attorney General's opinion asserts that

"universities in Alabama and two of its sister states also offer at least a bachelor's degree in ecology," the opinion does not address the fact that no such degrees were available in 1982 when the statute in question was passed. As a consequence, even though the Attorney General's opinion concedes that "great weight should be given to the practical effect that a proposed construction will involve" (Op. No. 2005-013 at 2), it appears that the Attorney General completely failed to consider the fact that his overly restrictive interpretation of the statute means that the Legislature would have created a position that was virtually impossible to fill at the time.

Having considered all of the evidentiary materials, legal memoranda and arguments of counsel, the Court concludes that Byington satisfies the statutory requirements of § 22-22A-6(b)(6) because he is an ecologist with a bachelor's degree in Environmental Studies from an accredited university and he has training in environmental matters. As a consequence, Byington is entitled to a judgment as a matter of law on Count II of the Plaintiffs' Complaint.

Judgment is entered in favor of Defendant Byington on all counts and claims asserted by the Plaintiffs. Further, the Court expressly finds and determines that there is no just reason for delay and directs that judgment be entered for the Defendant on all claims, counts, and causes of action asserted by the Plaintiffs. Ala.R.Civ.P. 54(b). Finally, having found that the Defendant is entitled to a judgment of all counts of the Plaintiffs' Complaint, this Court, pursuant to Ala. Code § 6-6-601 and Ala.R.Civ.P. 54(d), taxes costs to the Plaintiffs.

DONE this 18th day of May, 2006.



JENNY HARDWICK,
CIRCUIT JUDGE

cc: Hon. Albert L. Jordan
Hon. Barry A. Ragsdale
Hon. Jimmy Pool (*Pool*)