

Albuquerque-Bernalillo County Air Quality Control Board – Board's Authority to Act on Appellate Mandate

March 10, 2021

Sources of the Board's Authority to Act on Appellate Mandate

- Albuquerque City Ordinance (“ACO”), Section 9-5-1-7, specifying the Board’s duties and powers related to permits and appeals.
 - Requires the Board to adopt regulations requiring sources to obtain a permit from the EHD, including rules related to permit hearings.
 - Specifies that any person who participated in a permit hearing and is adversely affected by the permitting decision may file a petition for a hearing before the Board. ACO § 9-5-1-7(H).
- **Section 9-5-1-7 is consistent with the Air Quality Control Act, NMSA 1978, § 74-2-7.**

ACO § 9-5-1-7, cont'd

- Based on the evidence presented at the hearing, the Board “shall sustain, modify or reverse” the EHD’s permitting decision. ACO § 9-5-1-7(K).
- A **final** decision on a permit “by the Department, the Board or the court of appeals that a new source will or will not meet applicable local, state, and federal air pollution standards and regulations shall be conclusive and is binding on every city, county, and state agency, as an issue before any such agency shall be deemed resolved in accordance with that final decision.” ACO § 9-5-1-7(L)

Judicial Review

- ACO § 9-5-1-9: Any person adversely affected by the Board's action on a permit may appeal to the Court of Appeals.
 - Consistent with ACA § 74-2-9.

Disposition by the Court of Appeals

- The Court's Opinion on the appealed from decision is the Court's decision. The Opinion will affirm or reverse the decision appealed from, and as necessary, remand for further proceedings.
 - In this case and many others, there may be multiple grounds for appeal; in which case the Court may affirm or reverse as to some or all of the grounds raised.
 - In this case, four grounds or reversing the permitting decision were raised; the Court affirmed the decision on all four grounds.
- After the time for appealing the Opinion has elapsed, the Court's "mandate" issues. See Rule 12-402(C) NMRA.

Appellate Disposition, cont'd.

- Unlike the Opinion, the Mandate does not contain the Court's reasoning or decision. The Mandate is basically a cover sheet, "remanding" the case back to the court that issued the appealed from decision, for further proceedings "consistent with" the Court's Opinion.
- Pursuant to the Mandate, the lower court that issued the appealed from decision **effectuates** the appellate court's decision embodied in the Opinion. Technically, **the Mandate transfers jurisdiction** over the appealed from decision from the appellate court **back to the lower court – in this case, the Board.**

Appellate Disposition, cont'd.

- To effectuate the appellate court's decision, the lower court – the Board - must act consistently with the decision.
- Where the Court of Appeals **affirms** the lower court's decision, the Mandate "returns the case for entry of judgment to the prevailing party." Jennifer L. Swize, *The Appellate Mandate: What it is and Why it Matters*, 31, No. 2, A.B.A. Sec. Litig. Appellate Practice (Winter 2012).
- In this case, the Court of Appeals affirmed the Board's decision sustaining the EHD's decision to approve a permit.
- **The Mandate has returned the case to us to enter judgment accordingly.**

Order on Mandate

- The case is now back before us, the lower court. The case is back under our jurisdiction.
- The question that has been raised is what action the Board may now take pursuant to the Mandate.

Order on Mandate, cont'd.

- The New Mexico Rules of Civil Procedure, Rule 1-085 NMRA, provide the rule that the district courts **must** follow upon receipt of the appellate Mandate:
 - Within 30 days, "the prevailing party shall either present to the court a proposed judgment or order on the mandate containing the specific directions of the appellate court; or, if necessary, request a hearing."
 - As we know, the EHD, the prevailing party, submitted an approved Order on Mandate to this Board, **the equivalent of the district court and of any other lower court** in New Mexico, for entry by the Board.

Order on Mandate, cont'd.

- The question, again, is whether this Board, the equivalent of a lower court, has some discretion to not effectuate the Opinion of the Court of Appeals after receiving the Court's Mandate.
- The answer is "**no**".
 - "The district courts have only such jurisdiction on remand as the opinion and mandate of an appellate court specifies. **It is well settled that the duty of a lower court on remand is to comply with the mandate of the appellate court, and to obey the directions therein without variation**, even though the mandate may be erroneous." *Vinton Eppsco Inc. v. Showe Homes, Inc.*, 1981-NMSC-114, ¶ 4 (emphasis in original).

Order on Mandate, cont'd.

- Stated more directly: “It is well settled that **it is the duty of the lower court on remand of a cause to comply with the mandate of the appellate court, and to obey the directions therein without variation**, even though the mandate may be, or is supposed to be erroneous.” *Glaser v. Dannelley*, 1920-NMSC-083, ¶ 5 (emphasis in original)
 - "The mandate of the appellate tribunal **is law to the trial court, and must be strictly obeyed**. Where the mandate directs that a particular judgment be entered, that a specified ruling be made, or that a designated course be pursued, " (citation omitted) (emphasis added) **the inferior tribunal must yield obedience to the directions given.**

Order on Mandate, cont'd.

- The specific instructions given in this case are for the Board - the lower court - to assume jurisdiction of the case and enter an order consistent with the Court's Opinion.
 - **The Order on Mandate presented to the Board is that order.**
- It may be asserted by some Board members that the Court of Appeals' decision, embodied in its Opinion, is incorrect somehow, or that the underlying permitting decision might have been decided differently by the current Board.
 - **Those reasons would not give the Board any discretion to ignore the appellate mandate and refuse to enter an order adopting the Court of Appeals' decision and entering judgment accordingly.**

Adjudicatory Standards

- **When deciding permitting appeals, as in this case, the Board is an adjudicatory body.** NMAC § 20.11.81 et seq., Adjudicatory Procedures – Air Quality Control Board.
- **As adjudicators, Board members are required to behave like judges,** by the Board’s own rules:
 - A Board member may not perform any adjudicatory function in a matter in which he or she “has a **personal bias or prejudice concerning a party or the outcome of a proceeding.**” 20.11.81.12 (B)(3). This rule applies to the Board’s consideration of Order on Mandate.
 - Where bias or prejudice concerning the outcome of a proceeding is an issue, **voluntary recusal is required, or the Board member may be disqualified by a party.**

Adjudicatory Standards, cont'd.

- Such a bias or prejudice against the outcome of the proceeding in this case could be perceived as **unfairness, generally.**
- **Not acting**, as opposed to recusing oneself, would violate the law and probably constitute failure to carry out the duties of the Board.
 - It is the Board's **legal duty** to act in conformance with the mandate.
- A Board member may be removal by the Mayor or the City Council. “if such member has violated any law . . . , or for other good cause such as the intentional failure to carry out the duties of the board.” ACO § 2-6-1-3(C).

Adjudicatory Standards, cont'd.

- Bernalillo County Code § 2-434(b) provides that "A member of a board may be removed from office by a majority vote of the board of county commissioners after due notice and hearing, if such member has violated any law, regulation or ordinance, or for other good cause such as malfeasance *or the intentional failure to carry out the duties of the board.*" (Emphasis added).

Adjudicatory Standards, cont'd

- Under the NM Code of Judicial Conduct, Rule 21-211, cmt. 1, “a judge is disqualified whenever the judge’s **impartiality might reasonably be questioned**, regardless of whether any of the specific provisions of [Rule 20-211(A)(1)-(5)] apply.”
- Under Rule 21-101, “a judge shall respect and comply with the law.”
 - Non-compliance is not an option. Failing to perform known judicial duties probably constitutes willful misconduct. See *In re Guillory*.