

BEFORE THE OIL & GAS COMMISSION

GEMINI ENERGY, INC.,	:	
	:	Appeal No. 737
Appellant,	:	
	:	Review of Chief's Order
-vs-	:	2004-38
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	<u>FINDINGS, CONCLUSIONS</u>
	:	<u>& ORDER OF THE</u>
Appellee.	:	<u>COMMISSION</u>

Appearances: Robert W Gentzel, Counsel for Appellant Gemini Energy, Inc., Robert Eubanks, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued: April 5, 2005

BACKGROUND

This matter came before the Oil & Gas Commission upon appeal by Gemini Energy, Inc. from Chief's Order 2004-38. Chief's Order 2004-38 demanded the forfeiture of bond in the amount of \$15,000.

On September 29, 2004, this cause came on for hearing before five members of the Oil & Gas Commission. At hearing, the parties presented evidence and examined witnesses appearing for and against them. Following the hearing, the parties filed written closing arguments, with the final filing being made on November 9, 2004. On November 10, 2004, Gemini filed a Motion to Supplement the Record developed at the September 29, 2004 hearing. The Division opposed this Motion in a filing made November 18, 2004.

ISSUE

The issue presented by this appeal is: **Whether the Chief acted lawfully and reasonably in ordering the forfeiture of Gemini Energy's blanket bond.**

THE LAW

1. Pursuant to O.R.C. §1509.36, the Commission will affirm the Division Chief if the Commission finds that the order appealed is lawful and reasonable.

2. O.R.C. §1509.07 provides *inter alia*:

[A]n owner of any well, before being issued a permit under section 1509.06 of the Revised Code, shall execute and file with the division of mineral resources management a surety bond conditioned on compliance with the restoration requirements of section 1509.072, the plugging requirements of section 1509.12, the permit provisions of section 1509.13 of the Revised Code, and all rules and orders of the chief relating thereto, in an amount set by rule of the chief.

The owner may deposit with the chief, instead of a surety bond, cash in an amount equal to the surety bond as prescribed pursuant to this section or negotiable certificates of deposit or irrevocable letters of credit, having a cash value equal to or greater than the amount of the surety bond as prescribed pursuant to this section.

3. O.R.C. §1509.071 provides for the forfeiture of bond:

(A) When the chief of the division of mineral resources management finds that an owner has failed to comply with the restoration requirements of section 1509.072, plugging requirements of section 1509.12, or permit provisions of section 1509.13 of the Revised Code, or rules and orders relating thereto, the chief shall make a finding of that fact and declare any surety bond filed to ensure compliance with those sections and rules forfeited in the amount set by rule of the chief. The chief thereupon shall certify the total forfeiture to the attorney general, who shall proceed to collect the amount of the forfeiture.

- 4 O.R.C. §1509.12 provides in part:

Unless written permission is granted by the chief, any well which is or becomes incapable of producing oil or gas in commercial quantities shall be plugged. When the chief finds that a well should be plugged, the chief shall notify the owner to that effect by order in writing and shall specify in such order a reasonable time within which to comply. No owner shall fail or refuse to plug a well within the time specified in the order.

FINDINGS OF FACT

1 Gemini Energy, Inc. owns approximately 34 oil & gas wells located in Huron County, Ohio.

2. On September 6, 1999, Gemini filed Certificate of Deposit #1633641708 in the amount of \$15,000, with the Division of Mineral Resources Management. This "blanket bond" was filed in accordance with O.R.C §1509.07, and covered approximately 34 wells.

3 On January 17, 2002, the Division issued Chief's Order 2002-02 to Gemini. This Chief's Order required Gemini to either plug or produce 34 wells located in Huron County

4. Gemini Energy failed to comply with Chief's Order 2002-02.

5 On November 18, 2002, Chief's Order 2002-67 was issued to Gemini Energy forfeiting Gemini's blanket bond.

6. On December 18, 2002, Gemini appealed Chief's Order 2002-67 to the Oil & Gas Commission. This appeal was assigned case # 713.

7 Prior to hearing before the Oil & Gas Commission, Gemini and the Division entered into a Consent Agreement in appeal #713. This agreement provided that the Division would dismiss the bond forfeiture proceedings, and restore Gemini's bond, with the understanding that Gemini would undertake certain actions relative to the Huron County wells, including:

- completing the installation of necessary equipment, materials and controls for the gas scrubbing plant by September 16, 2003, and placing the plant into operation no later than January 15, 2004;
- updating the owner I.D. signs at all wells by July 10, 2003,
- obtaining permits to plug two wells (#172 & #182) by October 1, 2003;
- placing eight wells (#165, #171, #174, #175, #176, #203, #220 & #221) into production by December 31, 2003,
- placing nineteen wells (#108, #109, #117, #118, #138, #140, #150, #151, #153, #164, #202, #204, #209, #214, #215, #216, #217, #219 & #225) into production by March 1, 2004

This Consent Agreement was filed with the Oil & Gas Commission on November 10, 2003. On January 23, 2004, the Commission **adopted** the parties' agreement, and **dismissed** Gemini's appeal number #713.

8. As of May 19, 2004, Gemini had obtained permits to plug wells #172 and #182, as required under the Consent Agreement.

9. In July 2004, at the request of the Division, Gemini plugged well #183. This well was found to be leaking, and the plugging of well #183 was considered an emergency situation.

10. Gemini has invested approximately \$85,000.00 into a gas scrubbing plant, which plant is necessary to process the oil & gas to be produced by the Huron County wells. The scrubbing plant will be utilized to remove hydrogen sulfide from the gas in the wells.

11 On May 25, 2004, the Division issued Chief's Order 2004-38 to Gemini, again ordering the forfeiture of Gemini's bond. Chief's Order 2004-38 states that Gemini failed to comply with the Consent Agreement entered in appeal #713, and that the idle Huron County wells pose a threat to public health, safety and to the environment.

12. On June 15, 2004, Gemini appealed Chief's Order 2004-38 to the Oil & Gas Commission. This appeal was assigned appeal number #737. The appeal of Chief's Order 2004-38 is the subject of the immediate decision.

13 At hearing in appeal #737, conducted on September 29, 2004, a Division witness testified that Chief's Order 2004-38, forfeiting Gemini's bond, was issued as a penalty to Gemini.

RULING ON MOTION TO SUPPLEMENT RECORD

The Consent Agreement entered in appeal #713 provided:

2. Gemini shall update the owner I.D. signs at all wells, at the well heads and/or tank batteries, as requested, by July 10, 2003

At the merit hearing, the Division asserted that Gemini had not complied with the above-quoted provision of the Consent Agreement. In support of this claim, the Division submitted evidence, in the form of the testimony of Inspector Tom Banko and two photographs. The photographs submitted by the Division were taken in April 2003. At hearing, a witness for Gemini testified that he believed that the I.D. signs had been updated. However, Gemini presented no physical evidence in support of its witness' statement.

On November 10, 2004, Gemini submitted to the Commission a Motion for Leave to Supplement Record. Accompanying this Motion were eleven photographs, showing up-dated signs at various Gemini well sites. The Motion was also supported by two affidavits, indicating that the I.D signs were replaced in or about February 2004.

On November 18, 2004, the Division filed a Memorandum opposing Gemini's proposed supplementation of the Record.

The Commission's procedural rules do not specifically address the submission of additional evidence following a merit hearing. However, the general criteria for acceptance of additional evidence requires that the evidence be newly discovered, and that such evidence could not have been ascertained prior to hearing.

The Chief's Order under appeal in this case, alleges that Gemini failed to comply with the Consent Agreement in case #713. That Consent Agreement clearly required the updating of the I.D signs by July 10, 2003. Thus, Gemini should have been aware that the issue of signage would be raised at the merit hearing in the immediate appeal. Moreover, the photographs of the updated signs, and the testimony of Gemini witnesses regarding the date on which the signs were replaced or updated, was evidence that could have been ascertained prior to the September 29, 2004 merit hearing. Therefore, the Gemini's supplemental evidence is not newly discovered, and the Record should not be re-opened for the submission of said evidence.

The Commission **FINDS** that all parties to this matter were afforded a full and fair hearing, which included an opportunity to produce any relevant documentary or testimonial evidence. The Commission further **FINDS** that the supplemental evidence proposed for admission by Gemini does not qualify as newly discovered. Therefore, the Commission **DENIES** Gemini's Motion to Supplement the Record.

DISCUSSION OF THE MERITS

Before being issued a permit, the owner of any oil & gas well in the State of Ohio must post a performance bond. The purpose of the bond is to ensure that the well owner complies with the laws and rules regulating the production of oil & gas. See O.R.C. §1509.071. O.R.C. §1509.071 specifically states that this bond is conditioned upon compliance with the plugging requirements of O.R.C. §1509.12. O.R.C. §1509.12 requires the plugging of wells that are incapable of producing oil or gas in commercial quantities. This plugging requirement is intended to protect both the environment and other oil & gas producing strata.

The bond required under O.R.C. §1509.071 is a performance bond, providing funds to insure the plugging of non-productive wells. This is not a penal bond, and the forfeiture of the bond is not allowed as a means of punishing an operator

The facts in this case reveal that the Division has been coaxing Gemini to either plug or produce the 34 Huron County wells for several years. Progress on placing the wells into production has been slow. However, there is evidence that Gemini has invested substantial funds towards the eventual production of these wells.

In 2002, based upon Gemini's failure to plug or produce the 34 Huron County wells, the Division ordered the forfeiture of Gemini's performance bond. To avoid forfeiture, Gemini entered into an agreement with the Division, wherein Gemini agreed to take certain actions relative to the Huron County wells within specified time frames. However, Gemini has not complied with the terms of its agreement and has not acted within the designated time frames. As Gemini has failed to comply with its agreement, it is not unreasonable for the Division to order the forfeiture of Gemini's blanket performance bond.

While it may have been reasonable for the Division to order forfeiture, the Commission is troubled by the Division's testimony that the forfeiture of Gemini's blanket bond was intended as a penalty to Gemini. The language of O.R.C. §1509.07 does not identify the blanket bond as a penal bond. Therefore, to the extent that the Division applies forfeiture as a means of penalizing an operator, the Division operates outside of the provisions of O.R.C. §1509.07 and O.R.C. §1509.071.

In order to affirm a decision of the Chief, the Commission must find that the Chief's order was both reasonable **and** lawful. The Division's attempt to forfeit Gemini's performance bond as a penalty is unlawful and can not be supported by the Commission.

CONCLUSIONS OF LAW

1 Pursuant to O.R.C. §1509.36, the Commission will affirm the Division Chief if the Commission finds that the order appealed is both lawful and reasonable. If the Commission finds that an order is either unlawful or unreasonable, the Commission shall vacate the order appealed.

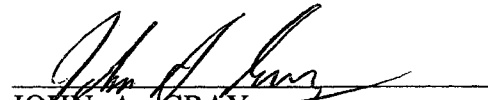
2. The issuance of Chief's Order 2004-38, requiring the forfeiture of Gemini's blanket bond, was not unreasonable.

3 The issuance of Chief's Order 2004-38, requiring the forfeiture of Gemini's blanket bond, was unlawful, as the forfeiture was issued as a penalty to Gemini.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **VACATES** the Division's issuance of Chief's Order 2004-38.


WILLIAM H. TAYLOR, Chairman


JOHN A. GRAY


JAMES H. CAMERON


MARILYN ENNIS

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37

DISTRIBUTION:

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[Cite as *Gemini Energy, Inc. v. Div. of Mineral Resources Mgt.*, 2007-Ohio-5091.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gemini Energy, Inc., .
Appellee-Appellant, .
v. . No. 06AP-633
Division of Mineral Resources . (C.P.C. No. 05CVF05-5012)
Management, . (REGULAR CALENDAR)
Appellant-Appellee. :
:

O P I N I O N

Rendered on September 27, 2007

Robert W Gentzel Co., L.P.A., and Robert W Gentzel, for appellant.

Marc Dann, Attorney General, Robert A. Eubanks, Mark G. Bonaventura, and Molly S. Corey, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

WHITESIDE, J.

{¶1} Gemini Energy, Inc. ("Gemini"), appeals from a decision of the Franklin County Court of Common Pleas which reversed an order of the Oil and Gas Commission ("Commission").

{¶2} On September 6, 1999, Gemini filed a Certificate of Deposit in the amount of \$15,000 to meet the requirements of R.C. 1509.07. The Chief of the Division of Mineral Resources Management of the Ohio Department of Natural Resources ("Chief") issued Order 2002-02, on January 17, 2002, which ordered Gemini to place into production or plug 34 wells. In November 2002, Gemini had failed to comply with the order and Chief's Order 2002-67 was issued ordering forfeiture of the Certificate of Deposit. (Tr. at 90, 92.)

{¶3} Gemini appealed the forfeiture order to the Commission and, rather than enforce the bond forfeiture order, a consent agreement was entered into and adopted by the Commission which required Gemini to complete 11 items, including updating the signs located at the wells and placing into production or plugging several wells. The consent agreement provided deadlines for each condition. The forfeiture proceedings initiated through Chief's Order 2002-67 were dismissed, and Chief's Order 2002-02 was rescinded. (Tr. at 94.)

{¶4} After finding that Gemini failed to comply with the consent agreement and that the idle wells posed a threat to the public health, safety, and the environment, Chief's Order 2004-38 was issued on May 25, 2004, ordering forfeiture of the Certificate of Deposit.

{¶5} Gemini appealed Order 2004-38 to the Commission, which found the order reasonable, but unlawful, and vacated the order. The State of Ohio, Division of Mineral Resources of the Department of Natural Resources, appealed to the Franklin County Court of Common Pleas, which reversed the Commission's order

{¶6} Gemini filed a notice of appeal and raised the following assignments of error:

[I.] THE COMMON PLEAS COURT ABUSED ITS DISCRETION AND ERRED IN REVERSING THE DECISION OF THE OIL AND GAS COMMISSION WHICH PROPERLY VACATED THE DIVISION CHIEF'S UNLAWFUL ORDER OF FORFEITURE.

[II.] THE COMMON PLEAS COURT ERRED IN REVERSING THE DECISION OF THE OIL AND GAS COMMISSION AS THE ATTEMPTED FORFEITURE BY THE CHIEF OF THE DIVISION OF MINERAL RESOURCES WAS AN UNCONSTITUTIONAL VIOLATION OF THE EXCESSIVE FINES AND DUE PROCESS CLAUSES OF BOTH THE OHIO AND UNITED STATES CONSTITUTIONS.

[III.] THE COMMON PLEAS COURT COMMITTED REVERSIBLE ERROR BY FAILING TO FOLLOW THE SPECIFIC REQUIREMENTS OF R.C. § 1509.37, AS THE COURT MADE ITS DECISION AND ENTRY WITHOUT FIRST CONDUCTING A PREFERENTIAL HEARING OR PROCEEDING AS IN THE TRIAL OF A CIVIL ACTION.

{¶7} The standard of review of an appeal to the common pleas court from the commission is whether the order was reasonable and lawful. *Johnson v Kell* (1993), 89 Ohio App.3d 623, 625. In *Johnson*, this court based the standard of review on R.C. 1509.37, which provides that, "[i]f the court finds that the order of the commission appealed from was lawful and reasonable, it shall affirm the order. If the court finds that the order was unreasonable or unlawful, it shall vacate the order and make the order that it finds the commission should have made." "Unlawful" is defined as that which is not in accordance with law, and "unreasonable" is defined as that which is not in accordance with reason or that which has no factual foundation. *Johnson*, at 626, citing *Citizens Commt. v. Williams* (1977), 56 Ohio App.2d 61, 70.

{¶8} The standard of review for this court was set forth in *Lorain City Bd. of Edn. v State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-261, as follows:

In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion " * * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" *State, ex rel. Commercial Lovelace Motor Freight, Inc., v Lancaster* (1986), 22 Ohio St.3d 191, 193 * * *. Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. See *Rohde v Farmer* (1970), 23 Ohio St.2d 82 * * *

The fact that the court of appeals, or this court, might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.

{¶9} On questions of law, however, the court of appeals' review is plenary *Univ Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus.

{¶10} The first and second assignments of error are related and shall be addressed together. By the first assignment of error, Gemini contends that the common pleas court abused its discretion and erred in reversing the decision of the Commission which properly vacated the Chief's unlawful order of forfeiture. Gemini cites the incorrect standard of review for this court because this issue is a question of law, determining what the statutes require, and, thus, our review is plenary. By the second assignment of error, Gemini contends that the common pleas court erred in reversing

the decision of the Commission because the attempted forfeiture by the Chief was an unconstitutional violation of the excessive fines and Due Process Clauses of both the Ohio and United States Constitutions.

{¶11} At the hearing before the Commission, Gemini presented evidence that they had been working toward completing the 11 tasks, however, there had been unexpected delays beyond its control, due to weather, finding contractors, obtaining parts, etc. Gemini's owner testified he had invested approximately \$85,000 and estimated would be investing \$75,000 to \$100,000 more to complete the tasks. (Tr. at 162.) He wanted the Commission to grant him additional time to complete the tasks. (Tr. at 167.)

{¶12} The Commission found, at 7-8, as follows:

The bond required under O.R.C. §1509.071 is a performance bond, providing funds to insure the plugging of non-productive wells. This is not a penal bond, and the forfeiture of the bond is not allowed as a means of punishing an operator.

* * *

* * * However, Gemini has not complied with the terms of its agreement and has not acted within the designated time frames. As Gemini has failed to comply with its agreement, it is not unreasonable for the Division to order the forfeiture of Gemini's blanket performance bond.

While it may have been reasonable for the Division to order forfeiture, the Commission is troubled by the Division's testimony that the forfeiture of Gemini's blanket bond was intended as a penalty to Gemini. The language of O.R.C. §1509.07 does not identify the blanket bond as a penal bond. Therefore, to the extent that the Division applies forfeiture as a means of penalizing an operator, the Division operates outside of the provisions of O.R.C. §1509.07 and O.R.C. §1509.071

In order to affirm a decision of the Chief, the Commission must find that the Chief's order was both reasonable and lawful. The Division's attempt to forfeit Gemini's performance bond as a penalty is unlawful and cannot be supported by the Commission.

{¶13} The common pleas court cited *Piqua v Ohio Farmers Ins. Co.* (1992), 84 Ohio App.3d 619, for a definition of a penal bond as a promise to pay a sum of money as a penalty in the event of non-performance, and there is no obligation to pay unless performance has failed. Thus, the common pleas court concluded that any forfeiture of a bond can be considered a penalty, but a penalty invoked for non-performance. See May 22, 2006 Decision and Entry The common pleas court stated, at 6-7, as follows:

The combination of circumstances in this action warrant reversal of the Commission Order. The history of events evidences that the decision to declare a forfeiture of the deposited money was reasonable and the Commission found it to be reasonable. Noncompliance by Gemini was not specific to the original order, but to one that they negotiated with the Division. No evidence suggests that Gemini attempted to have extensions of time to complete their obligations. Factually, the Chief had factual support to order forfeiture.

Legally, the statute could not be clearer. If noncompliance occurs, the chief shall declare the posted bond forfeit. While the Chief may have other avenues to follow to levy a penalty against the owner, the statute does not make a distinction as to whether the Chief intends the forfeiture to be a penalty or to provide funds for plugging. The Division acknowledged that Gemini was still liable for plugging or producing the wells unless circumstances indicate they were financially unable to do so. If that were the case, funds would be used by the state, including forfeited funds, to plug the wells. It is concluded that the Commission grafted a provision onto the statute that does not appear, nor does it fall within the reasonable connotation of the language.

After review of the record and arguments of counsel, the Court finds that the Order of the Commission is in error of law. * * *

{¶14} R.C. 1509.07 provides, as follows:

Except as otherwise provided in this section, an owner of any well, before being issued a permit under section 1509.06 of the Revised Code, shall execute and file with the division of mineral resources management a surety bond conditioned on compliance with the restoration requirements of section 1509.072 [1509.07.02], the plugging requirements of section 1509.12, the permit provisions of section 1509.13 of the Revised Code, and all rules and orders of the chief relating thereto, in an amount set by rule of the chief.

The owner may deposit with the chief, instead of a surety bond, cash in an amount equal to the surety bond as prescribed pursuant to this section or negotiable certificates of deposit or irrevocable letters of credit, issued by any bank organized or transacting business in this state or by any savings and loan association as defined in section 1151.01 of the Revised Code, having a cash value equal to or greater than the amount of the surety bond as prescribed pursuant to this section. Cash or certificates of deposit shall be deposited upon the same terms as those upon which surety bonds may be deposited. * * *

{¶15} R.C. 1509.071 provides, as follows:

(A) When the chief of the division of mineral resources management finds that an owner has failed to comply with the restoration requirements of section 1509.072 [1509.07.2], plugging requirements of section 1509.12, or permit provisions of section 1509.13 of the Revised Code, or rules and orders relating thereto, *the chief shall make a finding of that fact and declare any surety bond filed to ensure compliance with those sections and rules forfeited in the amount set by rule of the chief.* The chief thereupon shall certify the total forfeiture to the attorney general, who shall proceed to collect the amount of the forfeiture.

(Emphasis added.)

{¶16} Gemini has raised the issue that the forfeiture of the bond constitutes a penalty, as the Commission found, and, thus, is unconstitutional as a violation of the excessive fines and Due Process Clauses of both the Ohio and United States Constitutions. "[A] penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done." *The Toledo, Columbus & Ohio River R.R. Co. v. Miller* (1923), 108 Ohio St. 388, 397. A statute which requires payment of a fixed sum greater than actual damage may constitute a penalty *Cincinnati, Sandusky & Cleveland R.R. Co. v. Cook* (1881), 37 Ohio St. 265, 270. However, a performance bond is "a bond in a stated penal amount, securing the performance of a contract and may include other provisions, such as security for payment of materialmen and laborers." *State ex rel. Edwards v. Kohli* (Dec. 31, 1975), Franklin App. No. 75AP-303. A performance bond by its very nature is not a penalty bond unless the amount to be forfeited is substantially in excess of the amount necessary to secure performance. The purpose of the surety bond under R.C. 1509.07 is to insure compliance with the requirements of R.C. 1509.072, 1509.12, and 1509.13, as well as the rules and orders of the Chief. *Century Surety Co. v. Tugend* (Mar 30, 2000), Franklin App. No. 99AP-135. The Deputy Chief for the Division of Mineral Resources Management testified that the Division viewed the bond as a penalty bond for noncompliance with R.C. Chapters 1509 or 1501. (Tr. at 81.) The Commission used that finding to find the forfeiture unlawful. However, the Chief's intention as to the bond is irrelevant. The issue is the meaning of the statute. If the fixed bond amount was substantially in excess of the amount necessary to place in production or plug the wells, the bond might be construed as a penalty. However, in

this case, the \$15,000 covered approximately 34 wells. Gemini's owner testified he had invested approximately \$85,000 and estimated it would cost \$75,000 to \$100,000 to complete the tasks. The \$15,000 performance, therefore, does not constitute a penalty or excessive fine.

{¶17} Further, the statute requires the Chief to make a finding that the owner has failed to comply with the requirements of R.C. 1509.072, 1509.12 or 1509.13, and declare the surety bond forfeited. There is no discretion involved because the statute provides that the Chief "shall," and "shall," when used in a statute, indicates that compliance with the statute is mandatory *Ohio Dept. of Liquor Control v Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 1992-Ohio-17 The original order concerning these wells had been issued in January 2002, but this forfeiture order had not been issued until May 2004. Gemini had not requested any extensions of time to complete the remaining tasks. (Tr. at 96-99.) We find that the statutes provide for a performance bond which is not in the nature of an "excessive fine." The statute is clear that the Chief shall make a finding that the owner has failed to comply with the requirements of R.C. 1509.072, 1509.12 or 1509.13 and declare the surety bond forfeited to the extent determined by the Chief to be necessary In this case, Gemini admitted that it had not fully complied with the order, but was working toward compliance. The Chief found that Gemini had not complied and ordered forfeiture pursuant to the statute. The amount "forfeited" is not excessive in light of the evidence it would take \$75,000 to \$100,000 to complete compliance. The common pleas court did not abuse its discretion in reversing the Commission's order Gemini's first and second assignments of error are not well-taken.

{¶18} By the third assignment of error, Gemini contends that the common pleas court committed reversible error by failing to follow the specific requirements of R.C. 1509.37, as the court made its decision and entry without first conducting a preferential hearing or proceeding as in the trial of a civil action. R.C. 1509.37 provides, as follows:

Any party adversely affected by an order of the oil and gas commission may appeal to the court of common pleas of Franklin county * * *

* * *

* * * The court shall conduct a hearing on the appeal and shall give preference to the hearing over all other civil cases irrespective of the position of the proceedings on the calendar of the court. The hearing in the court shall proceed as in the trial of a civil action and the court shall determine the rights of the parties in accordance with the laws applicable to such an action. At the hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

{¶19} The statute does not specify that an oral hearing is required, only that the court shall conduct a hearing and that, at the hearing, counsel "may" be heard on oral argument, but does not require oral argument. In *Karas v The State of Ohio* (Sept. 11, 1979), Franklin App. No. 79AP-37, this court did not determine whether a formal hearing is required by R.C. 1509.37, but determined that the failure to hold an oral argument was not prejudicial where the parties had filed written briefs but did not request the submission of additional evidence.

{¶20} In this case, as in *Karas*, the parties did file written briefs. However, neither party requested the submission of additional evidence nor requested an oral hearing. Gemini has demonstrated no prejudice, since the alleged errors are matters

that must be determined by a review of the law and any oral argument to the court could not change that law, even if there was a right to an oral hearing. Gemini's third assignment of error is not well-taken.

{¶21} For the foregoing reasons, Gemini's three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

WHITESIDE, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C),
Article IV, Ohio Constitution.

TERMINATION NO. BY 5/18/06

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Gemini Energy Inc.,

Appellant,

CASE NO 05CVF05-5012

-vs-

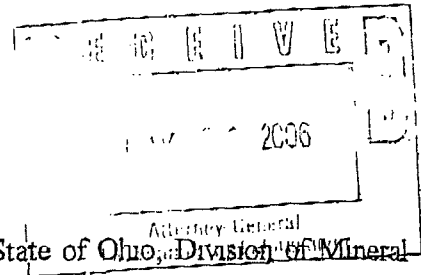
JUDGE JOHN A. CONNOR

Division of Mineral Resources Management,

Appellee.

**DECISION AND ENTRY REVERSING THE ORDER OF THE
OIL AND GAS COMMISSION**

Rendered this 18TH day of May, 2006.



CONNOR, JUDGE

I. INTRODUCTION

This action comes before the Court upon appeal by the State of Ohio, Division of Mineral Resources Management (hereinafter "Division") from an April 5, 2005 Order of the Oil and Gas Commission. That Order vacated a decision of the Chief of the Division numbered 2004-38 which ordered forfeiture of a \$15,000 surety bond posted by Gemini Energy, Inc. (hereinafter "Gemini"). The Division has appealed under the provisions of R.C. 1509.37. The record of proceedings has been filed and legal arguments of the parties offered. The decision of the Court issues below.

II. FACTUAL AND PROCEDURAL BACKGROUND

Several facts giving rise to this appeal are not in dispute and are contained within the Commission Order. Gemini owns 34 oil and gas located in Huron County, Ohio. Pursuant to R.C. 1509.07, Gemini assigned a certificate of deposit in the amount of \$15,000.00 with the Chief of the Division September 23, 1991 (Exhibit M1). Two separate orders were issued by the Chief, 2002-02 and 2002-67 related to the wells. Those orders intended to institute bond forfeiture. A resolution was

Post-It™ brand fax transmittal memo 7671		# of pages ▶ 7
To <u>Kinda Osterman</u>	From <u>Molly Corey</u>	
Co.	Co. <u>Asst. AG - OODR</u>	
Dept.	Phone # <u>262-6669</u>	
Fax # <u>262-1306</u>	Fax #	

entered into by a Consent Agreement, which was adopted by the Commission January 23, 2004. That agreement contained Gemini's obligations to complete a gas scrubbing plant in Fitchville, Ohio by September 16, 2003, update the I.D. signs on the well heads and/or tank batteries by July 10, 2003, plug two wells by October 1, 2003 (permits 172, 182) and place into production eight identified wells by December 31, 2003 and 19 others by March 1, 2004. Two additional wells were to be produced or plugged by July 31, 2004.

The Chief issued Order 2004-38 on May 25, 2004 for forfeiture of the bond for failure to comply with the consent order. That order stated that Gemini had failed to comply with the consent agreement, except for applying for the permits to plug wells 172 and 182. In addressing the propriety of the bond forfeiture, the Commission determined that Gemini had obtained plugging permits for wells 172 and 182 by May 19, 2004, plugged well 183, and invested \$85,000 in the scrubbing plant. It noted that progress on placing the wells into production had been slow, but Gemini had invested substantial funds towards the eventual production of the wells.

The Commission stated in its discussion of the merits that "[t]he bond required under O.R.C. 1509.71 is a performance bond, providing funds to insure the plugging of non-productive wells. This is not a penal bond, and the forfeiture of the bond is not allowed as a means of punishing an operator." The Commission further noted that it reasonable for the Division to order the forfeiture, but not as a means for punishing the operator. It concluded that while the forfeiture was not unreasonable, it was unlawful and it vacated the order.

III. ANALYSIS AND FINDINGS OF THE COURT

The stated assignment of errors are as follows:

- (1) The Oil and Gas Commission erred in vacating the statutorily mandated Chief's Bond Forfeiture Order 2004-38, issued for Gemini Oil's noncompliance with an initial Chief's plugging order and a second

Chief's plugging order to which Gemini consented and which had been previously adopted by the Oil and Gas Commission.

(2) The Oil and Gas Commission erred in exonerating Gemini Oil's bond from forfeiture based on an irrelevant inquiry into whether Ohio's oil and gas bonds are penal.

The Division asserts that the Commission did not use the proper standard of review and the bond forfeiture was supported by the facts. The Division also offers that the Commission vacated the forfeiture order on irrelevant grounds. R.C. § 1509.36 provides the right of appeal to commission. It states "[a]ny person claiming to be aggrieved or adversely affected by an order by the chief of the division of mineral resources management may appeal to the oil and gas commission for an order vacating or modifying such order." It further provides: "If upon completion of the hearing the commission finds that the order appealed from was lawful and reasonable, it shall make a written order affirming the order appealed from; if the commission finds that the order was unreasonable or unlawful, it shall make a written order vacating the order appealed from and making the order that it finds the chief should have made." R.C. 1509.37 grants the right to judicial review. The Court's review of the Commission decision under R.C. 1509.38 is confined to a determination of whether the decision is lawful and reasonable. This standard of review will be used in examining the assigned errors.

Since the Commission concluded that the Chief's order of forfeiture was reasonable, the Court's scrutiny will focus upon the issue of the lawfulness of the forfeiture. Chapter 1509 contains several relevant provisions as to the consequences for failure to comply with the rules. R.C. 1509.04 mandates that the chief or his authorized representatives enforce the statute and its rules. Enforcement may include requests for injunctions against violations. Section 1509.07 requires liability insurance and the posting of a surety bond or substitute for the purpose of compliance with restoration requirements under the chapter, plugging requirements or other permit provisions. Section 1509.071 addresses

forfeiture of the bond. It specifically states the following:

(A) When the chief of the division of mineral resources management finds that an owner has failed to comply with the restoration requirements of section 1509 072 [1509.07.2], plugging requirements of section 1509 12, or permit provisions of section 1509 13 of the Revised Code, or rules and orders relating thereto, the chief shall make a finding of that fact and declare any surety bond filed to ensure compliance with those sections and rules forfeited in the amount set by rule of the chief. The chief thereupon shall certify the total forfeiture to the attorney general, who shall proceed to collect the amount of the forfeiture.

In lieu of total forfeiture, the surety, at its option, may cause the well to be properly plugged and abandoned and the area properly restored or pay to the treasurer of state the cost of plugging and abandonment.

In addition to the above actions available to the Division, R.C. 1509.99 provides for various penalties ranging from one hundred dollars, to ten thousand dollars per day and up to two years imprisonment.

The Commission determined that Gemini had failed in 2002 to comply with an order to plug or produce and that it had escaped forfeiture by entering into a consent agreement which required it to put into production or plug wells and to put a scrubbing plant into operation. It further determined that it had failed to comply with the consent order. Upon those determinations, it found that it was not unreasonable for the Division to order forfeiture of the Gemini bond. Despite these findings, it concluded that use of the forfeiture as a penalty for nonperformance was unlawful. The stated basis was that R.C. 1509.07 and 1509 071 do not identify the bonds as penal bonds.

A working definition of penal bond can be found in *City of Piqua v. Ohio Farmers Ins. Co.* (1992) 84 Ohio App. 3d 619. The Court opined that a penal bond is a promise to pay a sum of money as a penalty in the event of non-performance. The promise is voided when performance takes place and there is no obligation to pay the penalty unless performance has failed. It may be posited that

any forfeiture of a bond can be considered a penalty but a penalty invoked for non-performance. The statute applicable in this instance uses the verbiage of "shall" as to the Chief's obligations. Under 1509 071(A), when the chief finds that an owner has failed to comply with the plugging requirements of section 1509 12, "the chief shall make a finding of that fact and declare any surety bond filed to ensure compliance with those sections and rules forfeited in the amount set by rule of the chief. The chief thereupon shall certify the total forfeiture to the attorney general, who shall proceed to collect the amount of the forfeiture." The statute does allow instead of a total forfeiture, that the surety may plug the well or pay to the treasurer the cost of the plugging.

The Commission could have looked at the facts offered at the hearing and determined that weather, unavailability of parts, crop plantings, or other factors mitigated compliance with the timetable agreed to by Gemini. It noted some of these factors but did not conclude that they excused performance. Gemini has offered its merits brief and asserted that there is no compelling reason why the wells should be plugged. Gemini claims that the Chief has exhibited a dictatorial attitude and believes that he has absolute authority to impose deadlines. This Court must note that the deadlines imposed were the result of a consent agreement. The record of proceedings reflects no evidence to support a position that Gemini ever contacted the Division in an attempt to have the times modified. While reasonableness of an order is clearly a subjective matter, the original imposition of an order with compliance times preceded the consent agreement by several years. The reasonableness of the order was not an issue to the Commission and it is not a substantive issue to the Court.

Gemini offers that there is no evidence of complaints of landowners or other evidence that danger of harm is presented by these uncapped and non-producing wells. The testimony of Inspector Thomas Benko, for the Division, belies the position of no harm. It may be true that the wells may not

be spewing gas or leaking streams of contaminants currently. However, it was the Mr. Benko's opinion that the wells were not being tended, they were deteriorating, storage tanks were leaking, and a year prior to the hearing, Gemini could have been attempting to resolve the problems, but had not. (Transcript at 35 and 36). He did not dispute that the scrubbing plant had new equipment.

The Division's Deputy Chief Thomas Tugend stated that the bond was being viewed as a penalty bond for noncompliance. (Transcript at 81). He further stated that bond forfeiture was considered a last ditch effort. It was also noted that there was no contact from Gemini after the expiration of the time deadlines until one day prior to the hearing. (Transcript at 96-99).

The combination of circumstances in this action warrant reversal of the Commission Order. The history of events evidences that the decision to declare a forfeiture of the deposited money was reasonable and the Commission found it to be reasonable. Noncompliance by Gemini was not specific to the original order, but to one that they negotiated with the Division. No evidence suggests that Gemini attempted to have extensions of time to complete their obligations. Factually, the Chief had factual support to order forfeiture.

Legally, the statute could not be clearer. If noncompliance occurs, the chief shall declare the posted bond forfeit. While the Chief may have other avenues to follow to levy a penalty against the owner, the statute does not make a distinction as to whether the Chief intends the forfeiture to be a penalty or to provide funds for plugging. The Division acknowledged that Gemini was still liable for plugging or producing the wells unless circumstances indicate they were financially unable to do so. If that were the case, funds would be used by the state, including forfeited funds, to plug the wells. It is concluded that the Commission grafted a provision onto the statute that does not appear, nor does it fall within the reasonable connotation of the language.

After review of the record and arguments of counsel, the Court finds that the Order of the Commission is in error of law. Accordingly, the Court hereby **REVERSES** the Order of the Commission.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

(B) **Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.



JOHN A. CONNOR, JUDGE

COPIES TO:
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