

STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO. 05:008:CF

IN RE:)
)
ADVANCE AMERICA, CASH ADVANCE)
CENTERS OF NORTH CAROLINA, INC.)
_____)

ATTORNEY GENERAL'S RESPONSE TO RESPONDENT'S NOTICE OF APPEAL OF
ORDER ALLOWING INTERVENTION BY THE ATTORNEY GENERAL
AND ATTORNEY GENERAL'S MOTION TO DISMISS APPEAL

On February 15, 2005, the Attorney General filed a motion to intervene in this proceeding pursuant to G.S. § 114-2(8) and other authority cited in the motion. Respondent Advance America, Cash Advance Centers of North Carolina, Inc. (hereinafter "Advance America" or "the respondent") filed an Opposition to the Motion to Intervene on March 11, 2005. On March 18, 2005, the Attorney General filed the Attorney General's Response to Respondent's Opposition to Motion to Intervene (attached hereto as Exhibit 1). Following his consideration of the parties' filings and arguments, Commissioner Smith granted the Attorney General's motion to intervene in a written order entered on March 21, 2005.

On March 28, 2005, respondent filed a Notice of Appeal of Order Allowing Intervention by the Attorney General. As set forth below, respondent has no right to appeal the Commissioner's

order allowing intervention at this juncture. Respondent's appeal is barred because it is interlocutory, and the Commissioner's order does not affect any substantial rights of the respondent. Further, respondent's appeal is premature because there has been no final agency adjudication of the contested case. Thus, respondent's appeal has no reasonable basis in law or fact, and is apparently being sought only for purposes of delaying these proceedings. Accordingly, the Commission should summarily dismiss respondent's appeal. Because respondent's appeal is meritless, there also is no basis for any stay of these proceedings.

I. THE ATTORNEY GENERAL HAS AN UNCONDITIONAL STATUTORY RIGHT TO INTERVENE IN THIS ACTION.

As set forth in the Attorney General's Response to Respondent's Opposition to Motion to Intervene, the Attorney General clearly has an unconditional statutory right to intervene in this action. North Carolina General Statute § 150B-38(f), which governs contested cases before state agencies, including the Commissioner of Banks, provides:

Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

In turn, Rule 24(a)(1) of the North Carolina Rules of Civil Procedure provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene . . .

North Carolina General Statute § 114-2(8) provides that the Attorney General has a duty

to intervene when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State.

Thus, G.S. § 114-2(8) confers an unconditional right under Rule 24 for intervention by the Attorney General before a state agency. Therefore, under this clear statutory authority for the Attorney General's intervention, Commissioner Smith did not err or abuse his discretion in any way in granting the Attorney General's motion to intervene.

II. RESPONDENT HAS NO STATUTORY RIGHT TO AN APPEAL AT THIS JUNCTURE BECAUSE THERE HAS BEEN NO HEARING OR FINAL AGENCY DECISION IN THIS CASE.

Respondent has no right to appeal the Commissioner's order granting the Attorney General's intervention at this juncture because there has been no administrative hearing nor any final agency decision in this case. Specifically, G.S. § 53-92(d)

provides:

Upon an appeal to the Banking Commission by any party from an order entered by the Commissioner of Banks following an administrative hearing pursuant to Article 3A of Chapter 150B of the General Statutes, the chairman of the commission may appoint an appellate review panel of not less than five members to review the record on appeal, hear oral arguments, and make a recommended decision to the Commission....

G.S. § 53-92(d) (emphasis added).

Similarly, the North Carolina Administrative Code provisions governing appeals to the Banking Commission provide that an appointment of an appellate panel shall be pursuant to G.S. § 53-92(d), and that the record on appeal "shall consist of the official agency record as set forth in G.S. § 150B-42." 04 NCAC 03B.0301, .0302. General Statute § 150B-42 provides that, following a contested case hearing, the agency must issue a "written final decision or order", and it sets forth the required components of "an official record of a [contested case] hearing." G.S. § 150B-42(b). Notably, this official record includes "[n]otices, pleadings, motions, and intermediate rulings." G.S. § 150B-42(b)(1) (emphasis added). The Commissioner's order granting the Attorney General's intervention is clearly an intermediate ruling; it is not a final order and is therefore not appealable at this juncture.

The appellate courts of North Carolina have consistently held that, when the language of a statute is clear and

unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or by a court under the guise of construction.¹ It is difficult to imagine a statute any more clear to the point; appeals to the Banking Commission are permitted "from an order entered by the Commissioner of Banks following an administrative hearing . . ." N.C.G.S. § 53-92(d).

An administrative hearing has not yet been held in this matter. Thus, the Commissioner has not issued an order from which an appeal may be taken under G.S. § 53-92(d), and therefore respondent's notice of appeal is premature. After this matter is fully adjudicated on the merits, if the decision is adverse to respondent, respondent may then assert its exception to the Commissioner's order on appeal.

III. THE COMMISSIONER'S ORDER ALLOWING INTERVENTION BY THE ATTORNEY GENERAL IS INTERLOCUTORY AND CANNOT BE IMMEDIATELY APPEALED.

It is axiomatic that the Commissioner's order allowing the Attorney General's intervention is an interlocutory order, and therefore cannot be immediately appealed. It has long been held that interlocutory orders are not appealable. See N.C. Gen. Stat. §§ 1-277, 7A-27, and 1A-1, Rule 54. "The rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for

¹See, e.g., *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973); *Utilities Commission v. Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663 (1969).

determination in a single appeal from a final judgment." *Love v. Moore, et al*, 305 N.C. 575, 580, 291 S.E.2d 141, 146, rehearing denied, 306 N.C. 393 (1982).

Further, as an interlocutory order, the North Carolina Court of Appeals has squarely held that "[i]t has long been the general rule in this jurisdiction that an order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits...." *Wood v. City of Fayetteville*, 35 N.C. App. 738, 739, 242 S.E.2d 640, 641 (1978) (emphasis added). This rule is "based upon the fact that, in such situations, procedural economy commands that an appeal be permitted only from a final adverse decision. It is equally obvious that an order granting intervention may be reviewed upon appeal from the final judgment in the cause." *Id.* (Emphasis added.)

Similarly, in *City of Raleigh v. Edwards, et al.*, 234 N.C. 528, 67 S.E.2d 669 (1951), the North Carolina Supreme Court dismissed petitioner's appeal of an order granting intervention by additional parties, holding that

the interlocutory order allowing intervention does not deprive the petitioner of a substantial right which it may lose if the order is not reviewed before final judgment. In consequence, the plaintiff's appeal is fragmentary and premature. This conclusion has explicit support in well considered decisions recognizing and enforcing the specific rule that an order granting a motion to intervene is not appealable.

Id., 234 N.C. at 530-531, 67 S.E.2d at 671 (emphasis added) (citations omitted).

The respondent bears the burden of demonstrating that the Commissioner's order affects a substantial right of respondent. *Watts v. Hemlock Homes of the Highlands, Inc.*, 160 N.C. App. 81, 84-85, 584 S.E.2d 97 (2003). Respondent cannot begin to sustain its burden.² The only purported "substantial right" that respondent has asserted is that it may wish to call members of the Attorney General's staff as witnesses in this proceeding. The Attorney General previously addressed this argument in its response to Respondent's Opposition to Motion to Intervene, (see Exhibit 1 at pp. 5-6), and which is incorporated herein by reference.

As previously stated in the Attorney General's earlier response, respondent's indication that it may call the Attorney General's staff as witnesses appears to be a thinly-veiled litigation tactic to disqualify the Attorney General's staff as attorneys in this proceeding, which has met with strong judicial disapproval. *Colonial Gas Co. V. Aetna Casualty and Surety Co.*, 144 F.R.D. 610, 612 (D. Mass. 1991). Further, it is unclear as to exactly what evidence respondent would seek to introduce through the Attorney General's staff. Respondent has suggested

²Contemporaneous with his Order allowing the Attorney General to intervene, the Commissioner also granted a limited intervention to John R. Kucan, et al (the "civil plaintiffs"). In this order, the Commissioner limited the civil plaintiffs' intervention to essentially the filing of an amicus curiae brief. The respondent has also appealed from this order, taking the incredible position that the filing of an amicus curiae brief somehow affects the respondent's substantial rights.

that it may call the Attorney General's staff to testify as to "legislative history type evidence." (Respondent's Opposition to Motion to Intervene, p. 10) As previously noted by the Attorney General, testimony of witnesses -- even from members of the General Assembly -- are not competent evidence of legislative history and are inadmissible to show legislative intent. *State ex rel. North Carolina Milk Comm. v. National Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). Even if members of the Attorney General's staff could offer competent and relevant evidence - which is extremely doubtful - respondent has made no showing that it has a compelling need for such testimony. Thus, respondent's attempted assertion of this "substantial right" is highly premature and remote.

IV. THE COMMISSIONER WAS NOT REQUIRED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO HIS REASONING FOR GRANTING THE ATTORNEY GENERAL'S MOTION TO INTERVENE.

The respondent also complains that the Commissioner did not include any findings or "reasoning" in his order granting intervention. The Commissioner was under no obligation to include any findings in a basic procedural order. See *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 458, 515 S.E.2d 675, 682 (1999) ("We have found no authority in decisions by this Court or the United States Supreme Court, . . . which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene.")

CONCLUSION

Respondent has no right to appeal the Commissioner's order at this juncture. The appeal is barred because it is interlocutory, does not affect any substantial rights of respondent, and is premature because there has been no final adjudication of the contested case on the merits.

WHEREFORE, the Attorney General respectfully requests that (1) respondent's appeal be dismissed, and (2) respondent's motion for a stay of this proceeding pending the outcome of its appeal be denied.

This the 4th day of ~~March~~^{April}, 2005.

ROY COOPER
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the ATTORNEY GENERAL'S RESPONSE TO RESPONDENT'S NOTICE OF APPEAL OF ORDER ALLOWING INTERVENTION BY THE ATTORNEY GENERAL AND ATTORNEY GENERAL'S MOTION TO DISMISS APPEAL was served upon counsel for respondent Advance America, Cash Advance Centers of North Carolina, Inc., by electronic mail, as well as placing a copy thereof in first-class mail, postage pre-paid, and addressed as follows:

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This the 4th day of April, 2005.



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