Texas Administrative Case Law Update

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I. Introduction

This case law update includes 16 Texas administrative law cases decided in the past year. These were selected to be representative of a range of substantive areas and administrative agencies and topics covered include agencies' interpretation of statutes and rules, sovereign immunity determinations, pleas to the jurisdiction, and issues of open government related to the Public Information Act and the Open Meetings Act.

II. Agency Authority

i. *Vergo Patio Gardens, Inc. v. R.R. Comm'n of Tex.*, 03-19-00070-CV, 2021 WL 476656 (Tex. App.—Austin Feb. 10, 2021, no pet.)

This case addresses the ability, or rather the lack thereof, of an Administrative Law Judge ("ALJ") to require a hearing to proceed after the parties have filed a valid settlement agreement. Vergo Patio Gardens applied to the Railroad Commission of Texas ("RRC") for renewal of its landfarm permit, which allows for the disposing of oil and gas wastes by spreading it over a land surface area. The RRC denied the permit renewal application for violations of the conditions for the permit. Vergo requested a contested hearing and subsequently requested a series of continuances of the hearing in order to conduct discovery and engage in settlement negotiations. After granting several continuances, the RRC ALJ issued a letter requiring the parties to file a settlement by September 2016 or prepare to go to hearing. On September 28, the parties filed a joint motion to dismiss the hearing and explained that they had entered into an agreement pursuant to Texas Rules of Civil Procedure ("TRCP") Rule 11 to enter a 60-day binding settlement period. The ALJ denied the joint motion to dismiss and a hearing was later held, with the ALJ subsequently issuing a Proposal for Decision which the RRC adopted to deny Vergo's application. Vergo sought judicial review of the RRC's decision, including the ALJ's denial of the Rule 11 agreement settling the case. The district court affirmed the RRC's order, and Vergo appealed.

The Third Court of Appeals reversed and remanded, holding that the ALJ had a ministerial duty to enter the order dismissing the case when presented with the Rule 11 Agreement. The Court acknowledged that Rule 11 only applies to agreements made during litigation and that this does not include administrative proceedings. However, the RRC's own rule governing settlements, codified in 16 Texas Administrative Code ("TAC") § 1.123, uses language substantially similar to Rule 11 and the Court looked to case law interpreting Rule 11 for guidance here because of a lack of case law interpreting 16 TAC § 1.123.[1] The Court pointed to the Supreme Court of Texas' holding in *Shamrock Psychiatric Clinic, P.A. v. Texas Dep't of Health & Human Servs.* that "Rule 11 agreements are contracts relating to litigation" and that they should be construed under the same rules as a contract.[2] The Court rejected the RRC's position that the Rule 11 Agreement was merely "an agreement-to-attempt-to-agree to settle," finding instead that "the Rule 11 Agreement contained the essential elements to informally dispose of the matter," including that it was in

[1] *See Shamrock Psychiatric Clinic, P.A. v. Texas Dep't of Health & Human Servs.,* 540 S.W.3d 553, 560 (Tex. 2018) (per curiam) (agreeing that because a State Office of Administrative Hearings ("SOAH") rule and TRCP Rule 11 "are nearly identical in language" that cases addressing Rule 11 may guide interpretation of the SOAH rule).

[2] *Vergo Patio Gardens, Inc. v. R.R. Comm'n of Tex.*, 03-19-00070-CV, 2021 WL 476656 at *3-4 (Tex. App.—Austin Feb. 10, 2021, no pet.) (citing *Shamrock Psychiatric Clinic, P.A. v. Texas Dep't of Health & Human Servs.,* 540 S.W.3d 553, 560-61 (Tex. 2018) (per curiam)).

writing, signed by the parties, and filed in the administrative proceeding as required. Most importantly, the Court found that the terms of the Agreement left nothing further for Vergo to agree to: either Vergo would perform under the Agreement and the RRC would then supplement and complete the draft permit or if Vergo failed to perform then the permit would expire and not be renewed.[3] Therefore, the Agreement was complete within itself and required only the "purely ministerial act" of the ALJ to enforce the resolution of the dispute via settlement agreement rather than a hearing. The Court held that, by proceeding with the contested case hearing, the ALJ had prejudiced Vergo's substantial rights in a manner that, under Texas Administrative Procedure Act ("APA") § 2001.174(2)(F), was "arbitrary and capricious or characterized by an abuse of discretion of clearly unwarranted exercise of discretion."

ii. *Hartzell v. S. O.,* 613 S.W.3d 244 (Tex. App.—Austin 2020, pet. filed)

Here the Third Court considered whether a state university has authority to revoke a degree. Plaintiff S.O., who holds a doctoral degree from the University of Texas at Austin ("University"), faced allegations of academic misconduct from the University, which then attempted to revoke her degree. S.O. filed suit against the University alleging violation of her due process rights because the University's investigation procedures did not comport with Article I, § 19 of the Texas Constitution's due course of law provision. The parties settled under a Rule 11 agreement, which specified that S.O.'s degree would be restored "subject to further discussions regarding additional process." The University then filed a plea to the jurisdiction asserting that the suit was moot because the University restored S.O.'s degree. The court affirmed and dismissed the suit.

Post dismissal, the University continued its investigation and subsequently informed S.O. that it intended to hold a disciplinary hearing to address allegations that S.O. had violated the University's "Institutional Rules." S.O. then brought suit again seeking declaratory and injunctive relief and alleging that the University's actions were *ultra vires* and a violation of her due process rights. However, after the University informed S.O. that it would conduct the disciplinary hearing on a certain date, but then did not conduct a disciplinary hearing on that date, the trial court held that S.O.'s claims were not ripe, and dismissed the claims. S.O. appealed the dismissal, and the Third Court of Appeals determined that S.O.'s *ultra vires* claim was ripe for adjudication, remanding the suit to the trial court. On remand, the University argued that its conduct was not *ultra vires*, and that any such claim was barred by sovereign immunity, while S.O. filed a motion for summary judgment. The trial court affirmed S.O.'s motion with regard to the *ultra vires* claim, and denied the University's plea to the jurisdiction with regard to sovereign immunity. The University officials appealed the trial court's denial of their plea to the jurisdiction, arguing that their actions were protected by sovereign immunity because they were not *ultra vires* and were within the scope of their authority pursuant to Texas Education Code ("TEC") § 65.31, which provides that the University's Board of Regents "is authorized to prescribe for each of the component institutions courses and programs leading to such degrees as are customarily offered in outstanding American universities, and to award all such degrees."

A plaintiff has the initial burden of alleging facts that demonstrate the court's jurisdiction to hear the case, in this case that the University's actions were *ultra vires*. State officials acting in their official capacity are generally entitled to sovereign immunity from suit,[4] however there is an

[3] *Id.* at *4.

[4] *Hartzell v. S. O.,* 613 S.W.3d 244, 251 (Tex. App.—Austin 2020, pet. filed) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-70 (Tex. 2009)).

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