

Affirmed as Modified in part; Dismissed in part and Opinion filed May 18, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00397-CV

**THE BOARD OF PILOT COMMISSIONERS
FOR THE PORTS OF BRAZORIA COUNTY, TEXAS, Appellant**

V.

KENNETH GONZALES, Appellee

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 412*JG97**

O P I N I O N

Appellant, the Board of Pilot Commissioners for the Ports of Brazoria County (“the Pilot Commissioners”), files this appeal from the trial court’s invalidation of its order suspending the branch pilot’s license of Kenneth Gonzales. Gonzales also files cross-points challenging the trial court’s determination that his due process rights, as well as the Texas Open Meetings Act, were not violated in the Pilot Board’s suspension proceeding. We affirm the trial court’s judgment as modified and dismiss Gonzales’ cross-points.

The Pilot Commissioners suspended Gonzales' branch pilot's license on January 16, 1996, after two other pilots lodged complaints against him based on complaints of shippers who were using Gonzales' services. These complaints were forwarded to the Pilot Review Board ("Review Board") for investigation and review of the complaints. After several hearings and recommendations from the Review Board that Gonzales' pilot's license be suspended, the Pilot Commissioners suspended Gonzales' license. They supported their suspension by finding that Gonzales violated the Pilot Commissioners' rules by making himself absent from duty on several occasions. The Pilot Commissioners also found in support of the suspension that Gonzales had grounded two vessels during the course of his duties, and he had been careless and neglectful of his duties in other ways. The suspension also contained language ordering Gonzales to "regain the confidence" of the shippers who were refusing his services. The suspension order expired June 16, 1997, by its own terms.

Gonzales appealed this order to the district court. On August 6, 1997, almost two months after the suspension order had expired, the trial court issued its own order declaring the suspension order void for vagueness based on the language commanding Gonzales to regain the confidence of the shippers. In its findings of fact and conclusions of law, the trial court also found that the Review Board did not violate the Texas Open Meetings Act, the Review Board was properly constituted under the statute to consider the complaints against Gonzales, and the Review Board and the Pilot Commissioners afforded proper due process to Gonzales during their deliberations.

The Pilot Commissioners appealed this decision, claiming that any issue regarding the suspension order became moot once the order expired according to its own terms. It also asserted that the trial court abused its discretion by failing to sever the vague part of the order (i.e., the "regain the confidence" language) from the remainder of the order suspending Gonzales' branch pilot's license. Gonzales asserted cross-points, challenging the trial court's findings on the due process issues.

I. MOOTNESS OF THE TRIAL COURT'S DECISION

The Pilot Commissioners assert that the trial court's decision was moot since its suspension order expired nearly two months before the trial court entered its order voiding the suspension. We disagree.

The general rule is when an order suspending a license or certificate expires according to its own terms pending appeal, no controversy remains and the case is moot. *See Young Trucking, Inc. v. Texas Railroad Comm'n*, 781 S.W.2d 719, 720 (Tex. App.—Austin 1989, no writ). There are two recognized exceptions to the mootness doctrine, however: (1) the “capable of repetition yet evading review” exception; and, (2) the “collateral consequences” exception. *See General Land Office of Texas v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). "The ‘capable of repetition yet evading review’ exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *Spring Branch Indep. Sch. Dist. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ). The “collateral consequences” exception has been applied when “the person against whom such order was made might suffer some subsequent detriment if the legality of the order were not determined.” *Rodriquez v. Texas Dept. of Public Safety*, 533 S.W.2d 849, 851 (Tex. Civ. App.—Tyler 1976, no writ).

Here, the Board’s suspension order expired according to its terms in June of 1997. Though the order contained language commanding Gonzales “to regain the confidence of the carriers who are currently refusing his services,” which Gonzales argued was a condition extending beyond six months, this condition was expressly to be performed during the six month suspension period. No provision was made to suspend or further enforce the order if Gonzales failed to meet this condition. Thus, the trial court’s judgment was moot unless one of the exceptions to the mootness doctrine applies to Gonzales’ case.

We find the “collateral consequences” exception to the mootness doctrine applicable to this case. Gonzales might suffer some legal detriment if the legality of the Pilot Commissioners’ order had not been determined by the trial court. The Pilot Commissioners have the power to use their findings in support of an order recommending to the governor that Gonzales’ license not be renewed. This determination is binding on the governor, who must follow the Pilot Commissioners’ recommendation. *See TEX. TRANS. CODE ANN. § 68.044(c)* (Vernon 1999). Thus, we find that the issue raised by Gonzales was not moot when the trial court addressed it nearly two months after the order expired by its own terms.

II. SEVERABILITY OF THE ORDER

The Pilot Commissioners argue that if the order is not moot, the trial court erred by refusing to sever out the void portion of the order from the portion of the order suspending Gonzales' license. Gonzales, however, argues that the unconstitutionally vague and impermissible portion of the order is not severable from the remainder, rendering the entire order void. We agree with the Pilot Commissioners and find that the order is severable.

Generally, courts reviewing the orders of administrative bodies must show deference to the rulings of those bodies. *See El-Kareh v. Texas Alcoholic Beverage Comm'n*, 874 S.W.2d 192, 197 (Tex. App.—Houston [14th Dist.] 1994, no writ) (citing *State Banking Bd. v. Allied Bank of Marble Falls*, 748 S.W.2d 447, 448-49 (Tex. 1988)). A court may affirm the administrative decision in whole or in part, and it must reverse the decision only when the administrative findings supporting the decision are not supported by substantial evidence. *See Board of Law Examiners v. Allen*, 908 S.W.2d 319, 321 (Tex. App.—Austin 1995, no writ). This is especially true where, as here, the court is reviewing decisions committed to the agency's discretion. *See id.*

Though there is no Texas case law addressing the severability of an administrative board's order, we find the cases addressing the severability of an administrative agency's promulgated rules applicable. Courts addressing the severability of agency rules have adopted a two-pronged test. If only part of an agency rule is found invalid,

the severance decision depends on the court's determination of two issues: (1) will the function of the regulatory statute as a whole be impaired without the invalid part of the rule; and (2) is there any indication that the agency would not have adopted the rule but for the invalid part? If the answer to either query is "yes," in the court's view, then severance is not justified and the entire rule must fall.

Texas Dep't of Banking v. Restland Funeral Home, Inc., 847 S.W.2d 680, 683 (Tex. App.—Austin 1993, no writ) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 295 (1988)). We find this test equally applicable to the orders of administrative agencies when a court finds only part of an administrative order invalid.

The suspension order passes the first prong of the test because severing the valid portion of the

Pilot Commissioners' order would not impair the function of the regulatory statute. The Pilot Commissioners' suspension order was made pursuant to Sections 62.046 and 68.044 of the Transportation Code, the regulatory statutes applicable to this case. Section 68.044 provides that the Pilot Board may suspend a branch pilot's license for up to six months if it finds, *inter alia*, that the pilot was absent from duty without authorization, was careless or neglected his duties, refused to perform his duties, or was incompetent while on duty. *See* TEX. TRANS. CODE ANN. § 68.044(a) (Vernon 1999). This statute allows the Pilot Commissioners to enforce the duties and obligations of the branch pilots they commission. Severing out the invalid portion of the suspension order would not affect this purpose since branch pilots are under no statutory obligation to maintain the confidence of shippers. The remaining portion, however, still achieves Section 68.044's purpose.

Likewise, there is no indication that the Pilot Board would not have adopted the suspension order but for the invalid part. Rather, the minutes of both the Review Board and Pilot Commissioners meetings reflect that the suspension order would have been adopted without the language ordering Gonzales to regain the confidence of the shippers. Thus, the second prong of the test is satisfied, as well.

Based on our analysis, we find that the district court should have severed out the invalid portion of the order and left the six-month suspension of Gonzales' license in place. By voiding the entire order when only part of it was impermissibly vague, the district court effectively substituted its judgment for that of the Pilot Commissioners, who are better suited to determine whether to suspend a branch pilot's license. We, therefore, sustain the Pilot Board's second issue on appeal.

III. ATTORNEY'S FEES

The Pilot Commissioners also complain that the trial court's award of attorney's fees is excessive and is not supported by the evidence. The trial court awarded attorney's fees to Gonzales based on the Texas Uniform Declaratory Judgment Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.001 *et seq.* (Vernon 1997).

The award of attorney's fees under the Declaratory Judgment Act is discretionary. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). A trial court abuses this discretion when the fees are not

reasonable and necessary or equitable and just. *See id.* Therefore, in reviewing an attorney fee award under the Declaratory Judgment Act, the statute requires us to determine whether the trial court abused its discretion by awarding fees based on insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. *See id.*

Here, ample evidence supports the trial court's determination that the fees were reasonable and necessary, as well as its determination that the fees were equitable and just. Accordingly, we overrule the Pilot Commissioners' appellate issue on this matter and turn to address the cross-points raised by Gonzales in his appeal.

IV. GONZALES' CROSS-POINTS

Though Gonzales raises four cross-points on appeal, he failed to comply with the Rules of Appellate Procedure by filing a notice of appeal. Texas Rule of Appellate Procedure 25 requires any party who wishes to modify the judgment of the trial court, or any appealable order, to file a notice of appeal. *See* TEX. R. APP. P. 25(c). If a party does not comply with this rule, we may not grant them any more favorable relief than did the trial court absent a showing of just cause. *See id.*

Here, we must first address whether Gonzales seeks to modify the trial court's judgment. The judgment signed by the trial court incorporates an earlier order granting Gonzales' petition for declaratory and injunctive relief. That order makes an express finding that the Pilot Board's order violated Section 68.044 of the Transportation Code. Gonzales asks us in his cross-points to find that the trial court erred in finding that the Pilot Board and Review Board did not violate the Texas Open Meetings Act or his due process rights. As such, he seeks to modify the trial court's judgment and should have filed a notice of appeal. Because he did not, and we do not find just cause on the record to support granting him greater relief than the trial court, we cannot reach his cross-points of error. Accordingly, we dismiss his cross-points and affirm the judgment of the trial court as modified.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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