

Robert Bean, Franklin Shaffer,)
David Autry, Mack Roberts, Kevin)
Antle, Tom Nichols, Tammie Beasley,)
and Roxanne Luce,)
Plaintiffs/Appellees,)

Appeal No.
01-A-01-9510-CH- 00431

v.)

Ned Ray McWherter, in his capacity)
as Governor of the State of)
Tennessee, Charles W. Burson,)
Attorney General of the Sate of)
Tennessee, Tennessee Wildlife)
Resources Commission, and Gary)
Myers, Director of the Wildlife)
Resources Agency,)
Defendants/Appellants.)

Chancery Court No.
91-2558-I

FILED

February 28, 1996

**Cecil W. Crowson
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM CHANCERY COURT, PART ONE

AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

Defendants/appellants appeal from the chancery courts' decision overruling appellants' motion for summary judgment and holding that Tennessee Code Annotated section 70-4-403(1), (3) unlawfully delegates legislative authority to appellants, the Tennessee Wildlife Resources Commission ("TWRC") and the Commissioner of Agriculture ("Commissioner").

This action began on 7 August 1991 when plaintiffs/appellees filed a complaint and application for declaratory judgment in the Davidson County Chancery Court. On 19 August 1991, the court entered an order denying appellees' request for a temporary restraining order and request to take an interlocutory appeal. The court also found that appellees had not exhausted their administrative remedies and reserved appellees' claims pending exhaustion of those remedies. On 13 January 1992, appellees filed an amended complaint. The amended complaint added appellants Ned Ray McWherter, Charles W. Burson, and TWRC and deleted appellant Tennessee Wildlife Resource Agency ("TWRA"). After several procedural maneuvers by both parties, appellees amended their complaint a third and a fourth time.

The complaint, as amended, alleged that Tennessee Code Annotated sections 70-4-401 to -417 violated the Tennessee Constitution. One of their constitutional claims was that the General Assembly had unlawfully delegated legislative authority to TWRC and the Commissioner by enacting Tennessee Code Annotated section 70-4-403(1), (3). This section provides, in pertinent part, as follows:

70-4-403. Classifications of wildlife. - Live wildlife, kept and maintained for any purpose, shall be classified in the following five (5) classes:

(1) Class I - This class shall include all species inherently dangerous to humans. These species may only be possessed by zoos, circuses and commercial propagators, except as otherwise provided in this part.

The following is a listing of animals considered inherently dangerous

. . . .
The commission, in conjunction with the commissioner of agriculture, may add or delete species from the list of Class I wildlife by promulgating rules and regulations.

. . . .
(3) Class III - This class shall require no permits except those required by the department of agriculture, and shall include all species not listed in other classes and shall include, but is not limited to, those listed in subdivisions (3)(A)-(Q). The commission, in conjunction with the commissioner of agriculture, may add or delete species from the list of Class III wildlife by promulgating rules and regulations

Tenn. Code Ann. §70-4-403(1), (3) (Supp. 1994). The appellees also alleged that they were all owners of one or more of the animals regulated by the statute and that each appellee would suffer irreparable injury if the law and the rules and regulations promulgated pursuant to that law were enforced.¹

On 31 January 1994, appellants filed a motion for summary judgment. After a hearing, the court entered a memorandum opinion on 19 July 1995. The court overruled defendants' motion for summary judgment and held that the statute unlawfully delegated legislative authority to TWRC and the Commissioner. The court found that "the legislature did not provide the agencies with any standards by which they were to proceed in deleting or adding species under Class I and Class III." On 26 July 1995, the court entered an order denying defendants' motion for summary judgment and a final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Defendants filed their notice of appeal on 22 August 1995. Although the chancery court denied appellants' motion as to all

¹ Since appellees filed their complaint, several parties have either lost or failed to renew their licenses. Tom Nichols, Tammie Beasley, and Roxanne Luce are no longer party appellees. Further, Robert Bean's and David Autry's commercial propagator permits expired in June 1992.

of the constitutional claims made by appellees, appellants only appealed the unlawful delegation portion of the chancery court's decision. They presented the following issue for our review:

Whether the trial court erred in holding that Chapter 487 of the Public Acts of 1991 provides for an unconstitutional delegation of legislative power to the Tennessee Wildlife Resources Commission and the Commissioner of Agriculture in permitting them, through the promulgation of rules, to add to, or delete from, the wildlife lists in Classes I and III, as set out in Tenn. Code Ann. §§ 70-4-403(1) and (3).

"The legislature may create laws which delegate to administrative bodies the power to promulgate rules and regulations to carry out the law." *Estrin v. Moss*, 221 Tenn. 657, 674, 430 S.W.2d 345, 352 (1968), *appeal dismissed*, 393 U.S. 318, 89 S. Ct. 554, 21 L. Ed. 2d 513 (1969). The enabling statute at issue expressly provides that TWRC and the Commissioner may add or delete species from the lists of Class I and Class III wildlife by promulgating rules and regulations. Tenn. Code Ann. §70-4-403(1), (3) (Supp. 1994). The General Assembly's power to delegate, however, is not without restrictions. The Tennessee Supreme Court has stated as follows:

A concise and accurate test to be used in determining whether or not a grant of power to an administrative body constitutes an unlawful delegation of legislative power is:

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law; * * * it is only necessary that the statute establish a sufficient basic standard, a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law, * * *" 16 C.J.S. Constitutional Law sec. 133, pages 560-561.

Lobelville Special School Dist. v. McCanless, 214 Tenn. 460, 463-64, 381 S.W.2d 273, 274 (1964). Therefore, the determinative issue in this case is whether the enabling statute provided the

entities administering the law, TWRC and the Commissioner, with the necessary standards.

In a 1954 case, the supreme court upheld an enabling statute that authorized the Department of Public Welfare to license and regulate child welfare agencies. *Department of Pub. Welfare v. National Help 'U' Ass'n*, 197 Tenn. 8, 13-14, 270 S.W.2d 337, 339 (1954). The enabling statute required the department to develop and publish standards to use when licensing child welfare agencies. The General Assembly laid out six factors for the department to follow when developing these standards. *Id.* at 338. After reviewing the standards, the supreme court stated as follows: "Such standards are definite and clear, though they leave the details of the requisites for the issuance of license to the discretion of the department. These details clearly are ministerial matters and may properly be delegated." *Id.* at 339.

In a later case, the supreme court addressed the constitutionality of an enabling statute that granted the State Board of Education the authority to develop requirements for reactivating special school districts. *Lobelville*, 381 S.W.2d at 274. The enabling statute stated as follows:

'In establishing such standards, the state board of education is authorized and directed to take into consideration such factors as (1) the scholastic population of such city or special school district according to the most recent census, (2) the financial ability per pupil of scholastic population, and (3) the expressed willingness of the people of such city or special school district, as indicated by a majority of its legal voters in a referendum, to raise local funds which, together with school funds received from the state and other sources, shall be sufficient to provide adequate educational opportunities for their children.'

Id. (quoting Tenn. Code Ann. §49-233). The supreme court determined that these factors were sufficient and held that there was not an unlawful delegation of legislative authority.

Appellants' rely heavily on the case of *Tasco Developing and Building Company v. Long*, 212 Tenn. 96, 368 S.W.2d 65 (1963), for the proposition that a broad delegation of discretionary authority to an administrative body does not contravene the constitution. A close reading of this case, however, reveals that it involved a different issue. Although the *Tasco* court discussed delegation of legislative authority, the only issue before it was whether the board overstepped its authority, not whether the enabling statute unlawfully delegated legislative powers. *Id.* at 66.

Turning to the instant case, it is the opinion of this court that the General Assembly failed to set forth the standards necessary to guide TWRC and the Commissioner in its enforcement and application of the law. The only guidance provided by the statute in regard to Class I is the statement that Class I includes "species inherently dangerous to humans" and a list of animals "considered inherently dangerous." Tenn. Code Ann. §70-4-403(1) (Supp. 1994). The list, however, is of little value considering it could include everything from poisonous frogs to elephants. As to Class III, the statute provides that it includes "all species not listed in other classes." *Id.* §70-4-403(3). Subsection three also includes a list of animals which Class III "shall include, but is not limited to." *Id.* These standards fail to provide "a definite and certain policy and rule of action for the guidance" of TWRC and the Commissioner. *Lobelville*, 381 S.W.2d at 274.

Not only do these standards provide little, if any, guidance, but the powers granted TWRC and the Commissioner coupled with these pseudo standards give the administrative bodies the power to amend the laws. To explain, they have the

power to delete any species from either list even though the General Assembly has seen fit to include that species in the list. In other words, the bodies can amend the law as enacted by the General Assembly. Using the test set forth in *Lobelville*, this statute gives TWRC and the Commissioner the discretion to determine what the law shall be as opposed to discretion as to the law's execution. While the latter is permissible, the former is unlawful. *Id.*

For the foregoing reasons, it is the opinion of this court that the chancellor correctly determined that Tennessee Code Annotated section 70-4-403(1), (3) unlawfully delegates legislative authority to TWRC and the Commissioner of Agriculture. The decision of the chancellor is affirmed, and the case is remanded for any further necessary proceeding. Costs of appeal are taxed to defendants/appellants, Ned Ray McWherter, in his capacity as Governor of the State of Tennessee; Charles W. Burson, Attorney General of the State of Tennessee; Tennessee Wildlife Resources Commission; and Gary Myers, Director of the Wildlife Resources Agency.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, J.