

**[J-43-C&D-2009] [MO: Saylor, J]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

EDWARD G. RENDELL, GOVERNOR OF : No. 82 MAP 2008
PENNSYLVANIA, AND JOHN QUIGLEY, :
PENNSYLVANIA ACTING SECRETARY :
OF CONSERVATION AND NATURAL : Appeal from the Order of the
RESOURCES, : Commonwealth Court at No. 268 MD 2007
: Dated October 3, 2008

Appellees

v.

PENNSYLVANIA STATE ETHICS :
COMMISSION, :

Appellant

EDWARD G. RENDELL, GOVERNOR OF : No. 83 MAP 2008
PENNSYLVANIA, AND JOHN HANGER, : Appeal from the Order of the
PENNSYLVANIA ACTING SECRETARY : Commonwealth Court at No. 269 MD 2007
OF ENVIRONMENTAL PROTECTION, : Dated October 3, 2008

Appellees

v.

PENNSYLVANIA STATE ETHICS :
COMMISSION, :

Appellant

: ARGUED: May 12, 2009

CONCURRING OPINION

MADAME JUSTICE GREENSPAN

DECIDED: November 30, 2009

If the issue of whether the term “business” as used in the Ethics Act includes a “non-profit corporation” had arisen in the context of an actual investigation by the Ethics Commission and subsequent prosecution of former Secretaries Michael DiBerardinis and

Kathleen McGinty then I would have wholeheartedly joined the majority opinion. However, as it did not, I must write separately because I believe that this case implicates an important prudential issue regarding judicial restraint, the case or controversy doctrine.¹ I realize that the parties have not discussed the application of the doctrine in their briefs. Nevertheless, I believe that, at a minimum, it is appropriate and necessary for this Court to address the prudential limitations before reaching the substantive issues.²

Respectfully, I believe that this Court should vacate the Commonwealth Court's decision as that decision is, in my opinion, advisory. Neither the Ethics Act nor the Declaratory Judgment Act or this Court's jurisprudence permit the Commonwealth Court or this Court to issue advisory opinions.

¹ In federal cases, the "case or controversy" doctrine has two sources: the United States Constitution and judicially self-imposed limitations that evolved on prudential grounds. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004). By comparison, in Pennsylvania, the state constitution does not contain a case or controversy clause. In re Hickson, 821 A.2d 1238, 1243 n.5 (Pa. 2003). Nonetheless, the doctrine is well recognized in Pennsylvania and has been employed to control access to courts. See In re Gross, 382 A.2d 116, 119 (Pa. 1978) (holding that a case or controversy must exist at all stages of litigation).

² This Court has the authority to raise the issue of justiciability *sua sponte* where there is no case or controversy between the parties. Pennsylvania R.R. Co. v. Pa. Pub. Util. Comm'n, 152 A.2d 422, 424 (Pa. 1959) (*sua sponte* vacating an order of the Superior Court on the ground that court had no jurisdiction to review agency regulation "where the regulatory impact of the rule had never been visited upon the appellant railroad"); Pheasant Run Civic Org. v. Bd. of Comm'rs of Penn Township, 430 A.2d 1231, 1233 (Pa. Commw. 1981) (holding that where there is no case or controversy ripe for judicial intervention "[a] court has the duty to raise, *sua sponte* if necessary, the issue of its power to hear an action, and the parties may not confer jurisdiction over a cause of action or the subject matter of an action by consent or agreement"); Rich v. Commonwealth, Dept. of Gen. Servs., 566 A.2d 1279, 1281 n.6 (Pa. Commw. 1989) (holding that the existence of a case or controversy is a jurisdictional issue that may be raised *sua sponte* by a court); Ass'n of City Mgmt. and Prof'l Employees v. Civil Serv. Comm'n of City, 721 A.2d 815, 818 (Pa. Commw. 1998), appeal denied, 740 A.2d 1149 (Pa. 1999) (holding that a case or controversy inquiry is jurisdictional so court could raise it *sua sponte*).

Remedy at law

The Commonwealth Court's opinion is advisory for several reasons. To begin, former Secretary of the Department of Conservation and Natural Resources (DCNR) Michael DiBerardinis, former Secretary of the Department of Environmental Protection (DEP) Kathleen McGinty, and Governor Edward G. Rendell (collectively Appellees) did not assert any cognizable injuries for which the Commonwealth Court could provide a legal remedy. The judgment entered by the Commonwealth Court provides an academic answer to a hypothetical situation that had yet to happen at the time that the declaratory judgment action was filed.³

Appellees provided the Commonwealth Court with the following hypothetical scenario and sought the opinion of that court as to whether they would be exposed to liability. In 2007, the spouses of Mr. DiBerardinis and Ms. McGinty were associated with non-profit entities. Ms. Joan Reilly, Mr. DiBerardinis's spouse, is a manager of the Pennsylvania Horticultural Society (PHS), while Dr. Karl Hausker, Ms. McGinty's spouse, was an independent contractor associated with Enterprising Environmental Solutions, Inc. (EESI). In the past, PHS applied for grants to the DCNR and EESI applied for grants to the DEP. Both entities expected but had not applied for grants to the respective departments by the time the present declaratory judgment was commenced in the Commonwealth Court. Mr. DiBerardinis and Ms. McGinty were expected to participate in the grant award

³ Indeed, the hypothetical events did not happen nor are they likely to happen because Mr. DiBerardinis and Ms. McGinty are no longer secretaries of the DCNR and DEP. The parties herein notified the Court and as a result the docket and caption of this case have been changed to reflect the substitution of the current secretaries, who obviously do not have the alleged personal conflicts that instigated this lawsuit. Yet, the fact that neither the former secretaries nor the current litigants could receive any relief from this litigation does not appear to have any effect on the majority's discussion of the law. In my view, this is because the opinion deals with the legal issue in the abstract and any change in circumstances does not affect the legal analysis.

processes of their respective departments but had not yet participated by the time the present declaratory judgment was filed in the Commonwealth Court.

Appellees filed an action in the Commonwealth Court seeking a declaration that, in the hypothetical scenario, Mr. DiBerardinis and Ms. McGinty would not have been violating the Ethics Act.⁴ The decision depended on the interpretation of the term “business,” as used in the Ethics Act so the parties asked the Commonwealth Court to issue an opinion on the meaning of the term.⁵ In general, however, a judgment declaring the law based on a hypothetical scenario is not a remedy recognized under Pennsylvania law. Philadelphia Entm’t and Dev. Partners, L.P. v. City of Phila., 937 A.2d 385, 293 (Pa. 2007) (holding that courts of the Commonwealth “should not give answers to academic questions or render advisory opinions or make decisions based on assertions as to hypothetical events that might occur in the future”). Indeed, such a declaration would amount to nothing more than an advisory opinion - an opinion that, like the advice of their own counsel, would merely alert Appellees to the legal consequences of possible future actions.⁶

⁴ Appellees first sought the same relief from the Ethics Commission. The Ethics Commission, which is permitted by statute to issue advisory opinions, issued an opinion that Mr. DiBerardinis and Ms. McGinty would be exposed to liability if they were to act as in the hypothetical scenario. In addition to filing the declaratory judgment subject to this opinion, Appellees also appealed the Ethics Commission’s advisory opinions. Because Appellees withdrew the appeals, only the declaratory judgment action remains before us.

⁵ In their declaratory judgment actions, Appellees raised a total of ten (10) issues, the majority of which required the interpretation of the Ethics Act. The Commonwealth Court dismissed eight of the issues on the ground that these were not even supported by the hypothetical facts described by Appellees. Rendell v. Pa. Ethics Comm’n, 938 A.2d 554, 561 n.6 (Pa. Commw. 2007). The Commonwealth Court issued a decision on the remaining two issues, which are the subject of this appeal, based on the hypothetical facts.

⁶ The majority recognizes that the Ethics Commission opinions issued to Appellees were advisory. Maj. Slip Op. at 3. Appellees were in the same procedural posture before the Commonwealth Court as they were before the Ethics Commission; therefore, logic dictates that the Commonwealth Court’s opinion is equally advisory.

Nor does the Ethics Act open the doors to the court for Appellees to seek such a remedy. See 65 Pa.C.S. §§ 1101-1113. Under the Ethics Act, state officials like Appellees may obtain an advisory opinion *from the Ethics Commission*. See 65 Pa.C.S. § 1107(10), (11). However, the Ethics Act contains no provisions allowing Appellees to obtain the same *in court*. Thus, the Ethics Act provides no statutory basis for recognizing the remedy sought by Appellees.

Finally, the Declaratory Judgment Act also does not provide Appellees with a remedy in this situation. According to the Declaratory Judgment Act, its purpose is “remedial.” 42 Pa.C.S. § 7541(a). A “remedial law” provides “means to enforce rights or redress injuries.” BLACK’S LAW DICTIONARY 1319 (8th ed. 1999). As to the remedy, the Declaratory Judgment Act states that

Any person interested under a deed, will, written contract, or other writings constituting a contract, *or whose rights, status, or other legal relations are affected by a statute*, municipal ordinance, contract, or franchise, *may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.*

42 Pa.C.S. § 7533 (emphasis added).

Under the plain language of the statute, only persons who “*are affected by a statute,*” the Ethics Act here, may seek a declaratory judgment. 42 Pa.C.S. § 7533 (emphasis added). The Declaratory Judgment Act does not provide a remedy to persons who *will be* or, even more remotely, *may be* affected by the statute.

As noted above, Appellees here sought a declaration from the Commonwealth Court that the term “business” as used in the Ethics Act did not include non-profit corporations. The expressed harm for which Mr. DiBerardinis and Ms. McGinty sought a “declaration” -- the Declaratory Judgment Act remedy -- was that they feared civil or criminal prosecution for engaging in the described conduct. The harm described by Governor Rendell was that

he was “denied the right to have the official of [his] choosing carry out [the duties and responsibilities of secretary].” Appellees’ Reply Brief at 1; see also Appellees’ Brief at 17.

Respectfully, in my opinion, the expressed harms were not present but future, hypothetical harms for which the Declaratory Judgment Act does not provide relief. See 42 Pa.C.S. § 7533. After all, Mr. DiBerardinis and Ms. McGinty had not engaged in the hypothetical conduct by the time the declaratory judgment action was filed (nor would they ever engage in that conduct) and Governor Rendell was not deprived of their services. The Declaratory Judgment Act does not provide a remedy when only a potential injury is averred. 42 Pa.C.S. § 7533.⁷ Thus, because Appellees asserted only a potential injury in their declaratory judgment action, I would hold that the Commonwealth Court issued an advisory opinion that should be vacated. See Gulnac v. South Butler Cnty. Sch. Dist., 587 A.2d 699, 702 (Pa. 1991) (holding that “[a] declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic”); Pennsylvania Railroad Co., supra.⁸

⁷ I recognize that the majority opinion is in line with a view that its author has expressed in the past that the “primary and direct purpose of the Declaratory Judgment Act . . . was to authorize courts to grant declaratory relief in the face of objections that such relief represented the giving of advisory opinions rather than the adjudication of controversies.” Nationwide Mutual Ins. Co. v. Wickett, 763 A.2d 813, 819 (Pa. 2000) (Saylor, J. dissenting); see also Pittsburgh Palisades Park, LLC v. Commonwealth, 888 A.2d 655, 663-664 (Pa. 2005) (Saylor, J. dissenting). This Court, however, recently and specifically rejected that position in Pittsburgh Palisades Park. 888 A.2d at 661 n.4; see also Vale Chem. Co. v. Hartford Accident and Indem. Co., 516 A.2d 684, 687 n.2 (Pa. 1986) (noting that “[a]lthough the Declaratory Judgment Act relaxes the traditional requirement that a case or controversy must involve an existing dispute, it does not, and could not, permit the entry of an advisory opinion”).

⁸ Further, I do not believe that this Court should implicitly overrule the long line of Pennsylvania Supreme Court decisions that have denied parties relief in the form of advisory opinions under the Declaratory Judgment Act. Pittsburgh Palisades Park, 888 (continued...)

Mootness

In the alternative, this Court should dismiss this action as moot because Ms. McGinty and Mr. DiBerardinis are no longer secretaries of the DEP and DCNR, as reflected by the docket and in the caption. Commonwealth v. Kallinger, 615 A.2d 730 (Pa. 1992) (*sua sponte* dismissing appeal as moot). Because the present litigation was precipitated by circumstances personal to the former secretaries, their successors cannot claim to have a personal interest in this matter. Further, given that the secretaries with potential conflicts of interest described in this case are no longer in office, the Governor also no longer faces his alleged harm -- not being able to use the services of his chosen secretaries in certain grant review processes.

(...continued)

A.2d at 661 n.4; Vale Chem. Co., 516 A.2d at 687 n.2; Gulnac, 587 A.2d at 702; Pa. State Lodge of Fraternal Order of Police v. Commonwealth, 571 A.2d 531, 532 (Pa. Commw. 1997), affirmed, 591 A.2d 1054 (Pa. 1991) (“[d]eclaratory judgment is not appropriate to determine rights in anticipation of events which may never occur; it is an appropriate remedy only where a case presents antagonistic claims indicating imminent and inevitable litigation”). First, the parties do not offer any arguments in support of such a position. Second, such a decision would be a drastic departure from traditional prudential standards that should not be undertaken implicitly. Rather, if this Court were to decide to overrule these decisions, it should do so openly so as to put the public on notice of this avenue of relief. I suspect that there are numerous persons who would welcome an opportunity to obtain an advisory opinion from courts of the Commonwealth on various legal topics.

In my opinion, the legislature’s policy of limiting relief under the Declaratory Judgment Act to persons who are presently affected is sound. First, it is the role of the legislature and not of the courts to set forth the Commonwealth’s public policy. By issuing opinions in a vacuum, without an actual controversy between parties, the courts would be interfering with the legislature’s role. Second, broad opinions issued in a vacuum, as advisory opinions necessarily are, cannot consider the true implications and possible exceptions that may arise if interested parties appear before the court. One need only look at In re Nomination Pet. of Carroll, 896 A.2d 566 (Pa. 2006), cited by the Majority to see that the application of the law differs depending on the context of a controversy. Finally, the case or controversy doctrine is an important tool for preserving judicial resources and ensuring that cases brought by persons who are immediately affected receive the appropriate attention from courts.

Appellees do not raise any arguments as to why we should make an exception here to the prudential limitation against court review of moot cases. See Commonwealth v. Dixon, 907 A.2d 468, 472-73 (Pa. 2006) (holding that “an appellate court may decide a case where issues important to the public interest are involved, the nature of the question under consideration is such that it will arise again, and review will be repeatedly thwarted if strict rules of mootness are applied”). Also, there is no reason to believe that the issue subject to this appeal is capable of repetition and would escape review if not decided here. In the event that this scenario was to occur again, the secretary involved could conform to the Ethics Commission’s advisory opinion or challenge it in a prosecution for a violation.⁹ Therefore, we should at least refrain from issuing an advisory opinion and dismiss these declaratory judgment actions as moot.

Conclusion

Because I believe that the Commonwealth Court erroneously reached the merits of the Appellants’ declaratory judgment action where it should have dismissed it for lack of justiciability, I would vacate the Commonwealth Court’s decision. See Gulnac, 587 A.2d at

⁹ By my reading, this is the procedure for challenging Ethics Act requirements. If those persons who fall under the purview of the Ethics Act (i.e., public officials) wish to change the requirements or the procedure, they should apply to the legislature for such amendments and not to the courts. I recognize that the Ethics Act places a higher burden of disclosure and conduct on public officials than on other Pennsylvanians. These public officials have some relief in the form of advice from the Ethics Commission, which has a duty to interpret the Ethics Act prior to any violation. The Ethics Act does not place the same duty on courts. Indeed, courts have no authority to issue advisory opinions under the Ethics Act and are otherwise prohibited from doing so on prudential grounds. There is no reason to make an exception to the rule against issuing advisory opinions for public officials simply because of their positions. These public officials knew the conduct and disclosure obligations of elected office and, arguably, may be in a better position than other Pennsylvanians to change these requirements by appealing to the legislature.

702 (vacating lower court opinion that improperly reached the merits of a non-justiciable action).¹⁰

¹⁰ The majority opinion reverses and remands to the Commonwealth Court for further proceedings. It is unclear to me what further action the Commonwealth Court could take or what relief it could provide to the Governor or to John Quigley and John Hanger, the newly appointed acting secretaries who replaced Ms. McGinty and Mr. DiBerardinis at the DCNR and DEP. In addition to the pragmatic issue, a remand highlights the justiciability problems in this matter. See *Stilp v. Commonwealth*, 910 A.2d 775, 781-82 (Pa. Commw. 2006) (dismissing action against the Governor on the ground that no case or controversy existed between the parties because petitioner did not aver a manifest wrong by the Governor).