

IN THE COURT OF APPEALS 05/21/96
OF THE
STATE OF MISSISSIPPI
NO. 93-CA-01406 COA

GOLDEN TRIANGLE REGIONAL HEALTH CORPORATION

APPELLANT

v.

BOARD OF SUPERVISORS OF LOWNDES COUNTY, MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

WILBUR O. COLOM

KELLY HARDWICK

ATTORNEYS FOR APPELLEE:

JACK F. DUNBAR

JOHN H. DUNBAR

TIMOTHY M. THREADGILL

TAYLOR B. SMITH

AUBREY NICHOLS

NATURE OF THE CASE: STATE BOARD AND AGENCY

TRIAL COURT DISPOSITION: AFFIRMED THE ACTION OF THE LOWNDES COUNTY BOARD OF SUPERVISORS

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

This case is before the Court on appeal from a judgment rendered in the Circuit Court of Lowndes County. The matter came before the circuit court as an appeal under section 11-51-71 of the Mississippi Code of 1972 from a decision by the Lowndes County Board of Supervisors to lease Lowndes County's community hospital to a non-profit corporation. The appeal was originally pursued at the circuit court level by a number of rejected candidates for the lease and one private citizen of the county. The circuit court affirmed the action of the board, and this appeal ensued. All of the appellants except one rejected candidate subsequently abandoned their appeals.

We conclude, as did the circuit court in its well-reasoned opinion, that there exists no basis under established legal principles to disturb the action of the board of supervisors, and we, therefore, affirm the judgment of the circuit court.

I.

The Facts

In late 1992, the Lowndes County Board of Supervisors (hereafter "the board" or "the supervisors") undertook a process aimed at concluding a lease of the county-owned Golden Triangle Regional Medical Center to a private entity. Up to that time the facility had been operated by a board of local trustees appointed by the supervisors under section 41-13-29 of the Mississippi Code of 1972. Leasing to an outside entity as an alternate method of operation of a community hospital is sanctioned by section 41-13-15(7).

In furtherance of this plan, the board issued a Request for Proposals (RFP) inviting interested parties to submit written proposals for consideration by the board. The RFP set forth a detailed format for the proposals, specifying a number of issues to be addressed, relating both to the financial aspects of the transaction as well as to other less quantifiable considerations. Interested parties were required to pay a non-refundable fee of \$1,500 for an RFP package. The RFP specifically stated that the board, in asking for proposals, was not undertaking a competitive bidding process. The exact language of the RFP was as follows:

All candidates should take note that Lowndes County is soliciting and accepting proposals pursuant to this Request for Proposal without regard to any bidding process. Lowndes County retains the right to accept or reject any candidate for any reason in its sole discretion.

A number of interested entities obtained RFP packages and submitted proposals. On November 13, 1992, the board adopted a resolution declaring its intent to enter into a Memorandum of Agreement with Baptist Memorial Health Care System, Inc. (hereafter "Baptist") to proceed toward negotiation of the final terms of a long-term lease of the facility to Baptist. The broad terms of the proposed lease were set out in the Memorandum of Agreement. The November 13 board action does not specifically mention the remaining entities that submitted proposals, but by implication, it seems clear that they were effectively removed from further consideration.

The negotiation process with Baptist was apparently fruitful and the matter of final approval of a proposed lease agreement was on the agenda for the January 29, 1993, board meeting. Representatives for certain of the remaining proposers, along with a private citizen named Tracy Brown, were permitted a brief time on the board's agenda, apparently for the purpose of speaking in opposition to the proposed lease.

Also, on that date, counsel for one of the proposers filed a motion with the board seeking the recusal of Supervisor Colson from voting on the lease matter. The motion raised an issue regarding Supervisor Colson's qualification to hold office that was unrelated to the hospital matter. Specifically, the motion urged that Supervisor Colson's assumption of office as a director of the Golden Triangle Regional Waste Authority while serving as a county supervisor was a constitutionally impermissible cross over from the judicial branch to the executive branch which constituted a forfeiture of his supervisor's office. The motion itself is unclear as to whether it was addressed to Supervisor Colson himself or to the board, since in one part it requests that he "recuse himself from any further deliberations in these proceedings," yet elsewhere "charges" that he should not "be allowed by the Board of Supervisors to participate any further" in the leasing matter. There is no evidence in the record that the board affirmatively dealt with the motion; however, the record does reveal that Supervisor Colson continued to participate in all aspects of the hospital leasing matter.

The board proceeded to vote on the matter of approving the lease, and three supervisors, including Supervisor Colson, voted in favor of the leasing arrangement. Two supervisors voted against approval.

Certain of the rejected proposers, along with Brown, appealed the January 29 decision to lease to Baptist to the Circuit Court of Lowndes County pursuant to section 11-51-75 of the Mississippi Code of 1972, which permits "[a]ny person aggrieved by a judgment or decision of the board of supervisors" to appeal within ten days of the adjournment of the session where the action occurred. Besides Brown, the appealing parties were Ornda Health Corporation, Healthtrust, Inc. - The Hospital Company, Health Management Associates, Inc., and Golden Triangle Regional Health Corporation. (This entity, the sole party still before the court, is also referred to on occasion in the record as GTR Health Corporation. We will hereafter shorten this abbreviated version to "GTR.") The circuit court found the issues raised in the appeal to be without merit and entered a judgment declaring that "the Bill of Exceptions filed herein are hereby dismissed"

This appeal was then perfected by Brown, Ornda, Healthtrust, and GTR. Health Management Associates did not appeal from the circuit court judgment. After this appeal was perfected, Healthtrust, Ornda, and Brown all voluntarily dismissed their appeals, leaving GTR as the sole

appellant.

GTR raises six separate issues for consideration by this Court. Those issues, reorganized and recast somewhat in this Court's language, are:

1. Whether Supervisor Colson was disqualified to vote on the question by virtue of his having vacated his office by assuming a position in the executive branch of government.
2. Whether the terms of the lease were so unreasonably favorable to Baptist as to constitute a breach of the board's fiduciary duty as trustee of public lands.
3. Whether the return to the County from the leasing arrangement was so low as to constitute a donation of public land to private use in violation of article four, section ninety-five of the Mississippi Constitution.
4. Whether the decision to award the lease was an arbitrary and capricious act by the board.
5. Whether the board had a contractual duty to GTR, by virtue of its participation in the proposal process, to award GTR the lease if its proposal was "the best proposal," and, if so, whether the board violated an implied covenant of good faith in such a contract by failing to fully evaluate GTR's proposal.
6. Whether the decision to allow GTR only five minutes to address the board prior to the board's consideration of the proposed lease to Baptist deprived GTR of a property right without due process of law.

The board filed a cross appeal, claiming that the appeal to circuit court was untimely filed. The board suggests that the November 13, 1992, resolution, which effectively excluded the competing proposers from further consideration, was the action of the board by which the appellants were aggrieved within the meaning of the statute, so that their appeal in February of the following year from the vote to finally approve the Baptist lease was substantially out of time.

II.

The Authority of Supervisor Colson to Vote on the Lease

The challenge mounted to Supervisor Colson's right to participate in the decision process on this

leasing arrangement is not issue-specific. The practical effect of an adjudication by this Court that Supervisor Colson was ineligible to vote on the ground urged by the appellant would be to oust Supervisor Colson from office.

We do not approach such a proposition lightly. Article 5, section 136 of the Mississippi Constitution provides that, "All officers named in this article shall hold their offices during the term for which they were selected, unless removed, and until their successors shall be duly qualified to enter on the discharge of their respective duties." Miss. Const. art. V, § 136.

Though the language of this section seems to limit its effect to members of the executive branch, its applicability has been extended by the Mississippi Supreme Court to county supervisors in *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722 (1941).

It would undoubtedly create chaos in government if every person to be affected by an action of a public body could, immediately before a decision, collaterally raise the issue of the right of one or more members of the body to hold office and thereby vote on the question. A duly elected supervisor, having withstood the challenges of the election process, received the approval of the qualified electors entitled to speak on the question, been duly commissioned, posted the required bond, and taken the oath of office, may not be subjected to so summary a proceeding to effectively remove him or her from office.

There are procedures available to remove from service those persons wrongfully holding office. The statutory procedure known as quo warranto is available in instances "[w]henver any person unlawfully holds or exercises the functions of any public office . . ." or "[w]henver any public officer has done or suffered to be done . . . any act, the doing . . . of which works a forfeiture of office." Miss. Code Ann. § 11-39-1 (1972). The procedural intricacies for bringing a quo warranto action were supplanted by Mississippi Rule of Civil Procedure 81(d), which provides that the "forms of relief formerly obtainable under [a writ] of . . . quo warranto, [or] in the nature of quo warranto . . . shall be obtained by motions or actions seeking such relief"; however, this did nothing to change the substantive law on the subject. *Barlow v. Weathersby*, 597 So. 2d 1288, 1293 (Miss. 1992).

Though a proceeding in the nature of quo warranto would appear an adequate remedy to address the problem of one improperly exercising the power of a public officer such that it could be reasonably deemed the exclusive remedy, we do note that, in the case of *Moore v. Sanders*, the Mississippi Supreme Court approved a procedure whereby the Board of Supervisors of Leflore County tried the right of one of the board's members to hold office on the ground that he had moved from the district from which he was elected. *Moore v. Sanders*, 558 So. 2d 1383, 1385 (Miss. 1990). In that proceeding, the board "conduct[ed] a full evidentiary hearing at which Moore was represented by counsel." *Id.* at 1384. Even on those facts, Presiding Justice Hawkins dissented, vigorously asserting that a quo warranto proceeding should be the exclusive remedy to remove an office holder. *Id.* at 1387 (Hawkins, P.J., dissenting). We are bound by the precedent of the majority opinion and not that of Presiding Justice Hawkins' dissent. Nevertheless, we note that, even though the majority in *Moore* accepts the board's authority to undertake such a proceeding, there is nothing to suggest a corresponding duty of the board to do so upon the demand of an outside party such as GTR.

Barlow v. Weathersby makes clear that an office holder has certain due process rights in regard to proceedings affecting his or her right to exercise the powers and duties of office. In *Weathersby*, the board of supervisors was attempting to deny the chancery clerk's authority to exercise the powers of clerk of the board and county auditor based upon an alleged failure to perform those duties. The Mississippi Supreme Court stated:

This record does not support any claim that Barlow had failed to perform his duties. But, even so, if the board desired to make such a claim it was obliged to give him a hearing. U.S. Const Amend. V and XIV, § 1; Miss. Const. Art. 3, § 14; *Tally v. Board of Supervisors*, 307 So. 2d 553 (Miss. 1975); 63 Am.Jur 2d *Public Officers and Employees* § 259, 260 (1984).

Weathersby, 597 So. 2d at 1293.

The record shows no such proceeding being commenced against Supervisor Colson prior to his vote on the hospital lease, and we conclude that his authority to vote on the question is not properly before this Court. We acknowledge that there is in the record a copy of a complaint against Supervisor Colson which was attached to the recusal motion bearing the style "In the Chancery Court of Lowndes County," and apparently seeking Supervisor Colson's removal from office. This document contains no cause number and no clerk's filing stamp. Such an instrument is not evidence that such a proceeding was actually commenced, and, if it were, would not affect Supervisor Colson's right to vote until finally adjudicated adversely to him.

Even assuming, for sake of argument, that appellant's theory of the law is correct and that Supervisor Colson irretrievably forfeited his right to serve as supervisor upon assuming his duties on the regional waste authority's board, until that issue is finally resolved in an appropriate proceeding, Supervisor Colson's votes would still have legal effect under section 25-1-37 of the Mississippi Code of 1972, which states, in part, that:

The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not"

Miss. Code Ann. § 25-1-37 (1972).

This issue is without merit.

IV.

Financial Considerations

The next three issues raised by GTR in this appeal (as realigned in this opinion) all appear to have the same essential foundation, and we will dispose of them together. These issues relate exclusively to

the proposition that this Court should reverse the decision of the board to lease to Baptist for the reason that a more profitable arrangement was offered by one or more of the other candidates.

This argument is so fundamentally flawed that it is difficult to even discuss. The proposition that the sole interest, or even one of the primary interests, of the county in leasing its hospital facilities was to maximize its profit is to ignore the reality of the situation. Yet GTR, in its brief, has persisted in advancing such an argument to the exclusion of even a recognition that there were other substantive issues involved that the board was compelled, both by statute and by reason, to consider. By way of example, at one point, GTR suggests that "all else being equal, there is a duty to make a decision involving the receipt of the maximum amount of funds for the public." In the context of this case, "all else" covers a very broad field. Assuming the accuracy of GTR's statement concerning the board's conditional duty to maximize its profit, we are presented with nothing in GTR's brief that would even faintly support the proposition that a comparison of GTR's proposal with that of Baptist would demonstrate that all else was, in fact, equal. Such fundamental issues as the capacity of the various candidates to fulfill the financial commitments made in their proposals or the anticipated quality of the health care each candidate would be capable of providing, vital to the board's decision process, are simply ignored by GTR. The board did not, in its decision process, enjoy the same luxury.

The statute permitting the lease of a community hospital facility in effect at the time quite clearly mandated that the board give primary consideration to matters that bore little or no relation to the profit the county could extract from the lease. The principal statutory charge to the board was that it ensure that "the leased facility continue to operate on a nonprofit basis in a manner safeguarding community health interests." Miss. Code Ann. § 41-13-15(7) (1972), *as amended by* Miss Code Ann. § 41-13-15(7) (Supp 1989). Financial considerations were confined to seeing that "proceeds from the lease [were] first applied against [the outstanding debt of the hospital]," and that any "surplus proceeds" would be limited to "being used for health related purposes." *Id.*

In the face of these statutorily compelled considerations, GTR takes, as the foundation for all of its arguments, the proposition that other proposals offered the promise of substantially more "surplus proceeds" to the county than did Baptist. This Court is firmly of the opinion that any analysis of the merits of the various proposals based solely upon such financial considerations falls woefully short of the mark. It should be fundamentally obvious that, in the matter of the operation of a community hospital, there are considerations that substantially transcend the maximization of the monetary return to the county. The sole mention in the statute of "surplus proceeds" derived from the lease was to make sure that these funds were tightly restricted in their use. This appears to this Court to be a legislative attempt, not to mandate the maximization of profit to the county, but rather to minimize the temptation for the board to fatten the county coffers by negotiating a lease with an eye toward nothing beyond the bottom-line return to the county. Admittedly, since the events of this case, there have been amendments to the statute that change somewhat the thrust of the board's responsibilities when considering a leasing arrangement; however, this has no impact upon our deliberations in this case. The board was obligated to conduct itself in accordance with the dictates of the statute as it was at the time, not as it might subsequently be amended.

We conclude that GTR, in its narrowly focussed argument, has failed to raise any issue concerning the propriety of the board's decision to lease to Baptist that is subject to any meaningful review by this Court. Any claimed grievance with the leasing decision that begins and ends with the proposition

that a more favorable financial deal existed simply ignores the complexity of the issues involved.

There is nothing particularly novel about this concept. It is not uncommon for a county to own and lease property suitable for manufacturing enterprises, and to base its selection of a tenant upon considerations other than which entity is prepared to pay the highest rent. More subjective considerations, not so easily quantifiable, such as the number of jobs reasonably to be anticipated, the prospects of the long-term success of the operation, and the capacity of the entity to meet its contractual commitments, might easily suggest the desirability to deal with a prospective lessee other than the one offering the most rent. One seeking to attack such a multifaceted decision on appeal must be prepared to raise and effectively address issues going far beyond an analysis of the anticipated net profit on the deal.

Narrow arguments relating solely to the county's profit potential appear particularly inappropriate in the context of this case. The mere fact that a potential lease candidate is willing to offer the county a significant portion of the profits it intends to extract from the operation of that community's hospital seems a poor standard upon which to decide the question, when it is recalled that those profits are, by and large, extracted from the same general population that will supposedly benefit from the attendant lightening of its tax burden. This appears nothing more than a shifting of some portion of the cost of operating the county from those citizens paying the taxes to those citizens requiring medical care.

Certainly financial considerations are relevant in making a leasing arrangement, but they are only a part of the mix. Thus, even were we to conclude that GTR has demonstrated the possibility that a better financial deal was possible, it simply does not follow that such a conclusion requires this Court to grant the requested relief. GTR has completely failed to address other competing and possibly conflicting considerations that the board was entitled, and even compelled, to consider in its decision. We do not consider it the proper function of this Court to sua sponte determine what other relevant issues properly bore on the board's decision, and then conduct an independent analysis to determine whether, had those issues been properly presented, GTR might have been entitled to relief.

This Court is not charged with determining that the board selected "the best" candidate or that it made the "right" decision. Given the complexity of the issues involved in this decision process, such a task would be impossible in any event. We would simply be substituting our judgment for that of the board, an undertaking specifically (and properly) prohibited to this Court. *In re D.K.L. v. Hall*, 652 So. 2d 184, 195 (Miss. 1995). Our limited role, based upon the issues raised by GTR, is to determine whether the board has acted arbitrarily or capriciously in making its decision. *Nelson v. Mississippi State Bd. of Veterinary Medicine*, 662 So. 2d 1058, 1062 (Miss. 1995); *Mississippi State Bd. of Nursing v. Wilson*, 624 So. 2d 485, 489 (Miss. 1993). If the decision appears based upon substantial evidence and is, at a minimum, "arguably correct," then we are without authority to disturb it. *Nelson*, 662 So. 2d at 1062; *Riddle v. Mississippi State Bd. of Pharmacy*, 592 So. 2d 37, 41 (Miss. 1991).

We cannot conclude, based upon our review of the voluminous record in this case, that the board lacked sufficient evidence upon which to base its decision. We concede that persuasive arguments can be advanced against the surrender of local control of a community-owned hospital facility that is entailed in a lease of this nature. However, equally cogent arguments can be advanced that the advantages of such an arrangement outweigh this partial loss of local control. The difficult task of

balancing these competing considerations properly lies with those local authorities elected to govern as to such matters and not with this Court. The decision of the board in this case, we conclude, was by any reasonable analysis, at least arguably correct. Thus judicial interference with the decision is unwarranted.

V.

Contractual Rights and Constitutional Claims

We reject out of hand the alternate claim that GTR had a contractual right to insist upon full and fair evaluation of its proposal, and that the board violated an implied covenant of fair dealing in its handling of the matter. There is no evidence in this record that would support a finding that GTR's proposal did not receive all the consideration that it merited. More fundamentally, the terms of the Request for Proposals clearly indicate that an entity electing to submit a proposal is not thereby acquiring any vested contractual right in the process.

In advancing this argument, GTR claims that the board "entered into an agreement" with the proposers that, "upon submission of a proposal, that same would be properly evaluated by the Board and, if a lease were executed, to lease based on the best proposal." GTR then states that "there was never any mention in the official minutes of the Board concerning efforts to evaluate each and every proposal received." There is nothing in the Request for Proposals that would suggest that the board agreed to any such proposition. Even assuming it had, there is nothing in the record that would support a contention that the Baptist proposal was not "the best" proposal within the necessarily wide discretion given to the board in making such decisions. Finally, GTR's factual assertion regarding a record of the board's efforts is factually inaccurate. The November 13 resolution of the board selecting Baptist as the principal candidate specifically states, in part, that "proposals have been received from various organizations and companies . . . and . . . said proposals have been studied and reviewed," and it was only "after careful and due consideration of all factors" that it was determined that the Baptist proposal was the one "which may best serve the needs of the citizens of Lowndes County." We find this issue, and the argument advanced in support of it, to be singularly without merit.

Similarly, we find no merit in the proposition that GTR acquired any "property right" by virtue of its submission of a proposal that was the subject of an unconstitutional confiscation by the board. The sole factual basis for this assertion is the fact that GTR and the remaining candidates were offered only five minutes to address the board on the subject of the lease in January 1993, and that this deprived them of "reasonable notice and a meaningful opportunity to be heard." GTR cites, in support of this proposition, two cases dealing with the finality of judicial proceedings directly affecting entities that were entitled to intervene in the proceeding but were unaware of its pendency due to the inadequacy of notice. *American Fidelity Fire Ins. Co. v. Athens Stove Works, Inc.*, 481 So. 2d 292, 295 (Miss. 1985); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). These cases have no application to this situation. The board's deliberations as to the lease of the hospital were not an adversary proceeding. GTR had no constitutional right, solely in its capacity as a candidate for the lease, to any notice that the board was prepared to vote on the Baptist lease or to demand any opportunity to make an oral presentation to the board on the subject. The willingness of the board to grant such an opportunity to be heard upon request does not create a right where

none previously existed.

VI.

The Board's Cross Appeal Concerning the Timeliness of GTR's Appeal

As to the board's cross appeal, we find that its claim that GTR's appeal was untimely filed was, in reality, a challenge to GTR's standing to appeal the board's ultimate decision to lease to Baptist. The board's original decision to concentrate solely on negotiations with Baptist was based upon factors, perhaps related to, but certainly not identical to, the factors controlling its decision to approve the final terms of the lease. Those final terms were unknown and unknowable in November 1992 when GTR was removed from active consideration. The fact that the November 1992 decision may have presented GTR with an appealable order from which it did not appeal does not necessarily answer the question of whether GTR could also appeal from the January 1993 decision approving the final terms of the lease to Baptist. GTR's right to appeal from the January 1993 decision, whatever right that might have been, was not necessarily affected by its failure to appeal the board's November 1992 action. The question of exactly what that right of appeal was involves an issue of first impression as to what, if any, heightened interest a disgruntled proposer has to challenge the propriety of a decision to lease to another on the basis that the rejected proposer was willing to offer a better deal. While it may appear a doubtful proposition that such a right exists, the issue has not been properly asserted or fully briefed, and, in view of the fact that the result we reach is the same, we decline to decide the case on that basis and reserve that question for another day.

**THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, PAYNE,
AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY.**