

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1160

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

COREEN CARNES,  
Petitioner,

v.

Wake County  
No. 98-CVS-6123  
98-CVS-8514

DEPARTMENT OF HUMAN RESOURCES,  
DIVISION OF FACILITY SERVICES,  
HEALTH CARE PERSONNEL,  
Respondent.

Appeal by respondent from order entered 20 March 2001 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 June 2002.

*Roberts & D'Agostino, by Melvin L. Roberts, for petitioner-appellee.*

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane L. Oliver, for respondent-appellant.*

MARTIN, Judge.

By letter dated 13 November 1996, respondent North Carolina Department of Human Resources, Division of Facility Services, Health Care Personnel Registry Section notified petitioner Coreen Carnes of its decision to investigate an allegation that petitioner had abused a resident of a health care facility and to list the allegation on the Health Care Personnel Registry pursuant to G.S. § 131E-256(a)(2). In response, petitioner filed a petition for a contested case hearing in the Office of Administrative

Hearings on 9 December 1996. On 24 April 1997, respondent moved to stay the contested case hearing until the completion of the agency investigation; at about the same time, petitioner moved to continue the contested case hearing. In her motion, petitioner stated,

In the event the agency does not substantiate the allegations, the Petitioner would want to withdraw her petition. If the agency were to substantiate the allegations, Petitioner would seek to file a new petition and move for the court to consolidate the two actions.

The administrative law judge (ALJ) issued an order staying the contested case until notification by respondent that the agency had completed its investigation. In the order, the ALJ provided:

[i]f the Respondent substantiates abuse, the Petitioner will file another Petition and move to consolidate the two cases. If the Respondent does not substantiate abuse, the Petitioner will withdraw her Petition in this contested case.

By letter dated 2 June 1997 and mailed via certified mail on 3 June 1997, respondent notified petitioner of its decision to substantiate the allegation of abuse and informed petitioner of the agency's intent to place the finding of abuse on the Health Care Personnel Registry, pursuant to G.S. § 131E-256. The letter also notified petitioner that she had a right to file a petition for a contested case hearing within thirty days of the mailing of the notice. On 30 June 1997, petitioner served a copy of a petition for a contested case hearing on respondent by mailing a copy to the agency's designated process agent and a copy to the counsel for respondent. In this petition, petitioner stated that she was contesting the agency's decision to list the substantiated finding

of abuse on the Health Care Personnel Registry. The petition for a contested case hearing was not filed with the Office of Administrative Hearings.

A letter dated 9 July 1997 was sent to petitioner informing her that respondent had, on 8 July 1997, placed a finding of abuse with the listing of her name on the Health Care Personnel Registry. On 13 October 1997, respondent filed a motion to dismiss the 9 December 1996 petition for contested case hearing on the grounds that the issues raised by the petition were moot because petitioner had not filed a petition to contest the entry of the substantiated finding of abuse. On 16 December 1997, petitioner filed with the Office of Administrative Hearings a motion for late filing, and, on 7 January 1998, she filed an amended petition for a contested case hearing and a motion to amend petition for a contested case hearing. Respondent filed a response to petitioner's motion for late filing, contending the ALJ lacked subject matter jurisdiction since petitioner failed to file her petition for a contested case hearing with the Office of Administrative Hearings within 30 days of the notice.

The ALJ granted respondent's motion to dismiss the petition for a contested case hearing on the ground that the issues raised in the petition were moot. The ALJ concluded that the petitioner did not file a petition contesting the agency's action with the Office of Administrative Hearings within the time limitation allowed by law (thirty days from the mailing of the notice of the intent to list a substantiated finding of abuse).

On 21 May 1998, petitioner filed a petition for review of the administrative final decision in Wake County Superior Court. The superior court reversed the ALJ's final decision order of dismissal and remanded the case for hearing to determine whether petitioner abused a patient. Respondent appeals.

---

I.

Respondent initially contends the trial court committed an error of law by retroactively applying a statutory amendment to G.S. § 131E-256 to the petition filed by petitioner on 9 December 1996. Respondent asserts that because of this error, the trial court's order should be reversed.

When reviewing a superior court order regarding an agency decision, this Court must review the order for error of law to determine whether the trial court employed the correct standard of review and whether it did so properly. *ACT-UP Triangle v. Comm'n for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997). The appropriate standard of review to be applied by the superior court is determined by the particular issues presented on appeal. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). If the appellant contends the agency's decision was based on an error of law, *de novo* review is the proper standard. *Id.*

Since petitioner argued on appeal that the ALJ erred in concluding that the agency did not have jurisdiction and that she was entitled to a hearing under the due process clauses in the North Carolina and United States Constitutions, the trial court was

required to apply *de novo* review. "'De novo' review requires a court to consider a question anew, as if not considered or decided by the agency." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Where *de novo* review is the proper standard of review for the initial reviewing court, it is also the standard of review to be applied upon appeal to this Court. *Id.* at 677, 443 S.E.2d at 119. Therefore, we will review the agency's final decision order of dismissal *de novo*.

In November 1996, when petitioner was notified that respondent had decided to investigate an allegation that petitioner had abused a resident of a health care facility and was going to list the allegation on the Health Care Personnel Registry, and in June 1997 when petitioner was informed that respondent had decided to substantiate the allegation of abuse and intended to place the finding of abuse on the Health Care Personnel Registry, the statute in effect, G.S. § 131E-256(d), provided the following:

Health care personnel who wish to contest a finding under subdivision (a)(1) of this section or the placement of information under subdivision (a)(2) of this section are entitled to an administrative hearing as provided by the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days of the mailing of the written notice by certified mail of the Department's intent to place information about the person in the health care personnel registry.

N.C. Gen. Stat. § 131E-256(d) [effective prior to 1 January 1999].

In the 1998 Session, the General Assembly amended G.S. § 131E-256 by changing the language in subsection (d) and by adding subsection (d1). 1998 N.C. Sess. Laws ch. 212, § 12.16E. The

statute was amended so that the provisions of the amended subsection (d) apply only to direct appeals of the agency's decision to list substantiated findings on the Health Care Personnel Registry pursuant to G.S. § 131E-256(a)(1). The provisions of the added subsection (d1) apply to appeals which are initiated upon notice of the agency's decision to list a pending allegation on the Health Care Personnel Registry pursuant to G.S. § 131E-256(a)(2). G.S. § 131E-256(d1) provides:

Health care personnel who wish to contest the placement of information under subdivision (a)(2) of this section are entitled to an administrative hearing as provided by the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case hearing shall be filed within 30 days of the mailing of the written notice of the Department's intent to place information about the person in the Health Care Personnel Registry under subdivision (a)(2) of this section. Health care personnel who have filed a petition contesting the placement of information in the health care personnel registry under subdivision (a)(2) of this section are deemed to have challenged any findings made by the Department at the conclusion of its investigation.

N.C. Gen. Stat. § 131E-256(d1) (2001). Under G.S. § 131E-256(d1), if an individual files a petition to contest the agency's decision to list an allegation pursuant to G.S. § 131E-256(a)(2), and the agency later substantiates a finding of abuse, it is unnecessary for the individual to file another petition in order to contest the listing of the substantiated finding.

In the instant case, petitioner timely filed a petition for a contested case hearing with the Office of Administrative Hearings concerning whether respondent should list petitioner as an accused

individual on the Health Care Personnel Registry. However, the record in this case reflects no filing in the Office of Administrative Hearings by petitioner, within 30 days of notice, of a second petition for a contested case hearing concerning the issue of whether respondent should list the substantiated finding that petitioner abused a patient in a health care facility. The statute, prior to its amendment, required petitioner to file this second petition; as amended, however, the filing of a second petition is no longer required.

In concluding that the agency erred in dismissing petitioner's petition for a contested case hearing, the superior court expressly concluded the 1998 amendments to G.S. § 131E-256 should be afforded retroactive application. We review *de novo* such determination to retroactively apply the 1998 amendments to G.S. § 131E-256.

Our Supreme Court has stated that "'statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention.'" *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E.2d 489, 495 (1970) (citations omitted). The amendments at issue in this case pertain to procedure rather than to substantive rights. We find it determinative that the General Assembly specified 1 January 1999 as the effective date for the 1998 amendments. Our Supreme Court has concluded that where amending legislation by its very terms expressly provides the intended effective date, there is "no room for a judicial construction otherwise." *Peeler v. State Highway Commission*, 302

N.C. 183, 187, 273 S.E.2d 705, 708 (1981). Thus, we must conclude, following precedent, that the trial court erred in retroactively applying the 1998 amendments to G.S. § 131E-256.

II.

Respondent next argues the trial court erred in finding that the Office of Administrative Hearings has continuing jurisdiction over the agency's decision to substantiate the allegation of abuse based on the petition filed by petitioner on 9 December 1996, by which petitioner contested her listing as an accused individual on the Health Care Personnel Registry. Respondent asserts that since petitioner failed to timely file a second petition for a contested case hearing to appeal the agency's decision to substantiate the allegation, the Office of Administrative Hearings lacks subject matter jurisdiction to adjudicate the decision to substantiate the allegation, as ordered by the trial court. We agree.

Subject matter jurisdiction over a contested case hearing is not conferred to the Office of Administrative Hearings unless the petitioner follows the statutory procedures for filing an administrative appeal. *Nailing v. UNC-CH*, 117 N.C. App. 318, 451 S.E.2d 351 (1994), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995); *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 428 S.E.2d 474 (1993). Further, on multiple occasions, our courts have held that an appeal from an agency decision has been properly dismissed due to a failure to file within the time period set by law. *See, e.g., Gaskill*, 109 N.C. App. 656, 428 S.E.2d 474 (held appeal from assessment of administrative penalty properly dismissed



due to the failure to file a verified petition within statutory time period); *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990) (held trial court properly affirmed ALJ's dismissal of the petition for a contested case hearing that was filed in OAH one day late); *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 712 (1989) (upheld the dismissal of a petition filed one day after statutory deadline).

In the instant case, the statutory procedure for filing a petition for a contested case hearing required petitioner to file the petition within 30 days of the mailing of the written notice of the department's intent to list the substantiated allegation of abuse on the Health Care Personnel Registry. N.C. Gen. Stat. § 131E-256 [effective prior to 1 January 1999]. Respondent mailed a letter on 3 June 1997, notifying petitioner of its decision to substantiate the allegation of abuse and informing petitioner that the agency intended to place the finding of abuse on the Health Care Personnel Registry. However, petitioner did not file a petition contesting the agency's decision to list the substantiated finding of abuse on the Health Care Personnel Registry in the Office of Administrative Hearings until 12 December 1997, well beyond the thirty day statutory period for filing. Because petitioner failed to comply with the statutory procedures for appealing the agency's decision, the trial court erred in finding that the Office of Administrative Hearings has continuing jurisdiction to hear petitioner's appeal of the agency's decision to substantiate the allegation of abuse.

III.

Respondent finally contends that the trial court erred in concluding that respondent denied petitioner her due process right to a hearing under the North Carolina and United States Constitutions. We agree.

The United States and North Carolina Constitutions "provide that no person shall be deprived of life, liberty or property without due process of law." *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), *affirmed*, 311 N.C. 397, 316 S.E.2d 870 (1984). "[D]ue process requires adequate notice and an opportunity to be heard." *Frizzelle v. Harnett County*, 106 N.C. App. 234, 239, 416 S.E.2d 421, 423, *disc. review denied*, 332 N.C. 147, 419 S.E.2d 571 (1992). Further, the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965).

In the instant case, by letter dated 2 June 1997 and mailed via certified mail on 3 June 1997, respondent informed petitioner of its intent to list its finding of abuse on the Health Care Personnel Registry. The letter notified petitioner that she had a right to file a petition for a contested case hearing within thirty days of the mailing of the notice and further informed petitioner that if she did not file a petition within the thirty day time period, she would lose her right to appeal. Therefore, we conclude that although petitioner was given ample opportunity to exercise her due process right to a hearing, she failed to exercise such right by failing to follow statutory procedures for appeal. Thus,

we hold the trial court erred in finding that the agency denied petitioner her due process right to a hearing.

The trial court's order is reversed and the petitioner's petition for a contested case hearing with regard to the agency's decision to list the substantiated finding of abuse on the Health Care Personnel Registry is dismissed.

Reversed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).