

WELBAUM, J.

{¶ 1} Plaintiff-Appellant, David Leist, appeals from a trial court judgment dismissing his administrative appeal of a decision of the Mad River Township Board of Trustees (“Board”). In support of his appeal, Leist contends that the trial court erred in finding that his notice of the administrative appeal was not filed in a timely manner.

{¶ 2} We conclude that the trial court erred in dismissing Leist’s administrative appeal, because the facts of record are insufficient to determine whether the notice of appeal was filed in a timely manner. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for further proceedings.

I. Facts and Course of Proceeding

{¶ 3} Between 2002 and May 2013, David Leist was the Chief of Emergency Services for the Mad River Township Fire Department. Prior to that time, the Fire and Emergency Medical Services (EMS) Departments were separate. The two departments were combined in 2002, and Leist was chosen from among several people who had applied for the job. All the EMS personnel in the department were part-time, and were paid on an hourly basis.

{¶ 4} Between 2002 and 2012, Leist apparently functioned as Chief without incident. However, in December 2012, the Board gave Leist a set of 17 directives that he was required to follow. Leist then filed a civil complaint in the Clark County Common Pleas Court against the Board and the individual board members in January 2013, alleging defamation. According to Leist, his relationship with the Board worsened after

the civil action was filed.

{¶ 5} Subsequently, the Board appointed Kelly Babcock, an account manager with Clemans, Nelson, & Associates, to investigate Leist's conduct. After investigating and being appointed by the Board, Babcock filed a notice of charges against Leist on April 1, 2013. Among the charges were allegations that Leist failed to comply with six directives in the December 2012 letter, by virtue of the following actions: (1) he failed to include a summary of personnel responding to "paid-on-call" runs in December 2012, January 2013, and February 2013; (2) he allowed an employee, Eric Harper, to work as "paid-part-time" despite Harper's lack of proper training and orientation; (3) he failed to provide training to employees and to include a notice of training in their personnel files; (4) he failed to take at least four or more "paid-on-call" shifts per month; (5) he disregarded a directive to require all units responding to a call to identify themselves to the dispatcher on duty; and (6) he failed to comply with requirements of the Ohio Administrative Code concerning written notification to the Board of Pharmacy of departmental personnel changes. According to the charges, this conduct constituted misfeasance, nonfeasance, and/or gross neglect of duty under R.C. 733.35.

{¶ 6} The Board held a hearing on the alleged charges on May 6, 2013, at which time, witnesses were presented and were cross-examined by Leist's counsel. Leist also testified and presented evidence. After finding Leist guilty of charges two, three, four, and six, the Board voted on May 6, 2013, to terminate Leist, immediately, and informed him orally of its decision on that date.

{¶ 7} On August 2, 2013, Leist filed a notice of administrative appeal with the Clark County Common Pleas Court. There is no indication in the record that he filed a notice of

appeal with the Board.

{¶ 8} After the Board transmitted the administrative record to the trial court, the Board filed a brief asking the court to dismiss the appeal, based on Leist's failure to timely file a notice of appeal. The Board's brief also addressed the merits of the appeal. In February 2014, Leist filed a motion asking the trial court for additional time to respond to the Board's brief, which had been filed in October 2013. The trial court granted the request for an extension and set out a briefing schedule, pursuant to which Leist was required to file his brief by June 15, 2014. The Board's reply was then due by June 30, 2014, and Leist's reply brief would be due on July 7, 2014.

{¶ 9} Leist never filed any further documents in the trial court, and on October 15, 2014, the trial court filed a decision dismissing the case. The court concluded that it lacked jurisdiction over the administrative appeal, based on Leist's failure to timely file his notice of administrative appeal. Leist now appeals from the judgment of the trial court.

II. Was the Notice of Appeal Timely?

{¶ 10} Leist's sole assignment of error states that:

The Court Erred in Finding that the Notice of Administrative Appeal
Was Not Filed in a Timely Manner.

{¶ 11} Under this assignment of error, Leist contends that his attorney's office sent an administrative notice of appeal to the Clark County Common Pleas Court and to counsel for the Board on May 13, 2013 via regular U.S. mail. Furthermore, although the attorney's paralegal checked with the court about the filing, neither the paralegal nor the attorney received any indication that the notice of appeal was not received or that there

was any problem with the filing until July 31, 2013. At that time, a second copy of the notice of appeal was sent to the court and to the Board's counsel. Based on these facts, Leist contends that the trial court should not have dismissed his appeal. Alternatively, Leist argues that he should be given relief under Civ.R 60(B).

{¶ 12} As a preliminary matter, we note that we cannot consider the alleged facts about what Leist's counsel or paralegal may have done regarding filing or service of the notice of appeal, because Leist did not raise these matters in the trial court. "We have repeatedly held that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." ' ' " *Greenlee v. Greenlee*, 2d Dist. Montgomery No. 26059, 2014-Ohio-2306, ¶ 35, quoting *Taylor v. Taylor*, 2d Dist. Miami No. 2012-CA-16, 2013-Ohio-2341, ¶ 90. (Other citation omitted.) Furthermore, although Leist refers to Civ.R. 60(B) in his brief, such motions must be filed in the trial court. Again, this was not done. As a result, the only "facts" we can consider are that the notice of appeal was filed in the trial court on August 2, 2013, and that there is no evidence that the notice of appeal was filed with the Board.

{¶ 13} As a general rule, we review decisions on subject-matter jurisdiction de novo. *LaSalle Bank Natl. Assn. v. Brown*, 2014-Ohio-3261, 17 N.E.3d 81, ¶ 29 (2d Dist.) (Citation omitted.) Regarding the trial court's jurisdiction, we note first that R.C. 505.38(A) provides for appointment of fire chiefs and fire-fighters, and indicates that they shall continue in office "until removed from office as provided by sections 733.35 to 733.39 of the Revised Code. To initiate removal proceedings, and for that purpose, the board shall designate the fire chief or a private citizen to investigate the conduct and

prepare the necessary charges in conformity with those sections.”

{¶ 14} R.C. 505.38(A) further provides that:

In case of the removal of a fire chief or any member of the fire department of a township or fire district, an appeal may be had from the decision of the board to the court of common pleas of the county in which the township or fire district fire department is situated to determine the sufficiency of the cause of removal. The appeal from the findings of the board shall be taken within ten days.

{¶ 15} R.C. 2505.07(A) provides for a longer time frame, stating that “[a]fter the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days.”

{¶ 16} In *Maschmann v. Bd. of Trustees of Concord Twp.*, 5th Dist. Delaware No. 95CAH04023, 1995 WL 829665 (Nov. 16, 1995), the Fifth District Court of Appeals considered the interplay of the two statutes, and concluded that the ten-day time limit in R.C. 505.38(A) falls within the meaning of appeal time that is “ ‘otherwise provided by law’ ” under R.C. 2505.07(A). *Id.* at *1. The court thus held that “[g]iven the clear language of R.C. 2505.07 and 505.38(A), the proper time for filing the appeal was ten days from the ‘findings of the board.’ ” *Id.* Consequently, a 10-day filing time would apply to the case before us.

{¶ 17} “It is well-settled that the filing of a notice of appeal under R.C. 2505.04 is jurisdictional and that the failure to properly perfect an appeal may not be waived.” *Roseman v. Village of Reminderville*, 14 Ohio App.3d 124, 126, 470 N.E.2d 224 (9th

Dist.1984), citing *Richards v. Indus. Comm.*, 163 Ohio St. 439, 127 N.E.2d 402 (1955). See also *Deaconess Hosp. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 11AP-259, 2012-Ohio-95, ¶ 15.

{¶ 18} Notably, the time for filing an appeal begins to run after the agency or board issues a final order or decision. In this regard, R.C. 2506.01 provides that:

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

* * *

(C) As used in this chapter, “final order, adjudication, or decision” means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

{¶ 19} Although R.C. 505.38 does not say where the notice of appeal must be filed, R.C. 2505.04 states that “[a]n appeal is perfected when a written notice of appeal is

filed, * * * in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved.”

However, the Supreme Court of Ohio recently clarified that:

An administrative appeal is considered filed and perfected for purposes of R.C. 2505.04 if the clerk of courts serves upon the administrative agency a copy of the notice of the appeal filed in the court of common pleas and the administrative agency is served within the time period prescribed by R.C. 2505.07.

Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm., 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, syllabus.

{¶ 20} In *Welsh*, the Supreme Court of Ohio went on to stress that:

We are not redefining the word “filing” in holding that an administrative appeal may be perfected when a party files a notice of appeal with the clerk of courts accompanied by a praecipe for the clerk to serve the complaint and notice of the appeal on the administrative agency. Filing does not occur until there is actual receipt by the agency within the time prescribed by R.C. 2505.07. Filing and service are still distinct terms.

Practitioners should not be confused or think that filing under R.C. 2505.04 is accomplished only if the clerk of courts serves upon the administrative agency a copy of the notice of the appeal filed in the court of common pleas. The administrative agency must still receive the appropriate complaint and notice within 30 days after entry of the final administrative order.

Welsh at ¶ 39-40.

{¶ 21} Thus, in the case before us, Leist could have perfected his appeal by filing a notice of appeal with the Board within 10 days of the Board’s written decision, or by filing a notice of appeal with the Clark County Common Pleas Clerk of Courts, if the clerk then served the Board within the ten-day limit.¹

{¶ 22} The final order referenced in R.C. 2506.01 is not confined to the minutes of an administrative body; it may also be a letter or other document from the proper authority that determines the “ ‘ rights, duties, privileges, benefits, or legal relationships of a person.’ ” *A.M.R. v. Zane Trace Local Bd. of Edn.*, 2012-Ohio-2419, 971 N.E.2d 457, ¶ 1 and 15-16 (4th Dist.). *Accord State ex rel. Nicholson v. Toledo*, 6th Dist. Lucas No. L-11-1072, 2012-Ohio-4325, ¶ 21 (noting that “[w]hat constitutes a ‘final order’ of an administrative body varies depending on the nature of the administrative body”). However, an oral vote has been held to not be a final order, adjudication, or decision of an administrative agency. *See Lupo v. Columbus*, 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792, ¶ 14.

{¶ 23} After hearing the evidence on May 6, 2013, the Board convened an executive session, pursuant to R.C. 121.22, to consider Leist’s discipline or dismissal. Notice of Filing Administrative Record, Doc. #7, Ex. 1, Transcript of Proceedings of May 6, 2013, p. 102. After being in executive session for approximately one hour, the Board returned to the meeting, orally announced its findings, and voted to terminate Leist from

¹ Courts have not yet accepted service on an administrative body’s attorney as satisfaction of the filing requirements. The Ninth District Court of Appeals has indicated that it would not foreclose the possibility, where factual circumstances suggest that such service would be appropriate. *See Highland Square Mgt., Inc. v. Akron*, 9th Dist. Summit Nos. 27211, 27372, 2015-Ohio-401, ¶ 10.

his position, effective immediately. *Id.* at pp. 103-107. The transcript does not indicate that Leist was given a copy of any written findings at the time.

{¶ 24} Ex. R of the Administrative Record also contains an undated document which appears to be a copy of minutes of the Board meeting for May 6, 2013. The record does not reveal when the meeting minutes were adopted, or whether a written decision of any sort, either per the meeting minutes or otherwise, was made. Based on the record, the trial court erred in concluding that Leist failed to perfect his appeal in a timely manner.

{¶ 25} Accordingly, for the reasons stated, Leist's sole assignment of error is sustained.

III. Conclusion

{¶ 26} Leist's sole assignment of error having been sustained, the judgment of the trial court is reversed, and this cause is remanded for further proceedings.

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FROELICH, P.J. and DONOVAN, J., concur.

Copies mailed to:

Mark J. Bamberger
Jeffrey C. Turner
Dawn M. Frick
Melanie L. Reitz
Hon. Douglas M. Rastatter