[Cite as *Biser v. Ohio Dept. of Health*, 2020-Ohio-6836.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

TIFFANY BISER,

Appellant,

v.

OHIO DEPARTMENT OF HEALTH,

Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0123

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CV 1364

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Edward Hartwig , Hartwig Law LLC, 120 Marwood Circle, Youngstown, Ohio 44512
and
Atty. Jeffrey W. Van Wagner and *Atty. Shannon R. Lear*, Bonezzi Switzer Polito & Hupp Co. L.P.A., 1300 E. 9th Street, Suite 1950, Cleveland, Ohio 44114, for Appellant

Atty. Dave Yost, Ohio Attorney General and *Atty. Rebecca L. Thomas*, Assistant Attorney General, Health and Human Services Section, 30 E Broad Street, 26th Floor, Columbus, Ohio 43215, for Appellee.

Dated: November 5, 2020

WAITE, P.J.

{¶1} Appellant Tiffany Biser appeals the decision of the Mahoning County Common Pleas Court dismissing her attempt to appeal an administrative decision by Appellee, the Ohio Department of Health. Appellant argues the court erred in determining that it lacked subject matter jurisdiction to hear her appeal. Based on the following, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant was employed as a State Tested Nurse Aide ("STNA") at Greenbriar long-term care facility in Boardman, Ohio. On May 2, 2018, Appellant was preparing a resident for a shower and was told by the charge nurse to record the resident's weight. According to the resident's medical chart, he weighed approximately 420 pounds and was a paraplegic, requiring two people and a Hoyer Lift whenever he was to be lifted and transferred. A Hoyer Lift is a specialized medical device used to assist in lifting and transferring certain patients. It is undisputed that Appellant opted to transfer the resident on to the Hoyer Lift herself and that the resident fell and sustained a spinal fracture.

{¶3} An allegation of neglect of a long-term care facility resident was filed against Appellant with the Ohio Department of Health (ODH), the agency responsible for overseeing allegations of neglect filed against STNAs. On November 28, 2018, pursuant

to R.C. 3721.23, Appellant was sent written notification of the allegation of neglect. She was also notified that she had the option to request a hearing on the matter. Appellant exercised that option and a hearing was conducted on May 1, 2019, by a hearing officer appointed by ODH. Appellant was present and was represented by counsel. Counsel for ODH was also present. Testimony and evidence were taken at the hearing but have not been made a part of this record on appeal. On May 24, 2019, the hearing officer issued a report and recommendation, concluding that Appellant's conduct did not rise to the level of recklessness required to find she neglected the resident and recommending that the ODH Director not make a finding of neglect against Appellant.

{¶4} Pursuant to Ohio Adm.Code 3701-64-04(J), Appellee filed objections to the hearing officer's report on May 31, 2019. In the objections, Appellee stated that the resident weighed over 400 pounds and was a paraplegic; that Appellant knew the lift was not in the optimal position to properly lift the resident; and that Appellant testified that she had attempted to lift the resident herself despite the fact that she was required to read his chart prior to her attempt to lift him. Appellant did not file a response to the objections. On June 17, 2019, ODH Director Amy Acton rejected the hearing officer's recommendation and issued a journal entry that contained a finding of neglect against Appellant. Pursuant to R.C. 3721.21(D), in order to find neglect it is necessary to find that the individual's conduct was reckless and caused serious physical harm to the patient or resident.

{¶5} On July 2, 2019, Appellant filed a Notice of Administrative Appeal with the Mahoning County Court of Common Pleas, citing R.C. 2505 as the basis of the appeal. On July 25, 2019, Appellee filed a motion to dismiss and to stay the briefing schedule and

transmission of record, asserting that the trial court lacked subject matter jurisdiction as there was no statutory right of appeal of this matter to a common pleas court. On August 1, 2019, Appellant filed a motion for sanctions and a brief in opposition to the motion to dismiss and to stay. Appellee filed a reply brief on August 5, 2019. On October 9, 2019, the trial court granted Appellee's motion to dismiss, concluding that the court lacked subject matter jurisdiction to hear the appeal. The trial court concluded that Chapter 3721 of the Revised Code does not explicitly provide a right to appeal the determination of the ODH Director, stating:

> Further, the Revised Code Sections that address abuse or neglect of residents at a long-term care facility—Sections 3721.21 – 3721.26—are devoid of any reference to a right to appeal. Notably, other Sections within Chapter 3721 do explicitly provide for a right to appeal. This suggests that if the Legislature had intended for a right to appellate review from decisions involving a finding of abuse or neglect of residents at a long-term care facility, it would have expressly provided for it. Moreover, Section 3721.23(C)(2) allows for an aggrieved party to file a statement disputing the director's findings and explaining the circumstances of the allegation. It appears to this Court that the Legislator [sic] provided this partial remedy in lieu of a right to appeal a finding pursuant to Chapter 3721.21 *et seq.*

(10/9/19 J.E.)

{¶6} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S ADMINISTRATIVE APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.

{¶7} Appellant raises three arguments in support of her contention that the trial court had jurisdiction to review an appeal of this matter. First, she contends that there is an implicit right to judicial review embedded within R.C. 3721 et seq. Second, due process and equal protection clauses in the Ohio Constitution provide a basis for her judicial review. Lastly, she argues that the trial court's interpretation of R.C. 2505.03 and R.C. 3721 et seq. is otherwise unconstitutional.

{¶8} Jurisdiction refers to a court's " 'statutory or constitutional power to adjudicate the case.' " *Pratts v. Hurley,* 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11, quoting *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Courts of common pleas in Ohio have only "such powers of review of proceedings of administrative officers and agencies as may be provided by law." Ohio Constitution, Article IV, Section 4; *see also Midwest Fireworks Mfg. Co., v. Deerfield Twp. Bd. of Zoning Appeals,* 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001). Thus, courts of common pleas lack jurisdiction to review administrative decisions unless R.C. 119.12 or some other statutory authority exists to grant jurisdiction. *Midwest* at 177. "In the absence of constitutional or statutory authority, the aggrieved party may not seek appellate review of the order of an administrative determination as the right to appeal is neither inherent nor inalienable." *Willoughby Hills v. C.C. Bar's Sahara, Inc.,* 64 Ohio St.3d 24, 26, 591 N.E.2d 1203 (1992).

{¶9} The issue of subject matter jurisdiction can be raised at any time, and if it appears the court lacks jurisdiction over the subject matter the court must dismiss the action. Civ.R. 12(H)(3). Whether the court of common pleas has subject matter jurisdiction is a question of law, reviewed *de novo* by a court of appeals. *Courtyard Lounge v. Bur. of Environmental Health,* 190 Ohio App.3d 25, 2010-Ohio-4442, 940 N.E.2d 626, ¶ 5 (10th Dist.).

{¶10} R.C. Chapter 119, or the Ohio Administrative Procedures Act, contains a provision which sets forth procedures for filing a notice of appeal from various state administrative agencies to courts of law. R.C. 119.12 provides, "any party adversely affected by any order of an agency issued pursuant to an adjudication" may appeal to a court of common pleas. However, not every state entity is an agency for purposes of R.C. 119.12. R.C. 119.01(A) defines "agency" and provides in pertinent part:

> (A)(1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

{¶11} The ODH is not specifically listed under the definition of "agency." Further, the definition requires that in order to be an "agency" for purposes of R.C. 119, the entity must specifically be "made subject to sections 119.01 to 119.13" in order for the judicial review of R.C. 119 to apply. In the instant matter, R.C. 3721.26, governing rulemaking powers of the ODH director of health regarding long-term care facilities provides:

> The director of health shall adopt rules pursuant to Chapter 119 of the Revised Code to implement sections 3721.21 to 3721.25 of the Revised Code, including rules prescribing requirements for the notice and hearing required under section 3721.23 of the Revised Code. The notice and hearing required under section 3721.23 of the Revised Code are not subject to Chapter 119 of the Revised Code; however, the rules may provide for the notice to be provided and the hearing to be conducted in accordance with that chapter. Rules adopted under this section shall be no less stringent than the requirements, guidelines, and procedures established by the United States secretary of health and human services under sections 1819 and 1919 of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended.

{¶12} While R.C. 3721.26 specifically provides that the ODH may look to R.C. 119.12 for guidance in hearing and notice requirements, most importantly in this matter, it is not subject to R.C. 119.12. The legislature explicitly precluded the hearing at issue from being subject to R.C. 119 judicial review.

{¶13} Appellant does not address R.C. 119, perhaps because it is clear it would prevent the review she seeks. Instead, Appellant concedes that the statute in question contains no explicit right to judicial review of the ODH Director's decision, but argues that the Ohio legislature created an implicit right to judicial review of her administrative appeal when it included provisions for notice and opportunity for a hearing in the statutory framework. R.C. 3721.23 governs the hearing and notice requirements for a finding of negligence by a STNA. It reads, in pertinent part:

> (A) The director of health shall receive, review, and investigate allegations of abuse, neglect, or exploitation of a resident or misappropriation of the property of a resident by any individual used by a long-term care facility or residential care facility to provide services to residents.
>
> (B) The director shall make findings regarding alleged abuse, neglect, exploitation, or misappropriation of property after doing both of the following:
>
> (1) Investigating the allegation and determining that there is a reasonable basis for it;
>
> (2) Giving notice to the individual named in the allegation and affording the individual a reasonable opportunity for a hearing.

{¶14} The notice and hearing provisions were undisputedly followed in Appellant's matter. She received written notification of the allegation of neglect and given the opportunity to request a hearing. That hearing was held, and Appellant was represented

by counsel and had the opportunity to present evidence and cross-examine witnesses. After the hearing officer issued Appellant a favorable recommendation, the matter proceeded to review by the Director based on the objections filed by ODH. Following review, the Director concluded that a reasonable basis for a finding of neglect existed, overturning the recommendation of the hearing officer. This matter has proceeded exactly as described by the statutory framework. Appellant urges that the matter should not conclude at this point and, instead, she has the implicit ability to seek judicial review.

{¶15} Appellant bases her argument on the provisions of R.C. 2505. She cites R.C. 2505.03(A), which states, in pertinent part:

> (A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

{¶16} According to Appellant, because the legislature provided her an opportunity for notice and hearing under R.C. 3721.23, it recognized a fundamental due process right exits, which satisfies the "provided by law" language in R.C. 2505.03(A). This creates an implicit right to judicial review of her administrative appeal. In further support of her theory, Appellant relies on *Smith v. Goodwill Indus. of the Miami Valley, Inc.,* 130 Ohio App.3d 437, 447, 720 N.E.2d 203 (2d Dist.1998). In *Smith,* Goodwill Industries appealed a decision of the Dayton Human Resources Council finding that Goodwill had discriminated against its employee Smith on the basis of race, in violation of a Dayton city

ordinance. The trial court affirmed the decision of the Dayton Human Resources Council. Goodwill appealed to the Second District Court of Appeals which affirmed the lower court's decision. On behalf of the Human Resources Council, the City of Dayton argued on appeal that the ordinance provided for judicial review. The ordinance language was not included in the *Smith* opinion. It can be gleaned, however, that city ordinance at issue explicitly provided for judicial review of the Dayton Human Resources Council's decision pursuant to R.C. Chapter 2506. R.C. 2506 provides, in part:

> (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.

R.C. 2506.01(A).

{¶17} Thus, in *Smith,* the ordinance enacted by the political subdivision of the state (the City of Dayton) explicitly allowed for a judicial administrative appeal of a decision made by its administrative agency. Appellant attempts to argue that language in the *Smith* holding supports her argument that she is entitled to judicial review of her administrative decision: "[d]ue process of law guarantees that all persons are entitled to a judicial inquiry into any controversy affecting the rights of persons or property." *Smith*

at 447, citing *Stanton v. Tax Commr.,* 114 Ohio St. 658, 671-672, 151 N.E. 760 (1926). Appellant argues that *Smith* and *Stanton* read together support her implicit judicial review theory. Because Appellee's decision affected her right to employment at a long-term care facility as a STNA, she claims that decision implicated a property right, which guarantees her "right" to judicial review as in *Smith*.

{¶18} *Smith* is inapplicable in the instant matter for several reasons. First, the city ordinance in *Smith* explicitly provided for judicial review within the language of the ordinance. As noted above, the statute here not only precludes judicial review because of the operation of R.C. 119, the statute at issue does not expressly provide for any judicial review. Further, R.C. 2506.01(A), on its face, applies only to political subdivisions of the state, such as municipalities. Appellee in this matter is not a political subdivision of the state.

{¶19} The judicial review provided for in *Smith* stemmed from R.C. 2506, rather than R.C. 2505, which Appellant cites as her basis for judicial review here. R.C. 2506 applies to judicial review of a decision of an agency of a political subdivision, not a state agency. Notwithstanding the express judicial review provided by the ordinance in *Smith*, Appellant fails to demonstrate how *Smith* pertains to judicial review under R.C. 2505, the statute on which she relies in her attempt to seek judicial review.

{¶20} In addition, although Appellant relies on the language in *Smith* and *Stanton* which seem to address a "right" to a "judicial inquiry into any controversy affecting the rights of persons or property," the Ohio Supreme Court has recently taken a more limiting approach, reaffirming that judicial review of an administrative decision is only permissible where expressly provided within the statute at issue. *Midwest* at 177. Although *Smith*

does have language that indicates judicial review is guaranteed when a property or liberty interest is implicated, the Ohio Supreme Court has more recently held such a right absolutely must be conferred by a statute. *Id.*

{¶21} Appellant also argues that denying judicial review of the administrative decision here would deny her due process of law. Appellant asserts that her loss of employment constitutes a loss of a protected liberty interest which demands a judicial review to protect her due process and equal protection rights. Appellant also contends the administrative decision at issue resulted from a quasi-judicial proceeding which requires judicial review. *Smith* at 447.

{¶22} In response, Appellee argues that Appellant has not lost a protected liberty interest because Ohio does not recognize STNA status through any licensure procedure. Instead, it is merely a skill-based designation. Appellant is still a STNA, and the finding of neglect only prevents employment at a long-term care facility. She is still permitted to seek employment as a STNA in other facilities, such as a doctor's office and hospital emergency room. Finally, the state asserts that since Appellant is able to petition the Director of ODH in one year to request that her neglect designation be removed from the State Nurse Aide Registry, a statutory remedy is provided to her and therefore her liberty interests are not implicated.

{¶23} Decisions of administrative agencies always are subject to review because to provide otherwise would deny the litigant due process of law. *Carney v. School Emp. Retirement Sys. Bd.,* 39 Ohio App.3d 71, 72, 528 N.E.2d 1322 (10th Dist.1987). However, this constitutional mandate for due process does not automatically generate a right to an appeal to a court of common pleas. Section 4(B), Article IV, Ohio Constitution governs

judicial review of administrative decisions: "[t]he courts of common pleas * * * shall have * * * such powers of review of proceedings of administrative officers and agencies as may be provided by law". Thus, absent any statutory authority permitting review by the court of common pleas, no right to appeal exists. *Abt v. Ohio Expositions Comm.,* 110 Ohio App.3d 696, 701, 675 N.E.2d 43 (10th Dist.1996).

{¶24} Due process rights guaranteed by the United States and Ohio Constitutions apply in administrative proceedings. *LTV Steel Co. v. Indus. Comm.* 140 Ohio App.3d 680, 688, 748 N.E.2d 1176 (10th Dist.2000). "However, due process is a flexible concept and calls for such procedural safeguards as the particular situation demands." *Id.* at 688-689. The fundamental concepts of procedural due process are notice and an opportunity for a hearing. *Korn v. Ohio State Med. Bd.,* 61 Ohio App.3d 677, 684, 573 N.E.2d 1100 (10th Dist.1998). The test for analyzing due process in administrative hearings involves weighing three factors: (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest and the probable value of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *LTV Steel* at 689, citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33-34 (1976).

{¶25} A review of this record reveals that after the allegation of neglect against Appellant was made, ODH issued a notice to Appellant pursuant to R.C. 3721.23 and Ohio Adm.Code Chapter 3701-64. A copy of the notice has not been made part of the record, but Appellant concedes she received notice and requested a hearing. It is undisputed that a full hearing before a hearing officer took place at which Appellant was represented by counsel, had the opportunity to testify, to cross-examine witnesses, and

to present evidence on her own behalf. Ohio Adm.Code 3701-64-04. A transcript of the hearing has not been made part of the record but, again, Appellant raises no error regarding her hearing. After Appellee filed objections to the hearing officer's recommendation, the matter was appealed to the Director of ODH who, after review, issued a finding of neglect. Once the neglect finding was entered in the State Nurse Aide Registry, Appellant was permitted to submit a statement disputing the Director's findings and explaining her circumstances regarding the allegation of neglect. This statement would also be entered in the registry along with the Director's findings. Ohio Adm.Code 3701-64-05. Appellant concedes she never drafted such a statement.

{¶26} Reviewing the requirements and regulations promulgated by the ODH for notice and hearing, the record shows Appellant's constitutional rights were adequately protected. Appellant was not subject to the loss of some licensure, as a STNA is a skill-based designation and does not require a license. The ODH notice was not defective and Appellant was given the opportunity to attend a hearing where she was represented by counsel and presented evidence. Appellant was also provided the opportunity to reply to Appellee's objections to the hearing officer's recommendations but waived this opportunity. She was given the opportunity to place an explanatory statement on the record and to apply for other STNA jobs. She is permitted to petition for removal of the neglect designation on the State Nurse Aide Registry within one year. Appellant's unsubstantiated statements that failure to provide a further, judicial, review renders the statute unconstitutional as it allows Appellee to conceal its records are not borne out in this record. Based on the above, it is apparent that the administrative process set forth

by ODH contains the appropriate procedural safeguards to Appellant's constitutional rights.

{¶27} Appellant's assignment of error is without merit and is overruled.

{¶28} Based on the foregoing, no statutory authority exists to grant the court of common pleas jurisdiction to hear Appellant's request for a further appeal in this matter. In the absence of express statutory authority for such an appeal, none exists. There is no implicit right to judicial review of Appellant's administrative determination. Finally, a review of the record indicates that the notice and hearing provisions provided for within the statutory framework were adhered to in this matter, and none of her constitutional rights were adversely affected. The judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.