

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Devereux Foundation,	:
Petitioner	:
	:
v.	: No. 1865 C.D. 2009
	: Submitted: April 23, 2010
Department of Public Welfare,	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
          HONORABLE ROBERT SIMPSON, Judge  
          HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: May 21, 2010

The Devereux Foundation (Foundation) appeals from an order of the Department of Public Welfare (Department) affirming the decision of the Bureau of Hearings and Appeals (Bureau) dismissing its administrative appeal as abandoned because it failed to appear at a hearing it rescheduled. For the reasons that follow, we affirm the Department’s decision.

The Foundation is primarily a provider of mental health/mental retardation services to poor and underprivileged individuals in various communities in Pennsylvania. On January 9, 2002, it received two final recommended settlements of its private ICF/MR programs for the fiscal year ending June 30, 1997, as issued by the Bureau of Financial Operations. The letter

indicated that it could appeal the recommended settlement within 30 days of the letter to the Bureau.

The Foundation filed a timely appeal from each recommendation, and the Bureau scheduled a hearing on January 12, 2009, at which time both appeals would be heard. On January 8, 2009, the Foundation, through its counsel, requested a continuance of that hearing. The Bureau granted its request and issued an order rescheduling the hearing for March 23, 2009. The Bureau sent a hearing notice to counsel's address of record which was not returned as undelivered. The Foundation did not contact the Bureau to request that the hearing be continued or notify the Bureau about any problems in attending the newly scheduled hearing.

Neither the Foundation nor its counsel appeared at the March 23, 2009 hearing. Counsel for DPW, who did appear at the hearing with its witness, requested that the Administrative Law Judge (ALJ) dismiss the consolidated appeals due to the Foundation's failure to appear and to meet its burden of proof necessary to prevail on the underlying appeals.

On April 22, 2009, almost 30 days after the rescheduled hearing date, the ALJ received a document from the Foundation titled "Answer to Hearing Issues Without Brief" in which the Foundation's counsel admitted that he did not notify the Bureau that he would not attend the March 23, 2009 hearing. He stated that he and a witness had medical emergencies and another witness had died. Counsel admitted, "With these problems, **there was no reason not to have timely requested a continuance prior to date of hearing.**" (Emphasis added.) He

requested that the appeals not be dismissed but be heard at another rescheduled hearing. The ALJ issued a decision on May 11, 2009, recommending that the appeals be dismissed. He noted his receipt of the retroactive request but refused to grant the rescheduling request due to the late date it was submitted. By order also dated May 11, 2009, the Bureau adopted the ALJ's recommendation and dismissed the Foundation's appeals as abandoned.

The Foundation filed an application for reconsideration of the Bureau's order with the Secretary of the Department, which was granted. By order dated August 25, 2009, the Secretary accepted the Bureau's reasoning and upheld the order dismissing the Foundation's administrative appeals and denied its request for reconsideration. This appeal followed.

The Foundation now argues that the Bureau should have allowed a continuance for another hearing because the ALJ did not address the truthfulness of the Foundation's counsel's allegations of sickness and the death of a witness when it determined that it would not grant his request to reschedule the March 23, 2009 hearing due to the lateness of his request on April 22, 2009. The Foundation argues that the ALJ should have addressed the truthfulness of its counsel's allegations because they went directly to the issue of whether the lateness of his request to reschedule should have been excused under the standards for *nunc pro tunc* relief.

While the Foundation contends that we should look to the reasons that its counsel could not attend the hearing, its counsel admitted in its "Answer to

Hearing Issues Without Brief” that despite his illness and the other problems that arose, “*there was no reason not to have timely requested a continuance prior to date of hearing.*” Consequently, even the Foundation’s counsel realized that whatever reasons he had given for not attending the hearing were not so grave that he could not have called to alert the Bureau that he would not be attending the scheduled hearing. Based on this admission, the ALJ, who has discretion to grant or deny a continuance, *Lee v. Department of Public Welfare*, 523 A.2d 1188 (Pa. Cmwlth. 1987), had more than sufficient reason to deny the requested continuance.

Moreover, what the Foundation fails to realize is that when it requested reconsideration of the Bureau’s order, the Secretary had the discretion to deny its request for reconsideration, and it has not alleged on appeal that the Secretary abused her discretion by doing so. This Court has held that the Secretary’s decision to deny a request for reconsideration must be affirmed unless the Secretary abused her discretion in making that decision. *Keith v. Department of Public Welfare*, 551 A.2d 333 (Pa. Cmwlth. 1988). In the absence of fraud, bad faith, capricious action or abuse of power, there is no abuse of discretion. *Id.*

The facts in this case do not support a finding of fraud, bad faith, capricious action or abuse of power. Instead, they show that the Foundation’s counsel requested to reschedule a hearing, did not attend that rescheduled hearing, and did not contact the ALJ until one month after the hearing and then only giving personal reasons for not attending the hearing.

Although counsel argues that *nunc pro tunc* relief is warranted, *nunc pro tunc* relief is only granted when the appellant can demonstrate that the delay in **filing an appeal** was due to fraud or a breakdown in the operations of the court or administrative agency or that the delay was the result of non-negligent circumstances involving the appellant or its counsel. *Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156 (2001). Here, the issue was the Foundation's counsel's lack of attendance at a hearing. Counsel did not inform the Bureau that he was unable to attend the scheduled hearing on the designated date and did not inform the Bureau of that problem until one month after the fact. Clearly, *nunc pro tunc* relief is not appropriate because the filing of an appeal was not an issue.

Accordingly, the Secretary's order denying the Foundation's appeal is affirmed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 21<sup>st</sup> day of May, the order of the Secretary of the Department of Public Welfare, dated August 25, 2009, denying the motion for reconsideration filed by the Devereux Foundation, is affirmed.

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DAN PELLEGRINI, JUDGE