

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Thomas, :
 :
 Petitioner :
 :
 v. : No. 2144 CD 2009
 : Argued: June 24, 2010
 Municipal Police Officers' :
 Education and Training Commission, :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: October 6, 2010

Petitioner Douglas Thomas (Thomas) filed a Petition for Review (Petition) with this Court on November 4, 2009. In his Petition, Thomas challenges two actions by Respondent Municipal Police Officers' Education and Training Commission (Commission): (1) a July 7, 2009 letter, barring Thomas "from all future attendance at Commission training programs" (Determination); and (2) the Commission's refusal to grant Thomas's request for a hearing on its decision. In his Petition, Thomas seeks the following relief:

WHEREFORE, the Petitioner respectfully requests that this Court enter an order requiring the Commission to either reverse its July 7, 2009 decision or grant Petitioner a hearing regarding the Commission's determination of July 7, 2009, and any other relief the Court deems necessary and proper.

As best we can glean from the parties' filings with the Court, the following facts appear to be undisputed. At the time the Commission issued the Determination, Thomas worked for Mansfield University as a campus police officer. The Determination provides, in pertinent part:

In March of 2009, staff members of the [Commission] began an investigation into an alleged cheating incident at the Mansfield University Police Academy. Our investigation indicates that you are one of the individuals involved in cheating on an in-service course examination.

Evidence in this case indicates that you obtained possession of the answers to the 2009 [Commission] in-service course examinations. Evidence also indicates that you provided these answers to another individual. You also admitted that while taking Commission tests in previous years you had received answers to questions from other participants, and probably provided answers to other participants.

The Commission has therefore decided to bar you from all future attendance at Commission training programs.

Since you are not currently certified as a municipal police officer and are not subject to the certification regulations of the Commission, you do not have a right to a hearing under 37 Pa. Code §203.101 et seq. of the Commission's Rules and Regulations.

(Reproduced Record (R.R.) 1a.) Effective July 8, 2009, Mansfield University suspended Thomas without pay based on Thomas's "alleged inappropriate behavior, poor judgment exercised, and actions involving the [Commission] certification and testing." (R.R. 2a.) Though the parties appear to dispute whether

and to what extent Thomas was required to attend the Commission's training programs, Thomas claims that attendance at these programs was a condition of his continued employment with Mansfield University.

Through counsel, by letter dated July 20, 2009, Thomas made a written request that the Commission hold a hearing on its decision to bar him from attending Commission courses. (R.R. 3a-4a.) Thomas expressly invoked the Commission's regulations, specifically Section 203.102, which provides:

(a) The Commission will forward in writing by certified mail, return receipt requested, the individual or school adversely affected by an action of the Commission, a notice specifying the reasons for the Commission action.

(b) An individual or school given notice of an adverse action by Commission staff may file a written request for a hearing within 15 days after receipt of the notice. The date of receipt of the request by the Commission and not the date of deposit in the mail is determinative of a timely request for a hearing.

37 Pa. Code § 203.102. It is undisputed that the Commission has not conducted the requested hearing on the Determination. Indeed, it appears from the record that the Commission has not responded at all to Thomas's hearing request.

Presently before the Court for disposition is the Commission's Application to Dismiss for Lack of Jurisdiction (Application). In the Application, the Commission argues that the Determination is not an adjudication and, as a

consequence, this Court lacks appellate jurisdiction to review Thomas’s challenge to the Determination. 2 Pa. C.S. § 702; *see Philadelphia County Med. Soc’y v. Kaiser*, 699 A.2d 800, 806 (Pa. Cmwlth. 1997) (*Kaiser*) (“If the agency action is not an ‘adjudication’, then it is not subject to judicial review by way of appeal.”). The Commission also claims that, even if the Determination is an adjudication, Thomas is not aggrieved and thus cannot appeal the Determination to this Court. 2 Pa. C.S. § 702 (authorizing “[a]ny person aggrieved” by and with direct interest in agency adjudication to appeal adjudication to this Court).

We agree with the Commission that the Determination is not an adjudication. Section 101 of the Administrative Agency Law defines “adjudication” as follows:

Any *final* order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

2 Pa. C.S. § 101 (emphasis added). As we explained in *Kaiser*, “[b]ecause, by definition, an agency action only results in an adjudication when there is a final order, only when those administrative appeals have been exhausted will the agency action become an adjudication subject to judicial review.” *Kaiser*, 699 A.2d at 806.

The Determination is not a “final” order and thus not an adjudication because Thomas has a right to a post-determination hearing under Section 203.102 of the Board’s regulations, which means that the Determination did not dispose of all the claims and of all the parties.¹ Pennsylvania Rule of Appellate Procedure 341(b) defines a final order as one that disposes “of all claims and of all parties.” The Commission claims that this administrative remedy of a post-determination hearing is only available to those individuals currently certified as a municipal police officer or subject to the Commission’s regulations. We see no such limiting language in Section 203.102. The right to a post-determination administrative hearing extends to “[a]n individual or school given notice of an adverse action by Commission staff.” 37 Pa. Code § 203.102(b). We view the Commission’s decision to bar Thomas from future attendance at the Commission’s training sessions based on a conclusion that Thomas cheated to be an “adverse action.”

It is also clear from the record that Thomas timely requested a hearing under the Board’s regulation. (R.R. 4a.) Accordingly, he availed himself of his post-determination administrative remedy, which further supports this Court’s

¹ Because we conclude that the Determination is not “final” and, therefore, is not an adjudication, we need not resolve at this time whether the Commission’s decision to bar Thomas from attending future training courses affects his “personal or property rights, privileges, immunities, duties, liabilities or obligations.” *See* 2 Pa. Code § 101 (definition of “adjudication”). The Commission, however, may renew this argument should Thomas seek appellate review of a final Commission order in this matter.

conclusion that the Determination is not “final” and is, therefore, not an “adjudication.” *See Kaiser*, 699 A.2d at 806 (noting that agency action becomes final and unappealable if adversely affected party fails to request hearing).

For these reasons, we will grant the Commission’s Application and dismiss Thomas’s appeal of the Determination.² Because we are granting the Commission’s Application, we do not reach the merits of Thomas’s appeal from the Determination.

The Commission’s Application, however, does not convince us that we should dismiss the entirety of Thomas’s Petition for Review. Left unresolved is Thomas’s claim that, notwithstanding his timely written request for a post-determination hearing on July 20, 2009, under the Commission’s own regulations, the Commission has failed and refused to respond to the hearing request.³ As noted above, while Thomas asks this Court to reverse the

² Even if we were to find that the Determination is an adjudication immediately appealable to this Court, we would nonetheless be compelled to quash the appeal as untimely. “The timeliness of an appeal is jurisdictional, and the issue of timeliness may be raised, even sua sponte, at any stage of the proceedings. *An untimely appeal must be quashed absent a showing of fraud or breakdown in the court’s operation.*” *Thorn v. Newman*, 538 A.2d 105, 107 (Pa. Cmwlth. 1988) (emphasis added). Here, the Determination is dated July 7, 2009. Petitioner filed his Petition for Review with this Court on November 4, 2009, well beyond the thirty (30) day period allotted to file an appeal from an administrative agency adjudication with this Court. *See Pa. R.A.P. 1512(a)(1)*.

³ We note that though the Determination included language to the effect that the Commission did not believe Thomas was entitled to a hearing, pursuant to the Commission’s regulations a request for a hearing must be made *after* receipt of the notice of adverse action. **(Footnote continued on next page...)**

Determination, he also seeks, in the alternative, an order compelling the Commission to hold a hearing. We view this as a request for mandamus relief. *See Banks v. Dep't of Corrs.*, 759 A.2d 432, 433 (Pa. Cmwlth.), *aff'd*, 563 Pa. 345, 761 A.2d 540 (2000) (holding that mandamus “will lie against an agency when it does not comply with the procedural requirements of its own regulations”); *State College Manor Ltd. v. Dep't of Pub. Welfare*, 498 A.2d 996, 998 (Pa. Cmwlth. 1985) (“It is well-established that duly authorized and promulgated regulations of an administrative agency have the force of law and are binding on the agency.”).⁴

Mandamus, however, is a remedy available in this Court’s original, rather than appellate, jurisdiction. Accordingly, pursuant to Section 708(b) of the Judicial Code, 42 Pa. C.S. § 708(b), we will transfer this matter to our original jurisdiction. We will also direct Thomas to file an amended petition for review

(continued...)

37 Pa. Code § 203.102(b). Because the Determination preceded Thomas’s timely request for a hearing under the Commission’s regulations, the Determination cannot be viewed as a denial of the subsequent hearing request.

⁴ The Pennsylvania Supreme Court has held that “an action to compel an administrative agency *which has finally denied a request for hearing* to hold one is, as a matter of statutory interpretation, addressed to the appellate jurisdiction of Commonwealth Court.” *O’Brien v. Commonwealth, State Emps. Ret. Sys.*, 503 Pa. 414, 420, 469 A.2d 1008, 1011 (1984) (emphasis added). Where, as here, however, the agency “refuses to act on a request for hearing,” the Supreme Court expressly recognized this Court’s authority to proceed in our original jurisdiction. *Id.* at 421 n.8, 469 A.2d at 1011 n.8.

directed to this Court's original jurisdiction and asserting only his request for mandamus relief as outlined above.

P. KEVIN BROBSON, Judge

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ORDER

AND NOW, this 6th day of October, 2010, Respondent's Application to Dismiss for Lack of Jurisdiction is GRANTED IN PART. The appeal from Respondent's July 7, 2009 letter determination is DISMISSED. The Chief Clerk is directed to file this matter in our original jurisdiction. Petitioner shall file an amended petition for review directed to this Court's original jurisdiction and asserting only his request for mandamus relief within thirty (30) days of the date of this order.

P. KEVIN BROBSON, Judge

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 HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION

BY JUDGE McCULLOUGH

FILED: October 6, 2010

Respectfully, I dissent.

By letter dated July 7, 2009, the Municipal Police Officers' Education and Training Commission (Commission) notified Douglas Thomas (Thomas) as follows:

The Commission has therefore decided to bar you from all future attendance at [the Mansfield University Police Academy] training programs.

Since you are not currently certified as a municipal police officer and are not subject to the certification regulations of the Commission, you do not have the right to a hearing under 37 Pa. Code §203.101 et seq. of the Commission's Rules and Regulations.

(R.R. at 1a.) On July 20, 2009, Thomas submitted a written request for a hearing to the Commission, citing 37 Pa. Code §203.102(b), which states that “an

individual [who is] given notice of an adverse action by Commission staff may file a written request for a hearing within 15 days.” He repeated his request in letters dated September 2, 2009, and October 2, 2009, asserting in the former that “the [Commission’s] position that Mr. Thomas is not entitled to a hearing because he is not subject to the certification regulations of the [Commission] is not supported by Pennsylvania law.” (R.R. at 6a.) The Commission did not respond to Thomas’ requests.

On November 4, 2009, Thomas filed a Petition for Review (Petition), asserting that the Commission’s decision barring him from the training program, in conjunction with its refusal to respond to his request for a hearing, is a final order that disposes of his claims and is therefore appealable to this Court. (Petition, ¶¶ 1, 16, 26.) Thomas further asserts in the Petition that his continued employment as a campus police officer was contingent upon his completion of the Commission’s training program and that he was terminated from his employment as a result of the Commission’s decision. (Petition, ¶¶ 17-25.) Thomas also contends that the Commission’s failure to respond to his written request for a hearing “was a violation of 37 Pa. Code §203.101 et seq. to which [he] had a Property interest.” (Petition, ¶ 29.)

Thomas maintains that the Commission’s decision to bar him from its training program, without a hearing, should be reversed, because the net effect was to deny him his constitutional right to his employment. In its responsive brief and in its subsequently filed application to dismiss, the Commission asserts a lack of jurisdiction *on the grounds that Thomas has no property interest in continued participation in the training program.* Therefore, according to the Commission, its

decision barring Thomas from the program is not an adjudication, and Thomas has no due process right to a hearing.

Both Thomas and the Commission refer to the July 7, 2009, letter as a final decision barring Thomas from participating in the training program and denying him a hearing as provided under 37 Pa. Code §203.102, and the record supports this characterization. Rather than address the issue raised by the parties – Thomas arguing that the Commission’s decision violated his right to continued employment, and the Commission arguing that he has no property right affected by its decision - the Majority concludes that the Commission did not finally decide whether Thomas was barred from the training program or is entitled to a hearing because Thomas has not been afforded a hearing. I believe that the Majority’s analysis misdeems the concepts of finality and validity.

In Merrell v. Chartiers Valley School District, 579 Pa. 97, 855 A.2d 713 (2004), our Supreme Court held that a school district’s letter informing a job applicant that he would not be hired did not constitute an appealable “adjudication” as defined by section 101 of Administrative Law and Procedure, 2 Pa. C.S. §101. Relying on its decision in Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981), the court in Merrell explained that the determination of whether an agency’s letter constitutes an appealable adjudication involves a three-step process: 1) first, a determination as to whether actual property rights are implicated; 2) next, an assessment as to whether the letter constitutes final agency action. “If the letter has satisfied the first two steps, it is an adjudication, but it is not a valid adjudication if there is an absence of notice and an opportunity to be heard; an invalid adjudication does not trigger a claim limitations period.” Merrell, 579 Pa. at 105, 855 A.2d at 717. The court concluded that, because the letter was

not a valid adjudication, the applicant was not required to file an appeal within thirty days of receipt of the letter; accordingly, the court remanded the matter for further proceedings. In accord with Merrell and Callahan, I would hold that, because the adjudication is not *valid*, Thomas' appeal was not untimely, and I would remand for a hearing. Id.

Here, the Commission acknowledges that its decision to deny Thomas a hearing was final. In my view, the fact that the Commission made that decision and communicated it to Thomas on July 7, 2009, is not irrelevant merely because Thomas formally requested a hearing on July 20, 2009, and again in September and October of 2009. The regulation at issue *allows* Thomas to make such a request within fifteen days; it does not make a formal request a prerequisite for a hearing and, thus, it does not preclude the Commission from anticipating a request and denying it. The fact that Thomas understood the Commission's July 7, 2009, letter as denying him a hearing is evidenced by his September 2, 2009, letter, which specifically challenges the "[Commission's] position that Mr. Thomas is not entitled to a hearing...." (R.R. at 6a.) The fact that Thomas' *subsequent* requests can be construed as stating a claim in mandamus does not nullify the Commission's prior action.¹

¹ In his brief, Thomas argues that the Commission's refusal to provide him a hearing violated 37 Pa. Code §203.102. The Majority recognizes this argument as a claim in mandamus and transfers the matter to our original jurisdiction. However, the Majority acknowledges that the final denial of a request for a hearing is a matter properly addressed to our *appellate* jurisdiction. O'Brien v. State Employees' Retirement System, 503 Pa. 414, 469 A.2d 1008 (1984). The court observed in O'Brien that the exercise of our original jurisdiction is appropriate if an agency refuses to provide a hearing "in an effort to avoid a final decision that allows appeal." Id. at 421 n.8, 469 A.2d 1011 n.8. Such is not the case here, and a mandamus action is not necessary, where the Commission characterizes its action as a final decision.

With respect to whether Thomas has a property right at issue, this Court previously has indicated that an adjudication for purposes of appeal need only involve a final order affecting a purported property right. Hasinecz v. Pennsylvania State Police, 515 A.2d 351 (Pa. Cmwlth. 1986). This appeal presents a genuine controversy concerning a claimed entitlement in the nature of a property right. See Merrell, 579 Pa. at 114-15, 855 A.2d at 723 (concurring op.). Accordingly, because this appeal is not untimely and affects a purported property right, and believing that the interests of justice and judicial economy would be better served by avoiding the time and expense necessary to pursue a mandamus action, I would remand this matter to the Commission with instructions to provide Thomas a hearing.

PATRICIA A. McCULLOUGH, Judge