

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Progressive Worship Center Daycare, :
Petitioner :
v. : No. 2319 C.D. 2010
: Submitted: June 17, 2011
Department of Public Welfare, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: July 11, 2011

Progressive Worship Center Daycare (Progressive) petitions for review of an order of the Department of Public Welfare's (Department) Bureau of Hearings and Appeals (Bureau) denying its request for reconsideration of its July 30, 2010 order revoking its license to operate a child daycare center and the emergency removal of the children in its care because the request was not timely filed. For the reasons that follow, we affirm the Department's order.

Progressive ran a daycare center licensed by the Office of Child Development and Early Learning (OCDEL). OCDEL investigates complaints about licensed facilities. On June 22, 2009, a complaint was received alleging that a five-year old child was sexually molested at Progressive by one of Progressive's

employees. An investigation was conducted, and ultimately, one of the employees was arrested and another employee was suspended. On July 1, 2009, the Department issued an order to revoke Progressive's daycare license and to remove the children from Progressive because the conditions at Progressive constituted gross incompetence, negligence and misconduct in operating a facility and it posed an immediate and serious danger to the life or health of the children.

Progressive filed an appeal with the Department and hearings were held on October 7 and 23, 2009. By order dated July 22, 2010, the Administrative Law Judge (ALJ) found that the Department presented credible evidence of violations of Department regulations and that it had met its burden of proving that Progressive had failed to comply with those regulations. The ALJ recommended that Progressive's appeal be denied. By order dated July 30, 2010, the Bureau adopted the ALJ's recommendation in its entirety. The order indicated that Progressive had 30 days in which to appeal its decision to this Court. Instead of doing so, Progressive chose to file a petition for reconsideration with the Bureau, but filed the petition four days after the expiration of the 15 day period for filing such petitions under 1 Pa. Code §35.241(a).¹ By order dated September 15, 2010, the Bureau denied Progressive's request for reconsideration because it was not

¹ 1 Pa. Code §35.241(a) provides:

An application for rehearing or reconsideration may be filed by a party to a proceeding within 15 days or another period as may be expressly provided by statute applicable to the proceeding, after the issuance of an adjudication or other final order by the agency. The application shall be made by petition, stating specifically the grounds relied upon.

timely filed. This appeal by Progressive followed contending that the Bureau erred in not granting a *nunc pro tunc* petition for reconsideration.²

Because there is no dispute that the petition was not filed in a timely manner, the only issue we need to determine is whether Progressive was entitled to a *nunc pro tunc* filing of its petition for reconsideration. A *nunc pro tunc* filing is allowed where the petitioner's delay was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process or non-negligent circumstances related to the petitioner, his counsel or a third party. *C.S. v. Department of Public Welfare*, 879 A.2d 1274 (Pa. Cmwlth. 2005). Here, Progressive did not request that the petition for reconsideration be granted on a *nunc pro tunc* basis before the Bureau. Because it did not file that request below, it is precluded from contending on appeal that the Bureau abused its discretion in not granting a *nunc pro tunc* appeal.

However, even if we considered the petition for reconsideration as including a request that it also be allowed to file late, Progressive did not provide any basis as to why it should be allowed to file late. Progressive admits that there was no fraud or breakdown in the administrative process. It argues that the delay was caused by non-negligent circumstances related to Progressive which proceeded *pro se* previously, and it is now entitled to reconsideration. Specifically, Progressive states in its brief:

² Our scope of review of the Department's order denying a petition for reconsideration is limited to determining whether the Department abused its discretion. *Steller v. Pennsylvania Securities Commission*, 877 A.2d 518 (Pa. Cmwlth. 2005).

Progressive Worship Center Daycare proceeded *pro se* through the Reverend Joe N. Mallory. While Pastor Mallory did not specifically request a *nunc pro tunc* filing of the petition nor did he outline the reasons for his late filing, his petition for review in this Court does. (R. 342a-343a). The petition reflects that Pastor Mallory made efforts to obtain additional documentation to submit to the Court in support of his Petition for Reconsideration. It was the delay of third parties in getting those papers to Pastor Mallory, rather than any negligence attributable to him, which delayed the filing of the petition.

(Progressive's brief at 10.) We have reviewed the petition for reconsideration and nothing in that petition states that efforts were being made to obtain additional documentation to submit to the Court in support of the petition, and, in any event, efforts to receive additional documentation are not the type of non-negligent circumstances that would justify the grant of a *nunc pro tunc* filing. Moreover, outlining the reasons in its brief now does not preserve that issue on appeal for purposes of determining whether it is entitled to a *nunc pro tunc* appeal. Pa. R.A.P. 1551.

While Progressive may have been proceeding *pro se*, it still had an obligation to follow the rules of administrative procedure. *Griffith v. Workers' Compensation Appeal Board (New Holland North America, Inc.)*, 798 A.2d 324 (Pa. Cmwlth. 2002) (lay person who chooses to represent himself in a legal proceeding must assume risk that lack of expertise and legal training may prove to be his undoing). Because the petition for reconsideration was late, the Bureau properly found that the petition for reconsideration was untimely filed.

Accordingly, the order of the Bureau is affirmed.

DAN PELLEGRINI, JUDGE

