

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

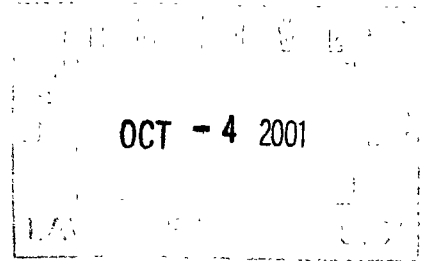
IN AND FOR SUSSEX COUNTY

ALADINO RODRIQUEZ,
Respondent/Appellant,
v.

C.A. No. 00A-03-002

ISSAC PALMER, as Director Division
Of Family Services,
Petitioner/Appellee.

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Submitted: June 20, 2001
Decided: September 26, 2001

On Appellant Aladino Rodriguez' Request
for a Writ of Certiorari. **DENIED.**

On Appellee Issac Palmer's Motion to
Dismiss Rodriguez' Amended Pleading.
GRANTED.

MEMORANDUM OPINION

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GRAVES, J.

I. INTRODUCTION

This is an appeal from a decision of a hearing officer of the Division of Family Services (hereinafter "Division") against Aladino Rodriguez (hereinafter "Rodriguez"). The Division has found Rodriguez responsible for a substantiated report of child abuse against his son. Pending before the Court are a motion to amend the original pleading to seek the issuance of a writ of certiorari and a motion to dismiss the proceedings. This is the Court's decision thereon.

A. FACTS AND PROCEDURAL POSTURE

On August 12, 1999, the Division found Rodriguez responsible for a substantiated incident of child abuse against his son as a result of bruising, cuts, and other injuries he inflicted on his minor son, Robert, on June 27, 1999. The Division substantiated this abuse by a preponderance of the evidence standard. The Division also informed Rodriguez that his name would be placed on the Delaware Child Abuse Central Registry pursuant to 16 Del. C. §902(2) and 11 Del. C. §8563(b). The criminal charges of child welfare endangering and third degree assault were eventually *nolle prossed* and Rodriguez entered a *nolo contendere* plea of disorderly conduct. The record before the court shows Rodriguez to be employed as a custodian for the Indian River School District in Sussex County.

Rodriguez filed an administrative appeal from the August 12, 2000, decision pursuant to Division policy 6011. After Rodriguez waived his Step 1 Appeal, he appealed the original decision in a Step 2 Appeal with the Sussex County Director of the Division on November 4, 1999. The Director affirmed the Division Investigator's original substantiation of abuse on November 22, 1999. Rodriguez then filed a Step 3 Appeal on February 17, 2000 before the State Director of the Division. The Step 3 hearing officer affirmed the Step 2 decision on March 16, 2000. On April 17, 2000, Rodriguez filed an appeal pursuant to Superior Court Civil Rule 72 from the hearing

officer's decision. The Division moved to dismiss this appeal on May 26, 2000. During a July 21, 2000, motion hearing, the Court permitted Rodriguez an opportunity to file a Motion to Amend, noting that it would reconsider the State's motion to dismiss at that time. The Court permitted Rodriguez to file a Motion to Amend, which he did on August 10, 2000. At a second motion hearing on September 1, 2000, the Court directed both parties to submit briefs on the issues. The matter now is ripe for decision.

C. PARTIES' CONTENTIONS

The primary inquiry is whether Rodriguez may petition the Superior Court to review the Division's decisions. This Court may not visit any of Rodriguez' contentions unless this matter is properly before it. Appellant Rodriguez wishes to amend his original appeal with a petition for a writ of certiorari. He argues that this Court may issue a writ of certiorari to an administrative agency.

Appellee argues that the Delaware Code does not permit jurisdiction of the Superior Court to review this appeal. He also contends that Rodriguez is attempting to improperly reframe his appeal as a writ of certiorari.

Rodriguez' other contentions on appeal are dependent on the issue of jurisdiction.

II. DISCUSSION

A. APPELLATE REVIEW OF AN ADMINISTRATIVE AGENCY

The first issue is whether Appellant Rodriguez may appeal the decision of the Division of Family Services before this Court. This Court has limited appellate jurisdiction over administrative boards. The Court has noted that "[t]he right of review is not an inherent or inalienable right." *Casey v. Southern Corp.*, Del. Supr., 29 A.2d 174, 176-77 (1942). The Court has stated that a "right to review in an appellate tribunal exists only when and to the extent provided in the Constitution and laws of this State'." *Marker v. State*, Del. Supr., 450 A.2d 397, 398 (1982)(quoting *McCoy v. State*, Del.

Supr., 217 A.2d 496, 497 (1966).

The laws of Delaware provide two methods by which a court may review a decision of an administrative board. The first is by way of the enacting statute of the board itself, and the second is by way of the Administrative Procedures Act. In *Wescott v. City of Milford Police*, Del. Super., C.A. No. 94A01-002, Toliver, J., (July 31, 1995), this Court held that the Superior Court does not possess the jurisdiction to investigate an administrative board decision unless “the jurisdiction is specifically conferred by the statute creating the board and/or commission or the Administrative Procedures Act.” *Id.* at 9. Absent such, there is no right to appeal to this Court. *Sinha v. Board of Trustees*, Del Super., 585 A.2d 1310, 1313 (1990).

At the time this appeal was filed, the legislature did not provide for appellate review of Division decisions to the Superior Court in its enacting statute.¹ Nor is there any mention of the Division in the Administrative Procedures Act; none of the provisions in 29 Del. C. §10161(a) provide a statutory right of appeal from a Division decision to this Court. *See id.* In fact, 29 Del. C. §10161(a) lists all of the state agencies whose decisions may be appealed to the Court, and the Division of Family Services is not listed among them. *Id.*

In fact, Appellant conceded in his Memorandum of Law and the Amended Complaint that he has no statutory right of appeal. *See* Memorandum dated January 5,

¹ There now exists a right to appeal pursuant to 16 Del.C. §902A(e), which was enacted in April 2001, after this appeal was filed. According to the statute, the proper procedure in appealing a substantiation of abuse is to file in writing an appeal “with the Family Court of the State within thirty days of the Hearing Officer’s decision. The scope of the Family Court’s review on appeal of the Hearing Officer’s decision in the absence of actual fraud or abuse of discretion shall be limited to whether there is substantial evidence to support the findings of fact, and to whether any error of law was made.” Thus, the Legislature has decided to permit appeals of Division decisions to the Family Court rather than to the Superior Court.

2001 at pg. 5; Amended Complaint dated August 3, 2000 at pt. 8. Thus, Appellant cannot assert a right of appeal of any of his claims before the Superior Court. There is no appellate jurisdiction of this matter.

B. WHETHER THE SUPERIOR COURT MAY GRANT MOTION TO AMEND

1. Motion to Amend Pleadings Is Not Time-Barred

The second issue is whether the Court may grant Rodriguez' motion to amend his pleadings to request a writ of certiorari. It may not if the matter is time-barred. In *Elcorta v. Summit Aviation, Inc.*, Del. Super., 528 A.2d 1199, 1201 (1987), the Court established a thirty day time limit for filing a praecipe seeking a writ of certiorari subject to the discretionary power of the court to excuse defaults. In *Capano Investments v. Levenberg*, Del. Super., C.A. No. 88A-JA-7, Bifferto, J., (Dec. 9, 1988), the Court held that a party could later file a petition for writ of certiorari after its right to appeal was questioned. *Id.* at 3. The *Capano* court stated that "changing the avenue of review from appeal to certiorari [after thirty days] does not unduly prejudice" the appellant. *Id.* Similarly, in the case at bar, there would be no prejudice, and thus, the motion to amend is not time-barred. This does not automatically mean, however, that this Court will grant certiorari to review any of appellant's claims.

2. Whether the Court May Grant Certiorari To Review Appellant's Claims

There are certain threshold requirements before a writ of certiorari is considered. As explained in *Matter of Butler*, Del. Supr., 609 A.2d 1080, 1081 (1992), "the judgement must be final, and there must be no other basis for review."² Where these threshold requirements are not met, this Court has no jurisdiction to hear the petitioner's claims, and

²Appellee suggests that Rodriguez may still potentially apply for an administrative expungement of his substantiated case of abuse under 16 Del.C. §902A(g). If an expungement is an effective form of appeal, then Mr. Rodriguez' case would have no place before this Court because he could not have yet fully exhausted his administrative remedies.

the proceedings will be dismissed. *Castner v. State*, Del Supr., 311 A.2d 858, 858 (1973).

There is no dispute that “[t]he writ for certiorari is distinct from an appeal.

Certiorari is on the record and the Superior Court may not weigh evidence or review the lower tribunal’s factual findings. Rather the reviewing court considers the record before the lower tribunal to determine whether it: (i) exceeded its jurisdiction, (ii) committed errors of law; or (iii) “proceeded irregularly.” *Reise v. Board of Building Appeals of City of Newark*, Del Supr., 746 A.2d 271, 274 (2000).

Therefore, if none of the claims Appellant presents fall into the limited category where the court may grant certiorari, then this Court may, in the name of judicial economy, deny the entire motion to amend as being futile. “Delaware cases indicate that ordinarily, the sufficiency of pleadings should not be tested on a motion to amend.”

Atamian v. Gorkin, Del. Super., C.A. No. 97C-08-001, Terry, J., (Feb. 3, 1998) at 1-2.

However, if the “insufficiency is obvious on its face, the legal sufficiency question should be ruled upon at the time of the motion for leave to amend.” *Id.*

This Court will now apply the standard for the limited situations in which certiorari is appropriate to the various issues Rodriguez is presenting for review.

C. APPLYING THE STANDARD FOR WRIT OF CERTIORARI TO THE ISSUES

The Court will analyze each element of the appellant’s petition as it was presented in the Amended Petition and discussed in his Memorandum of Law.

1. Appellant Contends That The Division’s Finding Of Abuse Was Made In Violation Of His Right To Counsel And Right Against Self-Incrimination

Appellant asserts that he was denied his Fifth and Fourteenth Amendment rights against self-incrimination and right to counsel when questioned by the Division Investigator. Presuming the claim is valid, it requires a weighing of evidence; thus, it is inappropriate for a certiorari proceeding.

2. Appellant Contends That The Proceeding Below Denied Him Due Process of Law Because The Hearing Officer Was Also The Deputy Director Of The Division

Rodriguez claims that the hearing officer presiding over the appeal was biased simply because he is an employee of the Division of Family Services. This Court cannot assume that a hearing officer for an administrative board is biased simply because he is an employee of the same board for which he is officiating. In *Blinder, Robinson & Co. v. Bruton*, Del. Supr., 552 A.2d 466, 472 (1989), the Supreme Court held that “it has long been recognized that the commingling of roles is often implicit in the practical functioning of administrative agencies which perform both investigative and fact finding functions.” Moreover, there is a “presumption of honesty and integrity” on the part of those serving as adjudicators which may only be overcome with specific evidence of bias. *Id.* at 473 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Since the issue of whether the hearing officer acted with bias because of his position is a factual determination, the Court would need to look past the record. Thus, the Court will not grant certiorari to review this issue.

3. Appellant Contends That The Policy Statements Governing The Division Proceeding Are Unconstitutionally Void For Vagueness Because It Lists Two Meanings For The Phrase “Preponderance Of The Evidence”

This issue is moot. The record shows that appellant’s attorney broached the issue of the dual definitions for “preponderance of the evidence” with the hearing officer, and that the officer decided that he would use the stricter legal standard when making his determination. See Letter from Dept. of Services for Children, Youth and Their Families dated March 16, 2000. The officer then made his determination with the correct standard for preponderance of the evidence, which is “evidence, which as a whole, shows that the fact sought to be proved is more probable than not.” See Division Policy # 1100(1)(C).

Thus, this issue was resolved on March 16, 2000. As such, there is no need for the Court to issue a writ of certiorari regarding it.

4. Appellant Contends That Appellee Failed To Serve Its Decision On Appellant Within Thirty Days As Stated In Its Division Policy

Procedural irregularities are grounds for certiorari review. However, as appellee points out in his Motion to Dismiss, the Division released the decision one day after the thirty day mandate. This is a *de minimis* violation of the Division policy, as the appellant has not demonstrated prejudice in any way by the one day delay. Further, as appellant does not appear to maintain this issue as an argument in his Memorandum of Law, the Court will consider him to have abandoned this issue. Therefore, the Court will not grant a writ to review this issue.

5. Appellant Contends He Was Denied Property Without Due Process Of Law Because He Stands To Lose His Job If His Name Is Placed On The Child Abuse Registry

This issue is not ripe because the record does not show that appellant has lost his job.

6. Appellant Contends That The Hearing Officer Committed An Abuse Of Discretion

Appellant contends two things in his amended petition: that the appellee should not have been permitted to ask if the original finder of fact had been persuaded by the evidence presented at the Level 3 hearing below, and that the Division erred by finding the original substantiation of abuse without interviewing the four eyewitnesses to the alleged abuse.

Any abuse of discretion review involves the weighing of evidence. Thus, these matters are not appropriate for a writ of certiorari. Furthermore, appellant has omitted further discussion of this second issue in his Memorandum of Law.

III. CONCLUSION

The Superior Court does not have jurisdiction over an appeal from the Division decision. Further, as none of the issues are proper candidates for review via a writ of certiorari, the Court must deny the motion to amend as being futile. For these reasons, the Appellant's motion for Writ of Certiorari is hereby DENIED and the Appellee's motion to dismiss the claim is hereby GRANTED.

IT IS SO ORDERED.