IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

C.B. C/O DEBRA WALLACE,

Appellant,

v. Case No. 5D20-890

DEPARTMENT OF CHILDREN AND FAMILIES,

Appellee.

_____/

Opinion filed February 5, 2021

Administrative Appeal from the Department of Children and Families,

Elizabeth M. Boyle, Venice, for Appellant.

Brian Meola, Assistant General Counsel, Department of Children and Families, Orlando, for Appellee.

PER CURIAM.

Appellant, C.B., appeals the denial of her motion for new hearing and the final order of abandonment that was issued in her case seeking Medicaid benefits. She contends that the hearing officer erred in dismissing her case for failure to appear at the administrative hearing because she never received notice of the hearing. The hearing officer, relying exclusively on *Florida Administrative Code* Rule 65-2.061, denied Appellant's motion as untimely. Because the hearing officer's mechanical application of

the rule resulted in a deprivation of Appellant's procedural due process rights, we reverse for a hearing on Appellant's motion for new hearing.

The Department of Children and Families ("DCF") denied Appellant's application for Medicaid benefits. The denial of benefits was timely appealed, and an administrative hearing was set for October 22, 2019. On October 9, 2019, Appellant's counsel filed a motion for continuance. On October 11, 2019, the hearing officer issued a notice of continuance that stated "[a]ll parties will be notified in the future of the new hearing date." On the same day, a separate notice was issued by a different hearing officer (to whom the case had been transferred) setting the rescheduled hearing for November 5, 2019 at 10:30 a.m. Although this notice recited that copies of the notice were "furnished" to Appellant and Appellant's counsel, no address was listed for either person.

Appellant and her counsel failed to attend the rescheduled hearing. On November 13, 2019, Appellant's case was closed as abandoned. No notice of the closing of the case was sent to Appellant or her counsel, and the hearing officer did not issue a final order. On February 7, 2020, Appellant's counsel's office contacted DCF's Office of Appeal Hearings to determine the status of Appellant's case. In response, Appellant's counsel was advised that the case was closed as abandoned on November 13, 2019, due to non-appearance at the administrative hearing.

On February 20, 2020, Appellant's counsel filed a motion for new hearing alleging, inter alia, that she never received notice of the rescheduled hearing. The motion was supported by affidavits executed by Appellant's counsel and counsel's paralegal.

On March 5, 2020, the hearing officer issued its "Order Denying [Appellant's] Motion for a New Hearing Day and Final Order of Abandonment." In its order, the hearing officer exclusively relied upon rule 65-2.061, which provides:

> Abandonment may be deemed to have occurred if the appellant, without good cause therefor, fails to appear by himself/herself or an authorized representative at the hearing scheduled for such appellant. If good cause is shown, the appeal will no longer be considered abandoned and the hearing will be reset. The hearing officer shall determine whether or not good cause existed for the non-appearance of the appellant or authorized representative upon receipt of written or oral explanation from the appellant, the appellant's authorized representative or Department representative. *Written explanation for failure to appear must be received by the Office of Appeal Hearings within 60 calendar days from the date of the hearing when the appellant alleges nonreceipt of the notice of hearing* or 30 calendar days from the date of the hearing for all other reasons.

(Emphasis added). The hearing officer concluded that Appellant's motion was untimely because it was filed more than sixty days after the November 5, 2019 hearing date.

Procedural due process requires both fair notice and an opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001). Procedural due process "serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." *Dep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991).

DCF's regulations also guarantee fair notice. Fla. Admin. Code R. 65-2.042(4) ("All parties shall be entitled to receive notice of hearings, conferences and decisions of [DCF] and those other rights afforded by Chapter 120, F.S."); Fla. Admin. Code R. 28-106.208 ("The presiding officer shall set the time and place for all hearings and shall serve written notice on all parties at their address of record.").

Section 120.68(7)(c), Florida Statutes (2019), authorizes this court to set aside agency action when it finds that "[t]he fairness of the proceedings or the correctness of

the action may have been impaired by a material error in procedure." We have applied this statute to reverse a final order for failing to provide proper notice of a hearing where the record demonstrated DCF sent notice to the wrong address. *Wilson v. DCF*, 259 So. 3d 987, 987–88 (Fla. 5th DCA 2018); *see also Butler v. State Bd. of Nursing*, 107 So. 3d 1184 (Fla. 1st DCA 2013). By contrast, our sister court declined to find a material error in procedure and affirmed agency dismissal when the record showed the petitioner received proper notice. *Aybar v. Dep't of Health,* 46 Fla. L. Weekly D7 (Fla. 1st DCA Dec. 22, 2020).

Our record is unclear. It only reflects that Appellant did not receive notice of the decision to close her case until after the expiration of the 60-day period set forth in rule 65-2061. Under the facts of this case, a mechanical application of rule 65-2.061 would contravene due process principles. *Cf. Millinger v. Broward Cnty. Mental Health Div. & Risk Mgmt.*, 672 So. 2d 24, 27 (Fla. 1996) (opining that due process violation would probably occur if administrative order was entered but never actually provided to litigants and thirty-day period to file timely appeal then passed). On remand, Appellant is entitled to have her motion for new hearing considered on the merits.[1]

REVERSED and REMANDED.

EVANDER, C.J., WALLIS and TRAVER, JJ., concur.

[1] While we express no opinion on the ultimate merits of this case, we reject DCFs' suggestion that Appellant's motion for new hearing was correctly denied because the record would support a finding that the notice of rescheduled hearing was properly mailed and received. Although proof of mailing normally raises a rebuttable presumption that the mailed item was received, the presumption does not arise where, as in the instant case, the certificate of service does not include the address to where the item was to be mailed. *See Ciolli v. City of Palm Bay*, 59 So. 3d 295, 297 (Fla. 5th DCA 2011).