RENDERED: June 22, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001654-MR

MARY'S LITTLE LAMBS DAYCARE
AND LEARNING CENTER — APPELLANT

v.

APPEAL FROM MONTOGMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 99-CI-00049

CABINET FOR HEALTH SERVICES — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL
** ** ** ** **

BEFORE: BARBER, GUIDUGLI, AND HUDDLESTON, JUDGES.

BARBER, JUDGE: Appellant, Mary's Little Lambs Daycare (the "Daycare"), seeks review of the May 31, 2000 order of Montgomery Circuit Court, affirming the February 17, 1999 order of the Secretary, Cabinet for Health Services, affirming the Administrative Law Judge's (ALJ's) decision to deny relicensure. For the reasons set forth below, we dismiss the appeal.

The ALJ's Findings of Fact, Conclusion of Law and Recommended Order of January 26, 1999 reflects that the Daycare is a Type I day care facility for children as defined in 905 KAR 2:001, Section 1(7)(a), licensed to operate by the Cabinet pursuant to 905 KAR 2:090. On March 19, 1998, the Cabinet

conducted its first annual inspection of the facility. The Daycare was cited for ten regulatory violations, including an inappropriate staff/child ratio. On May 12, 1998, the Cabinet conducted a follow-up visit; although some deficiencies had been corrected, there were four repeat regulatory violations, including an inappropriate staff/child ratio, and two new violations. On May 19, 1998, Mary Ann Ritchie, owner of the Daycare, was advised of the possibility of licensure revocation action, if she could not quickly bring the Daycare back into compliance with the program regulation.

On June 8, 1998, the Cabinet conducted a second follow-up visit, and identified a repeat regulatory violation -- failure to comply with staff-to-child ratios. On June 16, 1998, Ritchie was advised that negative licensure action would be initiated against the Daycare, if a subsequent follow-up identified a fourth instance of incorrect staff-to-child ratio. On July 17, 1998, the Cabinet conducted a third-follow up visit to the Daycare, which was again out of compliance with staff-to-child ratios. Ritchie maintained that the number of staff was appropriate, but that two children were not properly placed in their age group.

By letter of August 14, 1998, the Cabinet notified Ritchie that it was initiating action to revoke her license. By letter dated September 1, 1998, the Cabinet notified Ritchie that a decision had been made to deny relicensure of the Daycare. Ritchie made a written request for a hearing to appeal the Cabinet's determination.

On November 30, 1998, the ALJ conducted a hearing, and concluded:

> After reviewing the evidence . . . the undersigned concludes that the cabinet properly denied . . . [the Daycare] a renewal license. Although Mary Ritchie successfully corrected the violations noted during the first two inspections, she failed to comply with staff-to-child ratios during the first annual inspection and three following visits. The Cabinet provided the Daycare with three opportunities to correct its staff-to-child ratios. The facility failed to comply. Regulatory staff-to-child ratios ensure the safety of all children and are, therefore, mandatory. For these reasons, the Cabinet's decision to deny . . . [the Daycare] a renewal license should be affirmed.

The ALJ noted that each party shall have fifteen days within which to file exceptions with the Secretary of the Cabinet pursuant to KRS 13B.110; further, that an appeal of the final agency order may be filed pursuant to KRS 13B.140. In a "Final Order" issued February 17, 1999, the Secretary noted that no exceptions had been filed to the ALJ's decision. The Secretary reviewed the ALJ's decision and affirmed. The Daycare appealed to the Montgomery Circuit Court which affirmed the Cabinet by order entered May 31, 2000.

The Daycare filed a notice of appeal to this Court on June 27, 2000. The Daycare completely disregards the requirements of CR 76.12(4) (c)(ii) and (iv). Moreover, the argument on appeal is nothing more than a two-page explanation that the dog ate the homework. We agree that the Cabinet's decision is supported by substantial evidence; however, we dismiss the appeal, on the

ground that the Daycare failed to exhaust its administrative remedies.

KRS 13B.110 (4) provides:

> A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head. Transmittal of a recommended order may be sent by regular mail to the last known address of the party.

KRS 13B.120(1) provides "[i]n making the final order, **the agency head shall consider** the record including the recommended order and **any exceptions duly filed to a recommended order**." (emphasis added). The Daycare failed to file exceptions to the ALJ's recommended order.

The Supreme Court's analysis in Swatzell v. Commonwealth, Ky., 962 S.W.2d 866 (1998), applies here. There, the Court held that failure to file exceptions to the report of the hearing officer constitutes a failure to exhaust administrative remedies, thereby precluding circuit court review. The principle, that trial courts should have an opportunity to rule on issues before they are presented for appellate review, applies to administrative proceedings. "If a party fails to exhaust all available administrative remedies, a reviewing court is without jurisdiction to consider the contested matters as the administrative agency did not have the opportunity to first review them." Id. at 868.

In Swatzell, the applicable statutes were KRS 350.0301(2), providing that the parties shall be granted the

right to file exceptions within 14 days, and KRS 350.0301(2), providing that the Secretary shall consider the hearing officer's report and the exceptions. The statutory language contained in KRS 13B.110(1) and KRS 13B.120(4) is essentially the same. The Daycare's failure to file exceptions precluded the Secretary from considering the contested matter in making the final order, as required by statute. Hence, we lack jurisdiction to consider the matter.

It is therefore ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: June 22, 2001

/s/ David A. Barber
JUDGE, COURT OF APPEALS

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