

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002209-MR

DR. JAMES JENSEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 99-CI-007061

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Dr. James Jensen brings this appeal from a September 7, 2001 order of the Jefferson Circuit Court. We affirm.

On May 22, 1997, the Kentucky Board of Medical Licensure (Board), appellee herein, issued an emergency order suspending Jensen's medical license. An emergency hearing was scheduled, and the Board issued an administrative complaint. Kentucky Revised Statutes (KRS) 311.592. The Board's complaint enumerated myriad instances of egregious conduct on the part of Jensen in his professional capacity. Prior to the emergency

hearing, the Board issued an order directing Jensen to undergo a psychiatric/neuropsychological evaluation. Before undergoing said exam, Jensen agreed to voluntarily surrender his medical license for a period of three years in return for a termination of the Board's action against him. The emergency hearing was canceled. A proposed Agreed Order of Surrender was drafted and forwarded by the Board to Jensen. Jensen neither completed nor signed the order.

There is some confusion, but it seems that, though represented by counsel, Jensen filed a *pro se* pleading with the Board. Therein Jensen again offered to voluntarily surrender his medical license for three years. A pre-hearing conference was set. Jensen failed to appear. His counsel reported they were unable to contact him. Another pre-hearing conference was scheduled. At the conference, the Board filed a Motion for Default Order. A copy of this motion was sent to Jensen at his last three known addresses.¹ By order dated August 11, 1997, the hearing officer directed Jensen to respond by September 2, 1997 to the Motion for Default Order. The order was mailed to his last two known addresses, and faxed to a telephone number in Hawaii where Jensen had relocated. Jensen did not file a response.

On September 17, 1997, the hearing officer issued a Recommended Order. KRS 13B.110. Therein, the hearing officer recommended the Board find Jensen in default, find the

¹Jensen's counsel were still unable to contact him. They withdrew by order of the hearing officer dated September 15, 1997.

allegations contained in the Board's complaint true, and revoke Jensen's license to practice medicine. The order also included statements of Jensen's exception and appeal rights. On October 16, 1997, the Board accepted the hearing officer's recommended order, and issued a final order. No statement of appeal rights appeared in the final order, however, the recommended order containing a statement was incorporated by reference. Attempts to serve these orders upon Jensen at his last known address in Hawaii were unsuccessful.

On July 29, 1999, Jensen filed a petition seeking judicial review pursuant to Kentucky Revised Statutes (KRS) 311.593 in Franklin Circuit Court. By agreement, the action was transferred to Jefferson Circuit Court by order dated November 9, 1999.² On September 7, 2001, the Jefferson Circuit Court dismissed Jensen's petition for failure to timely file pursuant to KRS 13B.140(1). This appeal followed.

Jensen maintains the circuit court erred in dismissing his action as untimely. Jensen first complains that the Board's final order lacked a statement of his appeal rights as required by KRS 13B.120(3), which reads:

The final order in an administrative hearing shall be in writing and stated in the record. If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. The final order shall also include the effective date of the order

²Jensen petitioned for reinstatement of his medical license through several faxed messages sent to the Board between September 1 and September 24, 1999. The Board denied Jensen's petitions, concluding he did not meet the statutory requirements for reinstatement of his medical license.

and a statement advising parties fully of available appeal rights. (Emphasis added).

Because the final order failed to contain an independent statement of his appeal rights, Jensen contends the circuit court's dismissal of his petition as untimely was an exercise of arbitrary power in violation of Section 2 of our Constitution. However, the circuit court reasoned that the mandate of KRS 13B.120(3) was satisfied when the final order adopted the Recommended Order of the hearing officer, which order did, in fact, contain a statement of appeal rights.

We are aware that when the legislature statutorily prescribes the method and time for appeal from a decision of an administrative agency the requirements are mandatory and must be met in order for the court to obtain jurisdiction. See Frisby v. Board of Education of Boyle County, Ky. App., 707 S.W.2d 359 (1986).

Moreover, a court is required to give credence to the statutory language used by the legislature and give the language its ordinary meaning. See Court of Justice, ex rel, Administrative Office of the Courts v. Oney, Ky. App., 34 S.W.3d 814 (2001). In this regard, we note that KRS 13B.120(3) plainly sets out three requirements for final orders in administrative hearings; (1) the final order shall be in writing and stated in the record, (2) separate statements of findings of fact and conclusions of law shall be included if they differ from the recommended order, and (3) the effective date of the order along with a statement advising the parties of their appeal rights shall be included. The third requirement specifically states

that the final order "shall" include a statement of the parties' appeal rights. While we interpret this requirement as mandatory, we think the method of compliance is open to some discretion.

The question before us is whether compliance with the statute may be had by a final order which incorporates the appeal rights set forth in the hearing officer's recommendation. We are compelled to agree with the circuit court. We are of the opinion that in the absence of a showing that one is misled by the incorporation process, compliance with the requirements of KRS 13B.120(3) may be had by incorporating the hearing officer's notice of appeal rights.

Jensen also contends that he was not lawfully apprised of the proceedings which resulted in a default judgment. KRS 13B.050(h). We think this contention is without merit. The record is clear that the problem faced by Jensen is not the failure of the Board to notify him of the proceedings, but his own refusal to make himself available for notification. We know of nothing the Board could have done other than what it did, nor have we been apprised of any reasonable alternative. It seems to us that Jensen's position is that so long as he does not accept notice of proceedings, the Board is powerless to act. We cannot accept this position.

Having reviewed the record herein, we are of the opinion the circuit court was without error in dismissing the petition.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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