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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001980-MR

VYACHESLAVA "SLAVA" VOLKOVITSKAYA
AND LYUDMILA “MILA” VOLKOVITSKAYA — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CI-003757

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Vyacheslava (“Slava”) and Ludmila (“Mila”) Volkovitskaya appeal from an Opinion and Order of the Jefferson Circuit Court that dismissed their complaint against the Commonwealth of Kentucky, Cabinet for Health and Family Services (“the Cabinet”). Slava had appealed a determination by the Cabinet that he committed child abuse, and Mila joined in the appeal as co-owner of the child care center involved. The circuit court denied the appeal as untimely, finding that it

lacked subject matter jurisdiction to consider their complaint because they had failed to exhaust their administrative remedies. On appeal, Slava and Mila contend that the circuit court acted in an arbitrary and capricious manner in refusing to hear the merits of their case.

Slava and Mila were co-owners of the Little Stars Day Care Center in Louisville. Mila was the operator and director, while Slava worked on a part-time basis, opening the center in the morning and performing maintenance services. In the fall of 2004, the Cabinet received a report that Slava had sexually abused a child at the day care center. The Cabinet conducted an investigation and concluded that the abuse report was substantiated. On November 9, 2004, Slava was arrested and charged with sexual abuse in the first degree. The Cabinet's Office of the Inspector General immediately ordered an emergency suspension of the license of Little Stars to operate as a child care facility.

Julia Long, an employee of the Department for Community Based Services (an agency within the Cabinet that is charged with investigating allegations of child abuse, neglect, or dependency), sent Slava a Child Protective Service Substantiated Notification Letter ("notification letter"). Although the letter was dated November 3, 2004, the record shows that Slava did not receive it until November 15, 2004.

(Appellant's brief, appendix 4.) The letter informed Slava that the allegations of sexual abuse against him had been substantiated and explained what the implications of such a finding could be:

> The role of the Department for Community Based Services in investigating reports of child abuse or neglect is to assess the risk to the child and to make efforts to protect children from further risk. The Department is not responsible for criminal prosecution. However, this finding may be the basis for denying you certain rights and privileges, such as approval for foster parenting, adoption, or employment as required by state or federal law.

The letter then specified the procedures to be followed if Slava wished to appeal this determination.

> Pursuant to 922 Kentucky Administrative Regulation (KAR) 1:330, Section 10(1), individuals who are found to be substantiated perpetrators of child abuse or neglect shall be given the right to request an administrative hearing to challenge the finding of (abuse, risk or abuse, or neglect). Requests for an administrative hearing must be made by completing the attached DPP-155 form and submitting it, postmarked **within thirty (30) calendar days** of receipt of this letter[.] (Emphasis added.)

It is undisputed that the required DPP-155 form **was not attached** to the letter and that Slava did not file his appeal in a timely fashion. His attorney submitted a letter and a completed DPP-155 form to the Cabinet on February 1, 2005, forty-seven days **after his limit of 30 days time ran following**

receipt of the notification letter (from the deadline of December 15, 2004 to February 1, 2005). By way of explanation, the letter stated that "the [notification] Letter was received much later than the date it was written and was not accompanied by the required appeal form. Therefore, please accept this appeal as timely." The Cabinet denied the appeal, stating:

> Kentucky Administrative Regulation, 922 KAR 1:480, Section 3, Sub-section 3(a)(2), states that "A request for appeal shall be submitted to the cabinet no later than thirty (30) calendar days from the date the notice of a substantiated finding of child abuse or neglect is mailed; or of delivery of the notice if not mailed." After giving due consideration to your explanation, I must advise you that you have not established just cause for this office to grant an exception. Your appeal is therefore denied based upon your failure to file your appeal in a timely manner.

Slava and Mila filed a complaint in the Jefferson Circuit Court, appealing the Cabinet's denial of the administrative appeal. The Cabinet filed a motion to dismiss the complaint, which the court granted on the ground that it lacked subject matter jurisdiction because Slava and Mila had failed to exhaust their administrative remedies.

We review *de novo* the circuit court's granting of a motion to dismiss. American Premier Insurance Co. v. McBride, 159 S.W.3d 342, 345 (Ky.App. 2005).

The pertinent regulations governing appeals of child abuse and neglect determinations are found at 922 KAR[1] 1:480. Section 2 of the regulation provides that "[a] person who has been found by the cabinet to have abused or neglected a child may appeal the cabinet's finding through an administrative hearing."

Section 3 of the same regulation requires that the Cabinet provide the following to the alleged perpetrator:

> (a) Notice of a substantiated finding of child abuse or neglect . . . and
>
> (b) A copy of the Request for Appeal of Child Abuse or Neglect Investigative Finding, form DPP-155, incorporated by reference.

A request for an appeal must be submitted to the Cabinet:

> no later than thirty (30) calendar days from the date: a. The notice of a substantiated finding of child abuse or neglect is mailed; or b. Of delivery of the notice if not mailed[.]

922 KAR 1:480, Section 3(3)(a).

Finally, the regulation provides that "[t]he cabinet shall not dismiss a request for appeal as untimely if an appellant demonstrates good cause." Id., Section 3, (5). Good cause is defined as follows:

[1] Kentucky Administrative Regulations.

> "Good cause" means justification for failure to carry forward with a legal obligation related to an appeal, including:
>
> (a) An appellant's inability to comprehend the cabinet's written statement describing appeal rights; or
>
> (b) A cabinet-sanctioned determination that the appellant or the appellant's legal representative is not at fault for failure to:
>
> 1. Submit a written request for appeal; or
>
> 2. Participate in a proceeding related to an administrative hearing.

Id., Section 1, Definitions (5).

In regard to the Cabinet's determination that Slava and Mila failed to establish good cause to justify a late appeal, we note that "an administrative agency's interpretation of its own regulation is entitled to substantial deference." Commonwealth, Cabinet for Health Services v. Family Home Health Care, Inc., 98 S.W.3d 524, 527 (Ky.App. 2003). Furthermore,

> [a] reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious.

Id.

We are also mindful of the following principle relied upon by the circuit court in its decision to dismiss the appeal:

> [I]t has been repeatedly held that an appeal from an administrative decision is a matter of legislative grace and not a right. Thus, the failure to follow the statutory guidelines for such an appeal is fatal. The person seeking review of administrative decisions must strictly follow the applicable procedures.

Triad Development/Alta Glyne, Inc. v. Gellhaus, 150 S.W.3d 43, 47 (Ky. 2004), citing Taylor v. Duke, 896 S.W.2d 618 (Ky.App. 1995).

Slava and Mila argue that the trial court erred in failing to consider that Slava did not receive the notification letter from the Cabinet until November 15, 2004; and that Slava, who is a native Russian speaker, is functionally illiterate in English and was unable to comprehend the terms of the letter. Additionally, the Cabinet failed to enclose the DPP form, which was required to be completed and returned to the Cabinet in order to comply with its rules for filing an administrative appeal. Thus, the Cabinet's omission in this regard is partially responsible for the running of some additional time. Slava and Mila contend that the circuit court ignored these issues, which vitally affected the sufficiency of the notice afforded to Slava by the notification letter.

We agree that the Cabinet ignored the rudimentary elements of due process: adequate notice and an opportunity to be heard. It failed to make allowance for the 12-day delay in

Slava's receipt of the letter or perhaps his inability to readily comprehend its import due to the impediment of the language barrier. Additionally, the Cabinet itself neglected to include the DPP-155 form, which it represented in its letter to be a necessary component to perfect an administrative appeal. Whether or not it was in fact a necessary component, the Cabinet's letter most certainly made it appear to be so.

The delay of 47 days in filing the letter and the DPP-155 form is not great, and the fault for the delay arguably was not entirely his own -- attributable at least in part to the Cabinet's own omission. The charge of child abuse is serious and perhaps one of the most heinous and reprehensible offenses which afflict our society. In light of the gravity of the charge, the rather small amount of time involved in the delay, and the reasons underlying the delay, we conclude that the Cabinet acted both arbitrarily and capriciously in refusing to hear this administrative appeal.

Due process remains a sacrosanct right of any person subject to governmental reprisals in our constitutional framework. It may not be lightly disregarded or explained away:

> Basically, judicial review of administrative action is concerned with the question of *arbitrariness*. On this ground the courts will assume jurisdiction even in the absence of statutory authorization of an appeal.

> . . . .
>
> There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power.

American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456, (Ky. 1964) (citations omitted). See also, City of Louisville v. Slack, 39 S.W.3d 809, 812 (Ky. 2001).

We hold that the Cabinet acted arbitrarily and capriciously in failing to find good cause shown for the delay in filing this administrative appeal. Because the Cabinet improperly deprived the appellants of their opportunity for administrative review, we conclude that the failure to exhaust administrative remedies occurred through no fault of their own. The circuit court erred in declining to exercise jurisdiction under these circumstances.

We vacate its order and remand this matter for entry of an order directing the Cabinet to grant review.

ALL CONCUR.

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