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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001423-MR

MGT DIVERSIFIED SOLUTIONS, LLC — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 10-CI-01608

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION; AND KENTUCKY DIVISION OF UNEMPLOYMENT INSURANCE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: MGT Diversified Solutions (MGT) appeals from a judgment of the Franklin Circuit Court affirming the decision of the Kentucky Unemployment Insurance Commission (The Commission) to dismiss MGT's appeal as untimely. Finding no error, we affirm.

The Kentucky Division of Unemployment Insurance sent a notice of transfer of predecessor reserve account and a notice of subjectivity to MGT dated December 30, 2009, which stated in relevant part that:

> This is to advise you that based on information received by the Division of Unemployment Insurance: you have been determined successor to 100.00% of the reserve account of: TRACOM NS LLC[.[1]]
>
> If you disagree with this determination, you may file a written appeal to the Unemployment Insurance Commission pursuant to KRS[[2]] 341.430(2). This appeal may be faxed, delivered to the Unemployment Insurance Commission or any office of the Division of Unemployment Insurance or mailed if postmarked within twenty (20) days from the date of this notice.

MGT admitted that it received these notices on January 15, 2010. MGT further conceded that, upon receipt of the letter, it placed a telephone call to the Division of Unemployment Insurance during which it received information regarding the process for appealing the determination. MGT, however, did not file its appeal until February 3, 2010.

The Commission held a hearing during which it limited the scope of the hearing to the issue of the timeliness of MGT's appeal. At the hearing MGT representative Carl Bush testified regarding his reason for not filing the appeal within twenty days from the date of the letter. He stated that, in his opinion, "[the letter] would read that I had 20 days from receipt, not from when you wrote the letter. I don't care when you wrote the letter. I care when I received it."

[1] Before going out of business, Tracom was owned by the same entity as MGT.

[2] Kentucky Revised Statute.

Melissa Beasley, Assistant Director of Tax at the Division, testified that it was standard procedure for the notice to be mailed either on the day that it was printed or the morning thereafter. Based upon this testimony, the Commission found that the letter was mailed on the same date as was shown on the notice. The Commission thereafter held that:

> [t]he appellant's request for appeal was not timely filed and no explanation constituting good cause has been given for late filing. The notices set forth that an appeal had to be filed within twenty days of the date of the notices and that did not happen in this case. Even if one considers that the appellant did not receive its mail immediately, it admits that it did receive the mail before the twenty (20) days had expired. Still, the appellant did not meet the filing deadline. The issues have become final so far as the record shows.

The Franklin Circuit Court upheld the Commission's decision, finding that:

> [t]he evidence presented to the Court clearly reflects that the decision of the Commission that MGT's letter of appeal was filed on February 3, 2010, thirty-five (35) days after the Notice of Subjectivity was mailed, or nearly twice the length of the period for appeal clearly stated at the conclusion of this document, was based on substantial evidence that is essentially undisputed in the record. The evidence in the record does much more than merely 'create a suspicion of the existence of the fact to be established.' *George T. Stagg Company v. O'Nan*, 151 S.W.2d 51, 54 (Ky. 1941)[.] The notice clearly identified MGT's appeal rights and it cannot be said that MGT was unaware of the proper procedure for appeal of the assessments, when the record demonstrates that MGT's representative communicated with a representative of the Division about this issue while still within the appeal timeline.

MGT now appeals.

Pursuant to KRS 341.430(2), the time for an appeal begins to run as of the date that the notice is mailed. MGT argues that the Commission's finding that the notice was mailed on December 30, 2009, was unsupported by substantial evidence. MGT asserts that it had demonstrated that the notice could not have been mailed on December 30, 2009, because its standard procedure was to date stamp all mail on the date of receipt; and it did not stamp the notice as having been received until January 15, 2010. Melissa Beasley testified that it was standard procedure of the Division of Unemployment Insurance for the notice to be mailed either on the day that it was printed or the morning thereafter. The Commission was in the best position to weigh the credibility of this evidence; and, we are unable to disturb its conclusion that Ms. Beasley's testimony was more credible. *See Thompson,* 85 S.W.3d. at 624.

The fact that Ms. Beasley did not have personal knowledge regarding when the mailing of the notice actually occurred or that she did not provide a written policy regarding the standard operating procedures of mailing does not change the outcome. This goes to the weight of the evidence assigned by the Commission. Further, the testimony as to the standard procedure for mailings by someone holding such a position of authority was sufficiently probative to convince a reasonable person that there was an established procedure for mailing of such notices.

MGT also asserts that it was deprived of due process because the hearing officer failed to conduct a hearing regarding the merits of its appeal but instead limited the scope of the hearing to whether the appeal was timely. On appeal, the Commission is permitted to "1) deny the appeal as untimely, or 2) promptly schedule a hearing and mail notices to all interested parties specifying the date, time . . . ." 787 KAR 1:110 §3(2)(a). MGT argues that these options are mutually exclusive; therefore, the Commission may not dismiss the action as untimely after it has conducted a hearing and must instead address the merits of the appeal. MGT provides no authority to this effect, and the plain language of the regulation simply does not lend itself to that interpretation.

MGT also relies upon 787 KAR 1:110 §4(4)(c) to support its contention that the Commission was required to allow testimony regarding the merits of the appeal. That provision states in pertinent part that:

> (a) All hearings shall be conducted informally . . . and in a manner as to determine the substantial rights of the parties.
>
> (c) All issues relevant to the appeal shall be considered and passed upon.

787 KAR 1:110 §4(4)(c). Although MGT correctly interprets the regulation to require the Commission to hear all issues affecting the substantial rights of the parties, it ignores the fact that its right to an appeal on the merits was only available upon the filing of a timely appeal. *See* KRS 341.430(2).

For the aforementioned reasons, we affirm.

TAYLOR, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARTE OPINION.

ACREE, CHIEF JUDGE, DISSENTING. Respectfully, I dissent. I believe the Commission, having authority to deny appeals as untimely upon receipt, waived any objection to the timeliness of the appellant's appeal when it scheduled a hearing in compliance with its own regulations.

The legislature gave the Commission broad powers and wide latitude regarding the administration of Chapter 341. KRS 341.115(1) ("The secretary shall have the power and authority to adopt, amend, or rescind such rules and regulations as he deems necessary or suitable for the proper administration of this chapter. The commission shall determine its own organization and methods of procedure.").

When it came to procedures governing administrative hearings, the legislature chose to exempt the Commission from compliance with the Albert Jones Act of 1994, Chapter 13B. KRS 13B.090(3)(g)(1). The legislature even allowed the Commission a certain degree of creativity to permit "further appeals" not expressly defined by statute. KRS 341.430(1) ("The commission . . . may permit any of the parties to such decision to initiate further appeals before it."). Regardless of the nature of the appeal, the legislature left it to the Commission to promulgate regulations governing procedure in administrative appeals before it. KRS 341.115(3) ("The commission . . . shall adopt regulations governing the

manner of filing appeals and the conduct of hearings and appeals consistent with the provisions of this chapter.").

The Commission did promulgate such regulations. Section 3 of 787 Kentucky Administrative Regulations (KAR) 1:110 governs "Appeals to the Commission From an Employing Unit." In pertinent part, subsection (1)(a) of that regulation applies to "[a]ny employing unit wishing to make application for review of any administrative determination pursuant to . . . 341.430(2) . . . ." The appellant here was such an employing unit. So, what did the employing unit have to do to be entitled to the appeal? The statute, KRS 341.430(2), simply says that such appeals "may be filed by such employing unit . . . ." The regulation generally governing such appeals, promulgated pursuant to that statute, says little more, but simply that appeals shall be initiated "by filing with the commission . . . a written statement clearly indicating the employing unit's intention to appeal . . . ." 787 KAR 1:110 Section 3(1)(a).

The Commission must have believed these general statements to be inadequate guidance as to the timing of the initiation of appeals. After all, it is important to know, with some specificity, exactly when a taxpayer has exercised his rights. Consequently, it included in 787 KAR 1:110 Section 3(1)(b) a reference to a separate regulation it would create to clarify how we could be sure of the date an appeal was initiated. That subsection of 787 KAR 1:110 states that "[a]n appeal shall be considered initiated and filed as of the date it is received by the department as established in 787 KAR 1:230." So we look to 787 KAR 1:230.

Now, the Commission was careful when it promulgated 787 KAR 1:230, obviously desiring that taxpayers not be given "wiggle room" about the date they exercise their appeal rights. In particular, the Commission, displaying an apparent distrust of taxpayers, prohibited the use of privately-held postage meters to establish the date an appeal was mailed to the department. The regulation was clear to specify that an

> appeal shall be considered received by the department as of the date it is:
>
> (1) Delivered to the department; or
>
> (2) Deposited in the mail or with a commercial postal service on or before the due date, as indicated by the postmark applied by the U.S. Postal Service or official mark applied by a commercial postal service. The mark made by a privately-held postage meter shall not be considered in determining the date of receipt.

787 KAR 1:230 Section 1(1)-(2).

As important as it is to know when an appeal is initiated, is it not fair to say that it is even more important to know precisely when a taxpayer is informed of a tax assessment, and the date on which his appeal rights start to tick down? It certainly is from the taxpayer's standpoint. And yet, KRS 341.430(2) was just as general about when the department sends out notices as it was in stating when an appeal is to be filed. KRS 341.430(2) (time to challenge determination of tax assessment measured by when determination "was mailed" by the department).

So, one might expect the Commission to have promulgated a regulation, essentially mirroring 787 KAR 1:230 Section 1, that would afford the taxpayer the

same assurance and specificity regarding the initiation of his tax assessment, and appeal period, as the Commission demanded of the taxpayer when initiating the appeal. But one would be disappointed. There is no such regulation.

Rather, the Commission set up a procedure that begins with the taxpayer initiating the appeal in accordance with 787 KAR 1:110 and 787 KAR 1:230. According to 787 KAR 1:110 Section 3(2)(a), "upon receipt of an appeal under this section, the commission shall: 1. Deny the appeal as untimely; or 2. Promptly schedule a hearing . . . ."

In this case, there is no dispute as to when the appellant filed its appeal with the Commission. As the Commission noted, "The appellant filed an appeal dated February 3, 2010." The Commission could have examined its records, compared the dates of the determination of tax assessment with the date the appellant filed the appeal, and, in accordance with its own regulation, "[d]en[ied] the appeal as untimely[.]" The Commission did not do that. In fact, the Commission took no action for quite a while.

Regardless whether the Commission actually doubted its own records as to when it, in fact, mailed notice to the appellant, the known facts give cause for such doubt. There was no dispute about when the appellant received the notice of assessment; according to the Commission, "The appellant received the notices on January 15, 2010." If the Commission actually mailed the notices on December 30, 2009, then the necessary inference is that delivery took more than two weeks. Then, there was the notice itself which incorrectly stated the appeal period began

to run "from the date of this notice[,]" rather than from the date the notice "was mailed" as required by KRS 341.430(2). This is an error the Commission should correct. Then, there was the fact that the Commission apparently has no written policy or office protocol for how and precisely when these important notices of determination are mailed. Finally, we should not forget the notice was created at the end of the week between Christmas and New Years Day, state holidays when Commission offices were closed and the workers were to be off work, not to return from the New Years break until Monday, January 4, 2010.

Did these facts give the Commission pause? We cannot know. In fact, however, there was a pause, of more than four months. The Commission took no action until June 10, 2010, and, instead of electing to "[d]eny the appeal as untimely[,]" the Commission scheduled a hearing, though I would not say it was "[p]romptly schedule[d.]"

The Commission had the right to promulgate a regulation that would have clarified the starting date of the period in which an appeal of its tax assessment could be had; it declined to exercise that right. The Commission had the right, in accordance with its own regulation, to deny the appeal upon receipt as untimely; it declined also to exercise that right. I believe the Commission waived the right to question the timeliness of the appeal when, after four months of consideration, it scheduled a hearing. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Department of Revenue, Finance and Admin. Cabinet v. Wade*, 379 S.W.3d 134, 138-39 (Ky. 2012) (quoting *D. H. Overmyer Co. Inc., of*

Ohio v. Frick Co., 405 U.S. 174, 186, 92 S.Ct. 775 (1972)). I would hold that once the Commission made the choice to schedule a hearing under the regulation it promulgated, it irrevocably elected to consider the appeal on its merits. The taxpayer was entitled to present evidence refuting the department's determination that it was Tracom's successor, but that was not permitted.

I would reverse and order the Commission to conduct a new hearing during which the appellant could present evidence supporting its position that it is not liable for Tracom's tax assessment because it is not Tracom's successor.

BRIEF FOR APPELLANT:

Lynn C. Stidham
Lexington, Kentucky

BRIEF FOR APPELLEE:

Amy F. Howard
Frankfort, Kentucky