RENDERED: JANUARY 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002128-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY SERVICES — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-01670

FRASURE'S RIVERVIEW PERSONAL
CARE HOME — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services appeals from an order of the Franklin Circuit Court reversing an order of the Cabinet dismissing Frasure's Riverview Personal Care Home's (Frasure's) request for an administrative hearing after it was issued a Type A

citation for violation of administrative regulations governing personal care homes. The circuit court concluded the Cabinet's denial of a hearing was arbitrary and capricious and reversed and remanded the case to the Cabinet for a hearing. We agree Frasure's is entitled to a hearing and affirm.

Following an investigation, Frasure's was issued a Type A citation on July 29, 2005, and assessed a $1,500 penalty. On August 12, 2005, the Cabinet sent Frasure's a citation letter stating:

> "If you wish to appeal this citation, you must file a written request for a hearing with the Secretary of the Cabinet for Health and Family Services within 20 days of your receipt of this written notice of action by the Cabinet pursuant to 900 KAR 2:020."

Frasure's asserts it mailed a request for a hearing on August 3, 2005, and again on August 25, 2005, both addressed as follows: "Cabinet for Health Services, Health Services Building, First Floor, 275 E. Main St., Frankfort, Ky. 40621." On October 17, 2005, Frasure's wrote the Cabinet stating requests for a hearing were filed on August 3, 2005, and on August 25, 2005, and enclosed copies of its August requests. The October 17, 2005, letter was sent to the same mailing address as the requests for hearings but addressed to the "Office of the Inspector General." Although the Cabinet acknowledges receipt of the October 17, 2005 letter, it denies receipt of the August 3 or August 25 requests.

On October 25, 2005, the Cabinet hearing officer issued an order to Frasure's requesting it show cause why its appeal should not be dismissed as untimely. Frasure's filed a response on October 28, 2005. The hearing officer

dismissed the appeal as untimely finding the August requests for a hearing were improperly addressed because they were not addressed to the Secretary of the Cabinet and never reached the Cabinet's office. Despite the hearing officer's findings, there is nothing in the appellate record or the parties' briefs to indicate any proof was taken regarding whether the Cabinet received the August requests.

Frasure's appealed to the Franklin Circuit Court arguing the denial of a hearing was arbitrary and capricious. The Cabinet filed a motion to dismiss based on Frasure's failure to exhaust its administrative remedies. After briefing, the Franklin Circuit Court granted Frasure's petition for review and appeal and remanded the case to the Cabinet for further proceedings. After a thorough analysis of the applicable regulations, statutes, and case law, the circuit court concluded the absence of the inclusion of "Secretary of the Cabinet" in the mailing address on the August requests for a hearing was not fatal. Ultimately, the circuit court concluded:

> Whatever happened to the request for a hearing after it was received by the Cabinet is the responsibility of the Cabinet, not [Frasure's]. In these circumstances, if there is doubt about whether the request for a hearing was properly submitted, the doubt should be resolved in favor of [Frasure's], who seeks nothing more than a hearing at which it can contest a penalty imposed by the Cabinet.

The Cabinet appealed.

The citation letter sent to Frasure's on August 12, 2005, mirrors 900 KAR 2:020 Sec 2 (2) which states:

> Within twenty (20) days of the receipt of the written notice of action by the cabinet, the licensee of the facility may file a written request for hearing with the Secretary of the Cabinet for Health Services. Upon receipt of the written request for hearing, the secretary shall designate a hearing officer.

The Cabinet contends mailing the requests not specifically addressed to the Secretary of the Cabinet did not comply with the regulation and, therefore, Frasure's did not timely request a hearing.

An agency's decision may only be reversed "if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record." *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky.App. 2003). In *Hagan v. Farris,* 807 S.W.2d 488, 490 (Ky. 1991), the Kentucky Supreme Court summarily set forth guidelines to be followed in reviewing an agency's action:

> An agency must be bound by the regulations it promulgates. Further, the regulations adopted by an agency have the force and effect of law. An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation. KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action.
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> * * * *
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> In most cases, an agency's interpretation of its own regulations is entitled to substantial deference. (citations omitted).

A Court must uphold an agency's interpretation of its regulations unless it is incompatible and inconsistent with the statute under which it was promulgated or

otherwise defective as arbitrary and capricious. *Com., Cabinet for Health Services v. Family Home Health Care, Inc*., 98 S.W.3d 524, 527 (Ky.App. 2003).

Like statutes, regulations are to be "liberally construed with a view to promote their objects and carry out the intent of the legislature . . . ." KRS 446.080(1). Words and phrases are to "be construed according to the common and approved usage of language," unless a technical meaning applies. KRS 446.080(4).

The Cabinet contends the rule of liberal construction in accordance with the common understanding of the language used is not applicable because the term "file" has a technical legal meaning. It urges strict construction of the regulation and the conclusion that mailing of a request for a hearing is insufficient. Under its construction, the request must be hand-delivered to the Secretary of the Cabinet within twenty days of the citation letter.

The Cabinet relies on *Jenny Wiley Health Care Center v. Commonwealth*, 828 S.W.2d 657 (Ky. 1992). In that case, the Court was confronted with the situation where it was undisputed the request for hearing was not received within the twenty-day time limit. The Court held depositing a request for a hearing in the mail does not constitute a "filing" under the regulation when it is not received by the Cabinet within the twenty-day time period. *Id*. at 661.

One crucial fact distinguishes this case from *Jenny Wiley*. Here, Frasure's submitted evidence the requests for a hearing were timely received. Despite the hearing officer's finding, there is no contrary evidence.

A properly addressed, stamped, and sealed letter creates a presumption the addressee received the document. *Exec. Comm. of Christian Educ. & Ministerial Relief for the Presbyterian Church of the U.S. v. Fidelity & Columbia Trust Co*., 273 Ky. 715, 117 S.W.2d 958, 960 (1938). Frasure's mailed its first hearing request just four days after the Type A citation was issued and the second request just thirteen days after the citation letter was mailed advising Frasure's of its right to request a hearing. Ample time was allowed for both requests to be timely received and filed. It is the Cabinet's duty to establish procedures for the receipt and routing of mail, including hearing requests.

The Cabinet's suggestion the hearing requests must have been specifically addressed to the Secretary of the Cabinet is equally unpersuasive. In *Lassiter v. American Express Travel Related Services Co., Inc*., 308 S.W.3d 714, 719 (Ky. 2010), the Court held naming a governmental agency in a notice of appeal is the functional equivalent of naming the agency's head. The Court reasoned to hold otherwise would make a hyper-technical distinction that served no rational purpose. *Id*.

The same is true in this case. Mailing a request for a hearing addressed to the Cabinet is the functional equivalent of mailing a request addressed to the Secretary of the Cabinet. The purpose and intent of the hearing process is to ensure the procedural rights of citizens and business subject to administrative processes. Nothing in 900 KAR 2:020 or in the Cabinet's citation letter notifying Frasure's of its right to request a hearing indicates a properly addressed request for

a hearing would be rejected because it did not include "Secretary of the" in the mailing address.

We agree with the circuit court's poignant observation:

> [Frasure's] October 17, 2005 letter to [the Cabinet] was addressed to "Office of the Inspector General," not to "Secretary of the Cabinet." However, in their Final Order of Dismissal, the agency stated, "the Appellant filed an untimely appeal *with the proper address* on October 17, 2005." (emphasis added) The Court finds that the agency acted arbitrarily in accepting an appeal addressed to the "Office of the Inspector General," but refusing to accept the otherwise identical earlier appeals addressed to "Cabinet for Health Services," because it did not include "*Secretary of the*." This inconsistency illustrates the arbitrariness of the Hearing Officer's Final Order.

Under the circumstances, the denial of a hearing to Frasure's was arbitrary and capricious.

Based on the foregoing, the order of the Franklin Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: I find it appalling and repugnant that a public agency, created to serve the public interest, would fabricate such flagrant impediments barring legitimate access to an administrative appeal. Additionally, the Cabinet has manifested a mean spirit in bringing this appeal -section 115[1] of the Kentucky Constitution notwithstanding.

[1] Section 115 of Kentucky's Constitution grants one appeal as a matter of right.

The circuit court spoke clearly and correctly in directing the Cabinet to act in appropriate fashion. This appeal has created additional expense and aggravation to a party clearly entitled to reasonable access to the Cabinet.

Such conduct understandably erodes public confidence in our institutions.

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