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NO. COA08-1205

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

RONALD GOLD OVERCASH,

Petitioner

v.

Cabarrus County
No. 06 CVS 745

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF WASTE
MANAGEMENT, UST SECTION,

Respondent

Appeal by plaintiff from judgment entered 20 May 2008 by Judge Timothy L. Patti in Cabarrus County Superior Court. Heard in the Court of Appeals 6 April 2009.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay P.A., by James E. Scarbrough, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for respondent-appellee.

CALABRIA, Judge.

Ronald Gold Overcash, ("plaintiff") appeals the trial court's judgment affirming the Office of Administrative Hearings' ("OAH") grant of North Carolina Department of Environment and Natural Resources' ("defendant") motion to dismiss for lack of subject matter jurisdiction over plaintiff's petition for contested case hearing on grounds that it was not timely filed. We affirm.

On 6 December 2004, plaintiff was assessed a civil penalty ("CPA") in the amount of \$26,552.88, for violations of the Leaking Petroleum Underground Storage Tank Cleanup Act, N.C. Gen. Stat. § 143-215.94A, et seq. On 7 December 2004, defendant mailed the assessment to plaintiff by certified mail, return receipt requested. Plaintiff received the CPA on 16 December 2004. In addition, plaintiff was served the CPA by the Cabarrus County Sheriff's Office on 16 December 2004.

These violations included (1) failure to demonstrate compliance with corrosion protection requirement for one underground storage tank ("UST"), (2) failure to maintain spill prevention equipment for two UST systems, (3) failure to verify overfill prevention for one UST, (4) failure to meet the requirements for leak detection for two UST systems, (5) failure to provide performance claims for leak detection equipment, (6) failure to investigate a suspected release from two UST systems, and (7) failure to assess the site at the permanent closure of one UST system and submit a tank closure report. N.C. Gen. Stat. § 143-215.94A, et seq. (2007); 15A N.C. Admin. Code 2N- .0301, .0502, .0506, .0603, .0803 (2007).

The cover letter accompanying the CPA informed plaintiff of his options to (1) pay the penalty; (2) submit a request for remission of the penalty; or (3) petition for an administrative hearing with OAH within thirty days of receipt of the CPA.

On 31 May 2005 plaintiff filed a petition for writ of certiorari to OAH for a contested case hearing. On 18 November

2005, defendant filed a motion to dismiss the contested case for lack of subject matter jurisdiction. On 29 November 2005, plaintiff filed a response to the motion to dismiss.

On 31 January 2006, OAH, Administrative Law Judge ("ALJ") Augustus B. Elkins presiding, filed a final decision/order of dismissal ("final decision"), dismissing the contested case for failure to timely file the contested case petition and consequent failure to invoke the subject matter jurisdiction of the OAH. The final decision was served on plaintiff by certified mail and received by counsel for plaintiff on 2 February 2006.

On 28 February 2006, plaintiff filed a petition for statutory review and petition to issue common law writ of certiorari with the Cabarrus County Superior Court. On 20 May 2008, on judicial review, the Cabarrus County Superior Court entered a judgment affirming the final decision of OAH. Plaintiff appeals.

Plaintiff contends that the trial court erred in affirming OAH's final decision/order dismissing for lack of subject matter jurisdiction his petition for writ of certiorari for a contested case hearing, and not expressly ruling on plaintiff's petition for writ of certiorari to the trial court. We disagree.

The issue "whether a court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). N.C. Gen. Stat. § 150B-36(c)(1) (2007) states that "[a] determination that the Office of Administrative hearings lacks

jurisdiction" is a final decision to be made by an administrative law judge and is appealable directly to Superior Court.

The right to appeal an administrative agency ruling is statutory, and compliance with the statutory provisions is necessary to avail oneself of this right. *House of Raeford Farms, Inc. v. State ex rel. Envir. Mgmt. Comm'n*, 338 N.C. 262, 267, 449 S.E.2d 453, 457 (1994). Where a petitioner bears the responsibility of filing his petition with the Office of Administrative Hearings on or before the requisite date but fails to do so, the petition must be dismissed. *Gummels v. Dep't of Human Res.*, 98 N.C. App. 675, 678, 392 S.E.2d 113, 115 (1990) (contested case petition dismissed where the petition was mailed four days prior to the statutory deadline but filed one day after the deadline); see also *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 660, 428 S.E.2d 474, 476, *disc. rev. denied*, 334 N.C. 63, 432 S.E.2d 359 (1993) (if a petition is not filed within the time period set forth by statute, the court does not have subject matter jurisdiction).

N.C. Gen. Stat. § 143-215.94W(d) (2007) states in pertinent part that "[c]ontested case petitions shall be filed pursuant to G.S. 150B-23 within thirty days of receipt of the notice of assessment." Subject matter jurisdiction cannot be waived either by the court or by the parties. Pursuant to N. C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2007), "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

I. OAH Evidentiary Hearing on Writ of Certiorari

Plaintiff contends that "the Superior Court erred in determining that the final agency decision was supported or unsupported 'by substantial, admissible evidence' where, as here, there was never an evidentiary hearing" before OAH. We disagree. The trial court ruling quoted by plaintiff above states in full as follows:

Having reviewed the Final Decision and the whole record, this Court finds and concludes that the Final Decision was not made in excess of statutory authority, upon unlawful procedure, affected by error of law, or was unsupported by substantial, admissible evidence and is AFFIRMED in every respect.

In its ruling, the trial court recited some of the grounds on which a petitioner may challenge an agency action in OAH pursuant to N.C. Gen. Stat. § 150B-23. The record shows that the trial court considered the evidence in the record on judicial review. Plaintiff attached eleven exhibits to his petition for writ of certiorari filed with OAH, and again with the trial court. Plaintiff does not cite any authority for the proposition that OAH was required to hold a hearing on the motion to dismiss.

Plaintiff did not request oral argument when he filed his response to the motion to dismiss. OAH is governed by the Rules of the Office of Administrative Hearings. 26 N.C. Admin. Code 03-.0100, et seq. Rule .0115 (b) states that [a]ll motions in writing shall be decided without oral argument unless an oral argument is directed by the administrative law judge." 26 N.C. Admin. Code 03-.0115(b) (2007). Rule .0115(b) further provides that "[i]f any

party desires a hearing on the motion, he shall make a request for a hearing at the time of the filing of his motion or response.”

Id. Under this rule, the burden was on plaintiff to request a hearing, which he failed to do. This assignment of error is overruled.

II. Writ of Certiorari

Plaintiff argues that the trial court erred in not considering plaintiff's writ of certiorari. We disagree. N.C. Gen. Stat. § 150B-43 (2007) states, “[a]ny person who is aggrieved by the Final Decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article. . . .” The procedures in Chapter 150B provide the exclusive means for plaintiff to obtain judicial review by the Superior Court. *State ex rel. Envir. Mgmt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 442, 400 S.E.2d 107, 113 (1991), (*rev'd on other grounds*), 338 N.C. 262, 449 S.E. 2d 453 (1994); *see, e. g., Employment Sec. Comm'n v. Peace*, 128 N.C. App. 1, 493 S.E.2d 466 (1997), *aff'd*, 349 N.C. 315, 507 S.E.2d 272 (1998) (administrative appeals not determined by common law but only by rights granted by statute). The trial court properly concluded in its judgment that plaintiff's right of appeal was based exclusively on statute. This assignment of error is overruled.

III. North Carolina Rule of Civil Procedure 4

Plaintiff argues that defendant erred in serving the CPA on him rather than on his attorney; and that, therefore, defendant

should be estopped from enforcing the statutory filing deadline. We disagree.

Rule 4(j) (1) (b) and (c) state, in relevant part, as follows:

(j) Process-Manner of service to exercise personal jurisdiction.-In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1). . . upon a natural person by one of the following:

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C. Gen. Stat. § 1A-1, Rule 4 (2007). Plaintiff bases this argument on the contents of a letter allegedly faxed by his attorney to one of defendant's employees who, according to defendant, was not a penalty assessor. In the letter, plaintiff's attorney asked defendant's employee to "direct all correspondence to [the attorney] that is intended for Overcash in this matter and any DENR." There is no evidence that the letter was either sent or received. Assuming *arguendo* the letter was faxed, its existence nonetheless would not satisfy the requirements of Rule 4.

Plaintiff's request does not constitute lawfully executed substitution or acceptance of service pursuant to Rule 4(j) (1) (b).

No written substitution of service or acceptance of service appears in the record. Defendant served plaintiff in accord with the requirements of Rule 4 by serving the CPA on plaintiff both by certified mail and through the Cabarrus County Sheriff's Office. Rule 4(j)(1)(b) and (c). This assignment of error is overruled.

IV. Plaintiff's Alleged Confusion Regarding Prior Cases

Plaintiff further contends in an assignment of error, which is included in plaintiff's heading III, that defendant "knew there was confusion as to whether the violations alleged in the new NOV were actually the same as the ones being reviewed in Superior Court in another case involving the same parties and the same sites." The trial court rejected defendant's argument and concluded as a matter of law that "the CPA at issue differs from the four previous CPA's issued against petitioner and referenced in the record," then explained that CPAs have different penalty periods. However, plaintiff does not argue this issue in his brief; therefore, this assignment of error is abandoned.

V. Decision of ALJ Elkins "Overruled" Prior Decisions of OAH

Contrary to his assignment of error, plaintiff concedes there was no error based on the fact that the final agency decision was made by ALJ Elkins. Plaintiff concedes Chief ALJ Mann merely reassigned the case from ALJ Conner to ALJ Elkins, pursuant to his stated authority under N.C. Gen. Stat. § 150B-32. ALJ Elkins did not "overrule prior decisions" of OAH. We deem this assignment of error abandoned.

VI. Conclusion

Plaintiff did not file a contested case petition in OAH within the statutorily-mandated 30-day time period. The right to appeal an administrative agency ruling is statutory and compliance with the statutory provisions is necessary for plaintiff to sustain an appeal.

This Court affirms the trial court's ruling that plaintiff failed to comply strictly with statutory requirements for obtaining an appeal in OAH and those statutory requirements provide the exclusive means of review. OAH lacked subject matter jurisdiction over petitioner's contested case, and it was properly dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2007). The trial court properly affirmed the OAH dismissal for lack of subject matter jurisdiction.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).