

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-441

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

C.F. LITTLE and PATSY LITTLE,
Petitioners,

v.

Cabarrus County
No. 06 CVS 3215

N.C. DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES,
Respondent.

Appeal by petitioners from order entered 31 December 2008 by Judge Ronald K. Payne in Cabarrus County Superior Court. Heard in the Court of Appeals 14 October 2009.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay and James E. Scarbrough, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for respondent-appellee.

GEER, Judge.

Petitioners C.F. Little and Patsy Little appeal from the trial court's order affirming the dismissal of their petition for a contested case hearing to review the assessment of civil penalties against them by the North Carolina Department of Environment and Natural Resources, Division of Water Quality ("DENR"). Because the evidence in the record supports the finding that petitioners did not timely file their contested case petition, we agree that the Office of Administrative Hearings ("OAH") lacked subject matter

jurisdiction and, therefore, affirm the dismissal of petitioners' contested case petition.

Facts

Petitioners own a 438.55 acre tract of land in Union County, North Carolina. In 2004, in connection with the construction of a road on that property, petitioners applied for and received a water quality certification, with certain conditions, from DENR. On 26 May 2005, DENR sent petitioners a letter reminding them of the duty to comply with these conditions, and on 9 January 2006, DENR issued a notice of violation for failing to comply with the conditions. Petitioners admit receiving the 26 May 2005 letter, but deny receiving the 9 January 2006 notice of violation. On 15 May 2006, DENR assessed a civil penalty of \$2,582.13 against petitioners for their violations of the water quality certification's conditions. Petitioner C.F. Little admits he received notice of the civil penalty assessment on or about 28 June 2006. The parties dispute when petitioner Patsy Little received notice.

On 28 July 2006, petitioners mailed a petition for a contested case hearing to OAH. The petition was filed on 31 July 2006. On 25 August 2006, DENR moved to dismiss the petition on the grounds that it was not timely filed. The Administrative Law Judge ("ALJ") requested a response to the motion to dismiss, and on 20 September 2006, petitioners filed a response. In the response, petitioners argued they had complied with the requirement to "submit" the petition by mailing it to OAH on 28 July 2006. Petitioners also pointed out that C.F. Little had only alleged he received the

notice "on or about" 28 June 2006 and not "on" 28 June 2006. Finally, petitioners argued they had a good defense to the assessment, explaining that they had attempted to comply with the certification's conditions but could not do so due to delays in the review process by DENR. Petitioners did not attach any affidavits; the only evidence submitted by petitioners was a 10 March 2006 letter by their attorney to a DENR official explaining that petitioners were waiting for DENR approval before taking the next steps needed to comply with the water quality certification's conditions.

On 22 September 2006, the ALJ entered a final agency decision granting DENR's motion to dismiss. The ALJ found that petitioners received the notice of civil penalty assessment on 28 June 2006 and that the 30th day for filing their petition expired on 28 July 2006. Because petitioners filed their petition on 31 July 2006, the ALJ concluded that the petition was untimely filed and that OAH lacked subject matter jurisdiction to hear the case.

Petitioners filed a petition for judicial review in Cabarrus County Superior Court on 23 October 2006, renewing their arguments. DENR filed a response to the petition on 16 November 2006. On 31 December 2008, the trial court affirmed the dismissal. Petitioners timely appealed to this Court.

The sole issue raised by this appeal is whether the trial court erred in affirming the ALJ's dismissal of petitioners' contested case petition as untimely filed. A failure to timely

file a contested case petition deprives OAH and the reviewing courts of subject matter jurisdiction. *Gray v. N.C. Dep't of Env't, Health & Natural Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002) (explaining that "timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts"). See also *Nailing v. UNC-CH*, 117 N.C. App. 318, 327, 451 S.E.2d 351, 357 (1994) (holding "jurisdiction over a contested case hearing arising under [the State Personnel Act] is not conferred upon the OAH unless petitioner follows [the procedures in Article 3 of Chapter 150B for filing contested case petition]"), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995).

Generally, N.C. Gen. Stat. § 150B-23(f) (2009) governs the filing of a contested case petition:

Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation

for the filing of a petition for a contested case hearing.

(Emphasis added.)

The exception contemplated by § 150B-23(f) arises in this case: there is another statute setting a time limitation for the filing of a contested case petition against DENR. N.C. Gen. Stat. § 143-215.6A(d) (2009) requires a party against whom DENR assesses a civil penalty to file a contested case petition "within 30 days of receipt of the notice of assessment." It provides that "[t]he Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4."

The ALJ found that petitioners received the notice of civil penalty assessment on 28 June 2006 and, therefore, that petitioners had until 28 July 2006 to file their contested case petition. This finding is supported by sufficient evidence in the record. In their brief on appeal, petitioners acknowledge that DENR's Exhibit C, a computer printout from the Cabarrus County Sheriff's Department, indicates that C.F. Little was personally served at his home, 4600 Annette Drive, by Officer Heather Rice on 28 June 2006. Personal delivery is a method of service authorized by both N.C. Gen. Stat. § 150B-23(f) and N.C. Gen. Stat. § 143-215.6A(d).

Although petitioners argue Exhibit C is inadmissible evidence, they are precluded from challenging it on appeal by their failure to object to its admission below. See *Joyner v. Garrett*, 279 N.C. 226, 235, 182 S.E.2d 553, 560 (1971) (holding that where petitioner failed to object to introduction of arresting officer's sworn

police report at administrative hearing, report "was sufficient evidence to sustain [Department of Motor Vehicles'] suspension of petitioner's license"). C.F. Little also admitted in his contested case petition that he was served on or about 28 June 2006. The ALJ thus did not err in finding that C.F. Little received notice of the assessment on 28 June 2006.

Petitioners, however, argue that N.C. Gen. Stat. § 150B-23(f) requires that notice be given "to all persons aggrieved" before the time limitation for filing a contested case petition begins running, and, therefore, that C.F. Little's time to file his petition did not begin running until Patsy Little received notice of the civil penalty assessment. We need not address this argument because the evidence is sufficient to support the ALJ's determination that Patsy Little was also served with notice of the assessment on 28 June 2006.

N.C. Gen. Stat. § 143-215.6A(d) provides that notice of a civil penalty assessment may be served "by any means authorized by G.S. 1A-1, Rule 4." Rule 4(j)(1)(a) of the Rules of Civil Procedure provides that service on a natural person can be accomplished "[b]y delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Exhibit C, which we have held is competent evidence in light of petitioners' failure to object to its admission below, demonstrates that the 16 May 2006 letter, addressed to both petitioners, was delivered on 28

June 2006 to 4600 Annette Drive, petitioners' usual place of abode, and left with C.F. Little, Patsy Little's husband. In the absence of any evidence to the contrary, this was sufficient evidence to support the ALJ's finding that Patsy Little also received notice of the civil penalty assessment on 28 June 2006. See *Darby v. Darby*, 135 N.C. App. 627, 628, 521 S.E.2d 741, 742 (1999) (noting that wife met criteria for accepting service of complaint on behalf of husband at their home under Rule 4(j)(1)(a), but holding that she could not do so in that case because wife was plaintiff who filed complaint).

Petitioners contend, however, that Patsy Little was not living at 4600 Annette Drive because she moved out of the home after the couple separated. Petitioners did not make this argument before the ALJ, and our review of the record reveals no evidence to support the allegation that Patsy Little was not living at 4600 Annette Drive at the time of notice. Counsel for petitioners noted in petitioners' response to the motion to dismiss that petitioners were separated, but did not contend that Ms. Little had not, therefore, been provided with notice of the assessment. More importantly, this response was not verified, and petitioners submitted no evidence to support the assertion. It is well established that "[s]tatements by an attorney are not considered evidence." *In re D.L., A.L.*, 166 N.C. App. 574, 582, 603 S.E.2d 376, 382 (2004).

Consequently, because the ALJ had no evidence before her that petitioners were separated or that Patsy Little no longer lived at

4600 Annette Drive where the notice was served, the ALJ properly determined that Ms. Little received notice on the same date as C.F. Little – 28 June 2006 – based on the Sheriff's Department's service of the notice. The contested case petition was, therefore, untimely for both petitioners, and OAH lacked subject matter jurisdiction. We, therefore, affirm the dismissal of the contested case petition.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).