

Protective Services Law (Law), 23 Pa. C.S. §6341(a)(2),¹ she had forty-five days, or until April 10, 2006, to request a hearing to amend or expunge the report.

In a letter dated March 27, 2006, Petitioner requested a hearing to have the February 10, 2006, indicated report destroyed, sealed and/or expunged. However, Petitioner's letter was post-marked April 12, 2006, two days after the statutory appeal period expired, and it was not received by DPW until April 17, 2006. Accordingly, DPW notified Petitioner that her March 27, 2006, request for expunction would not be reviewed because it was untimely, but that she had the right to file a written request for the BHA to review the determination. Petitioner filed a timely request, and the matter was assigned to an administrative law judge (ALJ) to conduct a hearing on whether Petitioner should be afforded a *nunc pro tunc* appeal.

¹ This section provides, in pertinent part:

(a) **General Rule.** – At any time:

....

(2) Any person named as a perpetrator, and any school employee named, in an indicated report of child abuse may, within 45 days of being notified of the status of the report, request the secretary to amend or expunge an indicated report on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this chapter.

23 Pa. C.S. §6341(a)(2). DPW's regulations require that a request to the Secretary to amend or expunge an indicated report must be in writing and *post-marked* within forty-five calendar days of the mailing date of the letter from ChildLine Registry. 55 Pa. Code §3490.105a(a).

Before the ALJ, Petitioner acknowledged that she received the February 23, 2006, notice within a few days of its mailing. (R.R. at 45a.) However, explaining her delayed appeal, Petitioner testified that, during the forty-five day appeal period, she: was in the process of relocating; had to commute one hour a week to attend parenting classes; made daily one-hour commutes to visit with her daughter; commuted one-hour to visit her son on Thursdays; began a new job and had to commute to place her daughter in daycare; and had to transport her daughter once a week to visit the daughter's father. According to Petitioner, because these non-negligent circumstances related to her resulted in her untimely request for a hearing, she was entitled to a *nunc pro tunc* appeal.

After considering the evidence, the ALJ rejected Petitioner's argument that her moving, her work schedule and the requirements and conditions imposed by the County Agency for visiting her children constituted non-negligent, extraordinary circumstances that warranted the issuance of a *nunc pro tunc* appeal. The ALJ noted Petitioner's admission that she was unemployed until March 30, 2006, and that she regained custody of her daughter in late March 2006, relieving her of a daily commute to visit her daughter; instead, Petitioner only had a weekly commute to visit her son (four hours total) and a weekly trip with her daughter (a two-hour round-trip). (Findings of Fact, Nos. 5-9.) Accordingly, the ALJ recommended that Petitioner's appeal be dismissed as untimely.

The BHA adopted the ALJ's reasoning and recommendation in its entirety and dismissed Petitioner's appeal as untimely. The Secretary granted

reconsideration but subsequently upheld the BHA's decision to dismiss Petitioner's appeal. Petitioner now petitions this court for review.²

It is well settled that the failure to timely appeal an administrative agency's action is a jurisdictional defect. *J.C. v. Department of Public Welfare*, 720 A.2d 193 (Pa. Cmwlth. 1998). Therefore, the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. *Id.* An appeal *nunc pro tunc* may be allowed only where delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process or non-negligent circumstances related to the appellant, her counsel or a third party.³ *Id.* The question of whether the appellant established entitlement to an appeal *nunc pro tunc* is a legal conclusion to be drawn from the evidence in the record and is fully reviewable by this court. *H.D. v. Department of Public Welfare*, 751 A.2d 1216 (Pa. Cmwlth. 2000).

On appeal, Petitioner asserts that the Secretary erred in not granting her leave to proceed *nunc pro tunc* where she demonstrated that extraordinary, non-negligent circumstances prevented her from filing a timely appeal. In doing

² Our scope of review in an expungement case is limited to determining whether the BHA's adjudication violates constitutional rights or is not in accordance with the law, or whether the findings of fact are not supported by substantial evidence. *J.C. v. Department of Public Welfare*, 720 A.2d 193 (Pa. Cmwlth. 1998).

³ One seeking permission to file an appeal *nunc pro tunc* has the burden of establishing that: (1) the appeal was filed within a short time after learning of and having an opportunity to address the untimeliness; (2) the elapsed time period is of very short duration; and (3) the appellee is not prejudiced by the delay. *J.C.*

so, Petitioner does not challenge any of the ALJ's findings of fact or conclusions of law. Moreover, Petitioner abandons the argument she raised before the ALJ, i.e., that her failure to file a timely appeal was due to non-negligent circumstances related to *her*. Rather, Petitioner asserts for the first time that her untimely appeal was due to non-negligent circumstances related to *her counsel and a third party*. According to Petitioner, she executed the necessary documents to appeal the indicated report well before the expiration of the appeal period but, "for reasons unknown," an administrative assistant at her counsel's office did not mail the appeal until two days after the expiration of the appeal period. (*See* Petitioner's brief at 6-7.)

However, as previously stated, our determination of whether an appellant establishes an entitlement to a *nunc pro tunc* appeal is to be drawn *from the evidence in the record*. *H.D.* Because Petitioner did not raise the allegation relating to her employer's administrative assistant before the ALJ, there is *no evidence in the record* to support her allegations. Because Petitioner's only allegation on appeal is outside the scope of the record, it may not be considered. *J.C.* (holding that the court cannot consider an allegation that was not raised during the evidentiary hearing because the allegation was outside the scope of the record).

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| S.S., | : | |
| | : | Petitioner |
| | : | |
| v. | : | No. 1289 C.D. 2007 |
| | : | |
| Department of Public Welfare, | : | |
| Respondent | : | |

ORDER

AND NOW, this 30th day of January, 2008, the order of the Secretary of the Department of Public Welfare, dated June 11, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge