

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donahue's III - St. Leo's Manor, :
Petitioner :
v. :
Department of Public Welfare, : No. 2004 C.D. 2011
Respondent : Submitted: October 19, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: November 28, 2012

Donahue's III – St. Leo's Manor (Donahue's) challenges the order of the Department of Public Welfare, Bureau of Hearings and Appeals, Chief Administrative Law Judge (DPW-BHA), which adopted in its entirety the adjudication and recommendation of the Administrative Law Judge (ALJ) that Donahue's appeal should be dismissed for lack of jurisdiction as improperly filed.

Donahue's operates a licensed personal care home located at 1215 Schimmer Street, Pittsburgh, PA 15212. The Department of Public Welfare's Bureau of Adult Residential Licensing (BARL) conducted license inspections at Donahue's on January 21, 2011, February 11, 2011, and March 22, 2011. At the time of the inspection, Donahue's was operating under a first provisional license.

By notice dated April 6, 2011, BARL informed Donahue's that violations specified for the first provisional license had not been corrected and that

new violations were found during the inspections. BARL issued a second provisional license. BARL also informed Donahue's:

All violations listed on the Violation Report must be corrected by the dates specified on the Violation Report and continued compliance with 55 Pa. Code Ch. 2600 must be maintained. As soon as each violation is corrected, notify the Department's Regional Office of Adult Residential Licensing so that compliance can be verified.

....

A fine will be assessed on a daily basis beginning with the date of this letter and will continue until the violation is fully corrected, and full compliance with the regulation has been achieved. If the violation is fully corrected, and full compliance with the regulation has been achieved, by the mandated correction date, no fine will be assessed. You must notify the Department's Regional Adult Residential Licensing office in writing as soon as each violation is fully corrected and submit written documentation of each correction. The Department will conduct an on-site inspection after the mandated correction date, and within 20 calendar days of the date of this letter. If one or more violations is not fully corrected and full compliance with the regulation has not been achieved, you will periodically receive invoices from the Department's Bureau of Financial Operations with payment instructions. The fines will continue to accumulate until the violation is fully corrected and full compliance with the regulation is achieved. (Emphasis in original).

Letter from Ronald Melusky, Acting Director, Department of Public Welfare, Bureau of Adult Residential Licensing, April 6, 2011, at 1-2; Reproduced Record (R.R.) at 1a-2a.

By notice dated May 11, 2011, BARL informed Donahue's that three violations were not corrected. The violations were for failure to keep a proper

medication record for each resident, 55 Pa. Code §2600.187(a), failure to follow the directions of the medication prescriber, 55 Pa. Code §2600.187a, and for lack of compliance with the required content of resident records, 55 Pa. Code §2600.252. BARL assessed initial fines of \$1,500 for each of the first two violations and \$900 for the third violation for a total fine assessment for the period from April 7, 2011, through April 26, 2011, for a total of \$3,900. The fines accrued at the rate of \$75 per day for each of the first two violations and \$45 per day for the third.

The notice further informed Donahue's:

The enclosed notice for Personal Home Care Fine specifies the total amount of the fines for the period following the Department's notice of intent to assess a fine. The invoice is payable within 30 days from the mailing date of this letter. The fines will continue to accumulate and will be recalculated at the end of each month until all violations are fully corrected. You must notify the Department's Regional Adult Residential Licensing office in writing as soon as each violation is fully corrected and submit written documentation of each correction. Even if you pay the full amount of this invoice, fines will continue to accumulate for each violation until you have provided written notice of full correction and the Department has verified that the violations are fully corrected.

....

If you disagree with the decision to assess a fine, you have the right to appeal through hearing before the Bureau of Hearings and Appeals, Department of Public Welfare in accordance with 1 Pa. Code Part II, Chs. 31-35 and 62 P.S. §1086(f). *If you decide to appeal, a written request for an appeal with a check made payable to the 'Commonwealth of Pennsylvania' for the total monthly amount or \$500, whichever is less, must be*

received within 30 days of the mailing date of this letter. . .
.. (Emphasis in original and added).

Letter from Ronald Melusky, Acting Director, Department of Public Welfare, Bureau of Adult Residential Licensing, May 11, 2011, (May 11, 2011, Letter) at 2: R.R. at 6a.

Donahue's appealed the fines in a notice received by BARL on May 24, 2011.¹ While the appeal was timely, Donahue's failed to include the required \$500. On June 3, 2011, DPW-BHA issued a rule to show cause which ordered the parties to show cause why the appeal should not be dismissed because the \$500 penalty check was not included pursuant to DPW's regulation at 55 Pa. Code §2600.263(a). Donahue's did not respond to the rule to show cause.

On September 13, 2011, the ALJ issued an adjudication and recommended that Donahue's appeal be dismissed because it failed to include the requisite \$500 check:

The agency head is authorized . . . to enter summary judgment where there are no disputed facts and the motion proceedings provide ample opportunity to be heard. . . . Further, an evidentiary hearing is not required in order for an administrative agency to determine that it lacks jurisdiction over the subject matter of an appeal. . . .

Although an appeal letter was filed and forwarded to the Bureau of Hearings and Appeals, the appeal did not contain the requisite \$500 check; therefore, pursuant to

¹ Donahue's submitted one appeal for the three violations. DPW-BHA did not object on the basis that Donahue's had to pay \$500 per violation or \$1,500 in total. DPW-BHA treated the appeal of the three violations as a single appeal for which a \$500 payment was required.

55 Pa. Code § 2600.263(a), the Bureau of Hearings and Appeals does not have jurisdiction over the above-captioned appeal because the letter without the \$500 check does not constitute a valid appeal.

On June 3, 2011, the Bureau of Hearings and Appeals issued a Rule to Show Cause why the appeal should not be dismissed as improperly filed and directed the Appellant [Donahue's] to respond within thirty (30) days giving Appellant [Donahue's] an opportunity to correct the defective filing. The Appellant [Donahue's] failed to respond to the Rule to Show Cause and has provided no reason why the appeal should not be dismissed as improperly filed. Accordingly, the Bureau of Hearings and Appeals lacks jurisdiction to hear the Appellant's [Donahue's] appeal and it should be dismissed. (Citations omitted).

Adjudication, September 13, 2011, at 1-2; R.R. at 13a-14a.

By order dated September 14, 2011, DPW-BHA adopted the adjudication and recommendation of the ALJ in their entirety.

Donahue's contends that DPW-BHA erred when it adopted the adjudication and recommendation of the ALJ and summarily dismissed Donahue's appeal due to Donahue's failure to pay the \$500, that DPW-BHA erred in adopting the adjudication and recommendation of the ALJ where the record lacked any evidence of the alleged notification to Donahue's of the alleged monetary requirements, and that DPW-BHA misapplied 1 Pa. Code §33.21 despite its failure to notify Donahue's of a required fee.²

² This Court's review is limited to a determination of whether there has been a violation of constitutional rights, the commission of an error of law, or necessary findings of fact have been supported by substantial evidence. B.E. v. Department of Public Welfare, 654 A.2d 290 (Pa. Cmwlth. 1995).

Initially, Donahue's contends that the record in this case contains nothing to indicate to Donahue's that it was required to pay \$500.00. This Court disagrees. The May 11, 2011 Letter to Donahue's specifically states, "[i]f you decide to appeal, a written request for an appeal with a check made payable to the 'Commonwealth of Pennsylvania' for the total monthly fine amount or \$500, whichever is less, must be received within 30 days of the mailing date of this letter. . . ." May 11, 2011, Letter at 2; R.R. at 6a. Because the total fine for the three violations was \$3,900, \$500 was clearly less than the fine amount and was the amount necessary to be paid to perfect the appeal.

This appeal requirement conforms to Section 1086(f) of the Public Welfare Code (Code)³, 62 P.S. §1086(f), which provides in pertinent part that "if the provider wishes to contest either the amount of the penalty or the fact of the violation, the party shall forward the assessed penalty, not to exceed five hundred dollars (\$500), to the Secretary of Public Welfare for placement in an escrow account with the State Treasurer." Further, DPW's regulation, 55 Pa. Code §2600.263(a), provides:

If the home that is fined intends to appeal the amount of the penalty or the fact of the violation, the home shall forward the assessed penalty, not to exceed \$500, to the Secretary for placement in an escrow account with the State Treasurer. A letter appealing the penalty shall be submitted with the assessed penalty. This process constitutes an appeal.

³ Act of June 13, 1967, P.L. 31, *as amended*. This Section was added by the Act of December 21, 1988, P.L. 1883.

BARL made Donahue's aware of the need to pay the \$500. The procedure outlined in the May 11, 2011, Letter conformed to the statute and regulation.

Donahue's next contends that it did not need to pay the \$500 because, under 1 Pa. Code §33.21, if an agency's regulations do not specify the filing fee for a pleading or other document, the document may be deposited without a filing fee. However, 1 Pa. Code §33.21(b) only applies to agency regulations that include a filing fee requirement. Section 1086(f) of the Code and 55 Pa. Code §2600.263 require payment of the assessed penalty or \$500 whichever is the lesser, not a filing fee.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 28th day of November, 2012, the order of Department of Public Welfare, Bureau of Hearings and Appeals in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge