COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	No. 08-20-00045-CV
Appellant,	§	Appeal from the
v.	§	98th District Court
PULAK BARUA D/B/A SUNSHINE FOOD MART,	§	of Travis County, Texas
Appellee.	§	(TC# D-1-GN-09-001076)

O P I N I O N

Appellant, Texas Commission on Environmental Quality ("TCEQ"), appeals the trial court's reversal of its default order against Appellee, Pulak Barua d/b/a Sunshine Food Mart. TCEQ claims substantial evidence supports its finding that Appellee received notice of the order setting the enforcement action against him for hearing, and he was not deprived of due process when TCEQ entered the default order against him. As a preliminary issue, TCEQ also asserts Appellee failed to preserve any issues for appeal when he failed to adequately raise any issues in his motion for rehearing as required under the Texas Government Code.

We agree with TCEQ that Appellee failed to preserve his issues for appeal to the trial court

in Travis County,[1] and the trial court erred in considering them. We reverse and render judgment.

BACKGROUND

TCEQ's Regulatory Authority over Underground Storage Tanks (USTs)

Per legislative directive, TCEQ regulates USTs storing gasoline and other petroleum derivatives pursuant to the Texas Water Code. *See* TEX.WATER CODE ANN. §§ 26.343(a) and 26.345(a). Regulating storage of these products protects groundwater from contamination that could occur due to leaks in the USTs. *Id.* at § 26.341(b). TCEQ's rules governing USTs are codified in the Texas Administration Code at Title 30, Chapter 334. However, the Water Code grants enforcement authority to TCEQ, including authority to assess administrative penalties and order corrective action by owners and operators of USTs. *See* TEX.WATER CODE ANN. §§ 7.002, 7.051(a), and 7.073.

When TCEQ believes enforcement is warranted, it initiates an enforcement action by filing an Executive Director's Preliminary Report and Petition (the Petition). 30 TEX.ADMIN.CODE § 70.101(a) (1999)(Tex. Com'n on Envtl. Quality, Exec. Dir.'s Preliminary Report). TCEQ enforcement actions may proceed as contested cases governed by the APA and conducted by the State Office of Administrative Hearings (SOAH). *See* TEX.WATER CODE ANN. § 7.058; TEX.GOV'T CODE ANN. § 2003.047(a). When a respondent answers the Petition and requests a hearing, the matter is referred to the SOAH unless the commissioners choose to hear the case themselves. 30 TEX.ADMIN.CODE § 70.108 (1996)(Tex. Com'n on Envtl. Quality, Contested Enforcement Case Hearings to be Held by SOAH); 30 TEX.ADMIN.CODE § 70.109 (1996)(Tex.

[1] This case was transferred from the Third Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX.GOV'T CODE ANN. § 73.001. We follow the precedent of the Third Court of Appeals to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

Com'n on Envtl. Quality, Referral to SOAH). The respondent in an enforcement action receives notice of hearing as required by the Administrative Procedure Act in the Petition filed by TCEQ. *See* TEX.GOV'T CODE ANN. § 2001.052. The proceeding is governed by TCEQ's hearing rules and the SOAH' rules, to the extent they do not conflict with TCEQ's rules. *See* 1 TEX.ADMIN.CODE § 155.1(f) (2006)(State Office of Admin. Hearings, Purpose and Scope), *repealed by* 33 TEX.REG. 5089, 5089 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008); 1 TEX.ADMIN.CODE § 155.3(d) (2004)(State Office of Admin. Hearings, Application and Constr. of this Chapter), *repealed by* 33 TEX.REG. 5089, 5089 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008).

If a respondent in an enforcement action fails to answer the Petition or answers but fails to appear at the preliminary or evidentiary hearing, a default order may be entered against the respondent. *See* 30 TEX.ADMIN.CODE § 70.106(a) (1999)(Tex. Com'n on Envtl. Quality, Default Order). Where, as here, the respondent files an answer but fails to appear at an enforcement hearing, the situation may be treated the same as if the respondent filed no answer. *See* 30 TEX.ADMIN.CODE § 80.113(d) (1996)(Tex. Com'n on Envtl. Quality, Appearance)("Failure to appear at an enforcement hearing may result in a default order under § 70.106 of this title (relating to Default Orders)."). Likewise, the SOAH's rules allow the presiding administrative law judge at a hearing to process the case as a no-answer default if a respondent fails to appear for a properly-noticed hearing. 1 TEX.ADMIN.CODE § 155.55(a), (e) (2005)(State Office of Admin. Hearings, Default Proceedings), *repealed by* 33 TEX.REG. 5089, 5090 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008). Default proceedings require the agency to prove notice of hearing was sent by first class or certified mail to the respondent's last known address. 1 TEX.ADMIN.CODE § 155.55(b) (2005)(State Office of Admin. Hearings, Default Proceedings), *repealed by* 33 TEX.REG. 5089,

5090 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008). The factual allegations in the Petition are deemed admitted, and the administrative law judge may issue a proposed decision based on the deemed admissions in the Petition. 1 TEX.ADMIN.CODE § 155.55(a)(e) (2005)(State Office of Admin. Hearings, Default Proceedings), *repealed by* 33 TEX.REG. 5089, 5090 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008). The administrative law judge then dismisses the case from SOAH's docket, and the case is returned to the agency for disposition as a default order under the rules of the Administrative Procedure Act. 1 TEX.ADMIN.CODE § 155.55(e) (2005)(State Office of Admin. Hearings, Default Proceedings), *repealed by* 33 TEX.REG. 5089, 5090 (2008), *adoped by* 33 TEX.REG. 9451, 9451 (2008).

TCEQ's Enforcement Action Against Appellee

Appellee previously owned and operated four USTs at a convenience store and gas station in Kaufman, Texas, located at 1002 E. Mulberry Street. The business operated under the name Sunshine Food Mart. The mailing address Appellee registered with TCEQ was the same Mulberry Street address as the business.

The enforcement action at issue in this case began when TCEQ notified Appellee of various violations of TCEQ regulations following an inspection of the business's premises. Among the alleged violations was Appellee's alleged failure to complete previously-required corrective actions following an earlier enforcement action. Documents describing the violations were sent to Appellee along with a notice of enforcement cover letter. A short time after, TCEQ filed a Petition based on the alleged violations. The Petition contained a paragraph notifying Appellee that failure to answer the Petition, or failure to participate in a hearing after filing an answer, would result in the allegations being deemed admitted. The certificate of service on the Petition indicates it was

mailed to Appellee at the Mulberry Street address.

Appellee responded to the Petition in writing, denying the allegations and requesting that all notices and the "court date" be sent to the Mulberry Street address. TCEQ then referred the case to the SOAH, viewing Appellee's request for a court date as a request for a hearing.[2] Appellee received a copy of the referral request TCEQ sent to the SOAH as evidenced by the signed Certified Mail return receipt. The same day Appellee signed the Certified Mail return receipt for the referral request, TCEQ's chief clerk mailed the SOAH's notice of hearing for May 29, 2008, to Appellee at the Mulberry Street address via certified and first-class mail.

Appellee did not attend the hearing on May 29, 2008, and the administrative law judge presiding over the hearing granted a continuance to allow TCEQ to confirm Appellee received notice of the hearing. The order resetting the hearing contained a similar advisory to Appellee as was contained in the Petition regarding the consequences of Appellee failing to appear at the reset hearing date. Notice of the reset hearing was sent again to the Mulberry Street address by First Class mail.

The Certified Mail return receipt for the original notice of hearing was eventually returned to TCEQ as unclaimed on June 18, 2008. It also contained a postal notification of new address for Sunshine Food Mart at 112 Circle Drive in Kaufman, Texas.

Appellee did not appear at the hearing on June 25, 2008, and the hearing proceeded as a default proceeding. The administrative law judge issued a proposal for decision recommending that Appellee be found in default and TCEQ's allegations in the Petition should be admitted as true. The administrative law judge also recommended penalties to be assessed and corrective

[2] Appellee confirmed he requested a hearing on the enforcement action in his brief in this appeal.

action for Appellee to undertake. The SOAH sent notice of the administrative law judge's proposal for decision to Appellee at the Mulberry Street address. The TCEQ commissioners accepted the proposal for decision and issued a default order against Appellee on January 16, 2009.

Appellee timely filed a motion for rehearing. It stated as follows:

1) This motion is filed by Pulak Barua as a representative of himself and Sunshine Food Mart.

2) This case is associated with TCEQ Docket No. 2007-1842-PST-E and SOAH Docket No. 582-08-2780

3) The default order that I request a rehearing was issued on January16, 2009.

4) Pulak Barua states that the factual allegations made against him are not true. He further states that he has provided release detection for his tanks, conducted an inventory control, replaced his spill brackets and sent last 3 year CP test results.

5) Pulak Barua on behalf of himself and Sunshine Food Mart requests that a date be set where this case can be heard again. Pulak Barua was out of town during most, if not all, of the previous hearings.

In a letter dated March 24, 2009, Appellant notified Appellee that his motion for rehearing was "overruled by operation of law on March 9, 2009."

Appellee's Suit for Judicial Review

Appellee timely filed a petition for judicial review of TCEQ's default against him. In it, he claimed TCEQ erred by entering a default against him because he did not receive actual notice of the hearing dates. He also claimed TCEQ erred by not offering evidence proving its case against him at the default hearing. Appellee's petition for judicial review contained an affidavit from Pulak Barua stating he sold the business shortly after the enforcement action commenced against him and did not return to the business address on Mulberry Street and thus did not receive the notices sent to that address. The affidavit also stated he was out of the country when both hearings

occurred.

After a bench trial, the trial court reversed TCEQ's default order and remanded the case. TCEQ timely filed its appeal.

DISCUSSION

TCEQ raises three issues on appeal: (1) whether the finding Appellee received notice of the hearings is supported by substantial evidence; (2) whether Appellee was deprived of due process with the rendering of a default order based on facts alleged in TCEQ's petition; and (3) whether Appellee preserved his complaints for trial court review in his motion for rehearing.

Preservation of Error

As a threshold issue, we address the preservation question first. TCEQ claims neither of the two points of error asserted in Appellee's trial court suit was articulated in his motion for rehearing. Further, TCEQ asserts Appellee failed to identify any finding of fact, conclusion of law, ruling, or other action by the agency that he claims is in error, or the legal basis upon which his claim is based. Finally, TCEQ argues any attempt by Appellee to remedy this oversight by filing an affidavit as part of his petition in trial court fails to preserve error because it was not made as part of the administrative record presented to TCEQ. Appellee, in contrast, claims his statement in the motion for rehearing that he was "out of town during most, if not all, of the previous hearings" implies he did not receive actual notice of the settings. Appellee does not address the allegation his motion for rehearing fails to raise the evidentiary claims made in his trial court petition.

Parties seeking to appeal the decision of an administrative proceeding must timely file a motion for rehearing to preserve their issues for appeal. TEX.GOV'T CODE ANN. § 2001.145; *Texas Alcoholic Beverage Com'n v. Quintana*, 225 S.W.3d 200, 203 (Tex.App.—El Paso 2005, pet.

denied). Whether a motion for rehearing is filed timely is an issue of jurisdiction; whether the contents of a motion for rehearing are sufficient "goes solely to the issue of preservation of error." *Quintana*, 225 S.W.3d at 203 (*citing Hill v. Board of Trustees of the Retirement System of Texas*, 40 S.W.3d 676, 679 (Tex.App.—Austin 2001, no pet.)).

To be sufficient, "[t]he motion must set forth: (1) the particular finding of fact, conclusion of law, ruling, or other action by the agency which the complaining party asserts was error; and (2) the legal basis upon which the claim of error rests. *Quintana*, 225 S.W.3d at 203 (*citing BFI Waste Systems of North America, Inc. v. Martinez*, 93 S.W.3d 570, 578 (Tex.App.—Austin 2002, pet. denied)). Although neither element requires legal or factual briefing, "both elements must be present in the motion . . . [and] may not be supplied solely in the form of generalities." *Id.* (*citing Morgan v. Employees' Retirement System of Texas*, 872 S.W.2d 819, 821 (Tex.App.—Austin 1994, no writ). Mere allegations that the agency's order is not supported by substantial evidence is insufficient to satisfy the pleading requirements. *Id.* (*citing Burke v. Central Education Agency*, 725 S.W.2d 393, 397 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

Here, Appellee's motion for rehearing states, in pertinent part,

> 4) Pulak Barua states that the factual allegations made against him are not true. He further states that he has provided release detection for his tanks, conducted an inventory control, replaced his spill brackets and sent last 3 year CP test results.
>
> 5) Pulak Barua on behalf of himself and Sunshine Food Mart requests that a date be set where this case can be heard again. Pulak Barua was out of town during most, if not all, of the previous hearings.

First, we note Appellee's motion for rehearing does not allege he did not receive actual notice of the hearing settings. Further, he fails to assert the alleged lack of notice deprived him of due process, which is the legal basis upon which Appellee bases his lack-of-notice claims before

the trial court. The default order explicitly contains nine findings of fact related to TCEQ's efforts to notify Appellee of the hearings on his case, and a conclusion of law that states in part Appellee was notified of the hearings. If Appellee intended to challenge those findings on appeal to the trial court, he was required to specifically identify those findings in his motion for rehearing before the presiding administrative law judge. Additionally, to preserve error, he must state how the administrative law judge erred in making those findings because Appellee, in fact, did not receive notice of the hearings. *See Quintana*, 225 S.W.3d at 204 (Appellee failed to preserve error when she failed to challenge the specific factual findings). At a minimum, to preserve error, Appellee would have to allege he was unable to attend because he was unaware of the hearings. He did not. Instead, he stated only he was out of town when one or both hearings occurred. The fact he was unavailable to attend his hearings does not equate to a lack of notice for said hearings. We find Appellee failed to sufficiently preserve error on his lack-of-notice claims.

Appellee's brief does not address the sufficiency of its evidentiary argument in the motion for rehearing; rather, it simply states, "Appellee's motion for new trial . . . clearly puts at issue his claims on evidence." However, the record does not contain a motion for new trial filed by Appellee, nor does he elaborate on his contention the evidentiary claims were adequately addressed. Accordingly, we find Appellee waived this issue. *See RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 126 (Tex. 2018)(where appellee failed to provide argument or analysis for his contentions, the issue was waived).[3]

[3] An issue on appeal that is not supported by argument or citation to legal authority presents nothing for the court to review. *See Fredonia State Bank v. Gen. Am. Life Ins. Co.,* 881 S.W.2d 279, 284 (Tex. 1994); *J.C. Gen. Contractors v. Chavez,* 421 S.W.3d 678, 681 (Tex.App.—El Paso 2014, pet. denied); *see also Valadez v. Avitia,* 238 S.W.3d 843, 844–45 (Tex.App.—El Paso 2007, no pet.)(the reviewing court's duties do not include performing an independent review of the record to ascertain whether error exists).

However, even if the issue is not waived, we find his motion for rehearing fails to articulate, even in a general sense, how the administrative judge erred in allegedly failing to base his order on documentary evidence, or the legal basis upon which he relies in making that claim. *See Quintana*, 225 S.W.3d at 203 (*citing Martinez*, 93 S.W.3d at 578)(both the alleged error and the legal basis upon which it is based must be addressed in the motion for rehearing to preserve the issue for appeal). Appellee's motion only makes the general statement the allegations against him are false. For that reason, even if the issue had been properly raised by Appellee in his brief, we find Appellee failed to sufficiently preserve error regarding his complaint the administrative judge did not admit evidence on TCEQ's substantive claims in support of the default order.

The entire substance of Appellee's appeal to the trial court—that Appellee did not receive notice of the hearing settings, and the default order was based on no evidence or insufficient evidence—is not raised in any way in his motion for rehearing. General complaints regarding the substance of the agency's action or the sufficiency of the evidence supporting the action are inadequate to preserve an issue for appeal by judicial review. *See Quintana*, 225 S.W.3d at 203.

TCEQ's third issue is sustained.

CONCLUSION

Appellee failed to articulate the points of error raised in his petition before the trial court in the motion for rehearing. Accordingly, he failed to preserve them for review, and the trial court erred in reversing the default order against him.

Having sustained TCEQ's third issue, we reverse the judgment of the trial court and render judgment affirming the default order. *See Quintana*, 225 S.W.3d at 206.

August 20, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.