NUMBER 13-16-00377-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

RODERIC HORTON, **Appellant,**

v.

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, **Appellee.**

On appeal from the 419th District Court of Travis County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Rodriguez

Appellant Roderic Horton appeals from the trial court's order granting a plea to the jurisdiction filed by appellee Texas Department of Family and Protective Services (the Department). By four issues which we address as three, Horton contends that the trial court erred when it concluded that it lacked jurisdiction because: (1) a motion for

rehearing is not required before an individual can seek judicial review under the Texas Administrative Procedure Act (APA); (2) the Department, by its own conduct, waived immunity or created jurisdiction by estoppel; and (3) the Department's conduct resulted in the violation of his due process rights. We affirm.[1]

I. BACKGROUND

On July 10, 2013, after completing an investigation of an incident involving Horton, the owner and operator of 4 Corners Residential Services, the Department notified Horton that it had determined that he had exploited an adult with disabilities.[2] The Department informed Horton that it intended to send his name to the Texas Department of Aging and Disability Services (DADS) for placement on the Employee Misconduct Registry (EMR).[3] *See* TEX. HEALTH & SAFETY CODE ANN. § 253.007 (West, Westlaw through 2015 R.S.) (establishing EMR and requiring DADS to make it publicly available).

Horton timely requested an administrative appeal hearing to challenge the finding of exploitation. On May 13, 2015, a hearing was held before the administrative law judge of the State Office of Administrative Hearings. *See* TEX. HUM. RES. CODE ANN. § 48.405 (West, Westlaw through 2015 R.S.). Horton represented himself at the hearing.

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[1] This case is before the Court on transfer from the Third Court of Appeals in Austin pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

[2] The Department informed Horton that it had found the following: "On November 20, 2012, you exploited consumer [E.F.] when you used money from [E.F.'s] account to pay for a dayhab service . . . in the amount of $806.00. The dayhab service was not for [E.F.], but for another consumer in you care."

[3] A facility licensed by DADS must search the EMR for a job applicant's name and may not hire a person whose name appears in the EMR. *See* TEX. HEALTH & SAFETY CODE ANN. § 253.008 (West, Westlaw through 2015 R.S.).

On June 15, 2015, the administrative law judge issued a final order, sustaining the Department's determination. On that same day, the administrative law judge sent Horton a copy of the order and a notice letter, informing him of the following:

> The Texas Administrative Code at 40 T.A.C. § 711.1431 provides, in pertinent part, as follows:
>
> (a) To request judicial review of a Hearing Order, the employee must file a petition for judicial review in a Travis County district court, as provided by Government Code, Chapter 2001, Subchapter G.
>
> (b) The petition must be filed with the court no later than the 30th day after the date the Hearing Order becomes final, which is the date that the Hearing Order is received by the employee.
>
> (c) Judicial review by the court is under the substantial evidence rule, as provided by Government Code, Chapter 2001, Subchapter G.
>
> (d) Unless notice of petition for judicial review is served on [the Department] within 45 days after the date on which the Hearing Order is mailed to the employee, [the Department] will submit the employee's name for inclusion in the Employee Misconduct Registry. If valid service is received after the employee's name has been recorded in the registry, [the Department] will immediately request that the employee's name be removed from the registry pending the outcome of the judicial review.
>
> Your only recourse at this point, should you wish to challenge this decision is to file such a suit. Service of process should be made on Mr. John Specia, Jr., Commissioner of the Texas Department of Family and Protective Services, 70 l W. 51st Street, Austin, Texas 78751.

The notice informed Horton of available judicial review. It did not inform Horton about the need to file a motion for rehearing.

On July 15, 2015, without having filed a motion for rehearing with the agency, Horton filed his petition, seeking judicial review in a Travis County district court. In his petition, Horton argued that the EMR pertains to employees; therefore, his name should not be reported to EMR because it was his company, not Horton individually, that received

benefits, if any. Horton pleaded that the trial court had jurisdiction under the APA. *See* TEX. HUM. RES. CODE ANN. § 48.406(b) (West, Westlaw through 2015 R.S.). The Department filed a plea to the jurisdiction, asking the court to dismiss Horton's suit for lack of subject matter jurisdiction because Horton failed to exhaust his administrative remedies by not filing a motion for rehearing. In response, Horton amended his petition to include claims for waiver and estoppel. He also added a due process violation, alleging that the Department misled him by "intentionally and fraudulently misrepresenting to him that a petition for judicial review could be filed without any requirement of a rehearing" and by notifying him that a petition for judicial review was his only recourse, should he wish to challenge the administrative judge's decision. On May 19, 2016, the trial court granted the Department's plea to the jurisdiction and dismissed the suit for lack of subject matter jurisdiction. This appeal followed.[4]

II. STANDARD OF REVIEW

We review a challenge to a trial court's subject matter jurisdiction de novo. *Tex. Dept. of Parks & Wildlife v.* Miranda, 133 S.W.3d 217, 228 (Tex. 2004). A plaintiff bears the burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction. *Hidalgo Cnty. v. Dyer*, 358 S.W.3d 698, 703 (Tex. App.—Corpus Christi 2011, no pet.). In deciding a plea to the jurisdiction, a court may not weigh the claim's merits but must consider only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *Id*. (citing *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)).

[4] The Department has informed this Court that it has not added Horton's name to the EMR pending the outcome of this appeal.

III. APPLICABLE LAW

In *Mosley v. Texas Health and Human Services Commission*, the Austin Court of Appeals recently concluded that a trial court did not have jurisdiction over a suit, similar to the one in this case, because the petitioner failed to file a timely motion for rehearing. *See* No. 03-16-00358-CV, 2017 WL 1208764, at *2–3, ___ S.W.3d ___, ___ (Tex. App.—Austin, Mar. 30, 2017, no pet. h.). The *Mosley* Court set out that "the supreme court and [the Third Court of Appeals] have repeatedly held[] [that] the APA's motion-for-rehearing requirement is jurisdictional and applies generally to all suits for judicial review to challenge agency orders issued in contested cases." *Id.* at *2, ___ S.W.3d at ___ (summarizing cases). "This jurisdictional prerequisite applies even when agency-specific legislation authorizes judicial review of agency orders but does not explicitly make reference to motions for rehearing or expressly incorporate the APA," as in the present case. *Id.* (summarizing cases); *see* TEX. HUM. RES. CODE ANN. § 48.406. "In sum, '[u]nless otherwise provided, the APA's contested-case and judicial-review procedures apply to agency-governed proceedings.'" *Mosley*, 2017 WL 1208764, at *2, ___ S.W.3d at ___ (quoting *Marble Falls Indep. School v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008, pet. denied)). Moreover, a party cannot by its own conduct confer jurisdiction on a court, by estoppel or by waiver, when none exists otherwise. *Wilmer-Hutchins Indep. School Dist. v. Sullivan,* 51 S.W.3d 293, 294–95 (Tex. 2001) (per curiam) (citing *Daniel v. Dallas Indep. School Dist.*, 351 S.W.2d 356, 358 (Tex. App.—El Paso 1961, writ ref'd n.r.e.) ("[J]urisdiction of a court is so important and essential that it has long been held that it cannot be conferred by estoppel. It is a statutory creation or enactment, and cannot be waived or conferred by consent or estoppel" even when the

school board and the superintendent allegedly told the plaintiff after his termination that "there was nothing more for him to do, and that as far as they were concerned the matter was concluded."); *Washington v. Tyler Indep. School Dist.*, 932 S.W.2d 686, 690 (Tex. App.—Tyler 1996, no writ) ("[E]ven if the plaintiff could prove facts amounting to estoppel, [where the school's representatives had allegedly failed to advise the plaintiff of a prerequisite to filing suit,] jurisdiction could not thereby be conferred on the trial court."); *Janik v. Lamar Consolidated Indep. School Dist.*, 961 S.W.2d 322, 324 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (concluding that "the trial [court] could not acquire jurisdiction by estoppel" where the plaintiff alleged "that the district had never told her of the administrative procedures that were prerequisite to suit"); *see Lindsay v. Sterling*, 690 S.W.2d 560, 563–64 (Tex. 1985) ("The requirement of having a motion for rehearing overruled, thus exhausting administrative remedies, is a jurisdictional prerequisite to judicial review by the district court and cannot be waived by action of the parties.") (citing *Butler v. State Bd. of Educ.*, 581 S.W.2d 751, 754–55 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.)); *see also Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 173–74 (Tex. App.—Austin 2013) (noting that only the legislature may waive sovereign immunity).

IV. DISCUSSION

It is undisputed that Horton did not file a motion for rehearing with the Department. Nevertheless, by three issues, Horton contends that the trial court erred when it granted the Department's plea to the jurisdiction and dismissed his petition for the following reasons: (1) under the statute and the Department's rules, a motion for rehearing was not required before Horton sought judicial review of an order directing that he be placed

on the EMR under the APA; (2) when the Department instructed him that his "only recourse" to challenge this administrative order was to file a suit for judicial review within thirty days, and he timely filed suit, the Department, by its conduct, waived immunity or was estopped from arguing that the suit should be dismissed because Horton did not file an administrative motion for rehearing; and (3) his constitutional rights to due process were violated when the Department misled him into forfeiting judicial review. We address each in turn.

A. Is a Motion for Rehearing Required to be Filed Before Seeking Judicial Review?

By his first issue, Horton claims that under section 48.406(b) and (c) of the Texas Human Resources Code and the Department's rules found at section 711.1431(a)–(d) of the Texas Administration Code, a motion for rehearing was not required before he sought judicial review of the order directing that his name be placed on the EMR. *See* TEX. HUM. RES. CODE ANN. § 48.406(b); 40 TEX. ADMIN. CODE § 711.1431 (2015) (Dep't of Family & Protective Servs., How is judicial review requested and what is the deadline?) (former rule). We disagree.

1. The Statutes

Section 48.406 states that "[n]ot later than the 30th day after the date the decision becomes final as provided by Chapter 2001, Government Code, the employee may file a petition for judicial review contesting the finding of the reportable conduct." TEX. HUM. RES. CODE ANN. § 48.406(b). As reasoned in *Mosley*, this specific enabling legislation—section 48.406 of the human resources code—"does not expressly require a motion for rehearing, but neither does it expressly dispense with such requirement . . . ." 2017 WL

1208764, at *3, ___ S.W.3d at ___ (citing TEX. HUM. RES. CODE ANN. § 48.406). Section 48.406 continues, "[j]udicial review of [an EMR] order . . . is instituted by filing a petition as provided by Subchapter G, 2001, Government Code." TEX. HUM. RES. CODE ANN. § 48.406(c). "Subchapter G, in turn, provides that '[a] person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date the decision or order that is the subject of complaint is final *and appealable*.'" *Mosley*, 2017 WL 1208764, at *2, ___ S.W.3d at ___ (emphasis added) (quoting TEX. GOV'T CODE ANN. § 2001.176(a) (West, Westlaw through 2015 R.S.)). Finally, "appealable orders are those for which a motion for rehearing has been filed and overruled"—where administrative remedies have been exhausted. *Id.* (internal quotations omitted) (citing TEX. GOV'T CODE ANN. § 2001.145(a), (b) (West, Westlaw through 2015 R.S.)); *see Lindsay*, 690 S.W.2d at 563–64.[5]

"We will not read the legislature's failure to expressly incorporate the motion-for-rehearing requirement into the enabling statute [section 48.406] as creating a conflict with the APA's express requirement for such a motion but will, rather, read the statutes in conjunction and give effect to both." *Mosley*, 2017 WL 1208764, at *3, ___ S.W.3d at ___ (citing *Tex. Natural Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 811–12 (Tex. 2002)). In other words, because the statutes are not ambiguous when read in conjunction and because we can give effect to both, *see Sierra Club*, 70 S.W.3d at 811–12, we conclude, as did the court in *Mosley*, "that in the absence of an express legislative

[5] The government code also provides the following: "A timely motion for rehearing is a prerequisite to an appeal in a contested case except that a motion for rehearing of a decision or order that is final under Section 2001.144(a)(3) or (4) is not a prerequisite for appeal." TEX. GOV'T CODE ANN. § 2001.145(a) (West, Westlaw through 2015 R.S.). These exceptions do not apply here. "A decision or order that is final under Section 2001.144(a)(2), (3), or (4) is appealable." *Id.* § 2001.145(b).

exemption of EMR cases from the APA's motion-for-rehearing requirement, an employee is required to timely file a motion for rehearing as a jurisdictional prerequisite to judicial review of an EMR order." 2017 WL 1208764, at *4, ___ S.W.3d at ___ (citing *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 809–10 (Tex. 1993) (per curiam)).

2. The Rules

Horton also argues that the Department's rules in effect at the time of the proceedings below reflect the agency's "interpretation" that provides for judicial review without a motion for rehearing. Horton refers to rule 711.1431, which at the relevant time stated the following:

> (a) To request judicial review of a Hearing Order, the employee must file a petition for judicial review in a Travis County district court, as provided by Government Code, Chapter 2001, Subchapter G.
>
> (b) The petition must be filed with the court no later than the 30th day after the date the Hearing Order becomes final, which is the date that the Hearing Order is received by the employee.
>
> (c) Judicial review by the court is under the substantial evidence rule, as provided by § 48.406, Human Resources Code.

40 TEX. ADMIN. CODE § 711.1431 (2015).[6] But, even assuming that former rule 711.1431 reflected the Department's interpretation that section 48.406 does not require a motion for rehearing, it is only when a statute is ambiguous that a court will defer to an agency's interpretation. *See Mosley,* 2017 WL 1208764, at *4, ___ S.W.3d at ___ (citing *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176

[6] In August 2016, after Horton's contested-case proceedings had concluded and been appealed to the trial court, the Department amended its rules, including 711.1431, which now states: "A timely motion for rehearing is a prerequisite to judicial review and must be filed in accordance with Subchapters F and G, Chapter 2001, Government Code." 40 TEX. ADMIN. CODE § 711.1431(a) (2017) (Dep't of Family & Protective Servs., How is judicial review requested and what is the deadline?).

(Tex. 2004)). We have already concluded, as did the *Mosley* Court, that section 48.406 and the APA when read in conjunction, as we must, are not ambiguous, and we will not defer to the Department's assumed interpretation. *See id.* Horton's argument lacks merit.

3. First Issue Summary

Having concluded that neither the relevant statutes nor the Department's rules support Horton's contention that a motion for rehearing was not required before he sought judicial review of the order directing that his name be placed on the EMR, we overrule the first issue.

B. Can the Department Waive Immunity or Confer Jurisdiction by Estoppel When It Gives Improper Notice?

By his second issue, Horton contends that because the Department misinformed him, it waived its immunity and is estopped from arguing that Horton's suit should have been dismissed for lack of jurisdiction because Horton filed no rehearing motion. Horton complains that the Department affirmatively misled him by instructing him that he merely needed to file a petition for judicial review within thirty days and by not mentioning that he needed to file a motion for rehearing. Horton claims that the extreme factual circumstances of this case establish an equitable basis for waiver of immunity by conduct. Horton asserts that the Department claims the right to report his name to the EMR, even though he followed the instructions given to him by the Department. He argues that "[t]he Department lured him into believing that it was providing him notice of the right to judicial review of the order (as required by [s]ection 48.406)—instead it was setting a trap." The Department responds by arguing that it cannot by its own conduct confer jurisdiction on

a court by waiver or estoppel when none exists otherwise. We agree with the Department.

Mosley concisely concluded that the Department, by its conduct, "may not waive a jurisdictional prerequisite such as the APA's motion-for-rehearing requirement, even if the agency improperly communicates to a party that there are no further administrative remedies available to pursue." 2017 WL 1208764, at *4, ___ S.W.3d at ___; *see* TEX. GOV'T CODE ANN. § 311.034 (West, Westlaw through 2015 R.S.) (noting that the statutory prerequisites to suit are jurisdictional requirements in all suits against a governmental entity). And in *Sullivan*, the Texas Supreme Court reached the conclusion that a party, such as the Department in this case, cannot by its own conduct confer jurisdiction on a court, by estoppel or by waiver, where it has no jurisdiction. *See* 51 S.W.3d at 294–95; *Daniel*, 351 S.W.2d at 358.

As a jurisdictional prerequisite to judicial review, Horton must have exhausted his administrative remedies by filing a motion for rehearing and having it overruled. Because Horton filed no such motion, the trial court obtained no jurisdiction over his case. So even if the Department affirmatively misled Horton, as he claims, by giving him improper instructions and "luring" him into a "trap," the Department could not have, by its own conduct, conferred jurisdiction on the trial court by either estoppel or waiver of immunity because no jurisdiction existed otherwise. *See Bacon*, 411 S.W.3d at 173–74; *Lindsay*, 690 S.W.2d at 563–64; *see also Butler*, 581 S.W.2d 751 at 754–55. Although a harsh result, it was Horton's failure to exhaust his administrative remedies that was fatal to his action. *See Sullivan*, 51 S.W.3d at 294–95; *Mosley*, 2017 WL 1208764, at *4, ___

S.W.3d at ___; *see also* TEX. GOV'T CODE ANN. § 311.034. We overrule Horton's second issue.

C. Did the Department Violate Horton's Due Process Rights by Its Actions, Thereby, Absolving Horton of the Requirement to Exhaust Administrative Remedies?

In his third issue, Horton argues that the Department violated his constitutional due process rights, including vested property and liberty interests as an owner and operator of a business that cares for disabled adults. Specifically, Horton "claims that his due process rights were violated when the Department instructed him that his 'only recourse' was to seek judicial review, but later claimed that he missed a mandatory agency rehearing obligation, thereby creating a 'gotcha' that purportedly insulated the Department's decision from court review." He continues arguing that "[t]he constitutional question here is whether the Department's instruction to Horton, its rule, and its later inconsistent litigation position combined to deprive Horton of his statutory right to judicial review of the [EMR] decision." Finally, Horton contends that "[t]he Department lacks authority to determine the constitutionality of its own actions. The Department does not have immunity from this type of suit." Horton's arguments are misplaced.

"Texas law does not allow a party to avoid statutory jurisdictional prerequisites simply by including a constitutional claim." *Id.* at *5 (citing, *e.g.*, *Tex. Comm'n on Envtl. Quality v. Kelso*, 286 S.W.3d 91, 97 (Tex. App.—Austin 2009, pet. denied) (holding that when a statute provides the right of judicial review, a person raising a constitutional claim must comply with the statute's jurisdictional requirements even if making constitutional claims about the agency order's affecting vested property rights)). Also, Horton is charged with notice of the APA and its requirements, especially in light of the

representation in his petition that he filed it in accordance with human resources code section 48.406(b) and the APA. *See id.* Horton is charged with notice even though he represented that section 48.406 did not require a motion for rehearing as a prerequisite for judicial review of the Department's order. *See id.* Horton's due process claims do not absolve him of the requirement to exhaust administrative remedies. *See id.* We overrule Horton's third issue.

D. Summary

Reviewing Horton's challenge to a trial court's subject matter jurisdiction de novo, *see Miranda*, 133 S.W.3d at 228, we conclude that Horton has not affirmatively demonstrated the trial court's jurisdiction. *See Dyer*, 358 S.W.3d at 703. The trial court did not have jurisdiction over this suit for judicial review because Horton failed to file a motion for rehearing, and it properly granted the Department's plea to the jurisdiction.

V. CONCLUSION

We affirm the order of the trial court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
18th day of May, 2017.