

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Philip Cameron Evatz, L.P.N., :
Appellant, :
 vs. :
Ohio State Board of Nursing, :
Appellee. :

Case No. 11 CV 15833
Judge Fais

DECISION AND ENTRY GRANTING APPELLEE’S MOTION TO DISMISS,
FILED JANUARY 31, 2012

FAIS, J.

This matter is before the Court upon consideration of Appellee Ohio State Board of Nursing’s (“Nursing Board”) Motion to Dismiss Appellant’s Administrative Appeal, filed January 31, 2012. Appellant Philip Cameron Evatz, L.P.N. (“Evatz”), did not file a response.

Evatz was licensed to practice nursing as a practical nurse. On November 17, 2006, the Nursing Board issued a Notice of Immediate Suspension and Opportunity for Hearing (“Notice”) based on two violations of the Nurse Practice Act, R.C. Chapter 4723. The Nursing Board mailed the Notice to Evatz on November 20, 2006, and the Notice was returned as unclaimed. On May 26, 2011, Evatz signed a Waiver of Right to Deliver of Notice via Registered Mail (“Waiver”) as provided in R.C. 119.07. Pursuant to the Waiver, the Nursing Board served Evatz with a copy of the Notice by regular mail dated June 6, 2011.

In the Notice, the Nursing Board advised Evatz that he has “thirty (30) days from the time of mailing of this notice” to request a hearing. As such, Evatz had until July 5, 2011, to request a hearing. The Nursing Board did not receive a request for hearing.

On October 12, 2011, the Nursing Board informed Evatz that his case would be heard by the Nursing Board on November 17 and 18, 2011, but that he could not offer evidence or present testimony at the hearing since he failed to request a hearing. Evatz failed to appear for the hearing. On November 18, 2011, the Nursing Board permanently revoked Evatz’s nursing license (“Order”).

On December 5, 2011, the Nursing Board sent Evatz a copy of the Order by certified mail. On December 7, 2011, Evatz signed for delivery of the Order. The Order advised Evatz of the time period and method to perfect an appeal from the Order, stating: “A copy of such Notice of Appeal shall also be filed by the appellant with the Franklin County Court of Common Pleas, Columbus, Ohio. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the Ohio Board of Nursing’s Order as provided in Section 119.12 of the Ohio Revised Code.”

On December 20, 2011, Evatz filed the instant Notice of Appeal with the Nursing Board within the timer period for filing the appeal. However, Evatz did not file the Notice of Appeal with this Court until December 21, 2011, which was beyond the date set forth in the Order to perfect an appeal.

R.C. Chapter 119 states, in relevant part, as follows:

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency’s order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party’s appeal beyond the statement that the

agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. *** Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. ***

Pursuant to R.C. Chapter 119, the notice of appeal must be filed with the agency and the court within fifteen (15) days after the agency's order is mailed to the aggrieved party. See *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St. 3d 47 (citing *Ramsdell v. Ohio Civil Rights Commission* (1990), 56 Ohio St. 3d 24).

When a statute confers the right to appeal, the appeal can only be perfected in the mode prescribed by that statute. *Id.* Parties must strictly adhere to the filing requirements in order to perfect an appeal and invoke jurisdiction of the court of common pleas. *Id.* Failure to do so deprives the common pleas court of jurisdiction. *Id.*

In the case *sub judice*, Evatz filed a Notice of Appeal with the Franklin County Court of Common Pleas beyond the deadline set forth in the Order and R.C. Chapter 119.12. Accordingly, this Court lacks subject matter jurisdiction over Evatz's appeal.

Further, the Court finds well taken the Nursing Board's argument that Evatz failed to request a hearing, and therefore has not exhausted his administrative remedies. It is "long settled . . . that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Jones v. Chagrin Falls* (1997), 77 Ohio St. 3d 456 (quoting *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41. The Tenth District has stated that "[a]llowing a claimant to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process." *Jain v. Ohio State Medical*

Board (10th Dist.), 2010-Ohio-2855. A failure to request a hearing under R.C. 119.07 constitutes a failure to exhaust administrative remedies. *Id.* As such, when a party “[f]ails to request a hearing . . . [the] party generally waives the right to appeal an issue that could have been but was not raised in earlier proceedings.” *Crosby-Edwards v. Ohio Board of Embalmers & Funeral Directors* (10th Dist., 2008), 175 Ohio App. 3d 213.

There are two exceptions to the exhaustion of remedies requirement. “First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive.” *Karches v. City of Cincinnati* (1988), 38 Ohio St. 3d 12.

Here, the Court finds Evatz had an opportunity to appeal the Notice but failed to do so. Further, the process of requesting a hearing was not onerous or unusually expensive. Since Evatz could have challenged the Board’s order of suspension in an effort to obtain the relief sought, his failure to do so waives any right to raise these challenges now before this Court.

Based upon the foregoing, the Court hereby GRANTS the Nursing Board’s Motion to Dismiss.

It is so Ordered.

Franklin County Court of Common Pleas

Date: 03-15-2012

Case Title: PHILIP CAMERON EVATZ -VS- OHIO STATE BOARD NURSING

Case Number: 11CV015833

Type: ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "D. Fais", is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT" at the top and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge David W. Fais

Court Disposition

Case Number: 11CV015833

Case Style: PHILIP CAMERON EVATZ -VS- OHIO STATE BOARD NURSING

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0158332012-01-3199980000

Document Title: 01-31-2012-MOTION TO DISMISS

Disposition: MOTION GRANTED