

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS

James Long,	:	
	:	
Appellant,	:	Case No. 12 CV 3729
	:	
v.	:	Judge Sheeran
	:	
Ohio Div. of Commerce,	:	
	:	
Appellee.	:	

DECISION AND ENTRY GRANTING MOTION TO DISMISS
(FILED MAY 3, 2012)

SHEERAN, J.

The Court has reviewed the State's Motion to Dismiss, Appellant's Memorandum Contra, and the State's Reply. The State asserts that dismissal is appropriate because appellant failed to exhaust his administrative remedies by failing to request a hearing. It is undisputed that appellant failed to request a hearing on the underlying administrative decision before filing his appeal with this Court. It is also settled that the failure to exhaust administrative remedies, i.e. the failure to request a hearing, is an affirmative defense which, if properly asserted, merits dismissal because "a party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings." *See, Jain v. Ohio State Med. Bd.*, 10th Dist. No. 09AP-1180, 2010 Ohio 2855 (internal cites omitted).

Appellant, however, asserts that he did not receive effective notice of the underlying decision and was, therefore, precluded from exhausting his administrative remedies. It is true that the various notices which were mailed to Appellant were returned. However, R.C. § 119.07 provides:

If any notice sent by registered or ordinary mail is returned for failure of delivery, the agency either shall make personal delivery of the notice by an employee or agent of the agency or shall cause a summary of the substantive provisions of the notice to be published once a week for three consecutive weeks in a newspaper of

general circulation in the county where the last known address of the party is located. When notice is given by publication, a proof of publication affidavit, with the first publication of the notice set forth in the affidavit, shall be mailed by ordinary mail to the party at the party's last known address and the notice shall be deemed received as of the date of the last publication.

Here, it is undisputed that notice was published in the Tampa Bay Times, the newspaper of general circulation in the county of appellant's last known address. The State having complied with the notice provisions of R.C. § 119.07, Appellant's argument that he did not receive notice lacks merit.¹

Given all of the above, the Court finds that, despite proper notice, Appellant failed to request a hearing. As appellant failed to exhaust his administrative remedies, the State's Motion to Dismiss is well-taken and is GRANTED. Counsel for Appellee shall prepare and submit an appropriate judgment entry in accordance with Loc. R. 25. It is so ORDERED.

¹ As for the failure of mail delivery, appellant apparently did not update his address or have his mail forwarded to his new address. Appellant, in his Memorandum Contra, also indicates that he did not receive the State's February 6, 2012 letter until after the February 27, 2012 deadline for requesting a hearing had passed because his work hours prevented him from obtaining his mail box key during this time. Appellant is responsible for the above which led to if not caused his failure to receive the state's various notices.

Franklin County Court of Common Pleas

Date: 06-08-2012
Case Title: JAMES M LONG -VS- OHIO DIVISION OF COMMERCE
Case Number: 12CV003729
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Patrick E. Sheeran", is written over a circular, textured seal or stamp.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 12CV003729

Case Style: JAMES M LONG -VS- OHIO DIVISION OF COMMERCE

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0037292012-05-0399970000
Document Title: 05-03-2012-MOTION TO DISMISS
Disposition: MOTION GRANTED