

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

SMALL WORLD
EARLY CHILDHOOD CENTER,

Plaintiff/Appellant,

-vs-

OHIO DEPARTMENT OF
JOBS AND FAMILY SERVICES,

Defendant/Appellee.

CASE NO. 2016 CV 05982

JUDGE MARY KATHERINE HUFFMAN

DECISION, ORDER, AND ENTRY
SUSTAINING APPELLEE'S MOTION
TO DISMISS; ENTRY OF DISMISSAL

This matter is before the court on the appeal of Appellant, Small World Early Childhood Center, to challenge the Ohio Department of Job and Family Services' decisions denying (1) its appeal and (2) its request for reconsideration of overpayment calculation. Appellant filed its Notice of Appeal on November 22, 2016. Appellee, Ohio Department of Job and Family Services, filed its Motion to Dismiss on December 2, 2016. On January 10, 2017, Appellant filed its Memorandum in Response to Appellee's Motion to Dismiss. This matter is now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

This matter arises as an alleged administrative appeal, filed by Appellant, Small World Early Childhood Center, pursuant to R.C. 5101.35 and R.C. 119.12, of two decisions issued by Appellee, Ohio Department of Job and Family Services (ODJFS). Appellant is a licensed childcare provider,

offering publicly funded child care under a provider contract as set forth in R.C. 5104.32. On April 15, 2016, Appellee provided Appellant with a written Child Care Provider Investigative Report, recommending suspension and termination of the Provider Agreement, as well as a Proposed Suspension and Termination of the Provider Agreement and Overpayment Collection Notice. According to Appellant, the Investigative Report stated: “On April 23, 2015, after unidentified allegations of improper billing practices and illegal use of Ohio Electronic Child Care (ECC) swipe cards, ODJFS staff conducted a timed observation from outside of Small World and counted 62 children entering the center between 6:00 a.m. and 7:00 a.m. and during this same time, Ohio ECC records showed that 170 children were swiped in as having arrived at the center. On May 21, 2015, ODJFS performed another timed observation between 6:00 a.m. and 8:15 a.m. and observed 105 children arriving with the Ohio ECC records showing that 217 children were swiped in as having arrived and received care. On the same date, ODJFS staff entered the building between 8:15 a.m. and 8:30 a.m. and a head count of the children in the center’s two (2) buildings confirmed a total of 108 children. In addition, numerous ECC swipe cards were located by the front desk of both buildings. ODJFS reports that admissions were made that indicated that the Provider was using the ECC swipe cards and not the caretakers. However, when speaking to these persons directly, the accusations were denied.”

Per Appellant, the Notice of Proposed Termination informed Appellant of a right to appeal pursuant to R.C. 5104.37 and a right for reconsideration of the overpayment amount, as calculated by ODJFS, if the request was made in writing within 15 days of the date of the Notice pursuant to Ohio Administrative Code 5101:2-16-71(D). On April 20, 2016, Appellant apparently wrote to Appellee, asking for an appeal and for reconsideration of the overpayment calculation. On November 16, 2016, Appellee sent two decision letters to Appellant, denying Appellant’s appeal

and reconsideration of overpayment calculation. The first decision letter from Appellee to Appellant, dated November 16, 2016, stated, in part:

RE: Appeal Decision on Proposed Suspension and Termination of Child Care Provider Agreement for Small World Early Childhood Center #205356

Dear Provider:

This communication is notice of decision on your appeal filed April 20, 2016 with the Ohio Department of Job and Family Services (ODJFS) pursuant to Revised Code section 5104.37 in response to the suspension and termination notification letter dated April 15, 2016.

Your appeal is **denied** and the provider agreement will be suspended and terminated. You will be notified of the effective date of the suspension and termination. *This appeal decision is final and not subject to further review by the department.* A review of the evidence supports the suspension and termination action. This decision is based upon review of the complaint(s) identified in your suspension and termination notification letter and your appeal submission(s). The attached Appeal Decision Request on Proposed Suspension and Termination of Provider Agreement provides further information relating to the complaints and this appeal decision. Overpayment reconsideration decisions will be communicated separately from this suspension appeal decision.

(Emphasis added).

Additionally, the Appeal Decision Report on Proposed Suspension and Termination of Provider Agreement provided the following Finding of Fact and Conclusion to Appellant, stating:

Finding of Fact

Below are the findings that are based on a review of the department's assertions and evidence presented and the information presented in the Provider's appeal.

The **reviewer finds** that the department submitted sufficient evidence to support the assertion that the Provider was in possession of and used Ohio ECC cards. The department found 99 cards in envelopes in the Provider's possession. The center owner admitted to possessing and using Ohio ECC cards.

The **reviewer finds** that the department submitted sufficient evidence to support the assertion that the Provider billed for services that were not provided. The department

performed a timed observation of children entering the center on two separate occasions. On the first occasion the department counted 62 children the center, while Ohio ECC records showed that 170 children were swiped into the center. The second timed observation counted 105 children arriving, while Ohio ECC records had 217 children swiped in. The department presented evidence of Ohio ECC transaction billings that were much larger than the number of children entering the center. The center owner admitted to billing for services not provided. The owner claimed she would bill based on a child's schedule and not actual attendance.

The **reviewer finds** that Provider's argument that they were suffering a great loss of revenue because parents were not swiping and only held the cards out of fear of not being compensated to not be persuasive. The Provider was not just swiping for children who were in attendance but also for children were not in attendance.

The **reviewer finds** that the Provider received an improper payment as a result of an intentional act.

Conclusion:

Based on the allegations made, the evidence submitted, and the findings of facts in this appeal, the provider's request to remove the suspension action is:

Denied—Provider agreement will be suspended and terminated in accordance with Revised Code 5104.37

The second decision letter from Appellee to Appellant, also dated November 16, 2016, stated, in part:

RE: Decision on Reconsideration of Overpayment Calculation for Small World Early Childhood Center #205356

Dear Provider:

This communication is notice of our decision on your overpayment reconsideration requests filed April 20, 2016 with the Ohio Department of Job and Family Services (ODJFS) in response to the overpayment notification letter dated April 15, 2016.

In its March letter, ODJFS states it had identified an overpayment to you of \$442,963.67. The overpayments were caused by reimbursements made for the period of June 2014 through April 2015. The overpayment was due to billings that were not supported by attendance records.

There are specific rules for recording a child's attendance and for maintaining those records.

The Ohio Administrative Code at 5101:2-12-20 states:

(L) A record of daily attendance shall be kept for each child enrolled, beginning on the child's first day.

(1) A record of daily attendance for each group shall be kept by the child care staff member responsible for that group. Attendance records shall remain with the group at all times throughout the day including; outdoor play, emergency evacuations and when groups are combined. The record shall specify:

(a) The names and birth dates of children.

(b) The names of the child care staff members responsible for the group.

(c) The designated area used as home base.

(d) For those centers caring for children on both a part time and a full time basis, the attendance record shall include the days and hours of enrollment for each child.

(2) Attendance shall be recorded by the child care staff member upon the child's arrival, and the attendance record shall provide the documentation of each child's departure.

(3) A child attending the center on a drop in basis shall be listed on the attendance sheet of the group to which they are assigned.

(4) The written records of attendance shall be kept for a period of one year. A copy of attendance records shall remain at the center at all times.

In your appeal, you state that the sum of the overpayment is not accurate, however, you did not support any additional documentation to dispute this amount.

Therefore, the provider's request for reconsideration is denied.

This reconsideration decision is final and not subject to further review by the department.

(Emphasis added).

On November 22, 2016, Appellant filed its Notice of Appeal Pursuant to R.C. 5101.35 and R.C. 119.12. On December 2, 2016, Appellee filed its Motion to Dismiss, seeking a dismissal of this matter for lack of subject matter jurisdiction. Therein, Appellee argued that no statute,

including R.C. 5101.35 or R.C. 119.12, authorizes an appeal from either of Appellee ODJFS's decision letters, and, thus, this court lacks subject matter jurisdiction to hear Appellant's appeal.

II. LAW AND ANALYSIS

Pursuant to a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction, the court must determine whether the plaintiff has alleged any cause of action cognizable by the forum. *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App. 3d 65. In other words, the standard of review for a dismissal based upon lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1) is "whether the plaintiff has alleged any cause of action over which the court has authority to decide." *Bringheli v. Parma City School Dist. Bd. Of Edn.* (2009), 2009 Ohio 3077. The court is not confined to the allegations of the complaint when determining its subject matter jurisdiction. *Southgate Development Corp. v. Columbia Gas Corp.* (1976), 48 Ohio St. 2d 211.

"'Jurisdiction' refers to a court's 'statutory or constitutional power to adjudicate the case.'" *Estep v. Ohio Dep't of Job & Family Servs.* (2013), 2013 Ohio 82, citing *Pratts v. Hurley* (2004), 102 Ohio St.3d 81, quoting *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 89. "Courts of common pleas only have 'such powers of review of proceedings of administrative officers and agencies as may be provided by law.'" *Id.*, citing Ohio Constitution, Article IV, Section 4(B); *see also Springfield Fireworks, Inc. v. Ohio Dept. of Commerce* (2003), 2003 Ohio 6940. "Thus, courts of common pleas lack jurisdiction to review actions of administrative agencies unless R.C. 119.12 or some other specific statutory authority grants it." *Id.*, citing *Total Office Prods. v. Dept. of Adm. Servs.* (2006), 2006 Ohio 3313.

The right to appeal from an administrative decision is not an inherent right, but instead is one conferred by statute. *See Harrison v. Ohio State Medical Board* (1995), 103 Ohio App.3d 317, 321. "Where a statute confers a right of appeal, such appeal may be perfected only by compliance

with the mandatory statutory requirements.” *Geauga Welding & Pipeline Co. v. Germano* (2006), 2006 Ohio 1004, quoting *State ex rel. Kent State Univ. v. State Personnel Bd. of Review* (1990), 1990 Ohio App. LEXIS 2561, citing *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, paragraph one of the syllabus. Where a statute confers a right to appeal, strict adherence to the statutory conditions is essential. *Holmes v. Union Gospel Press* (1980), 64 Ohio St.2d 187, 188. “Thus, before a matter may be appealed from an administrative order, the proceedings of the administrative agency must have been quasi-judicial in nature.” *Id* [citations omitted].

“R.C. 119.12 is the appeals portion of the Ohio Administrative Procedure Act and is generally applicable to appeals from administrative adjudications from state agencies.” *Hummel v. Ohio Dep’t of Job & Family Servs.* (2005), 164 Ohio App. 3d 776, 779. “R.C. 119.12 permits any party ‘adversely affected’ by an order of an agency issued pursuant to an adjudication to appeal the order to the court of common pleas.” *Giese v. Dir., Ohio Dep’t of Job & Family Servs.* (2007), 2007 Ohio 2395 [citations omitted]. “A party is adversely affected for purposes of R.C. 119.12 when its rights, privileges, benefits, or pecuniary interests are the subject of the administrative adjudication, * * * and the party has been, or likely will be, injured by the administrative order.” *Id* [citations omitted].

Specifically, R.C. 119.12 (A)(1) provides:

Except as provided in division (A)(2) or (3) of this section, *any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident.*

(Emphasis added). Alternatively, R.C 119.12(B) provides:

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal issued under Chapter 3737. of the Revised Code may be to the court of common pleas of the county in which the building of the aggrieved person is located and except that appeals under division (B) of section 124.34 of the Revised Code from a decision of the state personnel board of review or a municipal or civil service township civil service commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the department of rehabilitation and correction, to the court of common pleas of Franklin county.

(Emphasis added).

As set forth below, R.C.119.01 defines the terms relevant to R.C. 119.12. “Agency,” in part, *“means any official or work unit having authority to promulgate rules or make adjudications in the department of job and family services, but only with respect to both of the following:*

(a) The adoption, amendment, or rescission of rules that section 5101.09 of the Revised Code requires be adopted in accordance with this chapter;

(b) The issuance, suspension, revocation, or cancellation of licenses.”

(Emphasis added) *R.C. 119.01(A)(2). “‘License’ means any license, permit, certificate, commission, or charter issued by any agency.” R.C. 119.01(B). “‘Rule’ means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. ‘Rule’ does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.” R.C. 119.01(C). “‘Adjudication’ means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.” R.C. 119.01(D). “‘Hearing’ means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.” R.C. 119.01(E). “‘Party’ means the*

person whose interests are the subject of an adjudication by an agency.” *R.C. 119.01(G)*. “‘Appeal’ means the procedure by which a person, aggrieved by a finding, decision, order, or adjudication of any agency, invokes the jurisdiction of a court.” *R.C. 119.01(H)*.

“The Ohio Supreme Court has recognized that there exists a limitation upon appeals pursuant to R.C. 119.12.” *Einstein Montessori v. Ohio Department of Job and Family Services* (2016), Franklin County Court of Common Pleas, 2016-CVH-8026. Again, “[b]efore an appeal can be brought successfully to the court of common pleas pursuant to R.C. 119.12, the administrative agency’s proceedings must have been quasi-judicial in nature.” *Id.* “Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing, and the opportunity for the introduction of evidence.” *Id.*, citing *see M.J. Kelley Co. v. Cleveland* (1972), 32 Ohio St.2d 150, 176.

R.C. 5101.35 directs appeals by applicants, participants, or recipients of a family services program and is governed by R.C. 119.12. *R.C. 5101.35*. Under R.C. 5101.35, an “agency” includes the department of job and family services, and an “appellant” for appeal purposes “means an applicant, participant, former participant, recipient, or former recipient of a family services program who is entitled by federal or state law to a hearing regarding a decision or order of the agency that administers the program.” *R.C. 5101.35(A)(1)(a)(i)*; *R.C. 5101.35(A)(2)*. R.C. 5101.35(E) specifically provides:

An appellant who disagrees with an administrative appeal decision of the director of job and family services or the director’s designee issued under division (C) of this section may appeal from the decision to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code except that:

(1) The person may appeal to the court of common pleas of the county in which the person resides, or to the court of common pleas of Franklin county if the person does not reside in this state.

(2) The person may apply to the court for designation as an indigent and, if the court grants this application, the appellant shall not be required to furnish the costs of the appeal.

(3) The appellant shall mail the notice of appeal to the department of job and family services and file notice of appeal with the court within thirty days after the department mails the administrative appeal decision to the appellant. For good cause shown, the court may extend the time for mailing and filing notice of appeal, but such time shall not exceed six months from the date the department mails the administrative appeal decision. Filing notice of appeal with the court shall be the only act necessary to vest jurisdiction in the court.

(4) The department shall be required to file a transcript of the testimony of the state hearing with the court only if the court orders the department to file the transcript. The court shall make such an order only if it finds that the department and the appellant are unable to stipulate to the facts of the case and that the transcript is essential to a determination of the appeal. The department shall file the transcript not later than thirty days after the day such an order is issued.

R.C. 5101.35.

Providers of publicly funded child care are not employees of ODJFS but are considered independent contractors who are responsible for the requirements of self-employment. *OAC 5101:2-16-44(Q)*. Ohio Administrative Code 5101:2-16-44 provides the terms relevant to a provider agreement for payment of publicly funded child care. Under the Code, providers are eligible for payment of publicly funded child care after they complete the provider agreement with ODJFS. *OAC 5101:2-16-44*. Under *OAC 5101:2-16-44(O)* and *(P)*, a provider agreement as entered into with ODJFS may be suspended if ODJFS determines misuse of publicly funded child care or Ohio ECC and may be terminated in accordance with the terms contained in the agreement. “***[T]he department may suspend a contract entered into under section 5104.32 of the Revised Code with an eligible provider if the department has initiated an investigation of the provider for either of the following:

- (1) The department has evidence that the eligible provider received an improper child care payment as a result of the provider’s intentional act.”

If the department suspends the provider's contract following the investigation, "[a]n eligible provider may file an appeal with the department regarding any proposal by the department to suspend the provider's contract***. The appeal must be received by the department not later than fifteen days after the date the provider receives the notification***. The department shall review the evidence and issue a decision not later than thirty days after receiving the appeal. The department shall not suspend a contract***until the time for filing the appeal has passed or, if the provider files a timely appeal, the department has issued a decision on the appeal." *R.C. 5104.37(H)*.

Moreover, under *R.C. 5104.37*, ODJFS may recover any money erroneously paid to a provider under a provider agreement, or contract. *R.C. 5104.37 (B)*. "Improper child care payments made to a provider are payments to which the provider was not entitled." *OAC 5101:2-16-71(A)*. Improper payments may be the result of an error on the part of the provider or an error by the county agency or the ODJFS. *Id.* If the overpayment is a result of misuse of Ohio ECC, ODJFS may recoup one hundred percent of the overpayment. *OAC 5101:2-16-71(C)(2)(a)*. A child care provider may request a review of an identified overpayment by making its request in writing to ODJFS that a reconsideration review be conducted for any identified overpayment that is subject to recoupment. *OAC 5101:2-16-71(D)*.

"Regarding a party's right to an administrative appeal, courts of common pleas only have 'such powers of review of proceedings of administrative officers and agencies as may be provided by law.'" *In re Admin. Appeal Decision Issued by Ohio Dep't of Job & Family Servs. Bureau of State Hearings* (2013), 2013 Ohio 2817, citing Ohio Constitution, Article IV, Section 4(B). As previously explained, "there is no inherent or inalienable right to appeal the decision of an administrative agency; such right only exists as conferred by statute." *Id.*, citing *Rappach v. Liberty Twp. Civil Serv. Comm.* (2005), 2005 Ohio 3088, citing *Midwest Fireworks Mfg. Co. v. Deerfield*

Twp. Bd. of Zoning Appeals (2001), 91 Ohio St.3d 174, 177. Thus, in order for Appellant to appeal to this court, the court must determine whether there was statutory support for the appeal.

Appellant argues that R.C. 5101.35 and R.C. 119.12 provide support for its ability to appeal Appellee's decision letters in this court. However, R.C. 119.01(A)(2) notes that the ODJFS is considered an agency for the purposes of R.C. 119.12 only with respect to the adoption or amendment of certain rules, or in issuing or cancelling licenses. Specifically, R.C. 119.12 states that "[a]ny party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license * * *, or revoking or suspending a license, or allowing the payment of a forfeiture * * * may appeal from the order of the agency to the court of common pleas of the county * * * in which the licensee is a resident." The adjudication in the present matter did not involve the denial of admission to an examination or a licensure issue, such that an appeal to this court was authorized under R.C. 119.12. R.C. 119.12 further provides that "[a]ny party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county* * *." This provision does not apply to the present matter since the appeal was initiated in the Montgomery County Court of Common Pleas. Furthermore, R.C. 119.01(A)(2) notes that the ODJFS is considered an agency for the purposes of R.C. 119.12 only with respect to the adoption or amendment of certain rules, or in issuing or cancelling licenses, which did not occur in the present matter. Thus, since R.C. 119.12 does not provide the basis for this administrative appeal, another statute must provide authority for Appellant's appeal in this matter for jurisdiction to exist.

The other statute cited by Appellant to provide authority for its appeal is R.C. 5101.35, which does allow for an appeal to a court of common pleas from an administrative decision of ODJFS under certain circumstances. However, a review of R.C. 5101.35 reveals that it does not provide authority for the appeal in this matter, as an appropriate appellant is only "an applicant,

participant, former participant, recipient, or former recipient of a family services program,” which does not apply to the Appellant in this case since Appellant was a child care provider receiving public funds for payment under a provider contract. Here, Appellant’s license to provide child care was not revoked, but, rather, its provider contract was merely terminated. Thus, Appellant fails to cite any authority to support its appeal under these circumstances pursuant to R.C. 5101.35.

Finally, it is undisputed that no hearing occurred in this matter before the ODJFS. It is also undisputed that there was no opportunity to testify and no notice requirement. There was no recorded hearing and, thus, no hearing record for the court to review. The decision letters do not concern rule-making or the issuance, suspension, revocation, or cancellation of a license under R.C. 119.12. Summarily, there is no evidence that the subject administrative agency’s proceedings were quasi-judicial in nature and, thus, subject to this court’s review.

In conclusion, Appellant has failed to provide any authority to support a determination that it has the right to appeal this matter or that gives this court jurisdiction to consider an appeal it otherwise cannot. Other than the two statutes discussed above, Appellant provides no legal basis for its appeal to this court in this matter. Therefore, Appellee’s Motion to Dismiss for lack of subject matter jurisdiction is **SUSTAINED**.

III. CONCLUSION

Appellee’s Motion to Dismiss is **SUSTAINED**. This matter is hereby **DISMISSED**.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV.R. 54. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.

JUDGE MARY KATHERINE HUFFMAN

To the Clerk of Courts:**Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.**

JUDGE MARY KATHERINE HUFFMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

JOHNNA M SHIA
(937) 225-4117
Attorney for Plaintiff, Small World Early Childhood Center

ANTHONY S VANNOY
(937) 952-5043
Attorney for Plaintiff, Small World Early Childhood Center

REBECCA L. THOMAS
(614) 466-8600
Attorney for Defendant, Ohio Department Of Jobs And Family Services

Ryan Colvin, Bailiff (937) 496-7955 Colvinr@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2016 CV 05982
Case Title: SMALL WORLD EARLY CHILDHOOD CENTER vs OHIO
DEPARTMENT OF JOBS AND FAMILY SERVICES

So Ordered

Mary H. Huffman