

In the
Supreme Court of Ohio

MEDCORP, INC.,
Appellee,
v.
OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,
Appellant.

: Case Nos. 2008-0584 and
: 2008-0630
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals Case
: No. 07-APE 04-312
:

MERIT BRIEF OF APPELLANT
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

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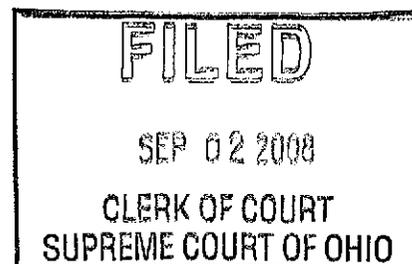


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INTRODUCTION

This case asks a simple question of procedure that applies to every administrative appeal filed under R.C. 119.12. That statute requires every party filing an administrative appeal under Chapter 119 to file a notice of appeal that states the “grounds” for its appeal. The same statute also says that a party may succeed on appeal only if the reviewing court concludes that the challenged agency order fails the standard of review for such orders—that is, that the order is “not in accordance with law,” “is not supported by reliable, probative, and substantial evidence,” or both. R.C. 119.12. The issue here is whether the “grounds” statement must say something beyond restating that statutory formula: Must it assert more than that the order appealed from is not “in accordance with law and is not supported by reliable, probative, and substantial evidence”? The answer is yes. A party must do more than merely recite that standard, and a notice of appeal that has such a recitation as its sole grounds—as the notice here did—is jurisdictionally flawed.

The statute must require more than reciting the statutory formula, for at least three reasons. First, allowing such a recitation to suffice is the same as eliminating the requirement entirely. No purpose is served by having the identical sentence filed in literally every R.C. 119.12 appeal filed by every party challenging an agency order, on cases involving anything from liquor-license penalties to Medicaid benefits. Neither a court nor an opposing agency is told anything of value by a statement that says nothing other than that this is an appeal and that the party claims to meet the standard required of all R.C. 119.12 appeals.

Second, the grounds requirement and the standard of review are stated separately in the statute, so each must have independent meaning, and the common understanding of “grounds” differs from “standard of review.” Third, the statute expressly provides that briefs in administrative appeals are optional at the court’s discretion, while by contrast, a court’s duty to

review the record is mandatory. That discretion presupposes that the notice of appeal provides real meaning, for, absent a brief, the statement of grounds is the court's sole guide in reviewing the record.

For these reasons, the Court should hold inadequate the notice of appeal filed by Medcorp, Inc.—the administrative appellant and Appellee here—as it filed a notice of appeal stating simply that the order it appealed “is not in accordance with law and is not supported by reliable, probative, and substantial evidence.” See *Medcorp v. Ohio Dep’t of Job and Family Servs.* (10th Dist.), 2008 Ohio App. Lexis 392, 2008-Ohio-464 (“App. Op.,” Ex. 3, Appendix at A-5), ¶ 8. Thus, Medcorp failed to invoke the lower courts’ jurisdiction, and it may not challenge the administrative order issued by the Ohio Department of Job and Family Services (“ODJFS”), the administrative appellee and the Appellant here.

Finally, the Court here need only hold that Medcorp’s notice falls short, and it need not define the extent of the grounds requirement. But if the Court wishes to provide further guidance, it should hold that a grounds statement should, as the statute contemplates, allow a court reasonably to review a case based on the grounds statement without briefing by the parties.

STATEMENT OF THE CASE AND FACTS

A. Medcorp sought to appeal an ODJFS decision, and Medcorp’s notice of appeal recited the statutory standard of review as the “grounds” for its appeal.

Medcorp is an Ohio Medicaid provider that provides ambulance and “ambulette” services to qualified patients. App. Op. ¶ 2. Ohio’s Medicaid program, run by ODJFS, reimburses the company for allowed expenses. ODJFS audited Medcorp and concluded that Medcorp improperly billed the Ohio Medicaid program by \$534,719.27 for ambulette services from March 1, 1996, through September 30, 1997. *Id.* at ¶ 3. Consequently, ODJFS issued an adjudication order (“Order”) directing Medcorp to repay that sum plus interest. *Id.*

Medcorp appealed the ODJFS Order to the Franklin County Court of Common Pleas. *Id.* at

¶ 4. As R.C. 119.12 requires, Medcorp filed a notice of appeal with the agency, with a copy to the court. The entire text of the body of Medcorp's Notice of Appeal was as follows:

Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. *The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.*

Id. at ¶ 8 (emphasis added); see Medcorp Notice of Appeal, Supplement at S-1.

B. ODJFS sought dismissal for failure to state grounds for the appeal, but both lower courts held that reciting the statutory standard was sufficient.

ODJFS moved the common pleas court to dismiss Medcorp's appeal, arguing that its notice of appeal failed to satisfy the "grounds" requirement of R.C. 119.12. The court disagreed, and on appeal, the Tenth District affirmed and held that Medcorp's notice was good enough to satisfy the statute. The appeals court explained that it "declined to adopt a requirement that an appellant set forth specific facts to support the grounds for appeal." App. Op. at ¶ 12. Thus, the court concluded that the notice of appeal "set forth grounds for the appeal sufficient to invoke the jurisdiction of the trial court." *Id.*

The Tenth District certified a conflict between its decision and the decision in *David May Ministries v. State ex rel. Petro* (2d Dist.), 2007 Ohio App. Lexis 3198, 2007-Ohio-3454, ¶¶ 23-24, which had rejected as inadequate a near-verbatim notice of appeal. See Journal Entry and Memorandum Decision, Tenth District Court of Appeals, Mar. 27, 2008 (Exs. 4, 5, A-18, A-19). This Court then granted discretionary review and also agreed to resolve the following certified question:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require an appellant to specify something beyond restating the statutory formula that the order appealed from

is not “in accordance with law and is not supported by reliable, probative, and substantial evidence”?

See Entry of June 4, 2008, Case No. 2008-0584 (granting discretionary review); Entry of June 4, 2008, Case No. 2008-0630 (accepting conflict).

ARGUMENT

Appellant ODJFS’s Proposition of Law:

R.C. 119.12’s “grounds” requirement, which provides that a notice of administrative appeal must state the “grounds” for the appeal, requires an appellant to specify something beyond restating the statutory formula that the order appealed from is “not in accordance with law” and/or is “not supported by reliable, probative, and substantial evidence.”

ODJFS’s core argument is simple: The statute requires a statement of “grounds,” and the statute separately requires courts to affirm an agency order unless the order fails to meet the standard of review, so those two requirements must be different. That is, in every appeal under R.C. 119.12, a party essentially asserts—not by using the formula in a notice, but by the mere act of filing the notice—that the agency order is not in accordance with law; that it is not supported by reliable, probative, and substantial evidence; or both. Thus, if the assertion that an order fails that test can do double-duty by also satisfying the grounds requirement, the grounds requirement is effectively eliminated. The Court should reject Medcorp’s inadequate notice.

A. The Court has repeatedly held that parties must strictly comply with R.C. 119.12’s requirements to invoke the courts’ jurisdiction, so a party’s failure to state grounds for the appeal deprives a reviewing court of jurisdiction.

The Court has repeatedly held that parties filing administrative appeals must strictly comply with the relevant statutory requirements and that a party’s failure to do so deprives a reviewing court of jurisdiction. See, e.g., *Hughes v. Ohio Dep’t of Commerce*, 114 Ohio St. 3d 47, 52, 2007-Ohio-2877, ¶¶ 17-18 (requiring appellant under R.C. 119.12 to file an original notice of appeal with the agency and a copy with the court, and finding reversed filing of original and copy invalid); *Nibert v. Ohio Dep’t of Rehab. & Corr.*, 84 Ohio St. 3d 100, 102, 1998-Ohio-

506 (holding that party failed to invoke courts' jurisdiction when it filed notice with agency but did not file copy with common pleas court within fifteen days); *Bd. of Educ. of Mentor v. Bd. of Revision* (1980), 61 Ohio St. 2d 332, 334 (holding failure to comply with statutory requirements for administrative appeals of property tax valuations was jurisdictional flaw); *McCruter v. Bd. of Review* (1980), 64 Ohio St. 2d 277, 279-80 (same, as to unemployment compensation appeals). Such strict compliance is necessary because a litigant has no inherent right to appeal, and thus may appeal only in the precise manner set forth by the law allowing the appeal. See, e.g., *Cooke v. Kinney* (1981), 65 Ohio St. 2d 7, 8 ("A litigant has no inherent right of appeal or review. Such right is purely statutory and requires the appellant to comply with the appeal provisions of the law."); *Holmes v. Union Gospel Press* (1980), 64 Ohio St. 2d 187, 188 ("We have consistently held that where a statute confers a right of appeal, as in the instant case, strict adherence to the statutory conditions is essential for the enjoyment of the right to appeal.").

Thus, Medcorp cannot dispute that it must strictly comply with the relevant statute—here, R.C. 119.12—and that any failure to do so is jurisdictional. That is, the sole issue here is whether Medcorp actually satisfied the statute, not whether some less-than-strict compliance is good enough, or whether its failure is non-jurisdictional or otherwise forgivable. The statute required Medcorp, and any party appealing an agency order pursuant to R.C. 119.12, to file a notice of appeal that sets forth (1) the order appealed from; and (2) the "grounds of the party's appeal." R.C. 119.12. If Medcorp did not do so—and as explained in Part B below, it did not—then its appeal must be dismissed for failure of jurisdiction.

Lower courts, following this Court's holdings that strict compliance is required, have recognized that failure to set forth the grounds of appeal in an R.C. 119.12 notice of appeal is a jurisdictional flaw, so those courts have dismissed cases when the appellant did not state grounds

in its notice of appeal. See, e.g., *Kelsey's Learning Ctr. v. Ohio Dep't of Job & Family Servs.* (10th Dist.), 2006 Ohio App. Lexis 3604, 2006-Ohio-3657, ¶¶ 6-7; *CHS-Windsor, Inc. v. Ohio Dep't of Job & Family Servs.* (10th Dist.), 2006 Ohio App. Lexis 2288, 2006-Ohio-2446, ¶¶ 9-10; *Stultz v. Ohio Dep't of Admin. Servs.* (10th Dist.), 2005 Ohio App. Lexis 166, 2005-Ohio-200, ¶¶ 8-10; *Berus v. Ohio Dep't of Admin. Servs.* (10th Dist.), 2005 Ohio App. Lexis 3113, 2005-Ohio-3384, ¶¶ 12-13.¹

Further, courts have dismissed cases in which the grounds statement was inadequate, such as when the notice recited the standard of review, as Medcorp's did, or asserted that a party was "adversely affected," or that an order "has no basis in law or fact." *David May Ministries*, 2007-Ohio-3454 at ¶¶ 3, 35 (rejecting notice that recited standard of review); *Green v. State Bd. of Registration* (2d Dist.), 2006 Ohio App. Lexis 1485, 2006-Ohio-1581, ¶¶ 14, 20 (rejecting notice stating that party "is adversely affected" by agency order); *Levitt v. City of Cleveland* (Cuyahoga C.P. Ct. 1970), 22 Ohio Misc. 54, 57, 64 (rejecting notice of appeal under Chapter 2506 where notice said that challenged order "is arbitrary, capricious, discriminatory, and has no basis in law or fact").

As shown below, Medcorp's notice was as inadequate as those rejected by other courts, and its notice, too, should be rejected.

¹ Notably, the court below, although it concluded that Medcorp's statement constituted adequate grounds, properly noted that this Court requires strict compliance. App. Op. at ¶ 7, 12. By contrast, one appeals court has, without acknowledging this Court's precedent, applied a lesser "substantial compliance" standard. See *Pham v. Ohio State Bd. of Cosmetology* (3d Dist.), 1998 Ohio App. Lexis 2506, *4-5 (holding that "substantial compliance" with appeal procedures is sufficient to vest jurisdiction). The *Pham* court found that "substantial compliance" was satisfied when a party stated merely that "there are very legitimate grounds for this Appeal." *Id.* at *3. *Pham* was mistaken in using a substantial compliance standard, and its mistaken result flowed from that mistaken standard.

B. An administrative appellant must do more than recite the standard of review to satisfy the grounds requirement.

Notices such as Medcorp's are insufficient for several reasons. First, the "grounds" requirement and the standard-of-review requirement are independent, both because they are stated separately and because they are conceptually distinct. Second, allowing the standard to serve as grounds would eliminate the grounds requirement as a practical matter, not just as a theoretical matter, because all administrative appeals could use the identical boilerplate with no distinction from one case to another. Third, the statute's plain text shows that it was designed to allow common pleas courts to decide appeals by reviewing the record without *necessarily* having parties file briefs, and that confirms that the grounds requirement is meant to provide real, substantive notice to the court and the opposing agency of what the appellant's objections are.

1. The grounds requirement must be distinct from the standard of review, as both are stated separately in the statute, and each is a distinct concept.

The statute here includes two distinct requirements (among others not at issue here): The grounds requirement and the standard-of-review requirement. The grounds requirement is stated as an express procedural requirement for the notice of appeal: "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and *the grounds of the party's appeal.*" R.C. 119.12 (emphasis added). The standard-of-review requirement is not a procedural requirement, in that the statute does not require a party to recite it in the notice. But it is a *substantive* requirement that sets the hurdle a party must clear if it wishes to succeed in its attack on an agency order. The statute provides for a court to affirm the agency order if it finds "that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." *Id.* Conversely, "[i]n the absence of this finding, [the court] may reverse, vacate, or modify the order." *Id.* Thus, an appellant can succeed *only* if the Court finds that the order fails to satisfy the standard of review. See, e.g., *Our Place, Inc. v.*

Ohio Liquor Control Comm'n (1992), 63 Ohio St. 3d 570, 571; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111 (per curiam). Thus, every administrative appeal under R.C. 119.12 must strive to meet that test.

While the standard is a matter of substance, it has procedural import for this case. Because every appellant must try to meet the test, it is inherent in filing the appeal that the appellant believes that its case meets that standard. In other words, by filing a document entitled “Notice of Appeal,” the party is not only asserting in general, “the order below was wrong,” but the party is saying in particular that “the order below was wrong in that it is not supported by reliable, probative, and substantial evidence or is not in accordance with law.” Thus, the General Assembly knew that every appellant was already stating this by the act of appealing, and the Assembly imposed the *independent* requirement that the party state the grounds for the appeal.

Consequently, the mere fact that the Assembly enacted the grounds requirement, in light of the fact that the standard of review assertion is inherent in every appeal, reflects the understanding that these are two separate concepts.

Further, the common understanding of “grounds” and of “standard of review” also shows that each is distinct. As the Second District explained, “[t]o state or set forth grounds means to recite some basis in law or fact for a claim.” *Green*, 2006-Ohio-1581 at ¶ 13 (citing *Black’s Law Dictionary*, 710 (7th ed. 1999)). Thus, “[t]he standards of review that R.C. 119.12 imposes are not themselves grounds for appeal, but only the findings on which the court may affirm, reverse, vacate, or modify the agency’s order.” *Id.* Indeed, beyond R.C. 119.12, a standard of review exists in every case, and it addresses the extent to which a higher court or other body defers to a lower one. And every standard of review, whether abuse of discretion, de novo review, or the R.C. 119.12 standard, intersects with the legal or factual grounds in a given case; no case ever

involves *solely* a standard of review without some other substantive standard or ground to apply. That is, a party must claim that a court or agency abused its discretion in when it found fact X, or that it misread the law in reaching conclusion Y. Conclusion Y might involve an element of the substantive law being applied, such as that a professional licensee violated the standards of his profession, but the finding being challenged is always on the ground of some asserted legal or factual error, as viewed through the prism of some standard of review. But the standard of review itself cannot *be* the grounds for appeal without tying it also to some substantive error.

Notably, the grounds for an appeal can be either factual or legal, so the Tenth District misconstrued ODJFS's argument when it said that ODJFS asked it to require a party to "set forth specific facts to support the grounds for the appeal." See App. Op. at ¶ 9. The grounds requirement does not require an appellant to state specific facts if it asserts that the agency's order was not supported by law; in the latter case, a party needs to identify the legal error but need not cite specific facts. For example, in one recent liquor-licensing case that reached this Court, the appellant licensee argued successfully that a certain statute—one that allowed liquor authorities to discipline a licensee if its employee was convicted of a felony—did not apply in *any* case in which the licensee fired the employee before conviction, so that the person was no longer an "employee" when convicted. See *WCI, Inc. v. Ohio Liquor Control Comm'n*, 116 Ohio St. 3d 547, 549, 2008-Ohio-88, ¶¶ 8-9. That case turned solely on the relevant statute's legal meaning and scope, and the parties agreed on the facts. The party's legal theory was its grounds for appeal. To be sure, in some cases a party may object that the agency's factual conclusion was not warranted by the evidence, but that merely confirms that different cases have different grounds for appeal, so a party can and should tell the agency what its grounds are.

In sum, a party's stated grounds must be independent of the standard of review. Those grounds must describe *how* the agency's decision is not in accordance with law or is not supported by the evidence, but that does not mean that a party must always set forth specific facts.

- 2. Allowing the standard of review to serve as grounds would eliminate the grounds requirement as a practical matter, as parties could use the same boilerplate in every appeal, and no case would be distinguished from any other.**

If the Court adopts Medcorp's view, it inescapably follows that, from now on, every administrative appellant could use the same statement that Medcorp did here as its sole statement of grounds: "The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence." See Medcorp's Notice of Appeal, Supp. at S-1. The subject of the appeal would not matter: The party could be challenging a liquor-license penalty, the loss of a medical or other professional license, or a denial of Medicaid benefits, or any other area of state law in which R.C. Chapter 119.12 governs the appeal. All such parties could use the same grounds statement. Put another way, a lawyer with a varied practice could cut-and-paste the same line into every notice of appeal; she need not even decide what grounds to appeal before filing.

The statutory grounds requirement would then be a dead letter, in violation of a cardinal rule of statutory construction: Statutes cannot be construed so as to render statutory language meaningless. *Bohan v. Indus. Comm'n of Ohio* (1946), 147 Ohio St. 249, 251. Courts must accord meaning to each word of a legislative enactment if it is reasonably possible so to do, because it is to be presumed that each word in a statute was placed there for a purpose. *Id.*; see also R.C. 1.47(B) ("The entire statute is intended to be effective"); *State v. Moaning* (1996), 76 Ohio St. 3d 126, 128 ("A court must give effect to all words of the statute.").

In addition, if Medcorp's view prevails, not only could parties use the same boilerplate language in every case, but they could further boil down the boilerplate to say as little as "the order was unlawful." Consider the following hypothetical statements of grounds, each of which may superficially seem to say less than the previous one, but on close exam, is virtually identical to its predecessor:

- The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.
- The challenged order does not meet the standard required of it by R.C. 119.12.
- The order does not meet the standard of review required by law.
- The order is wrong.

These four samples, ODJFS submits, are not steps along a proverbial slippery slope; rather, each statement is substantively the same, and each is equally empty in meaning. The first, of course, is precisely what Medcorp filed here. The second cannot be said to offer less information, as it simply refers to the statute by citation rather than recitation. The third, by saying "law" rather than citing the section, does not eliminate anything, especially if the full boilerplate paragraph begins, as Medcorp's did here, with the phrase, "[p]ursuant to sections 119.12," before identifying the date of the order and so on. Finally, the fourth sample loses no substance from the third, as it merely puts formal language into plain English.

A court reviewing an R.C. 119.12 appeal can reverse an agency order *only* if it is not supported by reliable, probative, and substantial evidence or is not in accordance with law. R.C. 119.12; *Our Place, Inc.*, 63 Ohio St. 3d at 571. Re-stating this standard of review in the notice of appeal provides the reviewing court and the agency with no information about the appeal. If the stating-grounds requirement in R.C. 119.12 has any meaning at all, it must mean that the notice of appeal must provide the reviewing court and the agency with at least some information

about the nature of the appeal beyond the standard of review that applies in every R.C. 119.12 appeal. Medcorp's view, and the Tenth District's, renders the stating-grounds requirement of R.C. 119.12 meaningless by equating it with the standard of review.

In sum, if reciting the standard of review counts as stating the grounds for an appeal, then future notices could all be meaningless in terms of the grounds requirement, and reading the requirement out of the statute violates fundamental principles of statutory construction.

3. The statute allows a court to decide an appeal based on a hearing and a review of the agency record, without briefing, so the grounds statement must have enough content to allow for a hearing and decision without briefing.

As the Second District explained in reaching the conclusion opposite the Tenth District's, a bare-bones notice of appeal such as Medcorp's—one that states only that an agency order is not supported by reliable, probative, and substantial evidence; that it is not in accordance with law; or both—does not notify the agency of the claims against which it may have to defend, and it does not help the court to dispose of the appeal. *David May Ministries*, 2007-Ohio-3454 at ¶¶ 3, 34. A notice with real content, by telling the agency what is truly at issue, helps the agency to consider approaching the party about resolving the case without the cost of further litigation. Equally important, an adequate notice allows the court to immediately assess the case, while a notice such as Medcorp's leave the court with no way to address issues before reading the parties' briefs. In some instances, however, those briefs never arrive. The statute was designed to make briefing optional, and to allow the court to review the record, hold a hearing, and decide the case—and that possibility confirms the critical role of the grounds requirement.

The statute leaves no doubt that a hearing and the court's review of the record are the norm, with briefing optional:

The court *shall conduct a hearing* on the appeal The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil

action. At the hearing, counsel may be heard on oral argument, *briefs may be submitted*, and evidence may be introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, *upon consideration of the entire record* and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

R.C. 119.12 (emphases added). Under this scheme, “counsel may be heard,” “briefs may be submitted,” and additional evidence may be introduced, if the court agrees. See *Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St. 3d 283, 287, 2008-Ohio-2337 (finding term “may” grants permissive discretion in city code regarding contracting). But the court could decide instead to review the record and call the parties in to announce its decision. Or the court could ask narrow, clarifying questions, and then decide whether to order briefing.

This statutory design, for a non-briefing scenario, underscores the importance of a grounds statement with real content, for without a brief, the grounds statement would be the sole pre-hearing guidance to the agency and court. A bare-bones statement such as Medcorp’s would give an agency no way to prepare for a hearing. The court would not be able to review the record with an eye toward the appellant’s issues; it would need to review the entire record while imagining every possible legal and factual objection. That is not tenable.

Further, a reviewing court should be able not only to use the grounds statement as a tool for reaching an ultimate decision, but also to look to that statement to consider preliminary issues such as whether to allow additional evidence, whether to call for full briefs, and so on.

Nor is it any answer to say that the modern practice is to require briefs in all cases, so that the non-briefing scenario is irrelevant. First, the issue here is the General Assembly’s intent in designing the statute and establishing the grounds requirement, so the evolution of modern

practice does not change what the statutory scheme requires as a baseline. If the modern practice could allow for the safe elimination of the grounds requirement, that is the Assembly's job.

Second, the grounds requirement matters for cases in which briefing is required, but the appellant simply fails to file—a scenario that does occur. The grounds statement in the original notice gives the agency enough information to shape a brief urging the court to affirm; it also gives the court enough to read the record with some focus. And these steps—both the agency's brief and the court's decision—have generally been taken in lower courts, even when an appellant fails to file a brief. That is, some courts have held—although this Court has not addressed the issue—that a court cannot reject an appeal solely for failure to prosecute, but must review the record based on the filing of an appeal. *Red Hotz, Inc. v. Liquor Control Comm'n* (10th Dist.), 1993 Ohio App. Lexis 4032, *3; *Minello v. Orange City Sch. Dist. Bd. of Educ.* (8th Dist.), 1982 Ohio App. Lexis 11662, *5. In *Red Hotz*, the Tenth District reasoned that dismissing an appeal for failure to file a brief was improper because automatic “dismissal circumvents and is inconsistent with R.C. 119.12's requirement that the trial court examine the record to find whether the order appealed from is or is not supported by reliable, probative and substantial evidence.” *Red Hotz, Inc.*, 1993 Ohio App. Lexis 4032, *3 (internal quotations omitted).

Third, even where briefs are to be filed, the grounds requirement serves several purposes. In non-administrative appeals, an appeal is typically in a court of appeals, and there, Appellate Rule 16 frames the case by requiring an appellant to set forth both the assignments of error and the issues presented for review. In this Court, propositions of law frame a case. But no such rule governs briefs in the common pleas courts, even if the briefs are appellate in nature. The grounds requirement provides appellate-style framing, which then carries over into the briefs, by

requiring grounds, akin to itemized errors or issues. Also, a pre-briefing grounds statement allows an agency to pursue settlement immediately, saving the court's and parties' time, if the grounds indicate something that the agency would rather settle. Finally, it alerts the agency and court to any issues of finality of an order or other flaws that should cut off the case without further proceedings, assisting judicial economy by allowing court to dismiss a case without unnecessary review of other issues. See, e.g., *CHS-Windsor, Inc.*, 2006-Ohio-2446 at ¶ 10 (holding that notice of appeal stating that an agency adjudication was not “in accordance with law” because the adjudication was not a “final order” failed to state grounds for an appeal; if the order was not final, the appeal was not ripe); see also *Vincent v. State* (1st Dist.), 1975 Ohio App. Lexis 7473 at *3 (dismissing appeal where notice of appeal was “silent as to any reasons which might support an appeal.”). Requiring an appellant to state grounds flushes out flawed appeals at the earliest opportunity, and it does so with the most efficient use of judicial resources.

In sum, because the statute was designed to allow a court to use the grounds statement as the starting point for a hearing and for reviewing the record to decide the appeal without full briefing, the grounds statement must have real content for the court to do its job. Indeed, as explained below in Part C, if the Court decides to address the grounds requirement beyond holding that Medcorp's is not enough—though it need not do so—it ought to use that non-briefing scenario as the basis for the standard. That is, the test for sufficiency of a grounds statement ought to be whether a court could, without briefs, assess the record in light of the grounds stated.

C. The Court need not define precisely the “grounds” standard here, but if the Court offers further guidance, it should hold that the stated grounds should be enough to allow a court to decide a case without briefing.

The sole issue here is whether Medcorp's notice of appeal, which merely recited the standard of review, satisfies the grounds requirement. Thus, if the Court concludes, as it should,

that Medcorp’s notice fails, then it should stop there, and it need not precisely define the scope of the grounds requirement. That issue of scope may be fleshed out in future cases, as issues often are. Indeed, procedural issues under R.C. 119 are often ironed out quickly, as most such cases are brought in the Tenth District—because appeals against many agencies belong exclusively in Franklin County—while a smaller set of cases are brought in the remaining districts. True, conflicts may develop, as happened here, but if the courts below reach consensus, this Court need not intervene. Or, if the Court does, it will then have the benefit of lower courts’ consideration of the issue:

If the Court wishes to provide guidance to the lower courts, however, the standard should be based on the no-briefing scenario discussed above in Part B-3. In other words, the Court should set a standard that asks whether the stated grounds offer a reviewing court enough guidance to resolve the case by reviewing the record without requiring briefing, or for the court to decide whether briefing is needed.

This common-sense standard is the best way to implement the statute’s intent, because it is perhaps the only formula firmly grounded in the statutory text. Further, this standard is one that courts can apply, as a court can of course ask itself—even if briefs are later filed—whether it could decide the case based on the stated grounds without briefing. This standard is also consistent with the Second District’s approach in *David May Ministries* and *Green*. In those cases, the Second District said that a notice must “show how the agency’s order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Otherwise, the agency is not put on notice of the claim or claims against which it must defend.” *David May Ministries*, 2007-Ohio-3454 at ¶ 22 (quoting *Green*, 2006-Ohio-1581 at ¶ 13). A notice that

shows “how” the agency purportedly failed to meet the standard, as the Second District requires, would also allow the court to decide the appeal without briefing.

Nor is it any objection that this standard is not precise enough for court to apply. To be sure, it allows for a case-by-case application, but that is true of most similar standards. By comparison, a court assessing a motion to dismiss under Civil Rule 12(B)(6) asks whether “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Wilson v. Riverside Hospital* (1985), 18 Ohio St. 3d 8, 9 (citing *Conley v. Gibson* (1957), 355 U.S. 41, 45). For decades, both state and federal courts have successfully applied that abstract standard to specific facts.

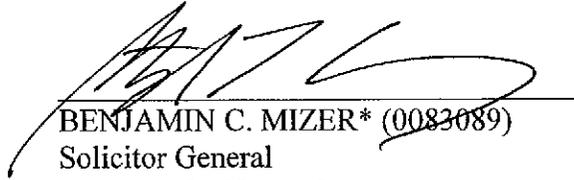
The Court should hold that Medcorp’s notice, and any other notice that merely recites the statutory standard of review, does not satisfy R.C. 119.12’s requirement that a party state the grounds for its appeal. The Court may stop there, and allow the standard to be worked out in future cases. But if the Court wishes to provide further guidance, it should hold that grounds statements should be reviewed case-by-case, and courts should ask whether the case could reasonably be reviewed, based on the grounds statement, if no briefs are filed.

CONCLUSION

This Court should reverse the judgment below and answer the certified question "yes."

Respectfully submitted,

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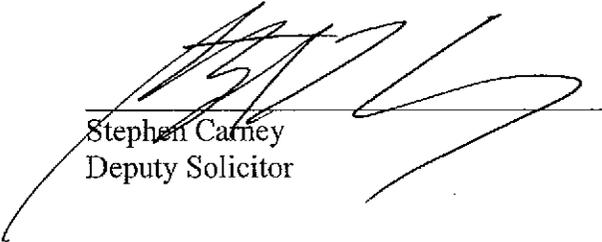
Counsel for Appellant
Ohio Department of Job and Family
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 2nd day of September, 2008, upon the following counsel:

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Medcorp, Inc.



Stephen Carney
Deputy Solicitor

In the
Supreme Court of Ohio

08-0584

MEDCORP, INC.,

Appellee,

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

Appellant.

: Case No. 2008-
:
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals Case
: No. 07 APE 04-312
:

**NOTICE OF APPEAL OF
APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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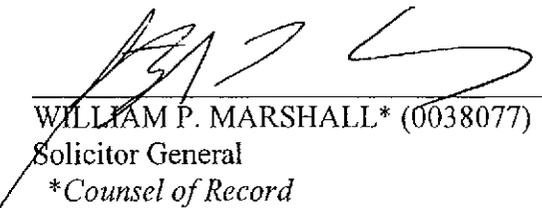
FILED
MAR 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF
APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

Appellant, Ohio Department of Job and Family Services, gives notice of its claimed appeal of right and discretionary appeal to this Court, pursuant to Ohio Supreme Court Rules II(A)(2) and (3), from a Judgment Entry of the Tenth Appellate District, February 7, 2008 Judgment Entry and Opinion, journalized in Case No. 07 APE 04-312, *Medcorp, Inc. v. The Ohio Department of Job and Family Services*. That Judgment Entry was stamped "Filed" on February 7, 2008. The Judgment Entry and Opinion are attached to the Appellant's Memorandum in Support of Jurisdiction. Reasons for this claimed appeal of right and discretionary appeal, including the great public and general interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

Respectfully submitted,

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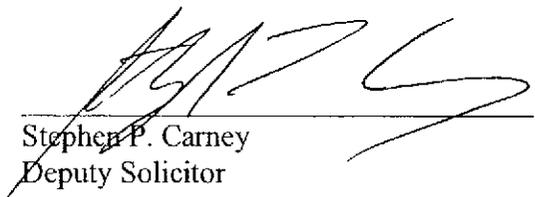
Counsel for Appellant
Ohio Department of Job and Family
Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 24th day of March, 2008, upon the following counsel:

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Medcorp, Inc.



Stephen P. Carney
Deputy Solicitor

20499 - M48

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2008 FEB -7 PM 12:18
CLERK OF COURTS

Medcorp, Inc.,

Appellant-Appellee,

v.

The Ohio Department of Job
and Family Services,

Appellee-Appellant.

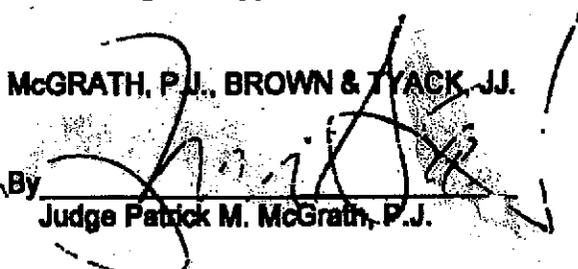
No. 07AP-312
(C.P.C. No. 06CVF-5822)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 7, 2008, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, P.J., BROWN & TYACK, JJ.

By  Judge Patrick M. McGrath, P.J.

OHIO ATTORNEY
GENERAL'S OFFICE

FEB 12 2008

HEALTH AND
HUMAN SERVICES

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 FEB -7 PM 12:1
CLERK OF COURTS

Medcorp, Inc.,	:	
	:	
Appellant-Appellee,	:	
	:	No. 07AP-312
v.	:	(C.P.C. No. 06CVF-5622)
	:	
The Ohio Department of Job	:	(REGULAR CALENDAR)
and Family Services,	:	
	:	
Appellee-Appellant.	:	
	:	

O P I N I O N

Rendered on February 7, 2008

Geoffrey E. Webster and J. Randall Richards, for appellant-appellee.

Marc Dann, Attorney General, and Ara Mekhjian, for appellee-appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Appellee-appellant, The Ohio Department of Job and Family Services ("ODJFS"), appeals from the decision of the Franklin County Court of Common Pleas reversing a decision of ODJFS that found a \$534,719.27 overpayment to appellant-appellee, Medcorp, Inc. ("Medcorp").

{¶2} This matter arose from a post-payment audit of Medicaid claims paid to Medcorp between March 1, 1996 and September 30, 1997. Medcorp is a medical

transport company that provides ambulance and ambulette services in various Ohio counties. In 1998, the Surveillance and Utilization Review Section ("SURS") of ODJFS, the agency that administers Ohio's Medicaid program, audited Medcorp.

{¶3} Between March 1, 1996 and September 30, 1997, Medcorp made claims for and was paid \$534,719.27 for 10,462 medical transports. For the 1998 audit, SURS asked for Medcorp's records based upon 48 random claims. After review of the 48 claims, SURS disallowed all 48 claims upon one or more bases. This random sample was then extrapolated to the entire number of claims, resulting in all 10,462 claims being disallowed. Therefore, repayment was sought for the \$534,719.27 that had previously been paid on those claims, plus interest. Medcorp challenged the overpayment determinations in an administrative hearing. A hearing examiner for ODJFS heard the matter on two days in April 2002, and on July 16, September 29, 30, and October 1, 2003. On January 10, 2005, the hearing examiner issued a report and recommendation in which he determined that an overpayment of \$1,850.02 had occurred, but determined that the remaining amount was properly billed. ODJFS's director reviewed the record, including the hearing examiner's report and recommendation. Upon review, the director found the hearing examiner based his recommendation on erroneous findings of fact and conclusions of law. Therefore, the director reinstated the full amount of the \$534,719.27 to be repaid and issued an adjudication order directing Medcorp to repay \$534,719.27 plus statutory interest.

{¶4} Medcorp appealed to the Franklin County Court of Common Pleas in accordance with R.C. 119.12. The trial court found the director's findings were not based on reliable, probative and substantial evidence and were not in accordance with law.

Therefore, the trial court essentially reinstated the hearing examiner's findings and agreed that ODJFS's statistical sampling methodology and its application to this audit were invalid. ODJFS timely appealed to this court and asserts the following two assignments of error for our review:

Assignment of Error No. 1:

THE LOWER COURT ERRED BY FAILING TO DISMISS MEDCORP'S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.

Assignment of Error No. 2:

THE LOWER COURT ERRED BY DETERMINING THAT ODJFS SHOULD HAVE USED AN EXTENDED SAMPLE SIZE BEFORE EXTRAPOLATING THE RESULTS OF THE INITIAL SAMPLE TO ALL OF THE CLAIMS AT ISSUE IN THE AUDIT.

{¶5} In the first assignment of error, ODJFS contends Medcorp's notice of appeal filed in the trial court was defective as a matter of law because it did not state "grounds" for the appeal as required by R.C. 119.12, and thereby deprived the trial court of subject-matter jurisdiction.¹ Subject-matter jurisdiction is a question of law, which we review de novo. *Village of Hills & Dales v. Ohio Dept. of Edn.*, Franklin App. No. 06AP-1249, 2007-Ohio-5156 at ¶16, citing *Yusuf v. Omar*, Franklin App. No. 06AP-416, 2006-Ohio-6657, at ¶7.

{¶6} An appeal from an adjudication of ODJFS may be taken under R.C. 119.12. In order to properly invoke the jurisdiction of the reviewing court, the appellant must

¹ ODJFS additionally argued in its merit brief that the trial court lacked subject-matter jurisdiction over this appeal because Medcorp did not file a bond as required by R.C. 2505.06. However, as noted by Medcorp, a motion for a reduced bond was pending at the time the trial court rendered its decision on the merits. Further, it appears ODJFS has since abandoned this argument.

comply with the requirements of R.C. 119.12. In pertinent part, that section provides as follows:

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of notice of appeal shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, the 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. * * *

{¶7} Where the right of appeal is conferred by statute, an appeal may be perfected only in the manner prescribed by statute. E.g., *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus. Parties must strictly adhere to the filing requirements in order to perfect an appeal and invoke the jurisdiction of the court of common pleas. *Harrison v. Ohio State Med. Bd.* (1995), 103 Ohio App.3d 317; *Hughes v. Ohio Dept. of Commerce, Div. of Fin. Inst.*, Franklin App. No. 04AP-1386, 2005-Ohio-6368, and cases cited therein. If a party fails to comply with the requirements of R.C. 119.12, the common pleas court does not have jurisdiction to hear the appeal. *Zier, Hughes*, supra.

{¶8} Medcorp's notice of appeal in this matter, stated:

Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated herein by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.

{¶9} In support of its argument that Medcorp failed to adhere to the filing requirements of R.C. 119.12, ODJFS relies on the Second District Court of Appeals

decisions in *David Day Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA 1, 2007-Ohio-3454, and *Green v. State Bd. of Registration For Professional Engineers and Surveyors*, Greene App. No. 05CA121, 2006-Ohio-1581, as well as this court's decision in *CHS-Windsor, Inc. v. Ohio Dept. of Job & Family Services*, Franklin App. No. 05AP-909, 2006-Ohio-2446. However, since the time *David Day Ministries* and *CHS-Windsor* were decided, this court has confronted an issue similar to that presented here in *Derakhshan v. State Med. Bd. of Ohio*, Franklin App. No. 07AP-261, 2007-Ohio-5802. The appellant in *Derakhshan* appealed the revocation of his medical license. The notice of appeal filed in the trial court stated:

- A. The revocation of [appellant's] medical license is not supported by reliable, probative, and substantial evidence.
- B. The revocation of [appellant's] medical license is contrary to law.
- C. The revocation of [appellant's] medical license was arbitrary and capricious.
- D. The revocation of [appellant's] medical license constitutes an abuse of discretion.

Id. at ¶6.

{¶10} The Medical Board argued that the notice of appeal was defective and deprived the trial court of subject-matter jurisdiction because it failed to set forth grounds for appeal in accordance with R.C. 119.12. The Medical Board relied, as ODJFS does here, on the Second District's decision in *Green*. This court agreed with the line of cases holding that a notice of appeal pursuant to R.C. 119.12 that contains no grounds for appeal deprived the trial court of jurisdiction. However, we went on to distinguish the

notice of appeal at issue in *Derakhshan*, finding that it stated four grounds for appeal.

This court stated:

In each of these prior cases from this court, the notice of appeal at issue contained no grounds for the appeal. That critical fact distinguishes these prior cases from the appeal before us, where appellant identified four separate grounds for his appeal to the trial court. While we can appreciate appellee's desire for more detail about appellant's arguments, R.C. 119.12 only requires an appellant to "set[] forth * * * the grounds of the party's appeal." It does not require an appellant to set forth specific facts to support those grounds, and we expressly decline to adopt such a requirement. Because we find that appellant's notice of appeal stated the grounds for his appeal and invoked the jurisdiction of the trial court, we reject appellee's contrary arguments.

Id. at ¶22.

{¶11} We find no meaningful difference between the grounds for appeal set forth in *Derakhshan*'s notice of appeal and the grounds for appeal set forth in the notice of appeal currently before us. As we explained in *Derakhshan*:

In its opinion, id. at P14, the Second District described Green's notice of appeal as follows:

The notice of appeal that Green filed merely states that he "is adversely affected" by the Board's order "finding that Appellant violated Revised Code Section 4733.20(A)(2)" and the sanctions the Board imposed. That bare contention, coupled with only a reference to the statutory authority under which the Board acted, is insufficient to satisfy the "grounds" requirement of R.C. 119.12. *Berus v. Ohio Dep't. Of Admin. Services*, Franklin App. No. 04AP-1196, 2005 Ohio 3384.

The Second District also explained that the "grounds" requirement in R.C. 119.12 required an appellant to "set forth facts sufficient on their face to show how the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Otherwise, the agency is not put on notice of the claim or claims against which it must defend." *Green* at P13.

While we agree with the holding in *Green*--the notice of appeal did not state the grounds for the appeal, and that defect deprived the trial court of jurisdiction over the appeal--we do not agree with the court's explanation of R.C. 119.12 requirements.

Id. at ¶15-17.

{¶12} Thus, contrary to ODJFS's contention, this court has declined to adopt a requirement that an appellant set forth specific facts to support the grounds for appeal required by R.C. 119.12.² We find the notice of appeal at issue currently before us did, like that in *Derakhshan*, set forth grounds for the appeal sufficient to invoke the jurisdiction of the trial court.³ Consequently, we overrule appellant's first assignment of error.

{¶13} In its second assignment of error, ODJFS contends the trial court erred in determining that ODJFS should have used an expanded sample size. In an administrative appeal pursuant to R.C. 119.12, the common pleas court considers the entire record and determines whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111. The common pleas court's "review of the

² We are mindful that *Derakhshan* did not discuss *David Day Ministries* as the two decisions were rendered in close proximity. However, in *Derakhshan*, this court denied a motion to reconsider based on *David Day Ministries*; therefore, we find *Derakhshan* instructive on the matter at hand.

³ ODJFS also suggests this court's decision in *CHS-Windsor* supports its position. However, in *CHS-Windsor*, this court found the original notice of appeal, which stated in part that the order "is not in accordance with law in that it is not a "Final Order" as required by state law because it purports to exclude any collection of amounts which may be owed to the Department as a result of a certain audit identified within the Adjudication Order" did not set forth grounds for appeal in accordance with R.C. 119.12 sufficient to invoke the jurisdiction of the trial court. Id. at ¶10. The amended notice of appeal, which this court stated "added both the correct day of the adjudication order and, as grounds for the appeal * * * that the order 'is not based on substantive, reliable or probative evidence[.]'" However, because the amended notice of appeal was filed after the 15-day period allowed for amendments, this court stated it did not consider the amended notice of appeal. We find nothing to suggest the extension of *CHS-Windsor* would be to find that the notice of appeal at issue here fails to set forth grounds for appeal in accordance with R.C. 119.12 sufficient to invoke the jurisdiction of the trial court. This is so particularly in light of our more recent decision in *Derakhshan*.

administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Furthermore, even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the agency's findings are not conclusive. *Univ. of Cincinnati*, *supra*, at 111. If the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. *Id.*

{¶14} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the agency's order is supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the agency's order is in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶15} In *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, the court defined the evidence required by R.C. 119.12 as follows:

* * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Id. (Footnotes omitted).

{¶16} As previously indicated, during the audit process, SURS extrapolated the results of the review of the preliminary 48 sample claims to the entire universe of 10,462 claims. According to Medcorp, this methodology is not provided for in the Case Review Procedure Manual ("the manual"), that was developed by Dr. Melvin Moeschberger for ODJFS, and has been judicially determined to satisfy constitutional requirements of due process. ODJFS asserts that the audit was done in this manner because present here is the rare instance where all of the preliminary 48 claims were disallowed.

{¶17} Section VI of the manual describes SURS use of "the statistical procedure known as random sampling to review a small portion of the larger group of Medicaid reimbursed services provided and to make inferences from the sampled portion to the larger universe in accordance with Standard Statistical Inferential Methods." From this method, it is determined what amount of services was incorrectly reimbursed and then the amount of incorrectly reimbursed services is projected to the larger group of services. Specifically, the manual states:

The procedure to be used by the [SUR] divides the review into the preliminary sample and the expanded sample. In the preliminary sample, a total of 48 claims are randomly selected

from a universe of all the claims paid to a provider for a predetermined time frame being reviewed. Based on the results of the preliminary sample, a decision is made by the analyst and supervisor to either not extend the sample and take a straight finding or to extend the sample size and project the findings for the entire universe.

{¶18} The manual continues with specific instructions regarding the "Sampling Procedure." Under subsection C of Section VI, Step 3 of the five-step process fixes the preliminary sample at 48. Step 4 instructs that from the results of the preliminary sample, if "the decision is made to go to an expanded sample, the additional number of samples needed would be calculated * * *." Step 5 outlines the procedure to calculate the additional number of samples needed for the expanded sample. Subsection D provides a nine-step procedure for determining the "Calculation of Findings." It provides that "[a]fter the records for the *entire* sample have been obtained and a determination reached on whether a claim is appropriate or excepted, it is necessary to statistically evaluate the resulting data and project a monetary finding." (Emphasis added.) When discussing the calculations, subsection D consistently refers to the size of the "entire sample" and the results of the "entire sample." Chapter VI(D)(9) states:

In rare instances when most of the items sampled are disallowed, the mean estimate may be more than the total amount paid to the provider. In that instance, the estimated total disallowance can be calculated by using the following formula * * *.

{¶19} In this case, it is undisputed that ODJFS went directly to Chapter VI(D)(9) and did not calculate an expanded sample as provided for Chapter VI(C). According to ODJFS, Dr. Moeschberger explained that the method utilized here, though not expressly provided for in the manual, is impliedly provided for, and is known as a "second methodology." Acknowledging that it is rare to use the "second methodology," Dr.

Moeschberger explained it was also rare to have an instance, such as this, where all of the claims at issue in the preliminary sample are entirely disallowed. Therefore, it is ODJFS' position that Dr. Moeschberger's testimony provided reliable, probative and substantial evidence upon which the director could rely and the trial court abused its discretion in finding the director's order was not supported by the same.

{¶20} Dr. Warren B. Bilker, Medcorp's expert disagreed with Dr. Moeschberger. According to Dr. Bilker, the results of the preliminary sample of 48 were simply insufficient to extrapolate to the entire universe of 10,462 claims. Dr. Bilker further testified that the method used here, and testified to by Dr. Moeschberger, is not provided for in the manual.

{¶21} The trial court reviewed not only the extrapolation methodology, but also reviewed the claims that were disallowed. The trial court agreed with the hearing examiner that not 100 percent of all the preliminary 48 claims were improper. On appeal to this court, ODJFS takes issue only with that regarding the expanded sample and extrapolation.⁴

{¶22} The hearing examiner determined that a total disallowance of the preliminary sample was in error; therefore, the situation explained by Dr. Moeschberger, i.e., that obviating the need to compute an expanded sample, is not present. On this basis, the hearing examiner found the sample size was insufficient and created a risk of erroneous deprivation of a private property interest and deprived Medcorp of its right to due process. In contrast, the director found Dr. Moeschberger's testimony persuasive,

⁴ In its appendix, Medcorp attached an Ohio Inspector General Report dated January 26, 2005. The trial court declined to consider it, finding it was not permitted to be considered on appeal. Similarly, we decline to consider it as well.

and concluded the manual does contain two statistical sampling methodologies. Under the facts contained herein, the director found that the results of the preliminary 48 samples could be extrapolated to the entire universe of paid claims for the audit period.

{¶23} Contrary to the director, the trial court found that though the manual may give some leeway on the audit procedure, and that due process may not be violated where the provider agrees to allow sampling to be used instead of a full review, "the manual did not contemplate this type of circumlocution of [an] extended sample" and that Dr. Moeschberger's testimony is "at odds" with the manual's actual language. (Decision at 10-11.) Thus, the trial court found Dr. Moeschberger's testimony did not provide reliable, probative and substantial evidence and that the agency's order was not in accordance with law. Upon review of the record, we cannot find the trial court abused its discretion in this instance.

{¶24} ODJFS suggests the trial court failed to give due deference to the director's resolution of evidentiary conflicts. However, the trial court expressly made its findings in light of "according due deference to the Director." (Decision at 10.)

{¶25} As found by the trial court, the manual does not suggest it would be appropriate to apply the results of a preliminary sample to the entire universe of claims without using an expanded sample, and Dr. Bilker's testimony supported this reading of the manual. Though Dr. Moeschberger testified to the contrary, given the trial court's determination that the manual itself refuted Dr. Moeschberger testimony, this is not, as ODJFS suggests, merely a matter of deciding which expert opinion to follow. Rather it is the trial court reviewing the administrative record and finding that, based on the record as a whole, the agency order is not in accordance with law or supported by reliable,

probative and substantial evidence. Such is precisely the process required to be undertaken. *Univ. of Cincinnati, supra* (noting that an agency's resolution of evidentiary conflicts is not conclusive). Upon review, we are unable to find an abuse of the trial court's discretion. Accordingly, we overrule appellant's second assignment of error.

{¶26} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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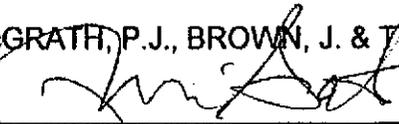
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

MedCorp, Inc.,	:	
	:	
Appellant-Appellee,	:	
	:	No. 07AP-312
v.	:	(C.P.C. No. 06CV-5622)
	:	
Ohio Department of Job & Family	:	(REGULAR CALENDAR)
Services,	:	
	:	
Appellee-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 27, 2008, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Court of Appeals for Greene County in *David May Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA 1, 2007-Ohio-3454, is sustained and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require an appellant to specify something beyond restating the statutory formula that the order appealed from is "not in accordance with law and is not supported by reliable, probative, and substantial evidence"?

McGRATH, P.J., BROWN, J. & TYACK, J.
By 

Judge Patrick M. McGrath, P.J.

HEALTH & HUMAN
APR 01 2008
SERVICES SECTION

Counsel

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

MedCorp, Inc.,

Appellant-Appellee,

v.

Ohio Department of Job & Family Services,

Appellee-Appellant.

No. 07AP-312

(C.P.C. No. 06CV-5622)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on March 27, 2008

Geoffrey E. Webster and J. Randall Richards, for appellee.

Marc Dann, Attorney General, and Ara Mekhjian, for appellant.

ON MOTION TO CERTIFY.

McGRATH, P.J.

{¶1} Pursuant to App.R. 25, the Ohio Department of Job and Family Services ("ODJFS"), moves this court for an order certifying to the Supreme Court of Ohio a conflict between our February 7, 2008 opinion in *Medcorp, Inc. v. Ohio Depart. of Job and Family Serv.*, Franklin App. No. 07AP-312, 2008-Ohio-464, and the opinion of the Second Appellate District in *David May Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA

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SERVICES SECTION

1, 2007-Ohio-3454. Appellee, Medcorp, Inc., has filed a memorandum in opposition to appellant's motion.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution gives the court of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state." We have previously held that certification under the Ohio Constitution will be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 537. Such questions must be over a question that is material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), Franklin App. No. 82AP-949.

{¶3} App.R. 25 provides, in part, that a motion to certify a conflict "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed."

{¶4} The Supreme Court of Ohio has instructed that there are conditions that must be met before and during the certification of a case to the Supreme Court pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. "[T]he alleged conflict must be on a rule of law – not facts." *Id.* at 596. "*Factual* distinctions between cases do not serve as a basis for conflict certification." (Emphasis sic.) *Id.* at 599.

{¶5} Appellant proposes the following question for certification to the Supreme Court of Ohio:

ADMINISTRATIVE

800 1 1000

RECORDS SECTION

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require an appellant to specify something beyond restating the statutory formula that the order appealed from is "not in accordance with law and is not supported by reliable, probative, and substantial evidence"?

{¶6} Both *Medcorp* and *David May Ministries* concern appeals taken from a decision of an administrative agency. In *David May Ministries*, the appellant appealed to the Greene County Common Pleas Court from an adjudication order of the Charitable Law Section of the Ohio Attorney General's Office that rejected the appellant's application for charitable bingo licenses for years 2005 and 2006. The notice of appeal filed in *David May Ministries* stated:

"Pursuant to Ohio Revised Code § 119.12, David May Ministries, a.k.a. Miami Valley Ministries hereby gives notice of its appeal to the Greene County Court of Common Pleas for the Adjudication Order issued by the Office of Attorney General of the State of Ohio, Charitable Law Section, dated November 15, 2006 * * *. The Adjudication Order is not supported by reliable, probative or substantial evidence, and is contrary to law."

Id. at ¶3.

{¶7} In *David May Ministries*, the Second District Court of Appeals held the notice of appeal did not comply with the requirement that is set forth in the grounds for its appeal as mandated by R.C. 119.12 because the notice of appeal did not "indicate *how* the agency order is not supported by reliable, probative, and substantial evidence and is not in accordance with law." Id. at ¶28. (Emphasis sic.) Consequently, the court in *David May Ministries* concluded the trial court did not err in dismissing the appeal for lack of jurisdiction.

{¶8} In *Medcorp*, an appeal was taken from the ODJFS' adjudication order finding a \$534,719.27 overpayment to Medcorp. The notice of appeal filed in *Medcorp* stated:

Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated herein by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.

Id. at ¶8.

{¶9} Relying on this court's opinion in *Derakhshan v. State Med. Bd. of Ohio*, Franklin App. No. 07AP-261, 2007-Ohio-5802, we held Medcorp's notice of appeal set forth grounds for the appeal as required by R.C. 119.12 sufficient to invoke the jurisdiction of the trial court.

{¶10} Though Medcorp argues to the contrary, we agree with ODJFS that our judgment in *Medcorp* conflicts with the Second District Court of Appeals' judgment in *David May Ministries* on the same question of law and that the cases are not distinguishable on their facts. Accordingly, we certify the present case as being in conflict with the opinion of the Second District Court of Appeals in *David May Ministries* in the following question:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require an appellant to specify something beyond restating the statutory formula that the order appealed from is "not in accordance with law and is not supported by reliable, probative, and substantial evidence"?

{¶11} For the foregoing reasons, we grant appellant's motion to certify, and certify the above-stated question to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

Motion to certify granted.

BROWN and TYACK, JJ., concur.

119.12 Appeal by party adversely affected - notice record - hearing - judgment.

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, except that appeals from decisions of the liquor control commission, the state medical board, state chiropractic board, and board of nursing shall be to the court of common pleas of Franklin county. If any party appealing from the order is not a resident of and has no place of business in this state, the party may appeal to the court of common pleas of Franklin county.

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.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of 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. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 of the Revised Code.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section, the suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of the suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board or state chiropractic board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code that suspends, revokes, or cancels a permit issued under Chapter 4303. of the Revised Code or that allows the payment of a forfeiture under section 4301.252 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the liquor control commission that extends beyond six months after the date on which the record of the liquor control commission is filed with a court of common pleas.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or state chiropractic board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of the certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Notwithstanding any other provision of this section, any party desiring to appeal an order or decision of the state personnel board of review shall, at the time of filing a notice of appeal with the board, provide a security deposit in an amount and manner prescribed in rules that the board shall adopt in accordance with this chapter. In addition, the board is not required to prepare or transcribe the record of any of its proceedings unless the appellant has provided the deposit described above. The failure of the board to prepare or transcribe a record for an appellant who has not provided a security deposit shall not cause a court to enter a finding adverse to the board.

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on the appeal and shall give preference to all proceedings under

sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code, or the state chiropractic board issued pursuant to section 4734.37 of the Revised Code, or the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. These appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. An appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and, in the appeal, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to the agency or take any other action necessary to give its judgment effect.

Effective Date: 04-10-2001; 07-01-2007

In the
Supreme Court of Ohio

MEDCORP, INC.,

Appellee,

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

Appellant.

Case No. 2008 **08-0630**

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
No. 07 APE 04-312

**NOTICE OF CERTIFIED CONFLICT OF
APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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Ohio Department of Job and Family
Services

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APR 03 2008
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SUPREME COURT OF OHIO

**NOTICE OF CERTIFIED CONFLICT OF APPELLANT
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

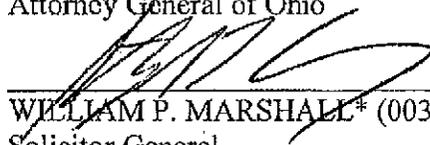
The Ohio Department of Job and Family Services hereby notifies the Court, pursuant to S. Ct. Rule IV, that the Tenth District Court of Appeals has certified a conflict. See Journal Entry and Memorandum Decision, March 27, 2008, in *Medcorp, Inc. v. Ohio Department of Job and Family Services* (10th Dist.), 07 APE 04-312 (Ex. 1). The Tenth District certified a conflict between its initial decision, 2008-Ohio-464 (Ex. 2), and the decision in *David May Ministries v. State ex rel. Petro* (2d Dist.), 2007-Ohio-3454 (Ex. 3). The Tenth District certified this issue:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require an appellant to specify something beyond restating the statutory formula that the order appealed from is "not in accordance with law and is not supported by reliable, probative, and substantial evidence"?

See Journal Entry, Ex. 1, at 1, and Memorandum Decision, Ex. 1, at ¶ 10. Appellant has also filed a discretionary appeal in this case; that appeal is Case No. 08-0584 (filed March 24, 2008).

Respectfully submitted,

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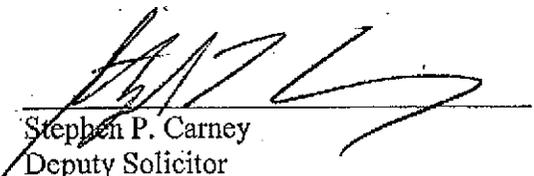
Counsel for Appellant
Ohio Department of Job and Family
Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Certified Conflict of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 3rd day of April, 2008, upon the following counsel:

Geoffrey E. Webster
J. Randall Richards
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Medcorp, Inc.



Stephen P. Carney
Deputy Solicitor