

IN THE SUPREME COURT OF OHIO

PATRICIA CRAWFORD-COLE,

*

Case No. 2008-0462

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Appellant,

*

On Appeal from the Lucas
County Court of Appeals,
Sixth Appellate District

*

*

Court of Appeals
C.A. No. L-07-1188

-vs-

*

LUCAS COUNTY DEPARTMENT OF
JOB AND FAMILY SERVICES,

*

Appellee.

*

REPLY BRIEF OF APPELLANT LUCAS COUNTY DEPARTMENT OF
JOB AND FAMILY SERVICES

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: John A. Borell (0016461)
Karlene D. Henderson (0076083)
Assistant Lucas County Prosecutors
Lucas County Courthouse, Suite 250
Toledo, Ohio 43604
Telephone: 419.213.2001
Facsimile: 419.213.2011
E-mail: jaborell@co.lucas.oh.us
Counsel for Appellant Lucas County
Department of Job and Family Services

Terry Lodge
315 N. Michigan St. Ste 350
Toledo, Ohio 43604
Counsel for Appellee Crawford-Cole

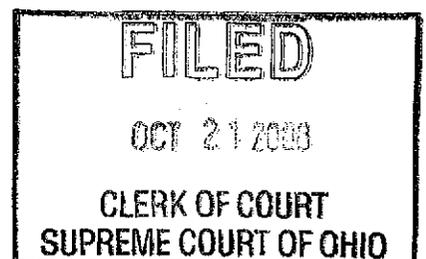


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Now comes the Appellant, Lucas County Department of Job and Family Services, and files this brief in response to Appellee's Merit Brief filed on or about September 10, 2008.

ARGUMENT

A. Summary

In her Merit Brief, Appellee contends that Appellant Lucas County Department of Job and Family Services have improperly raised a new issue before this Court which should have been argued in the trial court and appellate court. Appellee is wrong as ***the issue did not exist until the decision of the appellate court***. There would have been no basis for the Appellant to raise this argument until the Ohio Sixth District Court of Appeals issued its decision that a conflict existed between administration regulation 5101:2-14-40 and Chapter 119 of the Revised Code. Thus, there has been no failure to raise the issue before any other court which would result in a waiver of the issue on appeal.

Appellant's argument is properly before this Court. The basis for the Appellant Lucas County Department of Job and Family Services argument is that the Appellate Court erred in its decision because the statute and regulation are not "in conflict." There is no conflict because there is another statute, R.C. 5101.09, which specifically exempts the regulation from the notice and hearing requirements of R.C. 119.

B. **The issue before the trial court level was jurisdictional.**

The argument at the trial court level was a simple jurisdictional matter. Appellant Lucas County Department of Job and Family Services successfully argued that the Appellee had failed to request an administrative hearing within the ten day time period set forth in O.A.C.

5101:2-14-40.¹ Thus, the trial court had no jurisdiction to hear an appeal.² Moreover, because there was no hearing, there was no “record” for the trial court. The trial court even went so far as to judiciously attempt to see if correspondence between the Appellee and the agency could be determined to constitute a “hearing” so as to not divest itself of jurisdiction. It was not enough. The trial court rightfully determined that the correspondence was not an “adjudication” and that Appellee failed to meet the ten day time period in which to appeal the day care certificate revocation.³

¹ Contrary to the Appellee’s reference on page 5 of her brief that the license revocation 10 day appeal time is the shortest known administrative statute of limitations for an administrative hearing – she is wrong. For example, a dismissed fireman has only 10 days to request an administrative review. See, R.C. 505.38(A).

² A more direct, less litigious path for the Appellee would have been to file a Writ of Mandamus ordering Appellant to hold the hearing. Appellee would then have had an opportunity to perfect an appeal in common pleas court.

³ The Appellee has stated repeatedly that she did request an administrative appeal and that neither the Appellant or the Ohio Attorney General acknowledge this. Appellee corresponded with the agency after the time period for a hearing was passed. The proper notification was mailed as required by law. The excuses of why she did not know, whether vacationing or out of town or not looking at her mail on a daily basis is not of legal significance. The time for appeal lapsed.

- C. It was the decision of the appellate court that a conflict existed between R.C. 119 and O.A.C. 5101:2-14-40 which gave rise to Appellant's argument that 5101.09 provides an exemption from the notice, hearing, or other requirements of R.C. 119.06 through R.C. 119.13**

The Appellee appealed the decision of the trial court to Ohio Sixth District Court of Appeals, Lucas County. The appellate court issued a decision that a conflict existed between the administrative code, O.A.C. 5101:2-14-40 and R.C. 119.07.⁴ The Appellant, in its appeal to the Ohio Supreme Court has brought forth an argument not previously relevant, that the Appellate Court is wrong because R.C. 5101.09, which governs the adoption of rules by the ODJFS director, specifically exempts ODJFS from the notice, hearing or other requirements of R.C. Sections 119.06 to 119.13. The conflict in the 10 day versus thirty days for appealing is found in R.C. 119.07. The Appellant has brought out the issue that the appellate court's decision is incorrect because R.C. 119.07 falls among the exemptions created by R.C. 5101.09, specifically the exemption from the notice, hearing and other requirements of Chapter 119. This is a newly developed issue which stemmed from the erroneous decision of the appellate court that a conflict exists and its failure to acknowledge the exemption bestowed by R.C. 5101.09. The arguments in this case have evolved from the initial issue of jurisdiction in the trial court.

- D. R.C. 5101.09 prevents the constitutional conflict between O.A.C. R.C. 119.07**

The creation by the Appellate Court of a thirty-day right to appeal a Certificate revocation and invalidating the use of the ten-day administrative regulation deadline effects

⁴ The "conflict" is that the administrative regulation gives 10 days for an appeal to be requested, while R.C. 119.07 allows for 30 days to request an administrative hearing.

all 88 CDJFS agencies. The declaration of O.A.C. 5101:2-14-40 as “unconstitutional” creates additional delay in restoration of a Certificate as well as extending the periods of time appeals currently take. It is not, as Appellee suggests, a procedure to “weed out” day care providers. Reliable, rule abiding, honest day care providers with safe homes are an essential and highly regarded component of the department of job and family services. Those who cannot conform to the rules, have unsafe conditions, unapproved help and too many children create risks for children placed in their care and will lose their certification.

These governing statutes and regulations at issue are clear when read in conjunction with each other. When broken down, it is clear no conflict exists between the statutes and administrative regulations applicable to Type B day care certificates issued by a CDJFS.

R.C. 5101.09(A) grants the director of ODJFS the authority to adopt administrative regulations. R.C. 5101.09(B) allows the administrative regulations to be exempted from the statutory requirements of R.C. 119.06 through 119.13, which includes R.C. 119.07. The language clearly supports the authority of the director of job and family services to set up administration regulations which are not all within the purview of Ohio Revised Code Chapter 119.

O.A.C. 5101:2-14-40, which governs the appeal review procedures for Type B day care certificates, was adopted in accordance with R.C. 5101.09. It is necessary to read R.C. 5101.09 (A), which states that R.C. Chapter 119 governs appeals of state issued licenses, in combination with R.C. 5101.09 (B) which explicitly states:

Except as otherwise required by the Revised Code, the adoption of a rule in accordance with Chapter 119 of the Revised Code **does not make the department of job and**

family services, a county family services agency, or a workforce development agency subject to the notice, hearing or other requirements of section 119.06 to 119.13 of the Revised Code (Emphasis supplied).

R.C. 5101.09 specifically exempts ODJFS from the notice, hearing or other requirements of R.C. Sections 119.06 to 119.13 when adopting the agency regulations. Thus, the Appellate Court was incorrect in determining that the Lucas County Department of Job and Family Services must give a Certificate holder whose Certificate has been revoked thirty days to appeal.

CONCLUSION

This Court now has the opportunity clarify the administrative appeal process under the Ohio Revised Code and the Ohio Administrative Code for home day care providers whose type B certificates have been revoked. This is a significant issue because the implications of the Appellate Court's decision affect every county Type B day care certificate revocation in Ohio.

There is no new issue before this Honorable Court. The issue at the trial court level was purely jurisdictional. It is the decision of the Sixth District Court of Appeals which created the issue in its opinion declaring a conflict between the administration regulation and statute. There is no conflict as R.C. 5101.09 exempts the director of job and family services from the requirements the Appellate Court found in conflict.

WHEREFORE, in light of all of the foregoing reasons, the Lucas County Department of Job and Family Services requests that the judgment of the appeals court be reversed.

Respectfully submitted,

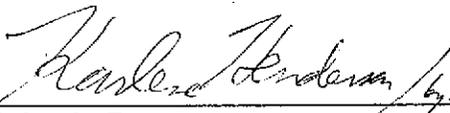
JULIA R. BATES
Lucas County Prosecuting Attorney

By: Karlene D. Henderson / by S. Correy
John A. Borell *with authorization*
Karlene D. Henderson
Assistant Prosecuting Attorneys
Counsel for Appellant Lucas County Job
and Family Services

CERTIFICATE OF SERVICE

This is to hereby certify that a copy of the foregoing was sent via U.S. ordinary mail this 21st day of October, 2008 to the following:

Terry Lodge
315 N. Michigan Street Ste 520
Toledo, Ohio 43624
Counsel for Appellant Crawford-Cole

By:  *by S. Carney authorization*

John A. Borell
Karlene D. Henderson
Assistant Prosecuting Attorneys
Counsel for Appellee-Appellant Lucas
County Job and Family Services