

In the
Supreme Court of Ohio

PATRICIA CRAWFORD-COLE, : Case No. 2008-0462
: :
Appellee, : :
: :
v. : On Appeal from the
: Lucas County
: Court of Appeals,
LUCAS COUNTY DEPARTMENT OF JOB : Sixth Appellate District
AND FAMILY SERVICES, : :
: :
Appellant. : Court of Appeals Case
: No. L-07-1188
:

**REPLY BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLANT
LUCAS COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES**

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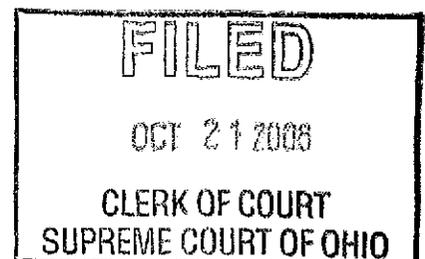


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INTRODUCTION

As the State's opening amicus explained, this case can and should be resolved on one simple issue, rendering the other issues raised by all parties irrelevant. That one issue is whether a *county* agency can be considered a *state* entity under R.C. Chapter 119, thus triggering Chapter 119's procedural rules in a licensing dispute between a county and an individual. The answer is no, a county agency—such as Appellant here, the Lucas County Department of Job and Family Services (“Lucas JFS”)—is not a state agency, because R.C. 119.01(A) defines state agencies as those departments, etc., “of the state” that have licensing functions.

Appellee Patricia Crawford-Cole's response does not overcome the statute's plain language. She argues that the Lucas JFS counts as “the state” because it performs a function delegated to it by state law. And indeed, the General Assembly has tasked the counties with licensing “certified Type B day-care homes.” But that does not trigger the “state agency” definition, because that definition is not based solely on what functions an entity performs: The definition includes any “department, division, bureau, board, or commission of the government *of the state* having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.” R.C. 119.01(A)(1) (emphasis added). The entity must be “of the state” first, and also perform a licensing function. The latter is not enough.

In addition, Crawford-Cole does not respond to the State's several other arguments on this point, each of which further confirms that the Lucas JFS cannot be a state entity. For example, the General Assembly has, in other statutes, expressly referred to counties along with the state when it meant to include counties. The General Assembly has also established a separate framework, in Chapter 2506, to govern appeals from counties. And Chapter 119 requires the Attorney General to represent the entities defined as “state” agencies, yet no one has ever insisted that the Attorney General must replace the county prosecutors in representing counties

when they perform day-care licensing functions. All these un rebutted points confirm that the Lucas JFS is not a state agency, so the Court should not reach any other issues.

If the Court reaches the exhaustion issue—though again, it should not—it should conclude that a party’s failure to exhaust administrative remedies is a jurisdictional flaw. Crawford-Cole’s response does not address the State’s legal points or case law on the issue; instead, she argues the facts and says that she did exhaust. But her story implicitly admits her failure, because she admits asking for a hearing too late, and asks for forgiveness on various purported equitable points. And she says that the notice—mailed to her house, received by an assistant, and opened too late—failed to satisfy constitutional due process requirements. But the notice was adequate, and her failure does not overcome the need for exhaustion. More important, whatever the facts of her case, is that exhaustion is a jurisdictional requirement as a matter of law.

But again, the Court should not reach the exhaustion issue, as it should hold that the Lucas JFS is not a state agency, and it should remand the case for application of the right body of law.

ARGUMENT

A. R.C. Chapter 119 applies only to state entities, not county agencies such as Lucas JFS.

1. R.C. 119.01 applies only to entities “of the state,” and counties do not qualify even when they perform functions delegated by the state under state law.

Crawford-Cole does not challenge the basic principle that R.C. Chapter 119 applies only to state agencies; instead, she says that the Lucas JFS *is* a state agency when it performs the state-law function of licensing Type B day-care centers.

But this argument fails, because R.C. 119.01(A)(1) defines state agencies not merely in terms of state-law *functions*, but also in terms of an entity’s status as a state arm. Specifically, the statute includes as a state “agency” any “executive officer, department, division, bureau, board, or commission *of the government of the state having the authority* or responsibility of

issuing, suspending, revoking, or canceling *licenses*. R.C. 119.01(A)(1) (emphases added). This language requires first that the department, division, etc. must be “of the government of the state,” and only after that does the sentence refer to licensing functions. (Preceding clauses in the subsection refer to functions other than licensing, such as rulemaking or nonlicensing adjudication, but those are not relevant here.)

Crawford-Cole relies solely on the *functional* argument, but does not address the statutory requirement that the entity be “of the government of the state”—and Lucas JFS does not qualify. Lucas JFS is statutorily created as part of a county, not the state. The General Assembly has created eighteen statewide departments. R.C. 121.02. ODJFS is one of those entities. R.C. 121.02(H). Its director is “appointed by the governor[] with the advice and consent of the senate[.]” R.C. 121.03. By contrast, Lucas JFS is a county department of job and family services established under R.C. 329.01. The director of Lucas JFS is appointed by and acts under the “control and direction of the board of county commissioners[.]” R.C. 329.02; R.C. 329.04(B). Thus, Lucas JFS is not a department “of the government of the state,” so it is not a state “agency” under R.C. 119.01(A).

In addition to the plain language explained above, several other statutes confirm that the Lucas JFS is not a state entity, and Crawford-Cole does not respond to any of the following three points that the State raised in its opening *amicus* brief. See State Br. at 7-9; see Crawford-Cole Br. at 10-12.

First, the absence of any mention of county agencies in R.C. 119.01(A) contrasts with the express mention of counties in other statutes, and that shows that the General Assembly knows how to ensure, when it wishes to, that a given law covers counties as well as the state. See, e.g., R.C. 9.315 (defining “public authority” to include any public agency of a “state or a county”);

R.C. 166.01(H) (defining “governmental agency” to include both state and county entities); R.C. 4117.01(B) (public employer includes both any “county” and “any state agency”). If there is some persuasive reason why the absence of any mention of counties in R.C. 119.01(A)(1) does not undercut Crawford-Cole’s view, Crawford-Cole has not identified that reason. But no such reason exists, and the Assembly’s exclusion of counties from the statute’s text means that counties are excluded from the statute’s coverage.

Second, the General Assembly enacted an entire procedural regime, Chapter 2506, to govern appeals from local governments’ administrative decisions. R.C. 2506.01(A) specifies that Chapter 2506 applies to decisions of “any political subdivision of the state,” and counties are of course political subdivisions. In a case that seems to be the mirror image of this one, the Court rejected an attempt to blur the line between the state and political subdivisions in the context of administrative appeals. See *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.* (1986), 22 Ohio St. 3d 1 (“*Dayton FOP*”). In *Dayton FOP*, a party sought to invoke Chapter 2506, rather than Chapter 119, to appeal a decision by a state entity, the State Employment Relations Board (SERB). The Court rejected that attempt, explaining that because SERB “is an agency of the state, a decision made by the SERB is not appealable pursuant to the rights granted in R.C. 2506.01.” *Id.* at 7. And just as Chapter 2506 cannot be used to appeal state agency decisions, Chapter 119 cannot be used here to appeal county agency decisions.

Third and finally, the Attorney General is required by statute to represent all “agencies” in Chapter 119 proceedings, R.C. 119.10, so Crawford-Cole’s view would require the Attorney General to represent counties in cases like this—and that cannot be right. That is, if the Lucas JFS somehow counts as a state agency under R.C. 119.01(A), which is the foundational

definition section for all of Chapter 119, then there is no logical reason for that principle to selectively trigger some parts of Chapter 119, such as the deadline provision purportedly at issue here, and not other parts of Chapter 119, such as the Attorney General representation provision. And again, Crawford-Cole does not respond to this point, or to the others above.

In sum, a county entity cannot be a state “agency” under R.C. 119.01(A)(1), and several other statutes confirm the point. Thus, the court below used the wrong starting point in its analysis, and this Court should reverse.

2. The lower-court decisions that Crawford-Cole cites are irrelevant or wrong.

Crawford-Cole cites several cases to support of her claim that Chapter 119 applies to appeals from the revocation of Type B day-care licenses, see Crawford-Cole Br. at 11-12, but those cases—all from intermediate appeals courts, not this Court—are either irrelevant or wrong.

First, as the State already explained in its opening brief, some of the cited cases are irrelevant because they concern a previous version of the regulations, and the analysis in those cases does not apply to the new framework for Type B day-care licenses. See State Br. at 8-9 (discussing *Gamblin v. Montgomery County Dep’t of Human Servs.* (2d Dist. 1993), 89 Ohio App. 3d 808, and *McAtee v. Ottawa County Dep’t of Human Servs.* (6th Dist. 1996), 111 Ohio App. 3d 812). Both the Second District in *Gamblin* and the Sixth District in *McAtee* relied upon language in the former version of O.A.C. 5101:2-14-06 that required “the revocation of Type B certificates to be in conformity with R.C. 5104.03’s procedures for Type A licenses[.]” *Gamblin*, 89 Ohio App. 3d at 811; see also *McAtee*, 111 Ohio App. 3d at 816-17. Type A day-care licenses are issued and administered at the state level, R.C. 5104.02(A), and Type A license proceedings are governed by Chapter 119.

The regulatory language linking Type B proceedings to Type A proceedings, which *Gamblin* and *McAtee* relied on, was no longer effective after March 15, 1996, when a new

regulation supplanted the old scheme. The new rule establishes procedures for administrative appeals concerning revocation of Type B day-care licenses by county departments of job and family services, and the process is not linked to Type A proceedings. See O.A.C. 5101:2-14-40. Thus, neither *Gamblin* nor *McAtee*, even if right at the time, help Crawford-Cole today. Further, as the State's opening brief explained, *McAtee* relied on the mistaken premise that ODJFS decided to delegate oversight of Type B licenses to counties, when in fact, the General Assembly directly imposed that duty on the counties, so no delegation theory applies. See State Br. at 9.

Second, Crawford-Cole's reliance on *Cosby v. Franklin County Department of Job and Family Services* (10th Dist.), 2007 Ohio App. Lexis 5818, 2007-Ohio-6641, is also misplaced. True, the Tenth District in *Cosby* did say in one passing sentence that Chapter 119 applies to actions to revoke Type B day-care licenses, but it was wrong. The sentence was dicta, because the issue before the Tenth District was whether a person had an absolute, vested due-process right to operate a Type B day-care center. Also, the entire discussion of the issue consisted of one sentence, supported only by a citation with no analysis. The court said simply that the Franklin County Department of Job and Family Services "is an 'agency' for purposes of R.C. 119.01(B). See R.C. 119.01(A)(2)." *Cosby*, 2007-Ohio-6641, ¶ 26. The court's reliance on R.C. 119.01(A)(2) (as opposed to R.C. 119.01(A)(1), which Crawford-Cole invokes) is mistaken because R.C. 119.01(A)(2) applies only to ODJFS, not county departments. Specifically, that provision states that a covered "agency" includes "any official or work unit having authority to promulgate rules or make adjudications in *the department of job and family services*["]." R.C. 119.01(A)(2) (emphasis added). Throughout the code, statutes that say "the department," with no use of the term "state" or "county," refer to the state-level entity only. See, e.g., R.C. 121.02(H) (establishing a "department of job and family services"); R.C. 5101.01 (providing that

references in revised code to department of human services mean department of job and family services). By contrast, when the General Assembly refers to the county-level departments, it uses the term “county department of job and family services.” E.g., R.C. 329.01(A). Thus, the Tenth District’s reliance on R.C. 119.01(A)(2) was wrong.

In sum, the statutes here all provide that the Lucas JFS is not a state “agency” for purposes of Chapter 119, and the cases that Crawford-Cole cites do not change that result. And again, resolution of this issue ends the case, and the Court need not address the State’s second issue below nor any other issues raised by any party.

B. A party’s failure to exhaust her administrative remedies, such as by failing to request a hearing by the relevant deadline, is a jurisdictional flaw.

1. Crawford-Cole does not expressly respond to the State’s legal argument that failure to exhaust is jurisdictional.

Crawford-Cole includes an entire section that is labeled as responding to the State’s second proposition, which explained that failure to exhaust administrative remedies is a jurisdictional flaw. See Crawford-Cole Br. at 12-15; see State Br. at 10-14. But the substance of Crawford-Cole’s argument never uses the term “jurisdiction,” nor does she cite or respond to any of the State’s case law on the topic. See Crawford-Cole Br. at 12-15. Instead, Crawford-Cole argues the facts, insisting alternately that she did exhaust, or that her belated attempt to exhaust should have counted, or that her failure to exhaust is excused by inadequate notice or other alleged due process violations by Lucas JFS, and so on. At best, these arguments might be viewed as responsive to the State’s proposition in the sense that they amount to an implicit argument that the nature of exhaustion as jurisdictional or not does not matter here, because Crawford-Cole, in her view, did indeed exhaust or should be excused for failing to do so. First, and most important, the State’s un rebutted legal argument is correct, so if the Court does reach the issue, it should hold that failure to exhaust is jurisdictional. Second, if the Court decides that it must address the

alternative arguments that Crawford-Cole raises, it should reject all of her claims. As explained in the subsections below, Crawford-Cole did not properly exhaust her administrative remedies, and Lucas JFS gave her adequate notice and satisfied due process.

2. Crawford-Cole received the notice with enough time to request a hearing, and she missed the deadline by her own fault.

Crawford-Cole admits that Lucas JFS sent her a notice by certified mail, and the mail reached her home and was signed for by a responsible adult. As she explains: “Since Crawford-Cole was not home, the person covering her day care responsibilities signed for the certified mail.” Crawford-Cole Br. at 3. Apparently, Crawford-Cole had not provided for the person running her business in her absence to open certified mail coming from the agency that licensed her business. Worse yet, Crawford-Cole apparently admits that she did not open the certified mail “for several days” after she returned from being out of town. Specifically, Crawford-Cole said in a filing in the common pleas court that she “did not notice the certified mail notification of revocation for several days after returning to Ohio—until it was too late under the 10 day limitation to commence an appeal.” See Crawford-Cole Mem. in Opp’n to Appellee’s Mot. to Dismiss, filed Nov. 21, 2006, in the Lucas County Court of Common Pleas, Court of Common Pleas Record (“Com. Pl. Rec.”) 6, at 4. Thus, her missed deadline was her own fault.

Neither her absence nor her misplaced reliance on her assistant give Crawford-Cole a free pass. Notice by certified mail, if confirmed by a signature by someone at the party’s residence—even if that recipient is not the party—creates a presumption of proper service. See *Chia v. Ohio Bd. of Nursing* (10th Dist.), 2004-Ohio-4709, ¶ 8; see also *Mitchell v. Mitchell* (1980), 64 Ohio St. 2d 49, syllabus paragraph two (certified mail is sufficient method of notifying individual of pending action). This presumption can be rebutted with “sufficient evidence.” *Chia*, 2004-Ohio-4709, ¶ 9. See also *Tripodi v. Liquor Control Comm’n* (10th Dist. 1970), 21 Ohio App. 2d 110.

Crawford-Cole's story does not amount to sufficient evidence that she was not notified, i.e., she does not assert that the mail never got to her. Instead, she says that she waited several days after arriving home to review her mail, and by then it was too late. Surely that is not enough, and the fault remains hers, not Lucas JFS's.

3. The notice was adequate and did not violate due process.

Crawford-Cole alternatively argues that the notice sent to her was constitutionally defective under the Fourteenth Amendment's Due Process Clause, Crawford-Cole Br. at 13-15, but she is wrong. An agency provides sufficient notice if the notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314; see also *Dusenbery v. United States* (2002), 534 U.S. 161, 167 (applying *Mullane*); *In re Thompkins*, 115 Ohio St. 3d 409, 2007-Ohio-5238, ¶ 13 (same). Here, Lucas JFS sent her a letter that satisfies *Mullane*'s "reasonably calculated" standard.

First, as noted above, the method of delivery, certified mail, was not only "reasonably calculated" to reach her, but it *did reach her*. She just did not open it in time.

Second, the letter's content gave her adequate notice of what was at stake. It told Crawford-Cole that her license would be revoked on August 3, 2006 unless she requested a hearing: "Please be advised that effective 8/3/2006, the Lucas County Department of Job and Family Services (LCDJFS) will revoke your Certificate." Lucas JFS Letter of July 24, 2006, attached as Ex. B to Affidavit of Patricia Crawford-Cole ("Crawford-Cole Aff."), filed Nov. 21, 2006, Com. Pl. Rec. 7 at 1. The letter further told her how to appeal, saying that she had "the right to appeal the revocation of [her] Certificate and request a County Appeal Review in accordance with O.A.C. Section 5101:2-14-40." *Id.* at 2. The letter also gave the address to which she should send any request. *Id.* The letter included a copy of O.A.C. 5101:2-14-40(C),

which detailed that the “request for a county appeal review shall be submitted in writing to the CDJFS no later than ten calendar days after the mailing date of the CDJFS notification,” and the letter itself included the deadline of August 3, 2006. In addition to including these procedural details, the letter told her the substance of the problems, as it recounted the incidents that led Lucas JFS to seek revocation. *Id.*

Thus, the letter’s substantive and procedural content, along with its method of delivery, all add up to the conclusion that the notice letter was “reasonably calculated, under all the circumstances, to apprise [her] of the pendency of the action and afford [her] an opportunity to present [her] objections.” *Mullane*, 339 U.S. at 314.

Crawford-Cole seeks to rely on *Chirila v. Ohio State Chiropractic Board* (10th Dist. 2001), 145 Ohio App. 3d 589, but that case does not help her cause. In *Chirila*, the party missed the deadline because of an error in the notice letter itself, not because the party did not open his mail. The letter in *Chirila* told a chiropractor that he had to request a hearing within thirty days, but it did not specify whether his request had to be *sent* by the thirtieth day or received by then. His request arrived one day late. The Tenth District concluded that the missed deadline was not fatal because the notice was ambiguous on how to calculate the deadline, and it held that such ambiguity violated due process.

For at least two reasons, *Chirila* does not help Crawford-Cole. First, it is factually distinct, because the missed deadline there was tied to the letter itself, not to the party’s unreasonable behavior, as occurred here. Second, *Chirila*’s legal reasoning is flawed: The court applied the wrong legal test in determining whether due process was violated. The *Chirila* court applied the three-part balancing found in *Mathews v. Eldridge* (1976), 424 U.S. 319. See *Chirila*, 145 Ohio App. 3d at 596. But the United States Supreme Court has since held, in a case decided the year

after *Chirila*, that *Mullane*, not *Mathews*, is the correct legal test when a party claims lack of notice. *Dusenbery*, 534 U.S. at 167. Since then, the Tenth District has properly applied *Mullane* to notice issues. *Althof v. Ohio State Bd. of Psychology* (10th Dist.), 2007-Ohio-1010, ¶ 19.

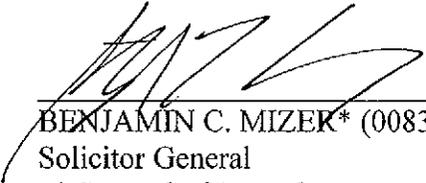
Consequently, the notice at issue did not violate due process, and Crawford-Cole has no other reasonable excuse for her failure to meet her administrative deadline. More important, as to this issue, is that a failure to exhaust is jurisdictional. And even more important than that, again, is that Lucas JFS is not a state agency, so the entire case needs to be remanded and re-assessed under the proper body of law.

CONCLUSION

For the reasons above and in the State's opening *amicus* brief, this Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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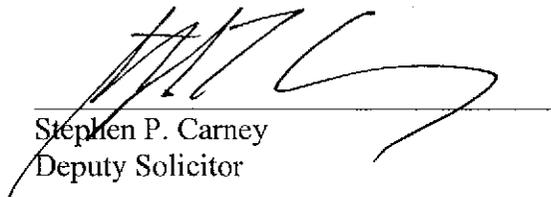
I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* State of Ohio in Support of Appellant Lucas County Department of Job and Family Services was served by U.S. mail this 21st day of October, 2008, upon the following counsel:

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