

STATE OF NORTH CAROLINA  
COUNTY OF GREENE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
22 DHR 02510

<p>Towanda Britt Petitioner,</p> <p>v.</p> <p>NC DHHS DHR ACLS Respondent.</p>	<p><b>FINAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT</b></p>
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**THIS MATTER** comes before the Honorable Karlene S. Turrentine, Administrative Law Judge, on Respondent's Motion for Summary Judgment (hereinafter, "Motion") filed October 31, 2022, in which Respondent asserts that the Office of Administrative Hearings (hereinafter, "OAH") lacks subject matter and personal jurisdiction, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and (2), and § 150B-33, due to Petitioner's failure to file her Petition for Contested Case within thirty (30) days of the date Respondent's decision letter, dated May 24, 2022, was placed in the care of the United States Postal Service.

Having reviewed the entire file in this matter, the Undersigned makes the following

**FINDINGS OF FACT**

1. On July 1, 2022, Petitioner filed a Petition for a Contested Case Hearing ("Petition") alleging that her Administrator's Certification was "revoked in error" based on a June 21, 2022 decision that she "neglected a resident" on or about February 18, 2022. *Petition*, p. 1.

2. On July 6, 2022, a Notice of Contested Case and Assignment was sent to the parties stating that,

**"The parties are required to file and serve Prehearing Statements in accordance with 26 NCAC 03 .0114(a). Prehearing Statements must be filed and served within 30 days of the date of this ORDER."** (Emphasis in original).

3. On July 13, 2022, this contested case was reassigned to the Undersigned.

4. On August 5, 2022, Petitioner filed her Prehearing Statement stating, "The investigation was a result from a follow up visit ... on February 18, 2022 [and subsequent letter] ... that alleges that on or about February 18, 2022 you neglected a resident." *Prehearing Statement*, ¶1, p.1.

5. Also on August 5, 2022, Respondent filed its Prehearing Statement and a Motion to Dismiss alleging, in summary, that on April 5, 2022, Respondent notified Petitioner that it intended to revoke Petitioner's license. Thereafter, Respondent issued a letter to Petitioner, dated May 24, 2022, notifying Petitioner that it had revoked her Assisted Living Administrator Certification.

6. On August 8, 2022, this Tribunal issued an Order for Response to Motion.

7. In response to the order, Petitioner filed a "Revised" Prehearing Statement, on August 16, 2022, to which she attached a letter she had received from Respondent, dated June 21, 2022, which stated Respondent's "investigation...did not substantiate the report[]" received on or about February 18, 2022 that Petitioner had neglected a resident of A Safe Place. *See* Petitioner's Revised Prehearing Statement, attachment.

8. On October 10, 2022, this Tribunal issued an Order Denying Respondent's Motion to Dismiss based upon Respondent failing to meet "... its burden of showing *when* its Notice, dated May 24, 2022, was placed in the care of the United States Postal Service." Order, ¶10.

9. On October 31, 2022, Respondent filed a Motion for Summary Judgment along with several Exhibits which relate to and verify when the May 24, 2022 letter was mailed.

10. By U.S.P.S. first class, certified mail dated May 24, 2022, Respondent issued its Final Agency Decision ("Decision") notifying Petitioner that it had revoked her Administrator Certification. Resp's Exh B, p. 1. A complete USPS tracking update, showing the Notice was deposited with the USPS on May 25, 2022, was also provided as part of Resp's Exh B.

11. Also attached to Respondent's Motion is the Affidavit of Megan Lamphere (DHHS Section Chief of the Adult Care Licensure Section, Division of Health Service Regulation) which verified that Respondent mailed a notice of revocation to Petitioner on May 24, 2022. Resp's Exh C, p. 2.

12. According to the USPS Exhibits provided by Respondent, the May 24, 2022 Notice was delivered to Petitioner on June 8, 2022. Resp. Exh B. p. 4.

13. The May 24, 2022 Notice advised Petitioner that, "...[Y]ou have the right to contest the action ... by filing for a contested case hearing with the Office of Administrative Hearings within thirty (30) days of mailing this letter.... If you do not file a petition within the 30 day period, you lose your right to appeal this action." Resp's. Exh B, p.2 (emphasis added).

14. Respondent also advised Petitioner of its intent to revoke her Assisted Living Administrator Certification by a May 26, 2022 electronic mail from Racine Monroe, Certification Administrator, to Petitioner which confirmed their earlier telephone conversation that date regarding same. Resp's. Exh C.

15. With Respondent's revocation Notice being mailed on May 25, 2022, Petitioner's 30-day filing period expired on June 24, 2022.

16. Petitioner's Petition was filed one (1) week later on July 1, 2022, and was, therefore, untimely.

BASED ON the foregoing Findings of Fact, the Undersigned makes the following

### CONCLUSIONS OF LAW

1. The Act defines "file" or "filing" to mean:

(A) to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Office of Administrative Hearings, and acceptance thereof by the clerk, except that when a party submits a document for filing to the administrative law judge during the course of a contested case hearing and the filing is accepted by the administrative law judge, the judge shall note thereon the filing date. All documents filed with the Office of Administrative Hearings, except exhibits, shall be in letter size 8 ½" by 11"; or

(B) electronic filing as defined in 26 NCAC 3 .0501(1).

26 NCAC 3. 0102(a)(2). Further, the Act defines "electronic filing" or "filed electronically" to mean: "...the electronic transmission of the petition, notice of hearing, pleadings, or any other documents filed in a contested case with the Office of Administrative Hearings by uploading to the case docket using the OAH electronic filing system (e-OAH) accessed through a link on the OAH website at [www.ncoah.com](http://www.ncoah.com)." 26 NCAC 3. 0501(1).

2. It has long been held that

"Our courts have traditionally acknowledged the rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning. *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *rehearing denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). In addition, because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal."

*Gummels v. N. Carolina Dep't of Hum. Res., Div. of Facility Servs., Certificate of Need Section*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990).

3. N.C.G.S. § 150B-23(f) reads, in pertinent part, that:

"Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general

limitation for the filing of a petition in a contested case *is 60 days*. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, commences when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.

*Id.* (emphasis added).

4. Moreover, the Court of Appeals has held that “...under Section 150B-23(f), a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it. N.C. Gen. Stat. § 150B-23(f).” *Krishnan v. N. Carolina Dep’t of Health & Hum. Servs.*, 274 N.C. App. 170, 851 S.E.2d 431, 433 (2020).

5. The Tribunal recognizes that an Order to Respond to Respondent’s Motion for Summary Judgment was issued on November 2, 2022 and inadvertently granted Petitioner up to November 14, 2022 to object when the contested case in this matter is scheduled to be heard on November 16, 2022. On October 10, 2022, the Tribunal ordered the parties to participate in a Prehearing Conference with the Undersigned on November 9, 2022 at 1:00 p.m., during which the Undersigned intended to inquire of Petitioner any objection she wished to raise. However, Petitioner did not attend the Prehearing Conference as ordered.

6. Nevertheless, the undisputed evidence reveals that the Notice was mailed on May 25, 2022. Petitioner’s 30-day deadline ended on June 24, 2022. Petitioner did not file her Petition until July 1, 2022, seven (7) days past the 30-day time limitation. Therefore, the Petition was untimely.

7. The untimely filing of the Petition precludes the OAH from acquiring subject matter jurisdiction over this case. *See, e.g., Gray v. N.C. Dept. of Environment and Natural Resources*, 149 N.C. App. 374, 378 (2002) (recognizing “timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts”).

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law,

### **FINAL DECISION**

**THEREFORE, IT IS ORDERED** that Respondent’s Motion for Summary Judgment is hereby **GRANTED** and this contested case is **DISMISSED**, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1).

**NOTICE OF APPEAL**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**SO ORDERED.** This the 9th day of November, 2022.



Hon. Karlene S. Turrentine  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Towanda Britt  
216 Glenfield Road  
Snow Hill NC 28580  
Petitioner

Farrah R. Raja  
NCDOJ  
fraja@ncdoj.gov  
Attorney For Respondent

This the 9th day of November, 2022.



Daniel Chunko  
Law Clerk  
N. C. Office of Administrative Hearings  
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