IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-470

No. COA21-386

Filed 5 July 2022

Cumberland County, No. 20 CVS 4304

ARIMETA PORTEE (SUNRISE RESIDENTIAL CARE), Petitioner,

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICES REGULATION, Respondent.

Appeal by Petitioner from order entered 21 December 2020 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 23 February 2022.

Q. Byrd Law, by Quintin D. Byrd, for the Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. Gibbs, for the Respondent-Appellee.

DILLON, Judge.

¶ 1 Petitioner operates the supervised living facility Sunrise Residential Care ("Sunrise"). Respondent conducted a regular, annual compliance survey on Sunrise. After the review, Respondent determined that Petitioner failed to comply with the rules that such facilities must adhere to under Articles 2 and 3 of Chapter 122C of our General Statutes. Respondent issued a statement of deficiencies and revoked

Petitioner's mental health facility license.

¶ 2 Petitioner challenged the revocation by filing a Petition for a Contested Case Hearing in the Office of Administrative Hearings ("OAH"). The OAH conducted a hearing and ultimately affirmed the revocation.

¶ 3 Petitioner then petitioned the superior court for judicial review. After a hearing on the matter, the superior court affirmed the OAH's revocation of Petitioner's license.

¶ 4 Petitioner timely appealed to our Court.

II. Standard of Review

¶ 5 "As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation omitted). A *de novo* review is required if a petitioner argues that an agency decision was based on an error of law. *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981).

III. Analysis

¶ 6 Petitioner essentially argues that the superior court (1) failed to conduct a *de novo* review and (2) violated her constitutional right by preventing her from

presenting evidence. We address each one in turn.

A. Superior Court *De Novo* Review

¶ 7 The Administrative Procedure Act instructs a superior court to conduct a *de novo* review on alleged constitutional violations. *See* N.C. Gen. Stat. § 150B-51(c) (2019) (entitled "Scope and Standard of Review").

¶ 8 Here, the superior court complied with this provision, as the court's order plainly states:

> Pursuant to N.C. Gen. Stat. § 150B-51(c), Petitioner's allegations that the [AOC decision] prejudiced Petitioner's substantial rights because the findings, inferences, conclusions, or decisions are in violation of constitutional provisions were reviewed de novo.

¶ 9 Further, at the hearing, the superior court judge voiced, "I have read the entire file. I have reviewed every exhibit that was introduced during the administrative hearing. I have read the entire transcript of the proceedings and I have reviewed the file here in the Superior Court of North Carolina." The judge was describing the *de novo* review process of looking at the case anew.

B. Due Process and Procedural Violation

¶ 10 Petitioner argues that the Administrative Law Judge (the "ALJ") unlawfully denied her the opportunity to present documents at the hearing. We disagree.

¶ 11 It is true that during administrative hearings "parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to

present evidence on issues of fact." N.C. Gen. Stat. § 150B-25(c). In the case before us, however, we conclude that Petitioner was afforded this opportunity. The ALJ did not prevent Petitioner from entering evidence.

¶ 12 In fact, the ALJ asked Petitioner numerous questions to help Petitioner clarify her case and went so far as to walk Petitioner through "building the foundation" for a piece of evidence. On the whole, the ALJ was helpful, patient, and courteous to the *pro se* litigant.

¶ 13 Due to the fault of Petitioner, an overarching issue presented at the hearing was that Respondent was not given notice nor copies of Petitioner's documents prior to the hearing.[1] Naturally, Respondent objected to admission of the documents, and the ALJ was faced with a difficult question of whether the documents should be admitted. *See* N.C. Gen. Stat. § 150B-29(b) ("Documentary evidence may be received . . . if the materials so incorporated are available for examination by the parties.").

¶ 14 Due to this lack of notice, the ALJ frequently asked Petitioner to "confer" with opposing counsel so they might understand what document was being addressed.

¶ 15 On a few occasions, Petitioner alluded to a desire to offer documents into evidence; however, Petitioner made no specific offer. The ALJ's order explains that Petitioner was attempting to hand over voluminous records for the court to sift

[1] Petitioner also failed to bring her documents to two prior meetings with Respondent.

through, rather than specific items. On this point, we agree with the ALJ that it is not an ALJ's duty nor prerogative to present one side's case—*pro se* litigants included. *See* N.C. Code Jud. Cond. Canon 3 (stating a judge should perform the duties of the judge's office impartially).

¶ 16 Petitioner cites one occasion where she did attempt to provide the ALJ with a specific document, to which the ALJ responded, "Don't bring anything up here. Just tell me what you want to tell me." At first glance, this exchange seems prejudicial, but the surrounding events place the interaction into its proper context.

¶ 17 At that time, Petitioner had just "conferred" with opposing counsel and was beginning to testify about the document. A foundation had not been laid, and Petitioner had not moved for admission into evidence. For these reasons, the ALJ stopped Petitioner from bringing her evidence to the stand. Soon after, she instructed Petitioner to take the witness chair and "grab any papers that you want to take with you"; the rationale being that the witness stand would be the proper place to offer sworn testimony to lay a foundation for documents she wanted to introduce. Petitioner complied and a constructive exchange ensued. However, Petitioner did not renew her attempt to offer the document into evidence.

¶ 18 We, therefore, conclude the ALJ did not commit prejudicial error. It would have been improper for the ALJ to hear testimony at that time Petitioner first spoke to the document. Further, the document had not been admitted into evidence.

¶ 19 Not until Petitioner's closing argument did she finally voice a clear frustration of being prevented (in her opinion) from presenting documents. Yet at that point, Petitioner had already rested her case and could no longer put on evidence.

¶ 20 Petitioner likewise renewed her grievances after the ALJ issued the ruling, but once again, the opportunity to present evidence had passed.

¶ 21 It is apparent from the transcript that, on the whole, the ALJ did not unlawfully deny Petitioner the opportunity to present documents.

IV. Conclusion

¶ 22 We conclude that the superior court conducted the correct judicial review, and the administrative court did not violate Petitioner's right to present documentary evidence. Accordingly, we affirm Judge Tally's order.

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

Report per Rule 30(e).