

MEMORANDUM DECISION

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ATTORNEYS FOR APPELLANT

Phyllis J. Garrison
Rebecca M. Eimerman
Noblesville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Frances Barrow
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Indiana Department of Child
Services,
Appellant,

v.

M.M.,
Appellee.

October 4, 2022

Court of Appeals Case No.
22A-MI-1117

Appeal from the Hendricks
Superior Court

The Honorable Stephenie LeMay-
Luken, Judge

Trial Court Cause No.
32D05-2109-MI-290

Bailey, Judge.

Case Summary

- [1] A caseworker employed by the Indiana Department of Child Services (“DCS”) classified an allegation that M.M. neglected her child by driving while intoxicated as a substantiated allegation; an Administrative Law Judge (“ALJ”) recommended reversal of the substantiation of neglect; and the DCS Administrative Appeals Final Agency Authority (“Final Agency Authority”) rejected the ALJ recommendation and affirmed the substantiation of neglect. M.M. sought judicial review and the trial court reversed the Final Agency Authority decision. DCS now appeals the trial court order, challenging the denial of its motion to dismiss the petition for judicial review. We address the sole dispositive issue: whether the trial court erroneously denied the DCS motion to dismiss for failure to timely file an agency record. We reverse and remand with instructions to grant the motion to dismiss.

Facts and Procedural History

- [2] At approximately 1:39 a.m. on May 12, 2019, Hendricks County Sheriff’s Sergeant Joshua Norem observed M.M. turn her vehicle left at a red light. Sergeant Norem initiated a traffic stop of M.M.’s vehicle, in which her one-year-old child, W.M., was a passenger. Based upon Sergeant Norem’s observations, results of field sobriety testing, and preliminary results of chemical testing, M.M. was charged with driving while intoxicated and neglect of a dependent.

- [3] Also on May 12, DCS received a neglect report, alleging that M.M. had endangered W.M. by driving while intoxicated. Family case manager Jessica Colton investigated the allegation and recommended the classification of a substantiated allegation.¹ Because M.M. was identified as a childcare worker, DCS conducted an agency review of that recommendation on July 18, 2019. M.M. participated in the review. The classification of substantiation was approved, and M.M. petitioned for administrative review, pursuant to IAC 3-3-3.²
- [4] The administrative proceedings were stayed, pending disposition of the criminal charges. Ultimately, the criminal charges against M.M. were dismissed after results of chemical testing were deemed inadmissible due to equipment calibration error. M.M. participated in a diversion program, and her criminal records were expunged.
- [5] On June 14, 2021, the ALJ conducted an administrative appeal hearing. On July 9, 2021, the ALJ recommended reversal of the DCS classification,

¹ DCS is responsible for assessing reports of child abuse or neglect received by DCS. Ind. Code § 31-33-8-1. At the conclusion of an assessment, DCS must classify the report as substantiated or unsubstantiated. I.C. § 31-33-8-12. A report is to be classified as substantiated when the facts obtained during the assessment provide a preponderance of evidence that child abuse or neglect occurred. I.C. § 31-9-2-123.

² IAC 3-3-3 provides in relevant part: “Any person who has been notified that a substantiated report of child abuse or neglect has been entered into the child protection index identifying the person as a perpetrator, and who has exhausted the department’s administrative review process, may request an administrative hearing by submitting the hearing request form made available by the department or attached to the administrative review decision, completed in accordance with the instructions included on the form and department policy.”

“find[ing] that the report of child neglect should be unsubstantiated.” (App. Vol. II, pg. 83.) The ALJ decision advised:

This Recommendation has been submitted to the Department of Child Services. They will review this Recommendation and make the final determination of whether or not to uphold the substantiations [sic] at issue. This process is called FINAL AGENCY REVIEW. This will NOT be a new hearing but will instead be a review of the established record by the ultimate authority for the agency or its designee.

(*Id.*) On August 30, 2021, the Final Agency Authority issued its Notice of Final Agency Action, rejecting the recommendation of the ALJ and affirming the substantiation of neglect.

[6] On September 28, 2021, M.M. filed her Petition for Judicial Review. On November 5, 2021, M.M. filed a motion for an extension of time to file the agency record. The trial court issued an order granting an extension of time “until seven (7) days after DCS approves the prepared transcript.” (*Id.* at 4.) On November 9, 2021, DCS filed a motion to dismiss M.M.’s appeal. The trial court denied the petition to dismiss on November 29, 2021.

[7] On April 18, 2022, the trial court conducted a hearing at which argument of counsel was heard. On the same day, the trial court issued an order summarily providing:

The Court grants Petitioner’s requested relief and remand[s] to the Indiana Department of Child Services Hearings and Appeals Office and orders reversal of substantiation of child abuse in this matter.

Appealed Order at 1.³ DCS now appeals.

Discussion and Decision

[8] DCS contends that the trial court erroneously denied the motion to dismiss the administrative appeal for failure to timely file the agency record for judicial review. We review de novo a trial court's ruling on a motion to dismiss for failure to timely file necessary agency records where the court has ruled on a paper record. *Wayne Cnty. Prop. Tax Assessment Bd. Of Appeals v. United Ancient order of Druids-Grove #29*, 847 N.E.2d 924, 926 (Ind. 2006).

[9] The Administrative Orders and Procedures Act ("AOPA") governs administrative proceedings and judicial review of agency decisions. *See* Ind. Code § 4-21.5-5-7. A person aggrieved by an agency action may file a petition for review in the trial court, and may show that the agency action was invalid by demonstrating the party was prejudiced by an agency action that was:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

³ Indiana Trial Rule 52(A)(2) provides that "[t]he court shall make special findings of fact without request in any review of actions by an administrative agency." *See also* I.C. 4-21.5-5-14(c) (a provision of AOPA mandating that the trial court "make findings of fact on each material issue on which the court's decision is based.")

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence.

Teaching our Posterity Success v. Ind. DOE, 20 N.E.3d 149, 151 (Ind. 2014) (citing I.C. § 4-21.5-5-14) [hereinafter “TOPS”].

[10] Indiana Code Section 4-21.5-5-13 governs the transmittal of the agency record to the trial court, providing in relevant part:

(a) Within thirty (30) days after the filing of the petition, or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of:

(1) any agency documents expressing the agency action;

(2) other documents identified by the agency as having been considered by it before its action and used as a basis for its action; and

(3) any other material described in this article as the agency record for the type of agency action at issue, subject to this section.

(b) An extension of time in which to file the record shall be granted by the court for good cause shown. Inability to obtain the record from the responsible agency within the time permitted

by this section is good cause. Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.

- [11] M.M.’s petition for judicial review was filed on September 28, 2021; thus, M.M. had until October 28, 2021, to file an agency record or request an extension of time. On November 5, 2021, M.M. filed her motion for an extension of time in which to file the agency record. On November 9, 2021, DCS approved the agency transcript and M.M. filed the transcript. M.M. argues that any statutory non-compliance was “a result of DCS’s negligence and delay.” Appellee’s Brief at 11. According to M.M.,

In short, the transcript did not exist within thirty (30) days of the filing of the petition for judicial review. There was no transcript until November 4, 2021, when Circle City completed it and sent it to Appellant who forwarded it to DCS for approval. Only after DCS reviewed and approved the transcript could it be filed with the trial court. The situation created by the AOPA rules is ripe for negligence or abuse.

Id. Additionally, M.M. argues that DCS was not harmed by the delay in the filing of the agency transcript and should be required to show prejudice to obtain a dismissal on these grounds.

- [12] M.M.’s equitable arguments are unavailing because the law is clear. Our Supreme Court clearly established in an AOPA case a bright-line approach to the filing of an agency record: “a petitioner for review cannot receive

consideration of its petition where the statutorily-defined agency record has not been filed.” *TOPS*, 20 N.E.3d at 155 (internal footnote omitted); *see also First Am. Title Ins. Co. Robertson*, 19 N.E.3d 757, 762-63 (Ind. 2014) (holding the same). *TOPS* involved a complete failure to file an agency record. However, The *TOPS* Court discussed at some length the case of *Ind. Fam. And Social Serv. Admin. v. Meyer*, 927 N.E.2d 367 (Ind. 2010). The *TOPS* Court recognized that, despite the lack of a majority opinion in *Meyer*, “[a]ll four justices in *Meyer* agreed that the trial court lacked authority to extend the filing deadline for an agency record that was not filed within the required statutory period or an authorized extension thereof.” 20 N.E.3d at 155. The Court reviewed the reasoning underlying that conclusion in *Meyer* (that is, “the purpose of AOPA section 13 is to ensure that the review of agency action proceeds in an efficient and speedy manner, and that the reviewing trial court has access to the record before rendering its decision” and “the filing requirement also ensures that no relevant evidence or materials are hidden”). *Id.* The Court clarified that the responsibility is upon the petitioner to file the agency record timely, and that any request for an extension of time must be made within the statutory time period. *Id.* at 153.

- [13] Subsequently, in *Allen Cnty. Plan Comm’n v. Olde Canal Place Ass’n*, 61 N.E.3d 1266 (Ind. Ct. App. 2016), a panel of this Court applied that bright-line rule to hold that dismissal is mandatory when a petitioner fails to timely file the agency record. The trial court had granted Old Canal Place Association (“OCPA”) an extension of time to file an agency record, but OCPA did not file the agency

record by the extended deadline. *See id.* at 1270. The opposing party, MRK, filed a motion to dismiss but OCPA then filed a complete agency record, eight days late. The matter was dismissed and OCPA filed a Trial Rule 60(B)(1) motion. The trial court granted the motion, reinstated the case, and MRK appealed. We held that the trial court’s action setting aside the dismissal was an “empty exercise,” explaining:

In *Robertson* and *TOPS*, our Supreme Court ... set forth a bright-line rule. Specifically, the Court held that the statutory language makes dismissal mandatory when the agency record is not timely filed. *TOPS*, 20 N.E.3d at 155 (holding that “a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed”); *Robertson*, 19 N.E.3d at 762–63 (same). Additionally, in *TOPS*, the Court reaffirmed its prior holding that “the relevant provisions of AOPA do not permit untimely filing of the agency record or nunc pro tunc extensions of the filing deadline.” *TOPS*, 20 N.E.3d at 153 (quoting [*Meyer*], 927 N.E.2d 367, 372 (Ind. 2010))....

Because OCPA is not permitted to belatedly file the Record, the Record is not, and will never be, properly before the trial court. Without the Record, OCPA’s petition cannot be considered.

Allen Cnty., 61 N.E.3d at 1269–70.

[14] To effect statutory compliance, M.M. was required to file the agency record or file a motion for an extension of time by October 28, 2021. She did not do so. The *nunc pro tunc* extension order was of no effect to extend the time for filing. *See id.* Our Indiana Supreme Court has examined the relevant statutory

language, balanced the preference for deciding cases on the merits against the need for judicial efficiency, and concluded that this “bright-line approach best serves the goals of accuracy, efficiency, and judicial economy.” *TOPS*, 20 N.E.3d at 155. Dismissal of the petition for judicial review was mandatory.

Conclusion

[15] DCS has demonstrated its entitlement to dismissal of M.M.’s petition for judicial review.

[16] Reversed and remanded with instructions to grant the motion to dismiss.

Riley, J., and Vaidik, J., concur.