

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Indiana Department of Child  
Services,

*Appellant-Respondent,*

v.

Brandon Lewis and Amber  
Lewis,

*Appellees-Petitioners.*

December 27, 2023

Court of Appeals Case No.  
23A-MI-836

Appeal from the Wabash Circuit  
Court

The Honorable Robert R.  
McCallen, III, Judge

Trial Court Cause No.  
85C01-2211-MI-722

**Memorandum Decision by Judge Tavitas**  
Judges Pyle and Foley concur.

**Tavitas, Judge.**

## Case Summary

- [1] The Indiana Department of Child Services (“DCS”) revoked the foster home license of Brandon Lewis and Amber Lewis. The Lewises administratively appealed the DCS’s decision, but the administrative law judge (“ALJ”) affirmed the revocation of the Lewises’ license. DCS then issued a final agency action revoking the Lewises’ license, and the Lewises timely petitioned for judicial review of DCS’s decision. The trial court granted DCS’s motion to dismiss the petition without prejudice. The Lewises then filed another petition for judicial review under a different cause number, and DCS filed another motion to dismiss. The trial court denied DCS’s motion. At DCS’s request, the trial court certified its order for interlocutory appeal, and we accepted interlocutory jurisdiction.
- [2] On appeal, DCS argues that the trial court erred in denying DCS’s motion to dismiss because: (1) the Lewises’ second petition for judicial review was filed almost four months after the final agency decision, well past the thirty-day deadline to seek judicial review of an agency decision, and (2) the Lewises failed to timely file the agency record. We agree with DCS that the Lewises failed to timely file the agency record and, accordingly, reverse the trial court and remand with instructions to grant DCS’s motion to dismiss.

## Issues

- [3] DCS presents two issues for our consideration, one of which we find dispositive and restate as whether the trial court erred by denying DCS's motion to dismiss because the Lewises failed to timely file the agency record.

## Facts

- [4] The Lewises were foster parents who had a foster home license issued by DCS. On July 14, 2020, DCS notified the Lewises that it was revoking their foster home license. The Lewises filed an administrative appeal of this decision, and an ALJ held a hearing on the matter on October 6, 2021, at which time it affirmed the revocation of the Lewises' license. DCS issued a notice of final agency action on June 2, 2022.
- [5] The Lewises filed a petition for judicial review of DCS's decision on July 2, 2022. On August 1, 2022, the trial court granted the Lewises' request to extend the deadline to transmit the agency record and gave the Lewises until October 31, 2022, to transmit the agency record. On October 27, the Lewises filed a document titled "Agency record part 1 of 2" and another document titled "transcript of administrative hearing." Chronological Case Summary Entries, Oct. 27, 2023, Cause No. 85C01-2207-MI-389.
- [6] On September 29, 2022, DCS filed a motion to dismiss the petition for judicial review, in which it argued that: (1) the Lewises had failed to properly serve DCS and the Office of the Indiana Attorney General, as required by Indiana Code Section 4-21.5-5-7; and (2) the Lewises' petition for judicial review failed

to delineate specific facts under which a trial court may grant a petition for judicial review under Indiana Code Section 4-21.5-5-14(d).<sup>1</sup> That same day, the trial court granted the motion to dismiss without prejudice, but noted that it was “willing to waive a filing fee for [the Lewises] if they choose to re-file.” Appellant’s App. Vol. II p. 36.

[7] On November 15, 2022, the Lewises filed their second petition for judicial review, under a different cause number. On December 5, 2022, DCS filed a motion to dismiss the Lewises’ second petition for judicial review, in which DCS argued that the Lewises’ second petition was untimely because it was filed more than thirty days after the final agency action and because the Lewises did not timely file the agency record. The next day, the Lewises filed a notice of transmission of a “certified” copy of the agency record, but the record was not, in fact, certified.

[8] The trial court held a brief hearing on DCS’s motion to dismiss on January 6, 2023, at which both parties presented their arguments to the trial court. Per the trial court’s request, the Lewises filed a brief in opposition to DCS’s motion to

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<sup>1</sup> This subsection provides that:

The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (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.

I.C. § 4-21.5-5-14(d).

dismiss on February 6, 2023, in which they argued that the second petition was timely because, per counsel’s recollection, DCS did not object to the trial court waiving the thirty-day deadline at the October 28 hearing on DCS’s first motion to dismiss. The Lewises acknowledged that the agency record they had filed on December 6 was, in fact, uncertified; they asked the trial court to take judicial notice of their transmission of the agency record in the earlier case. The Lewises did not address DCS’s argument that the agency record filed in the earlier case was incomplete.

[9] On February 13, 2023, the trial court denied DCS’s second motion to dismiss without explanation but did note that it would approve a request to certify its order for interlocutory appeal. Accordingly, on March 14, 2023, DCS moved to certify for interlocutory appeal the trial court’s denial of its motion to dismiss, which the trial court granted the same day. DCS filed a motion in this Court on April 13, 2023, requesting that we accept interlocutory jurisdiction. We entered an order on May 12, 2023, accepting interlocutory jurisdiction, and this appeal ensued.

## **Discussion and Decision**

[10] DCS claims that the trial court erred in denying its motion to dismiss the Lewises’ petition for judicial review.

### ***A. Standard of Review***

[11] “The standard of appellate review for motions to dismiss under Rule 12(B) depends on whether the trial court resolved disputed facts, and if so, whether

there was an evidentiary hearing.” *Teaching Our Posterity Success, Inc. v. Ind. Dep’t of Educ.*, 20 N.E.3d 149, 151 (Ind. 2014). Where, as here, the trial court ruled on a paper record without an evidentiary hearing, “[w]e review de novo a [trial] court’s ruling on motions to dismiss for failure to timely file necessary agency records[.]” *Id.*

### ***B. Failure to Timely File Agency Record***

[12] DCS argues that the trial court was required to grant its motion to dismiss the Lewises’ petition for judicial review because the Lewises failed to timely transmit the agency record. Indiana Code Section 4-21.5-5-13, a part of the Administrative Orders and Procedures Act (“AOPA”), provides 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<sup>[2]</sup> 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

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<sup>2</sup> The Lewises do not argue that they transmitted to the trial court the “original” agency record. Moreover, given the advent of electronic filing, the reference to the original agency record appears to be outdated.

(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.**

(emphases added).

[13] Although the language of this statute states that the failure to file the record within the time permitted is “cause for dismissal,” our Supreme Court interpreted this statute to establish a “bright-line approach” regarding the requirement that the statutorily-defined agency record be timely filed with the trial court in order for judicial review to proceed. *Teaching Our Posterity Success*, 20 N.E.3d at 154-55. In that case, the Court reaffirmed that the agency record must be filed within the statutory thirty-day deadline and that any request to extend the deadline must itself be made within that thirty day period. *Id.* at 153 (citing *Ind. Fam. & Soc. Svcs. Admin. v. Meyer*, 927 N.E.2d 367, 372 (Ind. 2010)). The Court held that “a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed.” *Id.* The Court wrote that “this bright-line approach best serves the goals of accuracy, efficiency, and judicial economy.” *Id.* (footnote omitted); *see also First Am. Title Ins. Co. v. Robertson*, 19 N.E.3d 757, 762-63 (Ind. 2014) (following

*Teaching Our Posterity Success* and holding that trial court erred in denying motion to dismiss petition for judicial review where petitioner did not file the statutorily-defined agency record with the trial court), *amended on reh'g*, 27 N.E.3d 768 (Ind. 2015).

[14] Here, the Lewises filed their second petition for judicial review on November 15, 2022. Thus, they were required to transmit the agency record, either the original or a certified copy, within thirty days, which would be December 15, 2022. Well before this deadline, on December 6, 2022, the Lewises filed a notice of transmission of a “certified” copy of the agency record. The copy of the agency record the Lewises transmitted was not, in fact, certified, as they later admitted. *See* Appellant’s App. Vol. II p. 68 (admitting, in response to DCS’s motion to dismiss that “[p]etitioners transmitted the uncertified [agency] [r]ecord in the present case on December 6, 2022.”).<sup>3</sup>

[15] Transmitting a non-certified copy of the agency record is insufficient to satisfy the requirements of Indiana Code Section 4-21.5-5-13, which clearly requires that the petitioner transmit “the original or a certified copy of the agency record.” *See Robertson*, 19 N.E.3d at 762-63 (reversing trial court’s denial of defendant’s motion to dismiss petition for judicial review where petitioners attached documents to petition but did not file a certified copy of the agency

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<sup>3</sup> We reject the Lewises’ argument that DCS waived its contention that the agency record was not timely filed by agreeing that the Lewises could refile their petition after the first petition was dismissed. In any event, a trial court is required to dismiss the petition on its own motion if the petitioner does not timely file the agency record. *Cent. States Tower IV, LLC v. Bd. of Zoning Appeals of City of Portage*, 149 N.E.3d 1206, 1214 (Ind. Ct. App. 2020).



record); *Town of Pittsboro Advisory Plan Comm'n v. Ark Park, LLC*, 26 N.E.3d 110, 118 (Ind. Ct. App. 2015) (reversing trial court's denial of defendant's motion to dismiss petition for judicial review where petitioner failed to timely file certified copy of agency record and instead attached to its petition a copy of the agency order and letters exchanged between the agency and the petitioner's counsel), *trans. denied*; *Wrogeman v. Roob*, 877 N.E.2d 219, 223 (Ind. Ct. App. 2007) (holding that trial court properly dismissed petition for judicial review because petitioner failed to transmit a certified copy of the agency record).

[16] The Lewises argue that, by asking the trial court to take judicial notice of the certified agency record they transmitted in their first petition for judicial review, they thereby timely transmitted the agency record in the present case. We disagree.

[17] Even if the trial court could take judicial notice of the agency record in the first case, the Lewises did not make such a request until February 6, 2023—eighty-three days after the filing of their petition for judicial review. As explained by our Supreme Court in *Teaching Our Posterity Success* and *Robertson*, the agency record, or a request for an extension of time to file the agency record, must be filed within thirty days of the filing of the petition for judicial review. The Lewises cannot circumvent this bright-line rule by requesting, eighty-three days after their petition was filed, that the trial court take judicial notice of an agency record filed in a separate cause of action. See *Teaching Our Children Prosperity*, 20 N.E.3d at 153 (reaffirming that the AOPA does not permit untimely filing of the agency record or *nunc pro tunc* extensions of the filing deadline) (citing

*Meyer*, 927 N.E.2d at 372); accord *Allen Cnty. Plan Comm’n v. Olde Canal Place Ass’n*, 61 N.E.3d 1266, 1270 (Ind. Ct. App. 2016)).<sup>4</sup>

## Conclusion

[18] The Lewises did not transmit the original or a certified copy of the agency record within thirty days of filing their petition for judicial review, nor did they seek an extension of time to do so within thirty days of filing their petition. Under the bright-line rule established by our Supreme Court, the trial court was, therefore, required to dismiss the Lewises petition for judicial review. Accordingly, we reverse the order of the trial court and remand with instructions to dismiss the Lewises petition for judicial review.

[19] Reversed and remanded.

Pyle, J., and Foley, J., concur.

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<sup>4</sup> We also note that it is not clear that the agency record filed in the initial cause was a complete copy of the agency record. As noted above, the Lewises only filed in the first cause a document titled “Agency record part 1 of 2” and the “transcript of administrative hearing.” Chronological Case Summary Entries for Oct. 27, 2022, Cause No. 85C01-2207-MI-389. Indiana Code § 4-21.5-5-13(a) requires the transmission of the complete agency record. See *Robertson*, 19 N.E.3d at 762-63 (reversing trial court’s denial of defendant’s motion to dismiss petition for judicial review where petitioners did not transmit a complete copy of the agency record).