

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>LITTLE FEET PRESCHOOL AND DAYCARE, LLC</b>	)	
	)	<b>CASE NO. CV 10 717896</b>
	)	
<b>Plaintiff-appellant</b>	)	<b>JUDGE JOHN P. O'DONNELL</b>
	)	
<b>vs.</b>	)	<b><u>JOURNAL ENTRY</u></b>
	)	
<b>OHIO DEPARTMENT OF JOBS AND FAMILY SERVICES</b>	)	
	)	
	)	
<b>Defendant-appellee</b>	)	

***John P. O'Donnell, J.:***

This case is an appeal by the plaintiff, Little Feet Preschool and Daycare, LLC, from a decision by the Ohio Department of Jobs and Family Services to deny its renewal application for a childcare center license.

On November 24, 2009, the DJFS sent a certified letter to the plaintiff notifying it of the department's proposal to revoke the license. That letter cited at least 31 violations of five separate provisions of Chapter 5104 of the Ohio Revised Code and their concomitants in the Ohio Administrative Code. The letter also informed the plaintiff of its right to a hearing, either in person or by way of written evidence and arguments. Pursuant to O.R.C. section 119.07 the day care center had 30 days from the date the letter was mailed to request a hearing. Moreover, the concluding paragraph of the letter, which reached Little Feet by December 1, informed the plaintiff:

Please be advised that failure to timely request such a hearing may cause JFS to enter an adjudication order to revoke the childcare center license of Little Feet Preschool and Daycare.

Little Feet never requested a hearing and, on January 26, 2010, the DJFS entered an adjudication order denying Little Feet's childcare center license renewal application. Little Feet then appealed that decision to this court.

This appeal is governed by Section 119.12 of the Ohio Revised Code. Pertinent portions of that section provide that:

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant . . . renewal of a license . . . may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located . . .

\*\*\*

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency.

\*\*\*

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with the law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

\*\*\*

With its notice of appeal to this court, the plaintiff-appellant asserted as grounds for appeal: 1) that the DJFS denied Little Feet the effective assistance of counsel by entering an order without a hearing; 2) that most of the violations had been corrected by the time of the adjudication; and 3) that a denial of the license renewal was an unduly harsh sanction under the circumstances. The DJFS has asserted, among other defenses, the affirmative defense of failure to exhaust administrative remedies.

The plaintiff's first claim, that the DJFS denied the plaintiff the effective assistance of counsel, is re-framed in Little Feet's merit brief as an argument that its counsel was negligent by failing to request a hearing within the time limit and that it would be unfair for Little Feet to bear the brunt of counsel's negligence. That may be true, but a determination of counsel's negligence is not within the statutory scope of this court's review of an administrative agency's order. This court is therefore precluded from granting relief on a claim based on the appellant's counsel's negligence. As for a claim that the agency itself denied the appellant the effective assistance of counsel, this court cannot discern any record evidence to support a finding that it was some action of the DJFS that resulted in the plaintiff's failure to request a hearing, and that claim is therefore without merit.

To support its assertion that non-renewal of the license was improper because the cited violations have been corrected, Little Feet attached to its notice of appeal and its merit brief two separate affidavits of Mary E. Gruhn. These affidavits variously describe Ms. Gruhn as a "principal" and an "owner" of Little Feet Preschool and Day Care, LLC. As to these affidavits, Little Feet never sought leave of this court to admit additional evidence that was not presented at the administrative level. Therefore, except to the extent that the affidavits describe Little Feet's reasons for not requesting a hearing, they are stricken and the court will not consider the claims that the violations justifying denial of the license were, in fact, corrected by the time of the adjudication.

The essence of the plaintiff's remaining claim is that fairness requires that the DJFS actually conduct a hearing before making an adjudication. This is not correct. Instead, due process requires only notice and the opportunity for a hearing, both of which were given. The situation here is analogous to the circumstances in *Jain v. The Ohio State Medical Board*, 2010-

Ohio-2855, 10<sup>th</sup> Dist. App. No. 09 AP 1180. In *Jain*, the State Medical Board notified Jain by letter dated May 13, 2009 of its intent to determine whether it should take action against her medical license. The letter informed Jain that she had 30 days to request a hearing. Jain's out-of-state counsel responded within the 30 days with a letter that did not specifically request a hearing, but did say "with regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel." Jain did not communicate further with the board and her license was suspended without a hearing.

When Jain appealed to the court of common pleas the State Medical Board asserted an affirmative defense of failure to exhaust administrative remedies. The Franklin County Court of Common Pleas agreed that the doctor had failed to exhaust her administrative remedies and dismissed the administrative appeal.

An appeal was taken to the Tenth District Court of Appeals. That court affirmed the trial court's dismissal, commenting:

The doctrine of exhaustion requires a person to exhaust administrative remedies before seeking redress from the judicial system. *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 762 N.E.2d 979, 2002-Ohio-794, citing *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 406 N.E.2d 1095. The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477; *Prairie Twp. Bd. of Trustees v. Hay*, 10th Dist. No. 01 AP-1198, 2002-Ohio-4765, ¶ 26. Allowing a claimant to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process. *Carmack v. Caltrider*, 164 Ohio App.3d 76, 841 N.E.2d 347, 2005-Ohio-5575, ¶ 6, quoting *Kaltenbach v. Mayfield* (Apr. 27, 1990), 4th Dist. No. 89-CA-10. The failure to exhaust administrative remedies is not a jurisdictional defect, but is rather an affirmative defense if timely asserted and maintained. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 674 N.E.2d 1388, syllabus.

To those reasons for the doctrine, this court adds that if the common pleas courts must automatically remand to the agency for a hearing where the adversely affected party never asked

for one, then the will of the legislature in enacting the 30-day time limit is thwarted by rendering that requirement effectively unenforceable.

Like the plaintiff in *Jain*, Little Feet failed to exhaust its administrative remedy,<sup>1</sup> therefore this appeal is dismissed.<sup>2</sup>

**IT IS SO ORDERED:**

\_\_\_\_\_  
JUDGE JOHN P. O'DONNELL

Date: \_\_\_\_\_

---

<sup>1</sup> The decision of the 10<sup>th</sup> District Court of Appeals in *Derakhshan v. State Med. Bd. of Ohio*, 2007-Ohio-5802, also supports the conclusion that Little Feet failed to exhaust its administrative remedies, despite the plaintiff-appellant's claims to the contrary. The *Derakhshan* court found that failure to exhaust administrative remedies ordinarily exists where no hearing is requested, but not in a case where the adversely affected party is claiming that the statute authorizing the administrative agency's action is unconstitutional. That circumstance does not exist here.

<sup>2</sup> And no hearing is necessary in this court before finding that dismissal is appropriate. The Ohio Supreme Court has held that the hearing required by O.R.C. 119.12 "may be limited to a review of the record." *Ohio Motor Vehicle Dealers Board v. Central Cadillac Co.* (1984), 14 Ohio St. 3d 64.

**SERVICE**

A copy of this journal entry was sent by e- mail, this 24th day of November, 2010, to the following:

William E. Gerstenslager, Esq.  
bill@gocolex.com  
Gerstenslager & Obert Co.  
6500 Creekside Trail  
Solon, OH 44139  
*Attorney for Plaintiff-appellant*

Denise M. Pleska, Esq.  
Denise.pleska@ohioattorneygeneral.gov  
Assistant Attorney General  
30 East Broad Street, 26th Floor  
Columbus, OH 43215-3400  
*Attorney for Defendant-appellee*

---

JUDGE JOHN P. O'DONNELL