

1993

Worth L. Annette C. Orton v. Collection Division of Utah State Tax Commission : Unknown

Utah Court of Appeals

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Utah Court of Appeals

SEP 27 1993

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September 27, 1993

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Re: Worth L. and Annette C. Orton v. Collection Division
of the Utah State Tax Commission, Case No. 930320-CA

Dear Ms. Noonan:

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure, this letter is written to inform the Court of pertinent and significant authorities which have come to the attention of the Respondent after the brief had been filed and before oral argument. These supplementary cases apply to pages 1-2 of the brief of Respondent relating to the jurisdiction of this Court and whether the appeal was timely filed.

The cases enclosed with this letter and considered as supplemental are:

1. Lopez v. Career Services Review Board, 834 P.2d 568, 571 (Utah App. 1992)
2. Ford Motor Company v. Iowa Dep't of Transportation Regulation Board, 282 N.W.2d 701 (Iowa 1979)
3. Davis v. Alabama Medicaid Agency, 519 S.2d 538 (Ala. App. 1987)

Yours very truly,

Gale K. Francis

Gale K. Francis
Assistant Attorney General

GKF:ds
Enclosures

today and make that a part of the record and I will consider the timeliness and determine from that whether I can consider the merits.

The administrative law judge did not mislead Armstrong such that her right to a fair hearing was jeopardized.

[5] Armstrong also argues her due process rights were compromised by the short duration of the appeals period. We disagree. The Utah Supreme Court previously rejected this argument in addressing the short statutory appeals period for those appealing judgments from small claims courts. Before a 1988 amendment increased the appeals period to ten days, an appellant had only five days in which to appeal a small claims court judgment. Nevertheless, the supreme court found this time period did not deprive appellants of their constitutional rights. *See, e.g., Larson Ford Sales, Inc. v. Silver*, 551 P.2d 233, 233 (Utah) (small claims court appellant having five days to appeal is not denied equal protection and is "given a reasonable time within which to take an appeal"), *appeal dismissed* 429 U.S. 909, 97 S.Ct. 299, 50 L.Ed.2d 277 (1976); *accord Hume v. Small Claims Court*, 590 P.2d 309, 311 (Utah 1979); *see also Kapetanov v. Small Claims Court*, 659 P.2d 1049, 1052 (Utah 1983) (small claims courts' five-day appeals period does not offend due process and fact that other civil appellants have a thirty-day appeals period "is of no consequence").

CONCLUSION

We conclude the Board did not err in declining to address the merits of Armstrong's untimely appeal. Armstrong failed to demonstrate good cause for filing her appeal late, the deadline for filing an appeal is not ambiguous, and Armstrong's constitutional rights were not jeopardized. Therefore, we affirm.

ORME and RUSSON, JJ., concur.



George A. LOPEZ, Petitioner,

v.

CAREER SERVICE REVIEW BOARD
and Industrial Commission of
Utah, Respondents.

No. 910501-CA.

Court of Appeals of Utah.

May 27, 1992.

State employee sought review of jurisdictional hearing conducted by Career Service Review Board wherein Board determined that it did not have jurisdiction to hear his employment grievance. The Court of Appeals, Bench, P.J., held that: (1) proceeding was a formal adjudicative one that it could properly review; (2) letter from hearing officer was not "written order" and employee's petition for judicial review, filed within 30 days of date his request for reconsideration of hearing officer's decision was deemed denied, was timely; (3) hearing officer's refusal to consider employee's written proffer of facts did not violate due process; and (4) Board lacked jurisdiction, insofar as employee was not subjected to "de facto suspension" when he opted to take unpaid leave of absence in order to attend law school, and employing agency did not violate personnel rule by deciding not to allow him to job share.

Affirmed.

1. Administrative Law and Procedure ⇨796

Questions regarding whether administrative agency has afforded petitioner due process in its hearings are questions of law, and court therefore does not give deference to agency's actions. U.S.C.A. Const.Amends. 5, 14.

2. Appeal and Error ⇨842(1)

Jurisdictional determinations are questions of law to which Court of Appeals gives no deference.

3. Administrative Law and Procedure ⌘701

Officers and Public Employees ⌘72.41

Administrative appeal by state employee seeking review of jurisdictional hearing conducted by Career Service Review Board, wherein Board determined that it did not have jurisdiction to hear employee's grievance, was formal adjudicative proceeding that Court of Appeals could properly review; hearing was conducted and there was no showing that any of the statutory requirements of formal hearing set forth in Utah Administrative Procedure Act had not been met. U.C.A.1953, 63-46b-8, 63-46b-16.

4. Administrative Law and Procedure ⌘723

Officers and Public Employees ⌘72.47

Hearing officer's letter sent nine days after state employee requested that officer reconsider her decision, stating that officer had read employee's motion and that it had not persuaded her to change her decision, was not "written order" within meaning of Utah Administrative Procedure Act, insofar as it was not sufficiently detailed; thus, employee's request for reconsideration was deemed denied as matter of law 20 days after it was filed, and his petition for judicial review, filed within 30 days of deemed denial, was timely. U.C.A.1953, 63-46b-10(1), 63-46b-13(3)(a, b), 63-46b-14(3)(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Administrative Law and Procedure ⌘469

Constitutional Law ⌘278.4(5)

Officers and Public Employees ⌘72.16

Even if hearing officer improperly refused to consider state employee's written proffer of facts, that refusal did not violate due process, absent showing that hearing officer's actions were patently unfair; employee was allowed to testify at length in lieu of written statement, which did not contain a single fact that employee was not allowed to present orally. U.S.C.A. Const. Amends. 5, 14.

6. Officers and Public Employees ⌘72.61

State employee had burden of showing that his grievance fit into statutorily designated category in order to bring that grievance before Career Service Review Board. U.C.A.1953, 67-19a-202(1).

7. Officers and Public Employees ⌘72.22

For purposes of determining whether Career Service Review Board had jurisdiction of its grievance, senior investigator with Utah State Industrial Commission was not given "de facto suspension" when Commission required him to take unpaid leave of absence in order to attend law school; employee made conscious decision to attend law school after being formally notified that he would be required to take a leave of absence if he did so. U.C.A.1953, 67-19a-202(1).

8. Officers and Public Employees ⌘72.22

For purposes of determining whether Career Service Review Board had jurisdiction to hear state employee's grievance, Utah State Industrial Commission's decision not to allow senior investigator to job share did not violate personnel rule, insofar as rule gave Commission full discretion as to whether job sharing would be allowed. U.C.A.1953, 67-19a-202(1).

Lynn J. Lund, Salt Lake City, for petitioner.

Benjamin A. Sims and Thomas C. Sturdy, Salt Lake City, for respondents.

Before BENCH, P.J., and ORME and RUSSON, JJ.

BENCH, Presiding Judge:

Petitioner Lopez seeks review of a jurisdictional hearing conducted by respondent Career Service Review Board (the Board), wherein the Board determined that it did not have jurisdiction to hear Lopez's employment grievance. We affirm.

FACTS

Lopez is a senior investigator with the Utah State Industrial Commission (the Commission). He claims that in 1989 he

saw a clear trend by the Commission towards using investigators with legal training.¹ Since Lopez had no legal training, he decided that it would be to his professional advantage to attend law school. He applied for and was accepted to the University of Utah law school. Upon learning of his acceptance, Lopez requested that he be allowed to work part-time while attending law school. His immediate supervisor informed him in writing that his proposal to work part-time was rejected. Lopez nevertheless pursued additional discussions in an attempt to accommodate the interests of the Commission. Various alternatives were discussed, but none was accepted.

Lopez claims that at one point in the discussions his supervisor asked him to draft a contract reflecting his proposal to work part-time on a job share basis. Lopez assumed that the request indicated that his job share proposal had been accepted. The contract he prepared, however, was never expressly accepted or rejected by the Commission.

Lopez went to law school. Part of his proposed plan was that he would use his annual leave while adjusting to law-school life. He therefore took approximately one month of annual leave at the beginning of the school year. When he attempted to return to work part-time, however, he was informed that his proposal to job share was still unacceptable. The Commission offered him the opportunity to work at a temporary level for 19 hours a week, but, because it was a temporary position, he would be required to relinquish his career service status. In the alternative, the Commission was willing to grant him a leave of absence without pay, thereby keeping his status intact. The only other alternative was for him simply to resign his position. Lopez opted to take the leave of absence

and, under protest, signed an agreement to that effect. Following his first year of law school, Lopez returned to full-time work with the Commission in his former position.

Lopez filed a grievance that progressed unsuccessfully through the Commission's internal review process. Lopez then requested an evidentiary hearing before the Board. Inasmuch as there was some question whether the Board was authorized to hear the grievance, the administrator of the Board ordered that a jurisdictional hearing be conducted. The administrator then recused himself due to a conflict caused by his involvement with an advisory board of the Commission, and a hearing officer was appointed to conduct the hearing.

At the hearing, Lopez "proffered" his version of the facts in writing. The hearing officer refused to accept his written version due to its length and argumentative nature. The Commission proposed its own "chronology" of events and documents, which was admitted without objection from Lopez. Lopez was then allowed to testify as to any facts he felt were relevant. His counsel questioned him for approximately three hours. The hearing officer then ruled that the grievance did not come within any of the statutory categories over which the Board had jurisdiction. The hearing officer further held that Lopez was not harmed by the Commission's actions because he was allowed to return to his former position after the leave of absence.

In accordance with section 13 of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-1 to -22 (1989), Lopez requested that the hearing officer reconsider her decision.² The decision was not altered, and Lopez filed this petition for

1. The Commission denies any trend, but it does admit that in advertisements for investigators it had indicated that preference would be given to those with legal training.

2. The Commission asserts that UAPA does not govern this case because UAPA does not apply to "internal personnel actions within an agency concerning its own employees, or judicial review of those actions." Section 63-46b-1(2)(e). The Board errs in asserting that the Board's

actions constitute "internal personnel actions within an agency." The Board is an agency external to the Commission to which personnel matters are appealed. UAPA therefore applies. This conclusion is supported by statutory language within the chapter establishing the Board that indicates UAPA applies to actions by the Board. See, e.g., Utah Code Ann. §§ 67-19a-202(2), 67-19a-203(6) (1986).

review. He alleges three principal errors by the hearing officer: (1) the refusal to accept his written proffer of facts was a denial of due process, (2) the conclusion that the Board did not have jurisdiction to hear his grievance was erroneous, and (3) the finding that he was not harmed by the Commission's actions was clearly erroneous.

STANDARD OF REVIEW

[1, 2] Questions regarding whether an administrative agency has afforded a petitioner due process in its hearings are questions of law. We therefore do not give deference to the agency's actions. *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 (Utah App.1991). Jurisdictional determinations are questions of law to which we give no deference. *Department of Social Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989).

OUR JURISDICTION

Before addressing the merits of the petition, we consider two threshold questions as to whether this court has jurisdiction.

Formal or Informal Proceedings

[3] The first jurisdictional question involves whether this administrative appeal should be before the district court. UAPA provides that district courts have exclusive jurisdiction over administrative appeals from informal adjudicative proceedings. Section 63-46b-15. Administrative appeals from formal adjudicative proceedings are to be made either to this court or to the supreme court. Section 63-46b-16.

Administrative appeals that are improperly brought to this court are to be transferred to the district court pursuant to Utah Rule of Appellate Procedure 44. *Alumbaugh v. White*, 800 P.2d 825 (Utah App.1990). In *Alumbaugh*, the administrator of the Career Services Review Board conducted an administrative review of an employee's grievance file without a hearing. We held that the absence of a hearing made the Board's action informal, despite the Board's designation of all adjudicative

proceedings as formal, and transferred the case to district court for a trial de novo. *Id.*

In the present case, the hearing officer conducted a hearing. Lopez was allowed to appear before the hearing officer and to present his position. Evidence and documents were accepted into the record, and a court reporter was present. There has been no showing that any of the requirements of a formal hearing, as set forth in section 8 of UAPA, have not been met. Since there was a hearing, and there is no showing of any violations of section 8, we conclude that this was a formal adjudicative proceeding that we may properly review.

Timeliness

[4] The second jurisdictional question involves the timeliness of Lopez's petition to this court. The hearing officer entered her decision on July 2, 1991. Lopez requested on July 22nd that the hearing officer reconsider her decision. On July 31st, the hearing officer sent Lopez a letter. The full text of the letter was as follows: "I have read your *Motion for Reconsideration and Evidentiary Hearing*. This letter is to notify you that your motion has not persuaded me to change my decision." Lopez filed this petition for review on September 3rd.

Subsection 14(3)(a) of UAPA provides: "A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to be issued under Subsection 63-46b-13(3)(b)." Subsection 13(3) applies to requests that an agency reconsider its action and provides:

(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

The issue is whether the letter from the hearing officer constitutes a "written order." If it does, then Lopez's appeal is untimely, the thirty days having run their course on August 30th, four days before Lopez filed his petition. If the letter did not constitute a written order, then Lopez's request for reconsideration was deemed denied, as a matter of law, on August 11th, twenty days from his request. Lopez's filing on September 3rd would therefore be timely.

Section 10 of UAPA requires considerable detail in agency orders issued in connection with formal adjudicative proceedings. It states, in pertinent part:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact ...;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

Utah Code Ann. § 63-46b-10 (1989).

An ambiguous letter, merely indicating that the request for reconsideration was unpersuasive, does not constitute a "written order" as described in subsection 10(1). As a matter of appellate necessity, we must have unambiguous final administrative orders from which we may calculate jurisdictional time periods. Otherwise, our jurisdiction can become uncertain.

Inasmuch as the hearing officer's letter was insufficient to constitute a written order as anticipated by subsection 13(3)(a), Lopez's request for reconsideration is

deemed denied on August 11th under subsection 13(3)(b). His petition for review is therefore timely.

THE MERITS

Proffer of Facts

[5] Lopez first asserts that the hearing officer denied him due process by not considering his written proffer of facts. He relies upon *Tolman* for the proposition that "due process demands a new trial when the appearance of unfairness is so plain that [the appellate court is] left with the abiding impression that a reasonable person would find the hearing unfair." *Tolman*, 818 P.2d at 28 (quoting *Bunnell v. Industrial Comm'n*, 740 P.2d 1331, 1333 n. 1 (Utah 1987)). Even if it were improper for the hearing officer to refuse to consider Lopez's written version of the facts, as asserted by Lopez, he has nevertheless failed to present to this court any explanation of how the actions of the hearing officer were patently unfair. At the hearing, Lopez was allowed to testify at length in lieu of the written statement. He has not directed us to a single fact contained in the written statement that he was not allowed to present orally to the hearing officer. Given Lopez's opportunity to testify, we simply are not left with an abiding impression that a reasonable person would find the hearing unfair.

Jurisdiction of Board

The Board was established to provide state civil service employees with a forum for appealing personnel decisions outside the agency for which they work. The Board, however, does not have jurisdiction to hear all appeals of all personnel matters. Its jurisdiction is statutorily limited to certain agency actions.

(a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reduc-

tions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.

(b) *The board has no jurisdiction to review or decide any other personnel matters.*

Utah Code Ann. § 67-19a-202(1) (Supp. 1991) (emphasis added).³

When an employee files a grievance with the Board, subsection 403(2)(a) requires the Board's administrator to determine the following factors before the Board may hear the grievance.

(i) whether or not the employee is a career service employee and is entitled to use the grievance system,

(ii) whether or not the board has jurisdiction over the grievance,

(iii) whether or not the employee has been directly harmed; and

(iv) the issues to be heard.

Utah Code Ann. § 67-19a-403(2)(a) (Supp. 1991).

In order to make the determinations required, the administrator may "hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both." Subsection 67-19a-403(2)(b)(i). This was the basis and goal of the jurisdictional hearing from which Lopez now appeals.⁴

[6] Lopez initially challenges the hearing officer's determination that the Board lacked jurisdiction by asserting that the Board's administrator erroneously placed the "burden of proof" on Lopez to prove that the Board had jurisdiction. It is axiomatic that a party wishing to bring a matter before a tribunal with limited subject matter jurisdiction must present sufficient facts to invoke the limited jurisdiction of that tribunal. *Department of Social*

Servs. v. Vigil, 784 P.2d 1130, 1132 (Utah 1989). It was therefore necessary for Lopez to show that his grievance fit into one of the categories of grievances designated in subsection 202(1) in order to bring his grievance before the Board.

[7] Lopez argues the Board has jurisdiction because the Commission's requirement that he take a leave of absence without pay was a "de facto suspension." The hearing officer, however, found that Lopez made a conscious decision to attend law school and that his decision was made after he had been formally notified that he would be required to take a leave of absence if he were to attend law school. The hearing officer also found that the ongoing discussions between Lopez and the Commission concerning other possible work alternatives had not resulted in a meeting of the minds. Given the hearing officer's factual findings, it is clear that the unpaid leave of absence was the direct result of Lopez's unilateral and voluntary decision to attend law school. It was not in any way initiated by the Commission. The record is clear that Lopez was always free to remain in his job full time as long as he did not elect to attend law school. He may not now transform the direct result of his own voluntary decision into a "de facto suspension" by the Commission.

[8] Lopez also argues that the Commission violated several personnel rules when it refused to allow him to work during law school. As stated in subsection 202(1), grievances arising from violations of personnel rules are within the Board's jurisdiction. Lopez points to Human Resource Management Rule R468-5-12, which states with our emphasis:

3. All other matters may be grieved only to the level of the department head whose decision is final and unappealable to the Board. See Utah Code Ann. § 67-19a-302(2) (Supp.1991).

4. Lopez asserts that the hearing officer improperly treated the jurisdictional hearing as a hearing on the merits. There is some language in the hearing officer's decision that supports his claim. As indicated in subsection 403(2)(b), the jurisdictional hearing is to consider the four

factors set out in subsection 403(2)(a). If an employee's grievance meets the statutory requirements in subsection 403(2)(a), the employee is entitled to a hearing on the merits of the claim. Any language suggesting that the hearing officer considered the actual merits of Lopez's grievance was nevertheless harmless since the factual findings clearly show that jurisdiction was lacking as a matter of law.

Agency management *may* establish a program of job sharing as a means of increasing opportunities for career part-time employment. In the absence of an agency program, individual employees *may* request approval for job sharing status through agency management.

Utah Admin.Code § R468-5-12 (1991).

The hearing officer held that the Commission's decision not to allow Lopez to job share was not a violation of this policy because the rule gives the Commission full discretion whether to allow job sharing. The hearing officer reasoned that since there was no mandate that job sharing be allowed, job sharing was a privilege that might be granted by the Commission, but it was not a right to which Lopez was entitled by law. Since the Commission's decision not to allow job sharing was within its discretion, Lopez's complaint could not logically constitute a claim that a personnel rule had been "violated." We agree.

Discretionary personnel powers granted to agencies do not constitute mandates. Absent a statutory mandate that an employee receive a certain benefit, the employee may not demand it as a right. Since there was no mandate requiring the Commission to allow Lopez to job share, Lopez has failed to identify any personnel rule that was violated by the Commission's refusal to allow him to job share. Jurisdiction therefore was properly denied.⁵

Harm to Lopez

Finally, Lopez claims that the hearing officer erred when she found that he had not been harmed by being "required" to take an unpaid leave of absence because he was able to return to his former position. Whether Lopez was directly harmed by the Commission's action is the third factor to be determined at a jurisdictional hearing. *See* section 67-19a-403(2)(a)(iii). However, the hearing officer did not need to reach this issue because she determined that Lopez's grievance did not fall within the cate-

gory of grievances over which the Board had jurisdiction. Regardless of whether or not Lopez was harmed, the Board could not hear the grievance. We therefore need not address this final claim of error.

CONCLUSION

The hearing officer's finding that the Board lacked jurisdiction to hear Lopez's grievance is affirmed.

ORME and RUSSON, JJ., concur.



Jasbir S. BHATIA, Petitioner,

v.

DEPARTMENT OF EMPLOYMENT
SECURITY; and Pizza Hut of
Utah, Respondents.

No. 910498-CA.

Court of Appeals of Utah.

June 2, 1992.

Cook sought judicial review of final decision of Board of Review of Industrial Commission denying his application for unemployment compensation benefits. The Court of Appeals, Billings, Associate P.J., held that cook who stormed out of restaurant during middle of busy shift after uttering vulgarity to manager was discharged for "just cause" and not entitled to unemployment compensation benefits.

Affirmed.

Bench, P.J., concurred and filed opinion.

5. Lopez also points to the Human Resource Management Rules regarding "Time Limited Positions," Utah Admin.Code § R468-5-10 (1991), and "Education Assistance," Utah Admin.Code § R468-10-4 (1991). We limit our discussion to

the policy on job sharing since our analysis applies equally to all three policies. Under these rules, agencies are given the ability to create time limited positions and provide education assistance *in their discretion*.

Cite as 282 N.W.2d 701

issue in dispute or to the issue of credibility

Relevancy on the other hand, relates to the probative value of evidence in relation to the purpose for which it is offered.

We further stated in *Clay*:

The law of evidence does teach what evidentiary facts are incompetent because in violation of the exclusionary rules. But as to irrelevant and immaterial matters logic and reasoning processes are the only tests.

Clay, 213 N.W.2d at 477. See *State v. O'Connell*, 275 N.W.2d 197, 203 (Iowa 1979); *State v. Kaufman*, 265 N.W.2d 610, 619-20 (Iowa 1978).

[1] The determination of relevancy is vested in trial court's discretion. *O'Connell*, 275 N.W.2d at 203; *Kaufman*, 265 N.W.2d at 619.

The scope of our review is for correction of errors of law. Iowa R.App.P. 4.

[2] I. *Usual medical practice.* The pleadings in this case present us with an unusual relevancy problem. Mercer contends evidence of usual medical practice adduced at trial is not relevant to the issue of her consent to a venogram of her right leg. Allegations of such medical battery, however, are ordinarily combined with allegations of negligence. See *Perin v. Hayne*, 210 N.W.2d 609 (Iowa 1973). Where negligence is pled, evidence of usual medical practice would be relevant to the standard of care. Presented only with allegations of medical battery, we must determine whether evidence of usual medical practice, nevertheless, may be properly admitted over relevancy objections under the record in this case.

[3,4] Although Mercer challenges the relevancy of evidence of usual medical practice to the issue of consent, the evidence is properly admitted if relevant to any issue in the case. During the first one and one-half days of trial plaintiff sought recovery of punitive damages. We have said such an award requires a showing of "the necessary animus" in commission of the wrongful act. *White v. Citizens National Bank of Boone*,

262 N.W.2d 812, 817 (Iowa 1978). Evidence of usual medical practice appears relevant to disproving the "animus" discussed in *White*. It could logically be argued the tests were performed in furtherance of usual medical practice rather than some intentional infliction of injury or discomfort on the patient. Although the punitive damage claim was subsequently dismissed, the claim was included in the petition when part of the evidence complained of was adduced.

[5] The relevance of usual medical practice to refutation of the punitive damage claim cannot justify admission of the challenged evidence after dismissal of the punitive damage claim; however, subsequent trial developments provide an independent basis for admission of that evidence. Mercer also complains of evidence of surgical implications of bilateral and unilateral venograms which was adduced after dismissal of the punitive damage claim. According to the challenged testimony a less severe form of surgery to restrict the movement of Mercer's blood clot would be and was performed following the bilateral venogram. Although Mercer again contends such evidence is not relevant to the issue of consent, the medical implications of a bilateral rather than a unilateral venogram were opened by Mercer's own testimony.

We have said a party may contradict testimony by showing a fact is otherwise than testified to by a witness. See *State v. Wycoff*, 255 N.W.2d 116, 118 (Iowa 1977) (evidence of conversation admissible to contradict previous testimony concerning the same conversation. "The present situation is merely an illustration of the right of a party to contradict a witness by showing the fact is otherwise.").

Following dismissal of the punitive damage claim but prior to the subsequently challenged testimony, Mercer testified on direct examination in part:

Q. What was your intention concerning any proposed venogram to the right leg? A. I had no intention of a venogram to the right leg.

Q. Did you have some purpose in mind why you didn't want a venogram to your right leg? A. Definitely, general pain and nothing wrong with the right leg.

Q. Was there any other reason? A. Medically I didn't—medically I didn't think it was necessary.

Since Mercer testified there was nothing wrong with her right leg which would require testing, the subject was opened for refutation. Defendants were entitled to introduce evidence of usual medical practice to show medical necessity of a right leg venogram to diagnose possible, visually undetectable blood clots of the right leg.

Mercer additionally contends evidence of hospital consent procedures is not relevant to her consent to a right leg venogram. Consent, however, is a factual issue in the present case. Existing hospital consent procedures, especially those followed in behalf of Mercer by her husband, seem relevant to a factual determination concerning the consent in issue.

[6] II. *Similar test procedures.* Shortly after her admission to the hospital Mercer underwent lung scan tests which, testimony showed, were similar in many respects to venograms. Appellant Mercer contends in this appeal that such consent to lung scan tests is not relevant to the issue of consent to a bilateral venogram. We need not review the exercise of trial court's discretion on this issue, however, since the challenged evidence is admissible on an alternative ground.

We have said a party cannot complain on appeal of evidence which the party, himself, introduced into the record. See *Brown v. First National Bank of Mason City*, 193 N.W.2d 547, 555 (Iowa 1972) (challenged evidence of gossip and rumor concerning bank investigation elicited by appellant as defendant at trial) and *Times-Guthrie Publishing Co. v. Guthrie County Vedette*, 256 Iowa 302, 304, 125 N.W.2d 829, 831 (1964) (challenged subscription card brought out by appellant as plaintiff at trial). The record reveals that Mercer introduced evidence of the lung scans through direct ex-

amination of plaintiff's witness Dr. Dall as well as through introduction of hospital records which noted administration of the lung scan tests.

[7] III. *Failure to resist testing.* In her direct testimony early in the trial Mercer testified she physically resisted administration of the right leg venogram. In this appeal, however, appellant Mercer contends evidence of lack of physical resistance was not relevant to consent and that defendants thereby introduced an erroneous element of necessity of resistance into consent law.

Since plaintiff Mercer, herself, testified to her physical resistance to the right leg venogram, defendants were entitled to present evidence in rebuttal under the authorities discussed in division I above. We cannot say trial court erred in permitting the defense to contradict plaintiff's direct testimony.

We have considered all contentions raised by plaintiff and find them to be without merit.

AFFIRMED.



FORD MOTOR COMPANY,
Petitioner-Appellant,

v.

IOWA DEPARTMENT OF TRANSPORTATION REGULATIONS BOARD,
Respondent-Appellee,

Bob Zimmerman Ford, Inc.,
Intervenor-Appellee.

No. 62630.

Supreme Court of Iowa.

Aug. 29, 1979.

Automobile manufacturer petitioned for judicial review of denial by the Trans-

portation Regulations Board of application seeking to enter into a franchise agreement for a new automobile dealership. The Polk District Court, A. B. Crouch, J., sustained motion to dismiss, and appeal was taken. The Supreme Court, Harris, J., held that: (1) where application for rehearing of administrative decision was filed March 22, 1978, it was deemed denied 20 days later, on April 11, 1978, when it had not been ruled on by the agency, and thus 30-day period for applying for judicial review ended May 11, 1978, even though the agency filed a written denial of the application for rehearing on April 14, 1978, and (2) failure to timely file application for judicial review was a jurisdictional defect.

Affirmed.

1. Administrative Law and Procedure ↔ 722

Where application for rehearing of administrative decision was filed March 22, 1978, it was deemed denied 20 days later, on April 11, 1978, when it had not been ruled on by the agency, and thus 30-day period for applying for judicial review ended May 11, 1978, even though the agency filed a written denial of the application for rehearing on April 14, 1978. I.C.A. §§ 17A.16, subd. 2, 17A.19, 17A.19, subd. 3.

2. Automobiles ↔ 84

Failure to timely file application for judicial review of ruling of the Transportation Regulations Board denying application to enter into an automobile franchise agreement was a jurisdictional defect. I.C.A. §§ 17A.16, subd. 2, 17A.19, 17A.19, subd. 3.

Robert F. Holz, Jr. and Edwin N. McIntosh, Des Moines, for appellant.

T. Scott Bannister and Martha Martell, Des Moines, for respondent-appellee.

Joseph E. Day of Hines, Pence, Day & Powers, Cedar Rapids, and W. Don Brittin, Jr., of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, for intervenor-appellee.

Considered by REYNOLDSON, C. J., and UHLENHOPP, HARRIS, McCORMICK, and LARSON, JJ.

HARRIS, Justice.

This appeal turns on whether a petition for judicial review of an administrative action was timely. The trial court held the petition was not timely and that the tardiness was fatal to its jurisdiction. We agree.

Ford Motor Company filed an application with the transportation regulation board of the Iowa department of transportation, pursuant to section 322A.6, The Code 1975, seeking to enter into a franchise agreement for a new Ford dealership in Cedar Rapids. The application was resisted by various intervening Ford dealers located in the area, including Bob Zimmerman Ford, Inc. Following a hearing the department denied Ford's application.

Ford filed an application for rehearing, pursuant to section 17A.16(2), The Code 1977 (Iowa Administrative Procedure Act). The department denied Ford's motion for rehearing. Ford thereafter petitioned for judicial review of the department's decision, pursuant to section 17A.19, The Code 1977. Bob Zimmerman Ford moved to dismiss the petition as untimely. This appeal is from a trial court ruling sustaining Zimmerman's motion to dismiss.

[1] I. The question calls for interpretation of the following provisions from the administrative procedure act:

Any party may file an application for rehearing, stating the specific grounds therefor and the relief sought, within twenty days after the issuance of any final decision by the agency in a contested case. A copy of such application shall be timely mailed by the applicant to all parties of record not joining therein. *Such an application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing.*

§ 17A.16(2) (emphasis added).

If a party files an application under section 17A.16, subsection 2, for rehearing

with the agency, the petition for judicial review must be filed within thirty days after that application has been denied or deemed denied.

§ 17A.19(3) (emphasis added).

Ford's difficulty stems from the fact that its application for rehearing was "deemed denied" under section 17A.16(2) before the agency's written denial was filed. But Ford ignored the "deemed denied" provision of the statute and paced its subsequent filing timetable from the date the written denial was filed. The dates were as follows: Ford's application for rehearing (under section 17A.16(2)) was filed March 22, 1978. By operation of the statute this application was deemed denied April 11, 1978, when it had not been ruled upon by the agency. Nevertheless, the agency filed a written denial of the application April 14, 1978. Under section 17A.19(3) Ford had 30 days in which to petition for judicial review. The statute states that the 30-day period begins to run when the application before the agency "has been denied or deemed denied."

Because the application before the agency was deemed denied April 11, the application for judicial review was due May 11, 1978. The trial court dismissed the proceeding because it was not filed until May 12, 1978.

[2] II. In *Kerr v. Iowa Public Service Co.*, 274 N.W.2d 283, 287 (Iowa 1979), we pointed out:

Judicial review of the administrative proceedings is a right conferred by statute. [Authorities.]

We have said that where a right of judicial review is statutory, the procedure prescribed, by the statute must be followed. [Authority.] . . . [F]ailure to satisfy requirements of § 17A.19 [is] a jurisdictional defect . . .

See *Richards v. Iowa State Commerce Commission*, 270 N.W.2d 616, 619 (Iowa 1978); *Iowa Public Service Company v. Iowa State Commerce Commission*, 263 N.W.2d 766, 770 (Iowa 1978).

Ford argues that some administrative agencies might, for various reasons, meet irregularly. Under the trial court's interpretation of section 17A.19(3)—which we adopt—inability to meet within the statutory period would rob the agency of its jurisdiction to act on an application to review its own decision. Ford assails this interpretation as at once harsh and absurd.

We conceded that the operation of the statute might seem harsh, especially where, as here, a party might have been misled by the nullity of a later filing. Nevertheless, we believe that the statutory scheme is neither absurd nor unfair. Parties to the proceedings have a need for and a right to a prompt disposition of a dispute. We are confident that the legislature was fully aware that administrative agencies might meet irregularly. Hence, in the interests of a prompt disposition of disputes, the legislature superimposed an automatic denial of any application not ruled upon within the prescribed period.

Regrettable hardships may well result to litigants who are unaware of the "deemed denied" provision of the statute. But it is in the over-all interests of litigants and the public at large that administrative proceedings move to a prompt conclusion. The legislature obviously had the broader public interest in mind in adopting the statute.

The trial court was right in determining that Ford's petition for judicial review was untimely.

AFFIRMED.



Annot., 10 A.L.R.Fed. 881, 891 (1972) (emphasis supplied). That is, alimony in gross is dischargeable in bankruptcy.

For the reasons given, this case is reversed and remanded to the trial court for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

BRADLEY, P.J., and INGRAM, J.,
concur.



Flora L. DAVIS

v.

ALABAMA MEDICAID AGENCY, and
Michael Horsley, as Commissioner.

Civ. 6114.

Court of Civil Appeals of Alabama.

Dec. 9, 1987.

State medicaid agency determined applicant was disqualified from receiving medicaid benefits for period of three months and notified applicant of determination on January 16. Applicant filed rehearing application on January 27, was advised of denial of her rehearing and notified that judicial review could be had pursuant to statute by letter dated March 10, and forwarded notice of appeal by letter dated April 9. The Circuit Court, Montgomery County, William R. Gordon, J., found the applicant's notice of appeal was untimely and dismissed appeal. Applicant appealed. The Court of Civil Appeals, Ingram, J., held that appeal was untimely, as application for rehearing was deemed denied at expiration of 30 days and applicant was required to file notice of appeal within 30 days after decision on application for rehearing.

Affirmed.

1. Administrative Law and Procedure ⌘722

Social Security and Public Welfare ⌘241.115

Medicaid benefit applicant's April 9th appeal from determination that applicant was disqualified from receiving medicaid benefits for period of three months, of which applicant was notified on January 16, was untimely; although applicant filed application for rehearing on January 27 and was advised by letter dated March 10 of denial of her rehearing and notified that judicial review could be had under statute, her application for rehearing was deemed denied by operation of law at expiration of 30 days, on February 26, and applicant was statutorily required to file notice of appeal within 30 days after decision on application for rehearing, so notice of appeal should have been filed within 30 days of date application for rehearing was deemed denied, February 26. Code 1975, §§ 41-22-17(a, e), 41-22-20(a, d).

2. Administrative Law and Procedure ⌘722

Social Security and Public Welfare ⌘241.115

Letter advising medicaid benefit applicant of denial of her application for rehearing and notifying applicant that judicial review could be had under statute was not sufficient to extend applicant's time for seeking judicial review; no active misrepresentation of date of decision relevant to time for review was made. Code 1975, §§ 41-22-17(a, e), 41-22-20(a, d).

Lawrence F. Gardella of Legal Services Corp. of Alabama, Inc., Montgomery, for appellant.

Don Siegelman, Atty. Gen., and J. Thomas Leverette, Asst. Atty. Gen., for appellees.

INGRAM, Judge.

This appeal arises under the Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1, et seq. (act), from an administrative hearing decision by the Ala-

bama Medicaid Agency (agency) denying applicant's medicaid benefits for three months. The circuit court found that the applicant's notice of appeal was untimely and dismissed the appeal. The applicant now appeals to this court.

The dispositive issue on appeal is whether or not the circuit court erred in dismissing the appeal.

The record in pertinent part reveals that on January 16, 1987, the applicant was notified that she was disqualified from receiving medicaid benefits for a period of three months. The applicant then filed an application for rehearing on January 27, 1987. By letter dated March 10, 1987, the applicant was advised of the denial of her rehearing and notified that judicial review could be had under the act. On April 15, 1987, the agency received applicant's notice of appeal by letter dated April 9, 1987.

[1] The applicant contends that the period of time within which she had to file her notice of appeal ran from March 10, 1987, the date the agency sent the letter notifying applicant of their decision. The agency, however, contends that the time to file the notice of appeal ran from the date the application for rehearing was deemed denied by law, February 26, 1987.

The applicable provisions of the act are as follows:

"(a) Any party to a contested case who deems himself aggrieved by a final order and who desires to have the same modified or set aside may, within 15 days after entry of said order, file an application for rehearing, which shall specify in detail the grounds for the relief sought therein and authorities in support thereof.

"....

"(e) ... If the agency enters no order whatsoever regarding the application within the 30-day period, the application shall be deemed to have been denied as of the expiration of the 30-day period. (Acts 1981, No. 81-855, p. 1534, § 17.)"

Sections 41-22-17(a) and (e).

"(a) A person who has exhausted all administrative remedies available within

the agency (other than rehearing) and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

"....

"(d) The notice of appeal or review shall be filed within 30 days after the receipt of the notice of or other service of the final decision of the agency upon the petitioner or, if a rehearing is requested under section 41-22-17, within 30 days after the decision thereon."

Sections 41-22-20(a) and (d).

It is clear from the above provision that if the agency does not enter an order within thirty days of the filing of the application for rehearing, the application is deemed denied by operation of law at the expiration of the thirty-day period. Ala. Code 1975, § 41-22-17(e). Further, the statute is clear that the applicant is required to file the notice of appeal within thirty days after the decision on the application for rehearing. Ala. Code 41-22-20(d).

Here, the application for rehearing was filed on January 27, 1987, and by operation of law was deemed denied on February 26, 1987. Therefore, pursuant to the act, the notice of appeal should have been filed within thirty days from February 26, 1987. As this was not done, the trial court did not err in dismissing the appeal.

Additionally, we agree with the trial court's apt and concise analogy, which follows:

"Appeals from agency decisions are purely statutory, and the time restrictions must be satisfied. Although this result may seem harsh at first blush, our Rules of Civil Procedure have a similar mechanism embodied in Rule 59.1, A.R. Civ.P. A motion for new trial, et cetera, is deemed denied if not ruled on within 90 days. The fact that a court may enter an order after the 90 day period ruling on the motion has no effect in determining the date that the notice of appeal

must be filed. The order is a mere nullity. *Olson vs. Olson*, 367 So.2d 504 (Ala. Civ.App.1979)."

[2] We further note that this case is factually distinguishable from *Ex parte Four Seasons, Ltd.*, 450 So.2d 110 (Ala. 1984). In *Ex parte Four Seasons*, the supreme court held that the secretary actively misrepresented in the notice to the taxpayer that the final decision was "this date." No such active misrepresentation occurred in the instant case. The letter dated March 10, 1987, to the applicant simply stated that the rehearing was denied and advised the applicant that judicial review was pursuant to the act.

In view of the above, it is clear that the circuit court did not err in dismissing the applicant's petition for review in that she failed to timely file her notice of appeal pursuant to the act.

This case is due to be affirmed.

AFFIRMED.

BRADLEY, P.J., and HOLMES, J.,
concur.



**STATE of Alabama, DEPARTMENT OF
HUMAN RESOURCES**

v.

Glenda MIDDLETON and
Clarence Middleton.

(In the Matter of Marcella Elizabeth
MIDDLETON).

Civ. 6022.

Court of Civil Appeals of Alabama.

Dec. 9, 1987.

Department of Human Resources appealed from judgment of the Juvenile Court, Mobile County, John F. Butler, J., relieving parents of duty to support child.

The Court of Civil Appeals, Edward N. Scruggs, Retired Circuit Judge, held that parents of adopted child could not be relieved of child support obligation on basis of expenses they had incurred in placing child in psychiatric care.

Reversed and remanded.

1. Infants ⇐250, 252

After trial at which evidence was presented ore tenus, action of juvenile court will be given every favorable presumption and it will not be altered on appeal if it was supported by credible evidence unless it was palpably wrong.

2. Parent and Child ⇐3.3(8)

After order of support has been entered by court, it can be modified only where there has been material change in circumstances which occurred after entry of last child support judgment.

3. Parent and Child ⇐3.3(7)

Although determination of amount of child support rests within discretion of trial court, as does modification of child support, trial court's decision as to amount of support is bound by legal evidence or lack thereof.

4. Infants ⇐228

Parents of adopted child could not be relieved of child support obligation on basis of expenses they had incurred in placing child in psychiatric care, absent showing of any change in circumstances of either needs of child or ability of parents to pay since entry of support order.

William Prendergast and Lois Brasfield,
Asst. Attys. Gen., for appellant.

No brief for appellees.

EDWARD N. SCRUGGS, Retired
Circuit Judge.

This is a child support case. Beth, the child here involved, was born in 1969, and she was adopted by the Middletons (parents) when she was fifteen months old.

Cite as 519 So.2d 540 (Ala.Civ.App. 1987)

In June 1982 the parents placed Beth in a hospital for treatment. The child has not resided with the parents since that time. She was placed in the care of the Department of Human Resources (Department) in 1983 under a boarding home agreement. The parents agreed on November 28, 1984 to contribute \$20 per month toward Beth's foster care support. In February 1985 the parents ceased making any such payments and, apparently, they did not pay any further child support for Beth after that time. Beth's temporary custody was granted to the Department in July 1983, and the parents were ordered to pay \$60 per month to the Department for child support. That amount was reduced on September 4, 1985 to \$40 per month. On January 29, 1987 the circuit court in a suit by the Division of Investigation and Recovery ordered the parents to pay an arrearage of \$450 and to pay \$70 per week as continuing child support. Therein, the trial court made a specific finding that the father's weekly take-home pay was \$440. The parents filed a notice of appeal from that child support order but they dismissed their appeal on March 11, 1987.

The parents' juvenile court motion of February 23, 1987, as later amended, sought a termination of their parental rights and of their duty to support Beth. After an evidentiary hearing on May 29, 1987, the juvenile court issued an order on June 2, 1987 whereby it declined to terminate the parental rights of the parents but it relieved them from further child support payments for Beth. In denying the Department's motion to reconsider on June 24, 1987, the trial court stated the following in open court:

"I took a lot of things into consideration in relieving them of child support. More than just the ability to pay was considered. It was my opinion that these people have done all they possibly could do, with and for this girl, for a great number of years. Mr. Pierson, I'm denying the motion. I just feel like what I did was appropriate in the matter. They had considerable expense over a number of years, placing her in psychiatric care, paying for it—the overage from their

insurance set them back a great deal, and I remember that. They had her placed in several treatment hospitals, and they incurred for a great number of years some excessive expenses over and above what one would have had for an ordinary child, and it was an adopted child, and the only distinction there is, the child, herself, has sought to be removed from the home.

"....

"... My position is, that the Court who last heard this, didn't consider those things and perhaps they should have. This family had some excessive expenditures over year after year after year, and from which they are just now recovering."

The Department timely appealed.

[1] After a trial at which evidence was presented ore tenus, the action of the juvenile court will be given every favorable presumption and it will not be altered on appeal if it was supported by credible evidence unless it was palpably wrong. *Witcher v. Motley*, 417 So.2d 208 (Ala.Civ. App.1982). Here, evidence of the financial condition of the parents was not presented to the trial court at either the May 1987 or June 1987 hearing. The parents did not testify on either occasion. The Department is paying \$57 per day for the eighteen-year-old child's care and treatment for severe depression.

[2,3] After an order of support has been entered by a court, it can be modified only where there has been a material change in circumstances which occurred after the entry of the last child support judgment. *Lyle v. Lyle*, 497 So.2d 154 (Ala.Civ. App.1986). Although the determination of an amount of child support rests within the discretion of the trial court, *Banks v. Spurlock*, 470 So.2d 1300 (Ala.Civ.App.1985), as does the modification of child support, *Jones v. Jones*, 462 So.2d 875 (Ala.Civ.App. 1984), the trial court's decision as to the amount of support is bound by legal evidence or the lack thereof. *Langford v. Langford*, 441 So.2d 962 (Ala.Civ.App. 1983).