2011 Ark. 349

NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTHWESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS.

Supreme Court of Arkansas.

Robert ROBINETTE, Appellant
v.
DEPARTMENT OF FINANCE
AND ADMINISTRATION,
Richard Weiss, Director, Appellee.

No. 10–1208. | Sept. 15, 2011.

Synopsis

Background: Licensee sought review of decision of Department of Finance and Administration's Office of Driver Services (DFA), suspending his driver's license for two years. The Circuit Court, Pulaski County, Ernest Sanders, Jr., J., affirmed. Licensee appealed.

Holdings: The Supreme Court, Paul E. Danielson, J., held that:

[1] denial of licensee's motion for summary judgment was final and appealable, and

[2] trial court did not abuse its discretion in denying licensee's challenge to notice.

Affirmed.

Robert L. Brown, J., concurred and filed opinion.

West Headnotes (3)

[1] Automobiles
Judicial Remedies and Review in General

Trial court's denial of licensee's motion for summary judgment on his challenge to decision of Department of Finance and Administration's Office of Driver Services (DFA), suspending his driver's license for two years, was a final, appealable order, where order denying licensee's motion also sustained the decision of the DFA's Office of Driver Services, effectively terminating the proceeding. (Per Danielson, J., with two judges concurring.)

1 Cases that cite this headnote

[2] Automobiles
Administrative procedure in general

Substantial compliance with the statutory procedural requirements for suspension, revocation or disqualification of driving privileges is required. (Per Danielson, J., with two judges concurring.) West's A.C.A. §§ 5–65–402, 5–65–403.

Cases that cite this headnote

[3] Automobiles
Administrative procedure in general

Where notice provided that licensee had seven days in which to file his request for administrative hearing challenging suspension of driver's license, and where licensee filed his request within the seven calendar days established by statute and was granted the opportunity to be heard, licensee failed to demonstrate any prejudice resulting from want of strict compliance with requirement that notice inform a licensee that a request for hearing must be filed within seven "calendar" days. (Per Danielson, J., with two judges concurring.) West's A.C.A. § 5–65–402(a)(7)(A).

Cases that cite this headnote

Appeal from the Pulaski County Circuit Court, [No. CV2009–8096], Ernest Sanders, Jr., Judge.

Attorneys and Law Firms

Robert Joseph Price, Little Rock, AR, for the Appellant.

Paul Michael Gehring, Little Rock, AR, for the Appellee.

Opinion

PAUL E. DANIELSON, Justice.

Appellant ***1** Robert Robinette appeals from the circuit court's order affirming appellee Arkansas Department of Finance and Administration's Office of Driver Services's (DFA) decision suspending his driver's license for two years. His sole assertion on appeal is that the circuit court erred in denying his motion for summary judgment in which he claimed that the notice provided to him failed to comply with Arkansas Code Annotated § 5–65–402 (Supp.2009) or § 5–65–403 (Repl.2005). We affirm the circuit court's order.

On December 11, 2009, Robinette was placed under arrest for suspicion of driving while intoxicated (DWI). Pursuant to Title 5, Chapter 65 of the Arkansas Criminal Code, Robinette was given an "Omnibus DWI Law Official Driver License Receipt and Notice of Suspension/Revocation or Disqualification of Driving Privileges." The notice provided:

> This is official notice that the suspension, revocation or disqualification of ***2** your driving privilege will begin at midnight of the 30th day from the date of arrest. You have the right to an administrative hearing on the revocation, suspension or disqualification of your driving privilege within twenty (20) days from your request for hearing. *You must request a hearing within seven (7) days of this notice being given.* The attached request for hearing form contains additional instructions. Your vehicle registrations will be suspended if you are charged with a second or subsequent alcohol related offense within five years of the first. If you hold a commercial driver license your commercial privilege will be disqualified whether you are in a commercial vehicle or a noncommercial vehicle at the time of the arrest.

(Emphasis added.) The attached Request for Administrative Hearing to Contest Suspension, Revocation or Disqualification or Request Restricted Driving Permit included, in pertinent part, the following notice:

> NOTICE: IF YOU DESIRE AN ADMINISTRATIVE HEARING BEFORE A FAIR HEARING REFEREE, THE HEARING REQUEST MUST BE POSTMARKED OR FAXED *WITHIN SEVEN (7) CALENDAR DAYS* OF THIS NOTICE BEING GIVEN OR YOUR REQUEST FOR AN ADMINISTRATIVE HEARING TO CONTEST WILL BE DENIED. YOU MUST FULLY COMPLETE AND MAIL OR FAX THIS FORM TO THE FOLLOWING ADDRESS IN ORDER TO BE SCHEDULED FOR A HEARING.

(Emphasis added.)

Robinette completed the request for an administrative hearing, and the record reflects that his request was received by Driver Control on December 14, 2009. On December 30, 2009, a hearing was held, and the hearing summary was issued by the hearing officer:

> This is a contested hearing and based upon the preponderance on [*sic*] evidence that is listed in the arresting officer's ALS this office decision is to allow the suspension to run from 01–12–2010 to 01–12–2012. The attorney was issued the appeal notice and interlock order. See atty written objection to suspension.

In his written objection, Robinette alleged that he was not given the proper notice required by Ark.Code Ann. §§ 5–65–402 and 5–65–403. [1] Specifically, he asserted that the notice was ***3** deficient because, rather than stating that a hearing be requested within seven *calendar* days, the notice stated seven days. Robinette contended that the omission of the term "calendar" rendered the notice, and any action to suspend his license, void.

On January 19, 2010, Robinette filed in circuit court his amended petition to review the agency's decision pursuant to Ark.Code Ann. § 5–65–403(h)(1)(A). Robinette also filed a motion for summary judgment in which he alleged that compliance with the notice and service requirements of § 5–

65–402 was not strict and exact. [2] DFA filed its response, and the circuit court held a hearing at which it denied Robinette's motion, finding that

> [t]he receipt/notice complies. I noticed it didn't say seven calendar days but seven calendar days and seven days are the same. I think if there were seven business days, then I think you would have a better argument. If they said seven business days and they did not put the business days, then there is a distinction to me between seven business days and just seven regular days. So seven calendar days is seven days.
>
> It further found that DFA had met its burden that Robinette was in possession of the vehicle and that by a preponderance of the evidence he was in fact intoxicated.

On August 5, 2010, the circuit court entered its final order, wherein it denied ***4** Robinette's motion for summary judgment. The circuit court found that DFA had proved by a preponderance of the evidence that this was Robinette's second DWI offense in five years, and it sustained the decision of DFA's hearing officer. Robinette's driving privileges were suspended for a period of twenty-four months, and he was found eligible for an ignition-interlock restricted-driving permit. Robinette now appeals.

For his sole point on appeal, Robinette asserts that the circuit court erred in denying his motion for summary judgment. He contends that because the notice he was given failed to comply with either § 5–65–402 or § 5–65–403 by its lack of the term "calendar," an ambiguity was created that was uniquely prejudicial to any licensee receiving such a notice. He avers that because compliance with notice requirements must be strict and exact, the fact that he timely filed his request for hearing is of no moment. Instead, he urges, because the notice lacked compliance, the subsequent action to suspend his license was void.

DFA counters that our case law prohibits an appeal from a denial of summary judgment and that Robinette's appeal should therefore be dismissed. In the alternative, DFA urges this court to affirm the circuit court's order, claiming that the omission of the term "calendar" is a distinction without a difference because the same deadline is had for either seven days or seven calendar days. It contends that because Robinette made a timely request for hearing within the seven-day period and was granted a hearing, the timeliness of his request is not an issue.

[1] We first address DFA's contention that the instant appeal should be dismissed. Ordinarily, an order denying a motion for summary judgment is not an appealable order. *See* ***5** *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003). However, we have held that such an order is appealable when it is combined with a dismissal on the merits that effectively terminates the proceeding below. *See Johnson v. Simes*, 361 Ark. 18, 204 S.W.3d 58 (2005). Accordingly, because the circuit court's order both denied Robinette's motion for summary judgment and sustained the decision of DFA's Office of Driver Services, the order is final and appealable.

We turn then to the merits of Robinette's argument. The standard of review for an order denying a motion for summary judgment is whether the circuit court abused its discretion in denying the motion. *See Arkansas Game & Fish Comm'n v. Eddings*, 2011 Ark. 47, —— S.W.3d ——. Likening the instant case to those in which we have held that certain statutory-service requirements must be strictly construed and compliance exact, Robinette maintains that the suspension of his driver's license is void due to the lack of the term "calendar" in the notice provided him. We disagree.

[2] Instead, we find the facts of this case more akin to our previous holdings in cases involving the Public School Employee Fair Hearing Act (PSEFHA), codified at Ark.Code Ann. §§ 6–17–1701 to –1705 (Repl.2007), and the Teacher Fair Dismissal Act (TFDA), codified at §§ 6–17–1501 to –1510 (Repl.2007 & Supp.2011). Under both acts, a notice of nonrenewal is required by statute, and upon receipt, the recipient may request a hearing under the specific conditions of each respective act. *See* Ark.Code Ann. § 6–17–1703; Ark.Code Ann. §§ 6–17–1506 and 6–17–1509 (Repl.2007). When reviewing cases involving both acts, this court has held that substantial compliance with the statutory procedural requirements of ***6** each act is required. [3] For instance, in *Small v. Cottrell*, 332 Ark. 225, 964 S.W.2d 383 (1998), we rejected Small's argument that the PSEFHA required strict compliance in order to protect his rights to notice and an opportunity to be heard, holding that absent contrary legislative directive, substantial compliance was the applicable standard under the PSEFHA. Likewise, in *Green Forest Public Schools v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985), we held that substantial compliance with the notice requirement of the TFDA was sufficient, absent a showing that prejudice resulted from want of strict compliance. The instant statutory scheme contains no legislative directive that the procedural requirements be

complied with strictly; therefore, we hold that substantial compliance is the appropriate standard.

[3] Here, the notice provided that Robinette had seven days in which to file his request, and he filed his request within the seven calendar days established by the statute. Most importantly, he was granted the opportunity to be heard, notwithstanding any discrepancy in the notice provided him. *See* Ark.Code Ann. § 5–65–402(a)(7)(A) (providing that the Office of Driver Services "shall grant the person an opportunity to be heard if the request is received by the office within seven (7) calendar days after the notice of the revocation, suspension, disqualification, or denial is given in accordance with this section or as otherwise provided in this chapter"). Because he was granted the opportunity to be heard, he has not demonstrated any prejudice resulting from want of strict compliance. Accordingly, we hold ***7** that the circuit court did not abuse its discretion in denying Robinette's summary-judgment motion, and we affirm the circuit court's order.

Affirmed.

BROWN and BAKER, JJ., concur.

ROBERT L. BROWN, Justice, concurring.

I concur in the decision announced by the majority. I write separately simply to note that we need not reach the issue of strict compliance versus substantial compliance because the notice given in the instant case satisfies either test. As the trial court correctly found, there is no distinction between "calendar days" and "days." The notice given to appellant, indicating that he had seven days in which to request a hearing, fully complied with the statutory notice requirements of Arkansas Code Annotated section 5–65–402, even if analyzed under a strict-compliance standard.

BAKER, J., joins this concurrence.

Parallel Citations

2011 WL 4092222 (Ark.)

Footnotes

1 The text of the statutes provide, in pertinent part:

> The receipt form shall contain and shall constitute a notice of suspension, disqualification, or revocation of driving privileges by the office, effective in thirty (30) days, notice of the right to a hearing within twenty (20) days, and if a hearing is to be requested, as notice that the hearing request is required to be made within seven (7) calendar days of the notice being given.

Ark.Code Ann. § 5–65–402(a)(2)(B)(i).

> At the time of arrest for violating § 5–65–103, § 5–65–303, § 27–23–114(a)(1), or § 27–23–114(a)(2), the arresting law enforcement officer shall provide written notice to the arrested person: ... [t]hat if a hearing is to be requested the hearing request is required to be made within seven (7) calendar days of the notice being given.

Ark.Code Ann. § 5–65–403(a)(3).

2 Robinette's motion for summary judgment reflects no file mark; however, Robinette's counsel admitted such in the hearing before the circuit court and requested that the motions and briefs of the parties be made a part of the record for appeal. The circuit court granted Robinette's request.

3 In certain cases within our jurisprudence, we have applied a strict-compliance standard to TFDA cases. *See, e.g.*, *Spainhour v. Dover Pub. Sch. Dist.*, 331 Ark. 53, 958 S.W.2d 528 (1998); *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994). We did so because the General Assembly had provided for such a standard. *See* Act 625 of 1989. In Act 1739 of 2001, however, the General Assembly returned the standard to that we had originally held applicable, substantial compliance.