[Cite as *Massey v. Ohio Election[s] Comm.*, 2013-Ohio-3498.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael J. Massey,	:	
Appellant-Appellant,	:	
		No. 13AP-20
v.	:	(C.P.C. No. 12CVF-10-12512)
Ohio Election[s] Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on August 13, 2013

David Glenn Phillips, for appellant.

Michael DeWine, Attorney General, *Richard N. Coglianese*, and *Sarah E. Pierce*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Michael J. Massey, appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss filed by appellee, Ohio Elections Commission, on grounds that the appeal was untimely. For the following reasons, we reverse the trial court's judgment and dismiss appellant's appeal.

I. BACKGROUND

{¶ 2} Appellant filed a complaint with appellee in the fall of 2011, alleging that several individuals violated the election law under R.C. 3517.21(B)(4), (8), and (10) by defaming him while he was a candidate for office. On December 15, 2011, appellee determined that there was no probable cause to support appellant's complaint and that his complaint was frivolous. On December 20, 2011, appellee sent appellant a letter

informing him of the decision and indicating that it would reconvene to determine whether to order appellant to pay the attorney fees of those he filed the complaint against.

{¶ 3} Appellant filed an appeal of appellee's decision, and appellee moved to dismiss on grounds that its decision was not a final appealable order. The trial court granted appellee's motion, but expressed "concerns with whether Appellant had proper notice of and an opportunity to be heard regarding the * * * finding that his Complaint was frivolous." (Apr. 18, 2012 Decision, 4.)

{¶ 4} On August 23, 2012, appellee conducted another hearing and determined that appellant's complaint was frivolous and awarded attorney fees in the amount of $5,775. On September 18, 2012, appellee sent appellant a letter informing him of its decision and indicating that "[i]t is hereby certified that the foregoing is a true and exact reproduction of the original Order of the Ohio Elections Commission for this case as entered on its journal." (Sept. 18, 2012 letter to appellant.) The letter also stated that, if appellant wanted to pursue an appeal, he had to file a notice of appeal within 15 days after the order was mailed. The letter indicated that the notice must be filed with appellee and the trial court.

{¶ 5} Appellant filed a notice of appeal with the trial court on October 2, 2013 and with appellee on October 4, 2013. Appellee moved to dismiss the appeal on grounds that the trial court lacked jurisdiction to entertain the appeal because appellant did not file his notice of appeal with appellee within the 15-day period. In his memorandum in opposition to the motion to dismiss, appellant asserted, pursuant to R.C. 119.09, that the 15-day time period for filing a notice of appeal had not yet commenced because appellee failed to journalize an original order. Thus, he contended that the appeal was not ripe for review. Appellee conceded that there was no original entry on the journal, but contends that its September 18, 2012 letter to appellant triggered the time for him to perfect an appeal.

{¶ 6} The trial court concluded that the time to file an appeal started to run when appellee mailed its decision to appellant and that appellant failed to timely file a

notice of appeal with appellee. Therefore, the trial court determined that the appeal was untimely and that it lacked jurisdiction to entertain appellant's appeal and granted appellee's motion to dismiss.

II. ASSIGNMENT OF ERROR

{¶ 7} Appellant filed a timely notice of appeal and assigns the following as error:

> The court of common pleas erred in granting the appellee administrative agency's motion to dismiss for the reasons advanced in the agency's motion; appellant's administrative appeal to the court of common pleas was not ripe because the agency failed to follow the mandatory procedural requirements set forth in R.C. 119.09.

III. DISCUSSION

{¶ 8} In his single assignment of error, appellant argues that the trial court erred by dismissing his appeal on grounds that it was untimely. We agree.

{¶ 9} We begin by setting forth the standard for reviewing decisions from an administrative agency, such as appellee. An agency's decision is subject to review by the common pleas court. R.C. 119.12. During that review, the common pleas court considers the entire record to determine whether reliable, probative, and substantial evidence supports the agency's decision, and the decision is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980). The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative decision is in accordance with law. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

{¶ 10} The common pleas court's decision is subject to review by the appellate court. *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 9 (10th Dist.). The appellate court's review is more limited than that of the common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The appellate court is to determine only whether the common pleas court abused its discretion. *Id.*; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983) (noting that an abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of the common pleas court or the administrative agency. *Pons* at 621. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.).

{¶ 11} With that standard in mind, we consider the merits of appellant's appeal. Pursuant to R.C. 119.12, a party desiring to appeal an agency's order shall file notices of appeal with the trial court and the agency "within fifteen days after the mailing of the notice of the agency's order." R.C. 119.09 governs the issuance of the agency's order and states that "[a]fter such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected." An agency must strictly comply with R.C. 119.09 before the 15-day period prescribed in R.C. 119.12 commences. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶ 12.

{¶ 12} In this case, appellant agrees with the trial court that it lacked authority to consider his appeal, albeit for a different reason than that articulated by the trial court. Appellant contends that the trial court abused its discretion by concluding that the appeal was untimely and instead argues that the appeal was not yet ripe for review due to the lack of an original order being entered on the agency's journal. According to appellant, because there was no journalization of the agency's order, no copy and notice

could have followed and thus the 15-day period to perfect an appeal had not yet commenced.

{¶ 13} Appellee contends that the September 18, 2012 letter it sent to appellant sufficiently satisfied R.C. 119.09 and commenced the 15-day period to perfect an appeal because the letter specifically indicated that it was a certified copy of appellee's order, was sent by certified mail, and mentioned the method by which an appeal must be perfected.

{¶ 14} Pursuant to *Hughes*, appellee is required to strictly comply with R.C. 119.09 prior to the 15-day period prescribed in R.C. 119.12 commencing. To determine appellee's duties under R.C. 119.09, we look to the plain language of the statute. *Id.* at ¶ 12. As above, the plain language of R.C. 119.09 requires an agency to enter its final order "on its journal" before sending a certified copy of the order to "the party affected thereby." The parties agree that there was no order entered on appellee's journal. Without such an order, appellee lacks grounds to assert that its September 18, 2012 letter is a certified copy "of the original Order * * * as entered on" appellee's journal. Thus, the letter was premature and cannot constitute a formal notice of the order to trigger the 15-day appeal time.

{¶ 15} Courts lack authority to adjudicate a matter that is not ripe. *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89 (1998). A matter is not ripe when " 'the time for judicial relief [has] simply not yet arrived.' " *Id.*, quoting Comment, Mootness and Ripeness: The Postman Always Rings Twice, 65 Colum.L.Rev. 867, 876 (1965). In particular, an appeal is not ripe when, as here, the time to file it has not yet commenced. *Randall v. Cantwell Mach. Co.*, 10th Dist. No. 12AP-786, 2013-Ohio-2744, ¶ 19-20.

{¶ 16} Because appellee did not comply with the plain language of R.C. 119.09, we find the 15-day period for appeal has not yet begun to run and determine that the trial court abused its discretion by concluding that appellant's appeal was not timely filed. This matter is dismissed as it is not yet ripe for review for the reasons previously stated. Once appellee issues an order in compliance with R.C. 119.09, appellant may perfect an

appeal pursuant to R.C. 119.12. *Hughes* at ¶ 19. For these reasons, we sustain appellant's single assignment of error.

IV. CONCLUSION

{¶ 17} Having sustained appellant's single assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas finding appellant's appeal to be untimely and dismiss appellant's appeal on other grounds.

Judgment reversed;
cause dismissed.

KLATT, P.J., and McCORMAC, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).