



# SWAN Legal Services Initiative

## June Legal Report

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## Pennsylvania Commonwealth Court

### **B.B. v. Department of Public Welfare**

Date of Decision: June 10, 2015

Cite: 2022 C.D. 2014

### **Holding:**

Reversed and remanded the decision to deny a request for reconsideration of a *nunc pro tunc* appeal, where the record contained unrefuted evidence supporting an attorney's non-negligent reasons for filing a late appeal.

### **Facts and Procedural Posture:**

B.B. sought review and expungement of an indicated report naming him as a perpetrator of child abuse. Following a review, it was determined that the report was accurate and B.B. was notified of his right to appeal the decision within 45 days<sup>1</sup>. B.B.'s attorney filed an appeal 48 days later. The Department of Human Services (formerly Department of Public Welfare) dismissed the appeal as untimely. B.B. sought an appeal *nunc pro tunc*, and a hearing was held before an administrative law judge (ALJ). At the hearing, B.B.'s attorney testified he filed the appeal late due to emergency eye surgery that did not allow him to return to work for approximately two and a half months. The ALJ recommended the appeal be dismissed as untimely, reasoning that B.B.'s attorney did not provide evidence that his absence from work was due to his eye surgery and therefore did not show the filing delay was caused by non-negligent circumstances beyond his control. The Bureau of Hearings and Appeals adopted the ALJ's recommendation and dismissed the appeal. B.B. sought reconsideration, but was denied and filed an appeal with Pennsylvania's Commonwealth Court.

### **Rationale:**

Citing the Pennsylvania Supreme Court, the court stated that a *nunc pro tunc* appeal may be granted "where an appellant proves that: (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellate or the appellate's counsel; (2) the appellate filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay." Here, B.B.'s attorney testified that emergency eye surgery kept him out of work and was sufficient to raise the inference that he was unable to timely file the appeal due to that medical emergency. No evidence was presented to challenge the inference raised or discredit the attorney's testimony in any way.

<sup>1</sup>The Child Protective Services Law was amended, effective December 31, 2014, extending the filing deadline for requesting an administrative review from 45 to 90 days. 23 Pa. C.S. §6341 (a)(2).

## State Legislation - Act 15 of 2015

Enacted July 1, 2015, effective immediately. Amends the Child Protective Services Law as follows:

- Requires an adult family member 18 years and older who is the person responsible for the child's welfare and provides services for individuals with intellectual disabilities or chronic psychiatric disabilities to report suspected child abuse.
- Requires an individual 14 years of age or older to obtain background check requirements unless they are applying for or holding a paid position as an employee in an internship, externship, work-study, co-op or similar program and the employer identifies an adult employee as their supervisor and that adult is in the immediate vicinity at regular intervals with the child.
- Exempts administrative or other support personnel from the background check requirements unless they have direct contact with children.
- Requires an individual 18 years of age or older who lives at least 30 days in a family living home, a community home for individuals with an intellectual disability or a host home for children be subject to the background check requirements, unless they are receiving services in that home.
- Exempts employees of higher education institutions from the background check requirements if, in the course of their employment, their direct contact with a child is limited to prospective students visiting a campus operated by that institution or matriculated students who are enrolled with the institution.
- Employees ages 14-17 subject to the background check requirements are exempt from the federal criminal history record requirement if they have lived in the state for the last 10 years, and both the individual and the individual's parent or legal guardian provides in writing that the individual is not otherwise disqualified under the statute.
- Employers are prohibited from accepting a certification of background check results obtained when the individual was a volunteer.
- Removes the background check requirements for volunteers who are enrolled in a school, not responsible for the child's welfare, are volunteering for an event that occurs on school grounds, the event is sponsored by the school in which the individual is enrolled and the event is not for children who are in the care of a child-care service.
- Waives fees for state criminal history and child abuse clearance for volunteers.
- Allows for the portability of background check certifications if an individual's certification is still current, and the individual provides in writing they are not otherwise disqualified under the statute.

### Spotlight: The Confrontation Clause and Statements of Abuse

On June 18, 2015, the Supreme Court of the United States decided the criminal case of Ohio v. Clark, 135 S.Ct. 2173 (2015) and provided some clarity regarding the scope of the Confrontation Clause of the Sixth Amendment when statements are made to someone other than police. The Court held that the introduction at trial of statements made by a three-year-old to his preschool teachers, identifying his mother's boyfriend as the person who caused his injuries, did not violate the Confrontation Clause when the child did not testify at trial, because the statements were not made with the primary purpose of creating evidence for prosecution.

Read the full opinion at: [http://www.supremecourt.gov/opinions/14pdf/13-1352\\_ed91.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1352_ed91.pdf)