

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 27, 2015 Session

**EDWIN P. OSBORNE v. TENNESSEE STATE BOARD OF  
ACCOUNTANCY**

**Appeal from the Chancery Court for Davidson County  
No. 14-181-I Claudia C. Bonnyman, Chancellor**

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**No. M2014-01050-COA-R3-CV – Filed March 10, 2015**

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An accountant appeals the dismissal of his petition for judicial review of an order of the Tennessee State Board of Accountancy. The trial court dismissed the petition for review for lack of subject matter jurisdiction. Because we find the petition for review was not timely filed, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Edwin P. Osborne, Knoxville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Associate Solicitor General; and Nicholas G. Barca, Assistant Attorney General, for the appellee, Tennessee State Board of Accountancy.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This appeal relates to a contested-case proceeding under the Uniform Administrative Procedures Act (“APA”) before the Tennessee State Board of Accountancy (the “Board”).<sup>1</sup> Following a hearing on July 27, 2012, the Board found that

Edwin P. Osborne and his firm had violated the Tennessee Accountancy Act of 1998 and rules of the Board, including practicing after the expiration of his license and firm permit and failing to provide proof of peer review. The Board's final order, entered on August 9, 2012, revoked Mr. Osborne's CPA license and his firm's permit and assessed a \$4,000 civil penalty.

Mr. Osborne filed a timely petition for judicial review of the August 9, 2012 final order to the Davidson County Chancery Court. While the matter was pending, the Office of the Attorney General discovered an error in the Board's findings of fact related to the expiration date of Mr. Osborne's CPA license and his firm's permit. The CPA license and firm permit had expired at later dates than originally found by the Board. In light of this information, the chancellor still affirmed the findings of statutory and rule violations but remanded the case for reconsideration of the disciplinary sanctions.

On remand, the Board again revoked Mr. Osborne's CPA license and his firm's permit but reduced the civil penalty to \$3,000. On December 5, 2013, the executive director of the Board signed an order, entitled "Amended Final Order," reflecting the Board's decision. An attorney with the Regulatory Boards Division of the Department of Commerce and Insurance also signed the Amended Final Order certifying that he had served it on Mr. Osborne by mail and e-mail on December 5.

Service did not take place on December 5. The Administrative Procedures Division ("APD") of the Office of the Secretary of State did not enter the Amended Final Order until December 6, and the attorney did not receive it until December 10. Upon receipt, the attorney sent the Amended Final Order to Mr. Osborne by mail and e-mail, but before doing so, he marked out the day of service from the certificate of service and interlined a "10<sup>th</sup>." In a December 10 e-mail to Mr. Osborne, the attorney explained as follows:

FYI, you may note some handwritten changes to the dates in the "Filed with APD" and Certificate of Service" [sic] sections of the Order on page 13. This is because I completed and dropped off the Order with APD in the afternoon on 12/5/13. However, APD did not get around to file-stamping the Order as received until the next day (12/6/13), hence the handwritten change by APD of the filing date from 12/5/13 to 12/6/13. Additionally, APD did not deliver the file-stamped copies of the Order back to me until today (12/10/13), hence the handwritten change to the date in the "Certificate of Service" section of the Order. While none of these changes impact the substance of the Order, I did want to provide you with an explanation for these handwritten date changes on the front end.

Mr. Osborne replied to the e-mail on the same day, asking, “What is the process for obtaining the record?”

On February 10, 2014, Mr. Osborne filed his complaint seeking judicial review of the Amended Final Order. The Board filed a motion to dismiss asserting lack of subject matter jurisdiction because the complaint was untimely. In response, Mr. Osborne argued that the Board failed to comply with the Tennessee Rules of Civil Procedure and the APA, making it impossible to determine the date of entry of the Amended Final Order. Mr. Osborne also alleged that inclement weather during January and early February justified an extension of the time period for seeking judicial review.

The trial court held a hearing on the Board’s motion to dismiss on April 11, 2014. A few days later, Mr. Osborne filed a motion to stay proceedings. As grounds, Mr. Osborne complained the Amended Final Order filed by the Board in support of its motion to dismiss was materially different from the Amended Final Order submitted to the Secretary of State. By order entered on May 2, 2014, the trial court granted the motion to dismiss, and by order entered on May 27, 2014, the trial court denied the motion to stay.

## II. ANALYSIS

The determinative issue here is the timeliness of Mr. Osborne’s complaint seeking judicial review of the Amended Final Order. Under the APA, persons aggrieved by a final decision of an administrative agency must file their petitions for review within sixty days after the entry of the agency’s final order. *See* Tenn. Code Ann. § 4-5-322(b)(1) (2011). “A party’s failure to file a petition for review on or before the statutory deadline prevents the courts from exercising their jurisdiction to review the agency’s decision.” *Davis v. Tenn. Dep’t of Emp’t Sec.*, 23 S.W.3d 304, 307-08 (Tenn. Ct. App. 1999). Because Mr. Osborne’s complaint was filed more than sixty days after entry of the Board’s Amended Final Order, the trial court properly dismissed the complaint for lack of subject matter jurisdiction.

On appeal, citing Tennessee Rule of Civil Procedure 5, Mr. Osborne argues that he was required to be served with the Amended Final Order before it was filed with the Secretary of State. This argument is unavailing. In this case, the Tennessee Rules of Civil Procedure do not control service of the Board’s order because a specific Secretary of State rule addresses the matter. *See* Tenn. Comp. R. & Regs. 1360-04-01-.01(1), (3) (2015) (providing that the Tennessee Rules of Civil Procedure apply in a “situation that is not specifically addressed by these rules”); *see also* *Yokley v. State Bd. of Educ.*, 305 S.W.3d 523, 526 (Tenn. Ct. App. 2009) (“[A]dministrative agencies may use the Tennessee Rules of Civil Procedure for guidance in determining the procedure to follow in situations not specifically addressed by the Department of State rules.” (footnote omitted)). Under the Secretary of State’s rules, the Board is required to “assure that a

copy of the final order with its filing/entry date filled in by the Administrative Procedures Division is mailed to the opposing party.” Tenn. Comp. R. & Regs. 1360-04-01-.19 (2015). We find that the Board complied with this requirement and did so in a manner that allowed Mr. Osborne an opportunity to timely seek judicial review.

Mr. Osborne also argues that dismissal was improper because the Amended Final Order filed in support of the motion to dismiss was different from the Amended Final Order entered by the Secretary of State. None of the differences identified by Mr. Osborne relate to the text of the Amended Final Order, rather they are largely of the administrative type described in the e-mail from the attorney with the Regulatory Boards Division. Like the trial court, we find the differences immaterial. Furthermore, it makes no difference which copy of the Amended Final Order Mr. Osborne received. Any copy of the Amended Final Order shows its date of filing/entry as December 6, 2013, and includes a statement alerting him to the sixty-day deadline. The Board also notified Mr. Osborne by e-mail, which he acknowledged by reply e-mail on December 10, and by letter that the filing date of the Amended Final Order was December 6, 2013.

### **III. CONCLUSION**

We affirm the dismissal of Mr. Osborne’s petition for review and remand the case to the trial court for further proceedings consistent with this opinion.

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W. NEAL McBRAYER, JUDGE