IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-228 / 94-1120

RICK FETTERMAN,

Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Fetterman appeals an order affirming the department of human services' decision to deny his untimely request for expungement of a founded sexual abuse report against him. **AFFIRMED.**

John S. Moeller of O'Brien, Galvin, Moeller & Neary, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Assistant Attorney General, and Mary K. Wickman, Assistant Attorney General, for appellee.

Considered by Hayden, P.J., and Sackett, Habhab, Cady, and Huitink, JJ.

HAYDEN, P.J.

On December 17, 1991, the Iowa Department of Human Services (DHS) issued a founded report of child abuse against Rick Fetterman. The report was based on claims Fetterman had sexually abused his daughter, E.F.

On December 31, 1991, Fetterman participated in a juvenile court proceeding on the State's petition alleging E.F. was a child in need of assistance (CINA). The founded report of child abuse was admitted into evidence at this hearing.

On September 3, 1992, DHS received a request from Fetterman requesting expungement of the child abuse report. He claimed there was insufficient evidence in the report to show he was the perpetrator. DHS denied the request on the ground it was untimely because it was filed more than six months after notice of the report was mailed to him. Iowa Code section 234A.19(2)(a), in pertinent part, provides:

> A subject of a child abuse report may file with the department within six months of the date of the notice of the results of an investigation required by section 232.71, subsection 7, a written statement to the effect that child abuse information referring to the subject is in whole or in part erroneous, and may request a correction of that information or of the findings of the investigation report.

Fetterman appealed the agency's decision to the department of inspections and appeals (DIA), claiming he had not received notice of the report. He claimed he was denied due process because of this failure to provide him with notice. At an administrative hearing, Robert Ameen, a child protective services investigator with DHS, testified he orally notified Fetterman of the result of the report shortly before he

wrote up the report. He also testified normal office procedure would be to mail notice of the report by ordinary mail on the same day the report was issued, here December 17, 1991. Ameen testified Fetterman lived in Sioux City during the investigation and the notice was mailed to this address. He further stated the notice was not returned to DHS by the post office.

Fetterman testified he temporarily moved to Kingsley from December 1991 until February 1992, when he moved back to his original address in Sioux City. He stated his mail was forwarded during this period, and admitted he received other mail which was forwarded from Sioux City. He stated he never received notice of the founded child abuse report. He also claimed the report was not admitted at the CINA proceeding in December 1991. He stated he did not know there was a founded child abuse report against him until June 1992, when he was attending a hearing on the case permanency plan in the CINA case.

DIA issued a proposed decision which affirmed DHS's denial of Fetterman's request for expungement on the grounds it was untimely. The administrative law judge found Fetterman was not credible when he testified he did not learn until June 1992 there was a founded child abuse report against him, and when he testified he did not receive notice of the report. Fetterman sought review of the proposed decision. The director of DHS reviewed the decision and adopted the proposed decision as the final agency action of DHS.

Fetterman then filed a petition for judicial review. The district court found there was substantial evidence in the record to raise a presumption Fetterman received the written notice. The court found Fetterman had not set forth sufficient facts to rebut the presumption he received the notice. The court also found DHS's practice of using ordinary mail to serve notice did not violate the Due Process Clause. The court affirmed the DHS decision. Fetterman appealed.

I. Fetterman contends DHS erred by denying his request for expungement of the founded child abuse report on the ground his request was untimely. He states there was no testimony the notice was actually mailed. He points out Ameen testified he assumed the mailing was done because such mailings were normally done in the ordinary course of business. Fetterman believes this is insufficient to show the notice was mailed to him.

The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 605 (Iowa App. 1990). On appeal, we apply the standards of section 17A.19(8) to assess whether our conclusions coincide with those reached by the district court. *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991).

We will reverse an agency decision in a contested case if it is unsupported by substantial evidence made before the agency when viewed as a whole. *Abel v. Iowa*

Dep't of Personnel, 472 N.W 2d 281, 283 (Iowa 1991). Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434, 435 (Iowa 1993).

Proof a document was properly mailed raises a presumption it was received. *Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 870 (Iowa 1987). To establish the presumption it was received, evidence must be introduced of the following six points:

1) Of the contents and execution of the paper;
2) It was enclosed in a wrapper or otherwise prepared for transmission through the mail;
3) Of the correct address of the person to receive it;
4) The wrapper was properly addressed;
5) The postage was prepaid; and
6) The article was deposited in the mail.

Public Fin. Co. v. Van Blaricome, 324 N.W.2d 716, 718-19 (quoting *Central Trust Co. v. City of Des Moines*, 205 Iowa 742, 746, 218 N.W. 580, 582 (1928)).

Proof of office custom is sufficient, absent proof to the contrary, to raise a presumption notices were mailed. *Liberty Mut. Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 859 (Iowa 1984). Under the office custom doctrine, the party seeking to establish the presumption must show the custom of the business as to their mailing procedure. ***Budget Premium** Co. v. Motor Ways, Inc.*, 400 N.W.2d 60, 65 (Iowa App. 1986). Evidence of a party's general practice regarding notification is not sufficient where there is no evidence of office custom. *Id.*

We determine there was sufficient evidence in the present case of office custom at DHS as to mailing procedure to raise a presumption the notice was mailed to Fetterman. This also raises a presumption the mail was received. Ameen testified the mail clerk picked up the mail and delivered it to the post office.

We also determine Fetterman failed to present sufficient proof to the contrary to rebut the presumption the notice was mailed. Because Fetterman's mail was forwarded from his Sioux City address, the fact he was not living at this address does not rebut the presumption the mail was sent to the correct address. Fetterman does not claim DHS should have known of his new address in Kingsley.

We conclude Fetterman's request for expungement of the founded child abuse report was untimely because it was received more than six months after Fetterman received notice of the founded child abuse report.

II. Fetterman claims the method used by DHS to transmit written notice of the result of a child abuse investigation failed to satisfy the requirements of due process. He believes notice by ordinary mail is a per se violation of his right to due process. Fetterman states notice by certified mail should be required.

The United States Supreme Court has stated due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Greene v. Lindsey*, 456 U.S. 444, 449-450, 102 S. Ct. 1874, 1878, 72 L. Ed. 2d 249,

255 (1982). Our supreme court has stated notice by ordinary mail and publication comports with the constitutional requirements of due process. *Hicks v. Franklin County Auditor*, 514 N.W 2d 431, 436 (Iowa 1994).

> We note our United States Supreme Court stated in *Greene* as follows.
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> > As noted by the Court of Appeals, and as we noted in *Mullane*, the mails provide an "efficient and inexpensive means of communication," upon which prudent men will ordinarily rely in the conduct of important affairs. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy. Particularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may be relied upon to provide interested persons with actual notice of judicial proceedings. We need not go so far as to insist that in order to "dispense with personal service the substitute that is most likely to reach the defendant is the least that out to be required," in order to recognize that where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued reliance on an ineffective means of service is not "reasonably calculated to reach those who could easily be reached by other means at hand."

Greene, 456 U.S. at 455, 102 S. Ct. at 1880, 72 L. Ed. 2d at 258. We observe the Supreme Court says service by mail is not per se violative of due process.

Here the Iowa Department of Human Services informed Fetterman of the results of the child abuse investigation and of his rights to appeal it orally and in writing.

We determine being told verbally and also in writing by ordinary mail does not violate Fetterman's due process rights.

We affirm the decision of the district court and the department of human services. Costs of appeal are assessed to Fetterman.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I dissent. I would find Fetterman is entitled to a hearing on his request for expungement of the child abuse report. Fetterman requested a hearing contending a founded child abuse report naming him as a perpetrator should be expunged. He has been denied a hearing. The majority has affirmed, finding the testimony a Department of Human Services worker orally notified Fetterman, coupled with testimony the normal office procedure is to mail a copy of the report on the day it is issued, are sufficient to meet due process requirements.

Iowa Code section 232.71(7) as to the manner of notice to a person or persons who are investigated of child abuse says:

> The department shall notify a subject of the report of the result of the investigation, of the subject's right to correct the information pursuant to section 235A.19, and of the procedures to correct the information. The juvenile court shall notify the registry of any action it takes with respect to a suspected case of child abuse.

The majority opinion holds compliance with notice is met if the department says they have a general office practice of mailing notices by ordinary mail. First, I disagree with the majority that mailing by ordinary mail meets due process requirements in this case, where Fetterman is losing a number of personal rights by being registered as a child abuser. This clearly distinguishes these facts from *Greene v. Lindsey*, 456 U.S. 444, 449-50, 102 S. Ct. 1874, 1878, 72 L. Ed. 2d 249, 255 (1982) and *Hicks v. Franklin County Auditor*, 514 N.W.2d 431, 436 (Iowa 1994).

Secondly, while proof of custom of mailing may be sufficient for some purposes, I disagree with the majority proof of custom of mailing by ordinary mail is sufficient to meet due process requirement.