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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-424 / 88-944

DON BURGMAIER,

Appellant,

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vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Appellant was named in a child abuse report in November 1985. Two years later he asked the Department of Human Services (DHS) to correct the report. DHS denied the request on the ground it was not made within six months as provided by Iowa Code section 235A.19(2). On judicial review the district court affirmed the department's decision. Appellant appeals, claiming: 1) he did not receive adequate notice of the report, which denied him an opportunity to contest the report; and 2) the State did not grant him a fair hearing prior to listing him as a child abuser. **REVERSED AND REMANDED.**

Don Burgmaier, Des Moines, pro se.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Katherine S. Miller-Todd, Assistant Attorney General, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

On October 24, 1985, a report alleging the abuse of two children was received by the Department of Human Services (DHS). Appellant was implicated in that report. A preliminary report was prepared on October 28, 1985. A final report was completed on November 6, 1985.

On November 4, 1987, DHS received appellant's request for correction and expungement of information contained in the child abuse information registry pursuant to section 235A.19(2) (1987). Contending appellant's request was not timely received, DHS declined to grant him a hearing on his claim.

Section 232.71(7) provides DHS must inform the subject of a child abuse investigation of the results of the investigation. A person has six months from notice of the results to seek correction or expungement of information contained in the child abuse registry. Iowa Code § 235A.19(2) (1987). DHS claims appellant received his section 232.71(7) notice in November 1985 and thus his November 1987 request for expungement was untimely.

Appellant appealed the department's decision, and a hearing was held on January 5, 1988. The hearing officer rendered her proposed decision on January 13, 1985. In affirming the agency's decision that appellant's request was barred by the six-month statute of limitations in section 235A.19(2), the hearing officer made the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 6, 1985, abuse report #A3673 was filed with the central child abuse registry naming the appellant as a person responsible for abuse.

2. On November 6, 1985, Mandatory Notification of the abuse report was sent to the appellant at RR 1, Creston, Ia. 50801. The worker testified that she did not talk to the appellant at the time because he was in the hospital and she was not allowed to.

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4. In November 1985, a court hearing was held. Much of the court hearing dealt with the contents of the abuse report. The court order was dated November 25, 1985.

CONCLUSIONS OF LAW

Although the appellant was unavailable to be notified orally of the abuse report when it was filed, the attempt was obviously made since the worker knew he was in the hospital and she could not talk to him. He would have received information concerning the report and its contents during the court hearing held the same month.

The department issued a written notice as was required by its rules. That notice was not returned to the department as being undeliverable. There is no indication that there were any problems concerning mail delivery at the time the notice was mailed. In order to operate a business, certain assumptions must be made for the sake of administrative efficiency. Absent evidence to the contrary, it must be assumed that an item that is mailed is received by the addressee.

* * *

The hearing officer finds that the department properly notified the appellant of the abuse report. He did not request correction of the report within six months of that notification. The action to deny review of the report was correct and is AFFIRMED. (Emphasis added.)

The hearing officer's proposed decision was adopted as the agency's final decision on February 15, 1988. Appellant then sought judicial review before the district court. Finding the agency's decision to be supported by substantial evidence, the district court affirmed it on June 7, 1988. Appellant now appeals the district court's decision. He contends the record does not support a finding that he received notice as required by section 232.71(7).

I. **Scope of Review.** The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is whether the district court correctly applied the law. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983). In order to make that determination, we apply the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

II. **Applicable Law.** At issue in this case is whether appellant received the statutorily-required notice of his right to expunge or correct information contained in the

central registry. Two statutes and one administrative rule are relevant to this matter. In 1985, our legislature amended the child abuse and investigation statutes to require DHS to notify the subject of a report of the results of an investigation.

> **Duties of the department upon receipt of report.** . . . 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.

Iowa Code § 232.71(7) (1987).

The same 1985 legislation which required mandatory notice to the subject of a report also implemented a six-month limitation upon requests to correct information.

> **Examination, requests for correction or expungement and appeal.** . . . A person 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 person is in whole or in part erroneous, and may request a correction of that information or of the findings of the investigation report. The department shall provide the person with an opportunity for an evidentiary hearing pursuant to chapter 17A to correct the information or the findings, unless the department corrects the information or findings as requested.

Iowa Code § 235A.19(2) (1987). We have recognized this legislation was intended to provide a greater opportunity for persons accused of child abuse to correct any adverse findings. Montgomery v. Iowa Dept. of Human Services, 409 N.W.2d 703, 706 (Iowa App. 1987).

Section 232.71(7) requires notification of the subject of a report; the department's administrative rules set forth the types of notice which are required.

> **Required notification.** . . . [T]he department shall: . . . Notify orally the subject of a report of the results of the case investigation. The department shall subsequently transmit a written notice to the subject which will include information regarding the results, the confidentiality provisions of Iowa Code sections 235A.15 and 235A.21, and the procedures for correction or expungement and appeal of child abuse information as provided in Iowa Code section 235A.19.

441 Iowa Admin. Code 175.14(2).

III. Notice. The agency decision rendered in this case is flawed in two respects. The hearing officer relied on the erroneous assumption that a mailed notice is assumed to be received. The officer also erred in concluding substantial evidence existed from which it could be concluded appellant received his notice in November 1985. We address the issue of the adequacy of mailed notices first.

The statute in question requires that the department "shall notify" a subject of a child abuse report of the results of an investigation. Iowa Code § 232.71(7) (1987). The department's rules specify the department is to "notify orally" the subject of an investigation's report, and it is to "subsequently transmit a written

notice to the subject." 441 Iowa Admin. Code 175.14(2).[1] A review of our case law reveals when notice must be given but no method is prescribed, the notice must be a reasonable one under the circumstances. It must afford a fair opportunity to appear and object. Buchholz v. Board of Adjustment, 199 N.W.2d 73, 77 (Iowa 1972). "Where a statute or rule merely states that written notice shall be given, ordinarily mailing a notice is not alone sufficient; the notice must be received." Liberty Mutual Ins. Co. v. Caterpillar Tractor Co., 353 N.W.2d 854, 857 (Iowa 1984). See also Flanders v. Waterloo Community School District, 217 N.W.2d 579, 582 (Iowa 1974) (when statute does not specify means of delivery, method of transmission is not important but receipt is essential); Eves v. Iowa Employment Security Comm'n, 211 N.W.2d 324, 327 (Iowa 1973) (when statute does not specify and notice is served by mail it is not effected until received). When a statute or rule does specify notice may be given by mail, service may be

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1. DHS concedes it did not give oral notification to appellant as required by its own rule. Violation of an agency rule is a basis for reversing an agency decision. Iowa Code § 17A.19(8)(c) (1987). Social Worker Mary Jones testified she was not able to give oral notice to appellant because he was hospitalized and she was not allowed to visit him. Appellant offered no evidence before the agency to refute this claim. We decline to address whether circumstances may justify a failure by DHS to give oral notice, because the record in this case reveals DHS gave appellant neither oral nor written notice. Such a complete failure to comply with agency rules warrants reversal in this case.

accomplished by depositing the properly addressed and stamped notice in the mail. Liberty Mutual, 353 N.W.2d at 857.

The statute and rule applicable to this case do not specify how the written notice was to be transmitted to appellant. Relying on Liberty Mutual, mailing of the notice alone was not sufficient in this case; it had to be received. The hearing officer's presumption that a notice which was mailed is assumed to be received was clearly in error.

Putting aside the incorrect presumption that mailed notice is notice received, a review of the record reveals substantial evidence did not exist to prove notice was transmitted to appellant. Appellant testified he never received the notice. The social worker who prepared the report testified she completed the mandatory notification form (the form is in triplicate with white, yellow, and pink copies) and gave it to her secretary to mail. Her secretary testified with regard to the notice and explained the regular procedures she follows in preparing and mailing such notices and how she handles undeliverable notices. She stated she did not recall any problem with appellant's notice not being deliverable; however, she never testified that she specifically remembered mailing appellant's notice. The record reveals DHS retained a pink copy of the notice in its case file.

DHS had the burden to prove appellant received his notice, and it could not rely on the mere assertion that the notice was mailed. Completely undercutting DHS's claim that it mailed a notice to appellant in November 1985 is the fact that the notification form contained in the central registry for child abuse information is dated December 10, 1987.[2] DHS is required to send a copy of its report to the registry. Iowa Code § 232.71(8) (1987). If DHS failed to send a copy of the notification form to the registry for over two years (the report was completed November 6, 1985, but the notification form was file-stamped December 10, 1987, at the registry), then it becomes less plausible it mailed appellant his notification in November 1985. The hearing officer did not appear to note this discrepancy, but we are aware of it and we find it most persuasive. DHS was required by law to inform appellant of the report's results and to send a copy of the report to the registry. DHS utilized a triplicate notification form which designated the white copy was to be sent to the appellant and the yellow to the registry. The registry did not receive its copy until December 1987

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2. For an inexplicable reason, DHS suggests in its brief that the file-stamped copy of the central abuse registry notification form found on page eleven of the appendix was not a part of the administrative record. It was in fact exhibit "D" submitted by DHS during the administrative hearing.

(shortly after appellant began these proceedings). DHS offers no explanation in its brief as to why the central registry did not receive its copy in November 1985.

We are cognizant of the fact that the notice requirements became effective July 1, 1985, and administrative rules regarding the requirements became effective November 1, 1985. At the time appellant was entitled to notice, DHS was probably implementing new notice procedures as required by the statutes and rules. However, DHS was bound to provide appellant with written notice of his right to expunge or correct the central registry's records, and the "newness" of the notice requirements does not excuse its failure to do so. In light of appellant's testimony and the delay in the registry's receipt of the report, substantial evidence does not exist to prove DHS gave appellant the statutorily-required notice.

The hearing officer in its decision and DHS in its brief allude to appellant's presence at the CHINA hearing in November 1985 and his receipt of copies of DHS's reports in February and August 1987 and suggest he had "constructive notice" of the report's contents even if he did not receive actual notification pursuant to Iowa Code section 232.71(7) and 441 Iowa Administrative Code 175.14(2). The purpose of the notification required by section 232.71(7) is to inform appellant of his right to

correct the registry's information. Notice of the report's contents, which detail the allegations of child abuse lodged against him, does not suffice to ensure appellant has notice of his rights pursuant to section 235A.19(2). A "constructive notice" analysis is not applicable in this case. We reverse the decision of the district court and remand to the agency for a hearing as set forth in section 235A.19(2).

Appellant's brief contains a second argument in addition to his claim that he did not receive notice. He contends the State did not grant him a fair hearing prior to listing him as a child abuser. Similar claims predicated on due process, the right of privacy, and equal protection were rejected in Roth v. Reagen, 422 N.W.2d 464, 467-69 (Iowa 1988). As appellant cites no authority for his position, we deem the issue to be waived. Iowa R. App. P. 14(a)(3).

REVERSED AND REMANDED.