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District Court of Appeal of Florida,
First District.

DEPARTMENT OF REVENUE, Appellant,
v.
Syndi VANAMBURG and Alejandro Jesus Ramirez, Appellees.

No. 1D15–753. | Sept. 21, 2015.

An appeal from an order of the Department of Revenue.

Attorneys and Law Firms

Pamela Jo Bondi, Attorney General, and Toni C. Bernstein, Senior Assistant Attorney General, Tallahassee, for Appellant.

No Appearance for Appellees.

Opinion

PER CURIAM.

***1** Appellant, the Department of Revenue, appeals the Order Denying Motion for Rehearing but Granting in Part Motion to Amend Final Administrative Paternity and Support Order and the Amended Final Administrative Paternity and Support Order. Appellant argues that the administrative law judge ("ALJ") who entered both orders lacked jurisdiction to do so given that Appellant filed a notice of appeal after filing its motion for rehearing but before the ALJ ruled on the motion. We agree and, therefore, quash both orders.

In August 2014, the ALJ entered a Final Administrative Paternity and Support Order, ordering Appellee Alejandro Jesus Ramirez to pay child support. In October 2014, Appellant filed a motion for rehearing with the Division of Administrative Hearings ("DOAH"), arguing that the ALJ mistakenly stated in the support order that Appellee did not appear at the hearing and that the order incorrectly stated what the ALJ found Appellee's actual income to be. Appellant also challenged the issues of imputation of income, credit for time with the parties' child, and retroactive child support. Later in October 2014, Appellant filed a notice of appeal as to the ALJ's support order. On January 12, 2015, we received the record in the appeal.

On January 22, 2015, the ALJ entered the Order Denying Motion for Rehearing but Granting in Part Motion to Amend Final Administrative Paternity and Support Order. After noting that neither the statutes nor DOAH's rules authorized the filing of motions for rehearing in the administrative context, the ALJ treated Appellant's motion as a motion to amend the support order. The ALJ set forth in part, "Since the undersigned is in agreement that the [support order] contains errors that should be corrected, the motion *sub judice* is being considered by the undersigned as a motion to amend the [support order]." The ALJ agreed with Appellant that the support order incorrectly stated that Appellee did not appear at the final hearing and that the order reflected Appellee's actual, rather than imputed, income. The ALJ declined to amend the support order as to the issues of whether Florida's minimum wage should have been imputed rather than federal minimum wage, credit for time spent with the parties' child, and retroactive child support. The ALJ entered the Amended Final Administrative Paternity and Support Order wherein he made the two corrections referred to in the order on the motion for rehearing. This appeal followed.

Appellant contends that the ALJ lacked jurisdiction to rule on the motion for rehearing given that the underlying order had been appealed. " 'An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction.' " *Dep't of Revenue ex rel. Smith v. Selles*, 47 So.3d 916, 918 (Fla. 1st DCA 2010) (citation omitted). Whether a lower tribunal has subject matter jurisdiction is a question of law that is reviewable de novo. *Id.* Lack of subject matter jurisdiction may be raised for the first time on appeal. *Id.* Subject matter jurisdiction may not be conferred upon the lower tribunal by the parties' consent or by their acquiescence. *Id.; see also Pomeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So.3d 1182, 1183 (Fla. 4th DCA 2014) (noting that the voluntary dismissal ended the trial court's jurisdiction and granting the petition for writ of prohibition "as the trial court is without subject matter jurisdiction over the motion [for sanctions]").

***2** The ALJ correctly determined that a motion for rehearing is not authorized in the context of the administrative establishment of child support obligations

under section 409.2563, Florida Statutes. *See, e.g., City of Palm Bay v. Palm Bay Greens, LLC,* 969 So.2d 1187, 1190 (Fla. 5th DCA 2007) ("A motion for rehearing does not suspend rendition of an administrative order because rehearing is not authorized in administrative proceedings."). Moreover, by filing a notice of appeal prior to obtaining a ruling on the motion for rehearing, Appellant abandoned its motion. Florida Rule of Appellate Procedure 9.020(i)(3) (2014) provided that if a motion for rehearing or a motion to alter or amend, among other post-judgment motions, is filed "and a notice of appeal is filed before the filing of a signed, written order disposing of all such motions, all motions filed by the appealing party that are pending at the time shall be deemed abandoned, and the final order shall be deemed rendered by the filing of the notice of appeal."[1] *See Johnson v. State,* 154 So.3d 1184, 1185 (Fla. 4th DCA 2015) (" '[A] party abandons previously filed post-final judgment motions when he files a notice of appeal to review that very judgment.' ") (Citing *In re Forfeiture of $104,591 in U.S. Currency,* 589 So.2d 283, 285 (Fla.1991)).

As for the ALJ's treatment of Appellant's motion for rehearing as a motion to amend, the ALJ cited *Taylor v. Department of Professional Regulation, Board of Medical Examiners,* 520 So.2d 557 (Fla.1988), as authority. In *Taylor,* the supreme court addressed our certified question of whether "an administrative agency exercising its quasi-judicial power in a license revocation proceeding ha[s] the inherent authority to change or modify its final order within a reasonable time after filing it so that the time for taking an appeal begins to run from the date of filing the amended order." *Id.* at 558. The supreme court answered the question in the affirmative but "emphasize[d] that it applies only to clerical errors or inadvertent mistakes in an agency order." *Id.* The supreme court explained that the appellant, whose medical license was suspended, notified the Board of Medical Examiners that while its order contained a five-year probationary term, the Board had decided at the hearing on a three-year probationary term. *Id.* In response to the appellant's letter, the Board filed a new order entitled "Amended Final Order," correcting the length of probation. *Id.* Thereafter, the appellant filed a notice of appeal, and we granted the Department of Professional Regulation's motion to dismiss, noting that no statute or rule authorized the filing of a motion for rehearing that tolls the time for appealing the Board's final order and that there was no express authority by statute or rule that authorized an agency to retain jurisdiction over its final order, once filed, so as to permit the agency to withdraw the order or change or modify it. *Id.* at 559. In disagreeing with our decision, the supreme court set forth in part:

> ***3** It is important to emphasize that this case does not involve a petition for rehearing or reconsideration, situations in which a party is seeking to change the administrative decision. In this instance, the aggrieved party seeks only to have the amended order correct an admitted substantive error in the original order to accurately reflect the decision of the board.
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> **...**
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> The proper motion to correct mistakes brought about by inadvertence or clerical error is a motion to alter or amend, not a motion for rehearing. We are not addressing, under the factual circumstances of this case, the authority of administrative agencies to rehear or reconsider their orders in the absence of a specific authorization by statute or rule.... Rather, we are considering the inherent power of an agency to correct clerical errors and errors arising from mistake or inadvertence in its own orders. All parties to this proceeding agree that agencies possess the inherent power to correct these types of errors. This Court has previously established the principle that an administrative tribunal, exercising quasi-judicial powers, enjoys the inherent authority to correct its own orders which contain clerical errors and errors arising from mistake or inadvertence.... We do not find that this inherent authority of an administrative agency to modify its order to accurately reflect the truth in any way adversely affects the doctrine of administrative finality, particularly when the request for correction of the error is made within thirty days of the entry of the order. Here, there is no dispute that an error has been made.
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> *Id.* at 559–60.

The problem with the ALJ's reliance upon *Taylor* and his correction of two errors contained in the initial support order is that Florida Rule of Appellate Procedure 9.600(a), entitled "Concurrent Jurisdiction," provides:

> Only the court may grant an extension of time for any act required by these rules. Before the record is docketed, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court, provided that clerical mistakes in judgments, decrees, or other parts of the record

> arising from oversight or omission may be corrected by the lower tribunal on its own initiative after notice or on motion of any party before the record is docketed in the court, and, thereafter with leave of the court.

Florida Rule of Appellate Procedure 9.190(a) provides that "[j]udicial review of administrative action shall be as in civil cases except as specifically modified by this rule." Because nothing in rule 9.190 addresses concurrent jurisdiction, rule 9.600(a) applies in this case. Thus, the ALJ lacked jurisdiction to make the two corrections given that the record in Appellant's appeal from the initial support order was filed prior to the ALJ's ruling and given that no leave of this Court was requested and granted. We, therefore, quash the Order Denying Motion for Rehearing but Granting in Part Motion to Amend Final Administrative Paternity and Support Order and the Amended Final Administrative Paternity and Support Order. *See 14302 Marina San Pablo Place SPE, LLC v. VCP–San Pablo, Ltd.*, 92 So.3d 320, 320 (Fla. 1st DCA 2012) (quashing the order on appeal where the trial court lacked jurisdiction to enter the order); *Wilkinson v. Clarke*, 91 So.3d 897, 898 (Fla. 2d DCA 2012) (holding that the judgment was entered without jurisdiction and was, therefore, a nullity).

***4** ORDERS QUASHED.

LEWIS and MAKAR, JJ., CONCUR; WETHERELL, J., concurs with opinion.

WETHERELL, J., concurring.

I agree that the orders on appeal must be quashed because the Administrative Law Judge (ALJ) lacked jurisdiction to rule on the motion for rehearing filed by the Department of Revenue (DOR) after DOR appealed the original final administrative paternity and support order (FAPSO) to this court. However, to be fair to the ALJ, he likely did not know that the FAPSO was on appeal when he ruled on the motion for rehearing and entered the amended FAPSO.

Although ALJs have final order authority in administrative paternity and child support cases, the FAPSO is actually rendered by DOR. *See* § 409.256(11)(a), Fla. Stat. (2014). As a result, when a FAPSO is appealed, the notice of appeal is filed with DOR, not the Division of Administrative Hearings (DOAH). *See* Fla. R.App. P. 9.110(c) (requiring the notice of appeal to be filed with the clerk of the "lower administrative tribunal") *and* Fla. R.App. P. 9.020(e) (defining "lower tribunal" as the "agency ... whose order is to be reviewed"). There is no requirement that a copy of the notice of appeal be served on DOAH or the ALJ, and unlike other cases in which ALJs have final order authority (*e.g.*, rule challenges under section 120.56, Florida Statutes), the DOAH clerk is not responsible for preparing and transmitting the record when a FAPSO is appealed. *See* Fla. R.App. P. 9.200(d) (requiring the "clerk of the lower tribunal" to prepare and transmit the record) *and* Fla. R.App. P. 9.020(e) (defining "lower tribunal" as the "agency ... whose order is to be reviewed"). Accordingly, the ALJ will likely have no idea that one of his or her FAPSOs has been appealed until the appellate court issues its opinion.

Here, the original FAPSO was entered by the ALJ on the same day as the final hearing, August 7, 2014, but it was not rendered until September 26, 2014, when it was filed with the DOR clerk.[2] The next record activity occurred on October 6, 2014, when DOR's appellate counsel filed a limited-purpose notice of appearance and a motion for rehearing at DOAH. The motion for rehearing identified two clerical errors in the FAPSO and it also challenged several of the substantive rulings in the FAPSO. The motion stated that a transcript of the final hearing was being prepared and that it would be filed with DOAH, thereby implying that the motion would not be ripe for a ruling until the transcript was filed.

No further record activity occurred at DOAH until January 21, 2015, when DOR's appellate counsel filed the final hearing transcript as promised in the motion for rehearing. This filing triggered the ALJ to rule on the motion for rehearing, which he did the following day by entering an "Order Denying Motion for Rehearing but Granting in Part Motion to Amend Final Administrative Paternity and Support Order" along with an amended FAPSO. However, unbeknownst to the ALJ at the time these orders were entered, the original FAPSO had been on appeal for several months and the record had been filed with this court.

***5** As the majority explains, the moment DOR filed its notice of appeal, it was deemed to have abandoned its motion for rehearing and the ALJ was divested of jurisdiction to rule on the motion. *Cf.* Fla. R.App. P. 9.020(i)(3) (2014).[3] And, once the record was filed with this court, the ALJ lost jurisdiction to even correct the clerical errors in the original FAPSO. *See* Fla. R.App. P.

9.600(a). The fact that the ALJ was likely unaware of the appeal has no legal bearing on his lack of jurisdiction to rule on the motion.

That said, it is hard to fault the ALJ for ruling on the motion for rehearing because, by filing the promised final hearing transcript with DOAH, DOR gave the ALJ every indication that it was still pursuing its motion for rehearing despite the fact that it had abandoned the motion by operation of law several months prior when it appealed the original FAPSO to this court. Had DOR's appellate counsel simply informed the ALJ that the FAPSO was on appeal, it is likely that the learned ALJ would have recognized that he lacked jurisdiction to rule on the motion for rehearing and he would not have wasted his time and effort in ruling on the merits of the motion.[4] Presumably, counsel's failure to advise the ALJ of the pending appeal was simply an oversight, and hopefully, counsel and/or the DOR clerk will implement appropriate procedures to ensure that this does not happen again.

With these observations, I fully concur in the majority opinion quashing the order entered by the ALJ on the motion for rehearing and the amended FAPSO. The practical and legal effect of this disposition, coupled with DOR's voluntary dismissal of its appeal of the original FAPSO, is that the original FAPSO remains in effect.

All Citations

--- So.3d ----, 2015 WL 5512955

Footnotes

1 Effective January 1, 2015, rule 9.020(i)(3) was amended to provide that if an "authorized and timely motion for new trial, for rehearing, for certification, to alter or amend, for judgment in accordance with prior motion for directed verdict ..." has been filed and a "notice of appeal is filed before the filing of a signed, written order disposing of all such motions, the appeal shall be held in abeyance until the filing of a signed, written order disposing of the last such motion." *See In re Amendments to Fla. Rules of Appellate Procedure,* No. SC14–227, 2014 WL 5714099, at *2 (Fla. Nov. 6, 2014) (noting that the amendment eliminated the language that post-judgment motions are abandoned upon the filing of a notice of appeal).

2 The record does not explain the reason for this delay.

3 Technically, this rule does not apply in these circumstances because the rule refers to "authorized" post-judgment motions that toll rendition of the underlying final order and, as the majority explains, DOR's motion for rehearing was not such a motion. However, the principle embodied in the rule—that, by filing an appeal, the appellant abandons any post-judgment motions—does apply.

4 Interestingly, DOR voluntarily dismissed its appeal of the original FAPSO on February 3, 2015, less than two weeks after the ALJ entered the order on the motion for rehearing. In that order, the ALJ explained in detail why the substantive issues raised by DOR in its motion for rehearing lacked merit. If, as it appears, DOR reconsidered its decision to appeal the original FAPSO based on the explanation provided by the ALJ in the order denying the motion for rehearing, then the time and effort spent by the ALJ ruling on the motion was not completely wasted.