

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of LMD Integrated	:	
Logistic Services, Inc. Notice of Apparent	:	
Violation and Intent to Assess Forfeiture,	:	
Appellant,	:	No. 15AP-545
	:	(PUCO No. 14-685-TR-CVF)
v.	:	
	:	(REGULAR CALENDAR)
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MEMORANDUM DECISION

Rendered on September 15, 2015

*AldenLaw, John L. Alden and Brian L. Shaw, for appellant.**Michael DeWine, Attorney General, William L. Wright and Ryan P. O'Rourke, for appellee.*

ON MOTION TO DISMISS

TYACK, J.

{¶ 1} We do not see merit in the motion to dismiss this appeal filed by the Public Utilities Commission of Ohio ("PUCO"). Counsel for PUCO argues that PUCO must file an appeal with itself in some situations, namely when it is the appealing party. That is nonsensical.

{¶ 2} Further, the Ohio Rules of Appellate Procedure imply that administrative appeals are initiated by the filing in a court. The applicable statute, R.C. 4923.99, calls for service of the notice of appeal on the chairperson of PUCO or upon another commissioner if the chairperson is absent. The third option mentioned in R.C. 4923.99(D) is simply leaving a copy of the appeal with PUCO's office in Columbus. R.C. 4923.99(D) is quite specific on this issue but does not say the notice of appeal shall be filed with PUCO.

Instead, it says the notice of appeal shall be served on the itemized persons or left at the office. Thus, R.C. 4923.99 seems to contemplate that the notice of appeal should be filed with the Tenth District Court of Appeals and then served on the stated persons or left at the PUCO office in Columbus. That occurred here.

{¶ 3} As a result of the above, PUCO's motion to dismiss this appeal is denied.

Motion to dismiss appeal denied.

HORTON, J., concurs.

SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 4} Because I believe that the notice of appeal filed by LMD with this court does not suffice to initiate an administrative appeal from an order of the commission, I must respectfully dissent.

{¶ 5} The commission determined that LMD, a commercial motor carrier, violated certain hazardous material regulations when transporting a chemical shipment. The commission imposed a \$1,680 civil forfeiture. LMD attempted to initiate an appeal pursuant to R.C. 4923.99 by filing a notice of appeal with the clerk of this court. While LMD did serve the commission's chairperson with a copy of the notice, LMD did not file a notice of appeal with the commission's docketing division. I would hold that this failure to file an original notice of appeal with the commission means that the appeal has not been perfected under the pertinent statutes and should be dismissed for lack of jurisdiction.

{¶ 6} R.C. 4923.99 governs imposition of compliance or forfeiture orders by the commission. R.C. 4923.99(C) and (D) govern appeals to this court from such orders:

(C) The court of appeals of Franklin county has exclusive, original jurisdiction to review, modify, or vacate an order of the commission issued to secure compliance with any provision of Chapter 4921. or 4923. of the Revised Code. * * * Such appeals may be taken either by the commission or the person to whom the compliance order or forfeiture assessment was issued and shall proceed as in the case of appeals in civil actions as provided in the rules of appellate procedure and Chapter 2505. of the Revised Code.

(D) Any person to whom [a compliance or forfeiture order] is issued who wishes to contest [the] compliance order, the fact of the violation, or the amount of the forfeiture shall file a notice of appeal, setting forth the order appealed from and the errors complained of, within sixty days after the entry of the order upon the journal of the commission. The notice of appeal shall be served, unless waived, upon the chairperson of the commission * * *. An order issued by the commission to secure compliance * * * or an order * * * assessing a forfeiture shall be reversed, vacated, or modified on appeal if, upon consideration of the record, the court is of the opinion that the order was unlawful or unreasonable.

{¶ 7} Neither R.C. 4923.99(C) nor (D) explicitly states where the notice of appeal from a commission order must be filed. Subsection (C), however, does specify that such appeals will proceed before this court "as provided in the rules of appellate procedure and Chapter 2505 of the Revised Code." App.R. 3(A) provides that an appeal as of right commences with the filing of a notice of appeal with the clerk of the trial court. R.C. 2505.04 provides that an appeal is perfected when a notice of appeal is filed in compliance with App.R. 3, "or, in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved."

{¶ 8} Applying the language of R.C. 4923.99(C) and (D), App.R. 3(A), R.C. 2505.04, and pertinent commission regulations, the requirements for initiating an appeal to this court from an order of the commission are, first, the filing within 60 days of the commission's order of a notice of appeal *with the commission* in the place and manner set forth in Ohio Adm.Code 4901-1-02 (the commission's procedural regulations governing docketing) and, second, service of that notice upon the chairperson of the commission.

{¶ 9} I conclude that LMD did not comply with these requirements because LMD attempted to initiate the appeal by filing its only notice of appeal directly with this court and failed to file the required notice with the commission. None of the controlling law contemplates the initiation of an appeal from the commission solely by this means. In fact, no other form of appeal to this court, whether civil, criminal, or administrative, commences with a notice of appeal filed solely with the appellate court. Appeals commence with a notice of appeal filed with the clerk of the "trial court" (Ohio Court of

Claims, court of common pleas, or municipal court) pursuant to App.R. 3, or with filing of a notice of appeal with the administrative agency issuing the order appealed from, sometimes accompanied by the requirement that a copy of the notice of appeal be filed with this court. *See, e.g.*, R.C. 5717.04 (appeals from the Board of Tax Appeals to the Tenth District Court of Appeals); *see also*, R.C. 119.12 (administrative appeals to the court of common pleas and subsequent appeals to this court).

{¶ 10} "[W]hen the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute." *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, ¶ 14. This court has stated that "Chapter 2505 establishes a catch-all series of procedural rules regarding the manner for filing administrative appeals in the absence of other applicable statutes." *Deaconess Hosp. v. Ohio Dept. of Job & Family Servs.*, 10th Dist No. 11AP-259, 2012-Ohio-95, ¶ 13. Where such a notice of appeal is not timely filed with the administrative agency, this court lacks jurisdiction to decide the merits and must dismiss the appeal. *Id.* at ¶ 16.

{¶ 11} In my view, this appeal has not been perfected under the applicable statutes and should be dismissed for lack of jurisdiction. Accordingly, I respectfully dissent.

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Summary: Memorandum Decision Rendered on September 15, 2015 denying PUCO's Motion to Dismiss in Case No. 15AP-545, Court of Appeals for the Tenth Appellate District.
electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio