IN THE SUPREME COURT OF TEXAS

NO. 02-0728

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES, PETITIONER

v.

MEGA CHILD CARE, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued on September 11, 2003

JUSTICE OWEN, concurring.

I join the Court's judgment and most of what it has written. I write separately because although section 42.072[1] is not a model of clarity, it is not "silent" regarding judicial review. It does provide for judicial review.

The Department of Protective and Regulatory Services revoked Mega's license in 1998. A hearing was held before an Administrative Law Judge in the State Office of Administrative Hearings, and an ALJ sustained the Department's ruling. Mega sought review in a Harris County District Court. The trial court dismissed the case for want of jurisdiction. The court of appeals

[1] TEX. HUM. RES. CODE § 42.072.

reversed and remanded, concluding that section 2001.171 of the Texas Administrative Procedure Act[2] granted the right to judicial review.[3]

Mega is a child-care facility, and the licensing of such facilities is governed by Chapter 42 of the Human Resources Code.[4] Prior to its amendment in 1997, section 42.072 contained an express provision providing for de novo review in district court of the denial or revocation of a license.[5] Section 42.072 provided, in pertinent part:

> (a) The division may deny or revoke the license . . . .
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> * * *
>
> (c) A person who wishes to appeal a license denial or revocation shall notify the director by certified mail within 30 days after receiving the notice required in Subsection (b) of this section. The person shall send a copy of the notice of appeal to the assigned division representative.
>
> (d) The denial or revocation of a license or certification and the appeal from that action are governed by the procedure for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).
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> (e) A person whose license has been denied or revoked may challenge the decision by filing a suit in a district court of Travis County or the county in which

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[2] TEX. GOV'T CODE § 2001.171.

[3] 81 S.W.3d at 473.

[4] TEX. HUM. RES. CODE §§ 42.001-.078.

[5] Act of May 27, 1979, 66th Leg., R.S., ch. 842, § 1, 1979 Tex. Gen. Laws 2333, 2365-66, *amended by* Act of Mar. 30, 1983, 68th Leg., R.S., ch. 23, § 2, 1983 Tex. Gen. Laws 110, 111, *amended by* Act of May 28, 1993, 73d Leg., R.S., ch. 977, § 1, 1993 Tex. Gen. Laws 4243, 4244 (former TEX. HUM. RES. CODE § 42.072) (renumbered 1995), *repealed by* Act of May 30, 1997, 75th Leg., R.S., ch. 1063, § 7, 1997 Tex. Gen. Laws 4043, 4054-55.

the person's facility is located within 30 days after receiving the decision. The trial shall be de novo.[6]

The 1997 amendments to section 42.072 deleted the sentence in subsection (e) regarding de novo review in district court, but other language was added regarding an appeal and the Administrative Procedure Act. Section 42.072, as amended, provided:

> (a) The department may suspend, deny, revoke, or refuse to renew the license . . . .
>
> (b) If the department proposes to take an action under Subsection (a), the person is entitled to a hearing conducted by the State Office of Administrative Hearings. Proceedings for a disciplinary action are governed by the administrative procedure law, Chapter 2001, Government Code. Rules of practice adopted by the board under Section 2001.004, Government Code, applicable to the proceedings for a disciplinary action may not conflict with rules adopted by the State Office of Administrative Hearings.
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> * * *
>
> (e) A person may continue to operate a facility or family home during an appeal of a license, listing, or registration denial or revocation unless the revocation or denial is based on a violation which poses a risk to the health or safety of children. The department shall by rule establish the violations which pose a risk to the health or safety of children. The department shall notify the facility or family home of the violation which poses a risk to health or safety and that the facility or family home may not operate. A person who has been notified by the department that the facility or home may not operate under this section may seek injunctive relief from a district court in Travis County or in the county in which the facility or home is located to allow operation during the pendency of an appeal. The court may grant injunctive relief against the agency's action only if the court finds that the child-care operation does not pose a health or safety risk to children. A court granting injunctive relief under this subsection shall have no other jurisdiction over an appeal of final agency action unless conferred by Chapter 2001, Government Code.[7]

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[6] *Id*.

[7] Act of May 30, 1997, 75th Leg., R.S., ch. 1063, § 7, 1997 Tex. Gen. Laws 4043, 4054-55 (current version at TEX. HUM. RES. CODE § 42.072).

Accordingly, pending an appeal, a child-care facility may seek an injunction from a district court in the county where it is located or in Travis County to maintain the status quo.[8] But that court has no other jurisdiction over an appeal "unless conferred by Chapter 2001."[9] I agree with the Court that section 2001.171 of the Administrative Procedure Act[10] confers a right to judicial review. That section says, "A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."[11] Mega exhausted all administrative remedies available within the Department, and it was aggrieved by a final decision in a contested case. It was entitled to judicial review.

Section 2001.176 states that unless otherwise provided by statute, a petition for judicial review must be filed in Travis County.[12] Section 42.072 does not "otherwise provide[]", so a district court located in a county other than Travis that entertained a request for injunctive relief pursuant to section 42.072(e) would have "no other jurisdiction" over an appeal. But a district court in Travis County would have jurisdiction of an appeal from the denial or revocation of a license because that jurisdiction is "conferred by Chapter 2001."[13]

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[8] *Id.*

[9] *Id.*

[10] TEX. GOV'T CODE § 2001.171.

[11] *Id*.

[12] *Id*. § 2001.176(a), (b)(1).

[13] Act of May 30, 1997, 75th Leg., R.S., ch. 1063, § 7, 1997 Tex. Gen. Laws 4043, 4054-55 (current version at TEX. HUM. RES. CODE § 42.072(e)).

Additionally, section 2001.174 provides that if the law does not define the scope of judicial review, the substantial evidence rule governs.[14] Section 42.072 is silent regarding the scope of judicial review, so the substantial evidence rule applies.

The State argues that the references to an "appeal" in section 42.072 are only to an "appeal" to the State Office of Administrative Hearings, and that a "final agency action" within the meaning of section 42.072(e) is the Department's revocation or denial of a license, not a determination by a hearing officer in a contested case. Such a cramped construction of section 42.072 is an unreasonable one.

The State additionally argues that there is clear legislative intent that there is no judicial review available to child-care facilities in these circumstances because the Legislature deleted the sentence that was formerly in subsection (e) regarding de novo judicial review, but left similar language intact in Chapter 43, which governs the licensing of child-care administrators. Section 43.011 provides:

> (a) A person whose license application is denied or whose license is revoked is entitled to written notice of the reasons and may request that the department provide a hearing.
>
> (b) The hearing shall be held within 30 days after the date the department receives the request.
>
> (c) If the hearing results in the department upholding the license denial or revocation, the person may challenge the department's decision by filing suit in a district court in the county where the person resides within 30 days after the date the person receives notice of the department's final decision.

[14] TEX. GOV'T CODE § 2001.174.

d) The trial shall be de novo.[15]

This disparate treatment of child-care facilities and child-care administrators is not a basis for ignoring the language in section 42.072 that refers to a right to an appeal and also specifically refers to the Administrative Procedure Act. The reasons the Legislature chose review by trial de novo and venue in counties in addition to Travis County for child-care administrators but not for child-care facilities may not be readily apparent. But we cannot draw from this disparate treatment an intent to deny judicial review to child-care facilities.

With regard to any guidance we may obtain from the United States Supreme Court in its construction of the federal Administrative Procedure Act, I note that subsequent to that court's decision in *Abbott Laboratories v. Gardner*,[16] cited by the Court today, the United States Supreme Court decided *Block v. Community Nutrition Institute*.[17] In that case, the Supreme Court held that consumers of dairy products were not entitled to seek judicial review under the federal Administrative Procedure Act of milk market orders issued by the Secretary of Agriculture because the Agriculture Marketing Agreement Act of 1937 impliedly precluded that right when it expressly granted the right of judicial review to producers and handlers of dairy products but was silent with regard to consumers.[18] The Supreme Court said, "In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons,

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[15] TEX. HUM. RES. CODE § 43.011.

[16] 387 U.S. 136 (1967).

[17] 467 U.S. 340 (1984).

[18] *Id.* at 341, 346-52.

judicial review of those issues at the behest of other persons may be found to be impliedly precluded."[19]

However, as discussed above, section 42.072 is not silent about judicial review for child-care facilities. Moreover, in discussing *Abbott*, the Supreme Court said it has found "the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernable in the statutory scheme.'"[20] In making that determination, the statutory scheme as a whole must be considered, and a "balanced approach" to statutory construction must be taken.[21] Applying these principles to section 42.072 and the Legislature's scheme for child-care providers as a whole, no preclusion of judicial review for child-care facilities can fairly be discerned.

One other matter is whether to remand this case to the Harris County District Court from which it came. As discussed, section 2001.176 directs that a petition for judicial review is to be filed in Travis County.[22] The Department has not raised this issue, however, and section 2001.176's

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[19] *Id*. at 349.

[20] *Id*. at 351.

[21] *Id*. at 349, 350.

[22] TEX. GOV'T CODE § 2001.176(b)(1).

requirement appears to be mandatory but not jurisdictional.[23] Therefore, remand to the Harris County District Court for further proceedings is appropriate.

I accordingly concur in the judgment rendered by the Court.

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Priscilla R. Owen
Justice

OPINION DELIVERED: September 3, 2004

[23] *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (holding that certain statutory requirements under the wrongful death statute were not jurisdictional and abrogating cases such as *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 891-92 (Tex. 1986), which held that the place of filing requirement in a similar statute was jurisdictional); *see also Sierra Club v. Tex. Natural Res. Conservation Comm'n*, 26 S.W.3d 684, 688 (Tex. App.–Austin 2000) (holding that section 2001.176(b)(2)'s service requirement is not jurisdictional under *Dubai*), *aff'd on other grounds*, 70 S.W.3d 809, 811, 814-15 (Tex. 2002) (indicating that *Grounds* was "overruled in part" by *Dubai*, but not reaching the jurisdictional issue, having concluded that the statutory requirements were satisfied); *cf. K.D.F. v. Rex*, 878 S.W.2d 589, 595 n.5 (Tex. 1994) (listing section 2001.176 as an example of a statute whose purpose is to "minimiz[e] the litigation costs that taxpayers must bear by providing state agencies with a convenient venue in which to litigate").