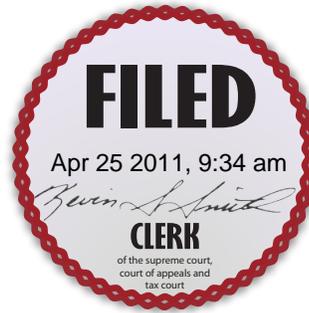


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RENEE KAY WILSON, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
INDIANA HORSE RACING COMMISSION, )  
 )  
Appellee-Plaintiff. )

No. 49A02-1011-MI-1303

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable David J. Dreyer, Judge  
Cause No. 49D10-1008-MI-37290

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**April 25, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Renee Kay Wilson appeals from the trial court's order dismissing with prejudice her Petition for Judicial Review of a decision of the Indiana Horse Racing Commission (IHRC) granting her only a conditional horse racing trainer's license containing the restriction that the horses she trained be stabled in Indiana. Wilson presents several issues for our review, which we consolidate and restate as follows: Did the trial court err in dismissing with prejudice her petition for judicial review?

We affirm.

On April 22, 2009, Wilson applied for a horse trainer's license from the IHRC. On May 1, 2009, the IHRC granted Wilson a conditional license, requiring that any horses trained by Wilson be stabled in Indiana. Wilson responded by filing a request for an unconditional license, which was denied on June 3, 2009. Wilson sought review of the determination by an administrative law judge, who, in an order dated February 18, 2010, upheld the denial of Wilson's request for an unconditional license. On July 13, 2010, the IHRC issued its final order affirming the decision to grant Wilson only a conditional license.

Wilson filed a petition for judicial review on August 10, 2010. The petition was not verified. Wilson attached to her petition a copy of the IHRC's final order and ALJ's decision dated February 18. The agency record was filed with the trial court on September 13, 2010.

On October 13, 2010, the IHRC filed a motion to dismiss the petition for judicial review, tendering affidavits and transcripts in support thereof. The basis for the motion to dismiss was that Wilson's petition was not verified and that the agency record was also not verified and was tendered three days late. The IHRC maintained that these omissions/errors deprived the trial court of jurisdiction. On October 29, 2010, Wilson filed a reply brief and a

motion to amend the complaint to add the required verification. Wilson also added another count to her complaint seeking a declaratory judgment. On November 4, 2010, the trial court, without a hearing, dismissed Wilson's petition by signing the IHRC's tendered order, which provides as follows:

Respondent, Indiana Horse Racing Commission (named as IHRC Staff) ("IHRC"), having filed its Motion to Dismiss this action based upon Petitioner's failure to comply with the requirements of the Administrative Orders and Procedures Act ("AOPA"), and the Court having considered the Motion, briefing and exhibits thereto, and any further hearing, response or reply, now **GRANTS** the Respondent's Motion to Dismiss in its entirety. The Court now makes these **FINDINGS** [sic] of **FACT and CONCLUSIONS of LAW**, which are not all inclusive of the Court's reasoning herein, but instructive of it:

1. This judicial review involves the IHRC's agency determination, the Final Order of July 13, 2010, that offered a 2009 conditional horse racing owner/trainer license, containing an 'on the grounds stabling requirement', to Petitioner Wilson.
2. The Court takes judicial notice of its Docket and file.
3. On August 10, 2010, Petitioner filed her unverified "Petition for Judicial Review" seeking to challenge the conditional license offer and Final Order issued by the Respondent IHRC on July 13, 2010.
4. On Monday, September 13, 2010, Petitioner untimely filed (three days late), by regular mail, a substantially incomplete Record of the relevant IHRC agency proceedings below (the "Record").
5. Under controlling authority, the Record was due within thirty (30) days, or Friday, September 10, 2010, of the filing of the Petition or an extension for time with the Court had to be timely filed within that period. Petitioner did neither, subjecting this case to dismissal for lack of jurisdiction or lack of statutory authority. Ind. Code § 4-21.5-5-13 (AOPA). The Court has no authority to extend the deadline or grant a late extension – the missed deadline is jurisdictional or a pre-requisite of statutory compliance. *Indiana Family of Social Services Administration v. Alice Meyer*, 927 N.E.2d 367, 370-1 (Ind. May 25, 2010); *Ind. Bd. of Health Facility Administration v. Werner*, 841 N.E.2d 1196, 1206 (Ind. Ct. App. 2006).
6. Because the Petition was filed *unverified* it is not in compliance with AOPA and untimely for this second reason. Ind. Code §4-21.5-5-7(b). Mere signature by Petitioner's attorney on the petition is insufficient. Further, as the thirty day petition filing period has passed on August 12, 2010, an

amended petition with verification would still be untimely and improper. *Kemp v. Family and Social Services*, 693 N.E.2d 641 (Ind. Ct. App. 1998).

7. The late-filed Record is substantially incomplete as it lacks the April 29 and July 13, 2010 transcripts of the deliberations leading to the Final Order of the IHRC. These missing transcripts are significant and make any possible Court review without them less accurate. Petitioner also failed to follow the statute requiring that she ask IHRC to properly assemble the record following the Final Order. See, Ind. Code §4-21.5-5-13(c), and *Meyer*, 927 N.E.2d 371-2 (Submitting only selected documents from the agency record is insufficient, and substantial compliance is only found if the incomplete record allows ‘accurate’ review.)

8. The Record is substantially incomplete, the time to cure the record passed on September 13, and this Court cannot as ‘accurately’ give review. Dismissal under *Meyer’s* reasoning is appropriate.

9. As the agency Record was filed untimely and substantially incomplete by Petitioner, and the Petition was filed unverified, this Court must dismiss this action for lack of jurisdiction pursuant to 12(B)(1) or in the alternative, 12(B)(6) for failure to state a claim upon which relief can be granted.

**IT IS THEREFORE ORDERED** that the Petition for judicial review is hereby **DISMISSED** with prejudice.

*Appellant’s Appendix* at 3-5 (emphasis in original). Wilson now appeals.

We begin by noting our standard of review. Here, the IHRC filed a motion to dismiss pursuant to Ind. Trial Rule 12(B)(6) and attached thereto several exhibits and an affidavit. In its order, the court made clear that it considered the exhibits in reaching its decision. “If matters outside the pleadings are presented to and not excluded by the trial court, [a motion to dismiss] shall be treated as one for summary judgment and disposed of as provided in Trial Rule 56.” *Reich v. Lincoln Hills Christian Church, Inc.*, 888 N.E.2d 239, 242 (Ind. Ct. App. 2008); T.R. 12(B).

Our standard of review for a trial court’s grant of a motion for summary judgment is well settled:

Summary judgment is appropriate only where the evidence shows that there is

no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is “genuine” if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is “material” when its existence facilitates the resolution of an issue in the case.

*Van Kirk v. Miller*, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

At the outset, we note that Wilson does not deny that there were procedural flaws in her petition for judicial review of the IHRC’s final determination denying her request for an unconditional license. Wilson acknowledges that the petition was not verified as required by Ind. Code Ann. § 4-21.5-5-7(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011). She further acknowledges that the record was not sent via certified mail, resulting in the record being filed three days late. Wilson maintains that this was due to a clerical error. Notwithstanding these deficiencies, Wilson argues that it was error for the trial court to dismiss her petition for judicial review. Specifically, Wilson maintains that the statutory requirements for judicial review of an agency action directly conflict with the Indiana Trial Rules and therefore, the AOPA requirements should be deemed a nullity. Wilson also contends that to the extent AOPA purports to establish procedural rules, it is unconstitutional as a violation of separation of powers.

AOPA provides the exclusive means for judicial review of a final agency action. I.C. § 4-21.5-5-1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011). AOPA requires that a petitioner file the original or a certified copy of the agency

record or request additional time to file the agency record within thirty days of the filing of a petition for judicial review. I.C. § 4-21.5-5-13(a) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011). “Failure to file the record within the time permitted by . . . , including any extension period ordered by the court, is *cause for dismissal* of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.” I.C. § 4-21.5-5-13(b) (emphasis supplied). As our Supreme Court has observed:

The purpose of AOPA section 13 is to ensure that the review of agency action proceeds in an efficient and speedy manner, and that the reviewing trial court has access to the record before rendering its decision. *Wayne County Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove # 29*, 847 N.E.2d 924, 928 (Ind. 2006). The filing requirement also ensures that “no relevant evidence or materials are hidden, and no ‘new’ or ‘secret’ evidence is introduced to either contradict or support an agency decision.” *Izaak Walton League of America, Inc. v. DeKalb County Surveyor’s Office*, 850 N.E.2d 957, 965 (Ind. Ct. App. 2006), *trans. denied*

*Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d at 370.

Only a person who complies with the requirements concerning time for filing is entitled to judicial review of a final agency action. I.C. § 4-21.5-5-2(b)(4) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011). If the person does not comply with the filing deadlines established by AOPA, the petition for judicial review must be dismissed because, in such case, the trial court does not acquire jurisdiction over the case.<sup>1</sup> *See MicroVote Gen. Corp. v. Office of Sec’y of State*, 890 N.E.2d 21 (Ind. Ct. App. 2008), *trans. denied*; *Indiana State Bd. of Health Facility Adm’rs v. Werner*, 841

N.E.2d 1196 (Ind. Ct. App. 2006), *clarified on reh'g* by 846 N.E.2d 669 (Ind. Ct. App. 2006), *trans. denied*.

Here, Wilson filed her petition for judicial review on August 10, 2010. The agency record, or a motion for extension of time to file the record, would have therefore been due within thirty days, i.e., by September 9, 2010. Wilson did not file for an extension of time and she untimely filed the agency record on September 13, 2010. The IHRC filed its motion to dismiss with the trial court on October 13, 2010. *See Indiana State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196 (holding that issue of untimely filing of agency record is waived if not raised with the trial court). Pursuant to I.C. § 4-21.5-5-2 and I.C. § 4-21.5-5-13(a) and (b), Wilson's petition was properly dismissed because she failed to timely file the agency record.

Wilson attributes the untimely filing of the agency record to a clerical error that resulted in the failure of the record being submitted to the court by certified mail. Our Supreme Court has recognized that AOPA "acknowledges possible difficulties in preparing and submitting the agency record, but places the burden on the petitioner to file or seek an extension within the statutory period or any extension." *Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d at 371. The Court further noted that AOPA "does not excuse untimely filing", *id.* at 370, and that a trial court has no authority to grant an extension of time after the time for filing the record has expired. Wilson's "clerical error" excuse does not save her petition from dismissal.

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<sup>1</sup> As noted by the court in *MicroVote Gen. Corp. v. Office of Sec'y of State*, the trial court loses jurisdiction over the particular case, not subject matter jurisdiction, by virtue of a petitioner's failure to comply with I.C. §

The trial court also determined that the untimely filed record was “substantially incomplete.” *Appellant’s Appendix* at 4. I.C. § 4-21.5-3-33(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011) sets forth eleven items that comprise the agency record, including notices of all proceedings; any prehearing order; any motions, pleadings, briefs, petitions, requests, and intermediate rulings; evidence received or considered; a statement of matters officially noticed; proffers of proof and objections and rulings thereon; proposed findings, requested orders, and exceptions; the record prepared for the ALJ and any transcript of the record considered before final disposition; any final order, nonfinal order, or order on rehearing; staff memoranda; matters placed on the record after an ex parte communication. “Generally, submitting only selected documents from the agency record does not comply with the requirement of Indiana Code § 4-21.5-5-13(a) that the agency record be filed.” *Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d at 371. But imperfect compliance with the filing requirement is not always fatal. *Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367. A petition for review may be accepted if the materials submitted provide the trial court with “all that is necessary ... to accurately assess the challenged agency action.” *Izaak Walton League of Am., Inc. v. DeKalb County Surveyor’s Office*, 850 N.E.2d 957, 965 (Ind. Ct. App. 2006), *trans. denied*.

According to the affidavit of Joe Gorajec, the Executive Director of the IHRC, the agency record submitted by Wilson did not include transcripts of meetings that occurred on April 29, 2010 and July 13, 2010 nor did it include the official minutes of those meetings.

Gorajec also noted that Wilson never requested the IHRC to prepare the agency record. *See* I.C. § 4-21.5-5-13(c) (upon a written request, the agency taking the action “shall prepare the agency record”). We note that AOPA provides that the record may be shortened, summarized, or organized by stipulation of the parties. I.C. § 4-21.5-5-13(e). There is no record of a stipulation in the materials before us. Wilson simply maintains that the material missing from the agency record she submitted to the court is not relevant to the matter at hand and thus, the record she submitted is substantially complete. Even if we assume that the record submitted by Wilson is complete, Wilson would not prevail on this argument because the record was filed late. Even a substantially complete record must be timely filed.

As an alternative argument, Wilson argues that she filed a substantially complete record with the filing of her petition. Wilson maintains that the IHRC’s final order and the ALJ’s decision that were attached to her petition were the only part of the agency record that were pertinent to judicial review because the underlying facts are not in dispute. The IHRC maintains that judicial review will not be accurate if based only on the documents of the agency record chosen by Wilson. As noted above, AOPA requires that a petitioner seeking judicial review of an agency action provide substantially more than what Wilson attached to her petition. We further note that in Wilson’s petition for judicial review, she challenges the IHRC’s decision as not being supported by sufficient evidence, as exceeding the IHRC’s statutory authority, and as being in violation of her constitutional rights. To accurately and meaningfully review the IHRC’s actions in light of the challenges raised by Wilson, the reviewing court would need more than the IHRC’s final order and the ALJ’s decision. The

attachments to Wilson's petition for judicial review do not constitute a substantially complete record.

We further note that in addition to being untimely, there is another deficiency with regard to the agency record. The record submitted by Wilson was not the original or a certified copy of the agency record as is required by I.C. § 4-21.5-5-13(a). Wilson argues that her attorney prepared and certified the record and that is sufficient to meet this requirement. This is not so. I.C. § 4-21.5-3-33 provides that the "agency shall maintain an official record of each proceeding," that the agency record consists only of the listed items; and that "the agency record . . . constitutes the exclusive basis for agency action in proceedings for judicial review." The record submitted by Wilson did not meet the statutory requirements because it was certified only by her attorney and not by the IHRC.

Wilson also argues that failing to apply the trial rules to judicial review of agency actions violates the Indiana Constitution, more specifically, article 3, section 1 regarding separation of powers. Wilson argues that AOPA provisions conflict with trial rules on multiple points. Wilson does not provide any cogent argument to support her argument, nor does she provide any citation to authority regarding the separation of powers doctrine. *See* Ind. Appellate Rule 46(A)(8)(a). Wilson compares the trial rules to the statutory requirements in an attempt to establish a conflict between the two and then concludes that to the extent AOPA purports to establish a judicial proceeding where the trial rules do not apply or to the extent AOPA purports to establish unique procedural rules and so forth, "it [i.e., AOPA] invades the exclusive province of the judiciary in matters of judicial procedure and as such is unconstitutional under Ind. Const art. 3 sec. 1." *Appellant's Brief* at 17, 18, 19, 20,

23. This conclusory assertion is unsupported by meaningful analysis or citation to authority.

Wilson has waived this argument.

Wilson further tries to save her petition by arguing that the trial rules should prevail over the procedural requirements of AOPA. Our Supreme Court has rejected this argument, stating:

Each of the several administrative agencies is a creature of the Legislature. The procedures to be followed in presenting matters to these agencies and in appeals therefrom are specifically set out in the statutes pertaining to each. The rules of trial procedure, which, as stated in Trial Rule 1, govern the procedure and practice in all courts of the state of Indiana are not applicable to proceedings before the administrative agencies nor to the proceedings requisite to invoking the jurisdiction of reviewing judicial authority.

*Clary v. Nat'l Friction Prod., Inc.*, 290 N.E.2d 53, 55 (Ind. 1972). The Supreme Court applied and explained the holding in *Clary* in *Ball Stores, Inc. v. State Bd. of Tax Comm'rs*, 316 N.E.2d 674 (Ind. 1974), and held that when a conflict occurs between the trial rules and a statutory procedure, the statutory procedure prevails. Where, however, the statute is silent regarding a procedure, the trial rules apply. *Id.* The limited application of the trial rules to judicial review proceedings is appropriate in light of the unique nature of review of administrative decisions.

Here, AOPA sets forth specific timelines and verification requirements for purposes of seeking judicial review. If giving effect to the trial rules results in the statutory requirements being excused, then the statutory scheme would be rendered meaningless. Contrary to Wilson's argument that *Clary* and its progeny have been overruled, we have found no case that has contradicted the general principle that where the statutory procedure for judicial review conflicts with the trial rules, the statutory procedure applies, but where the statute is

silent, the trial rules may apply.

In 1987, the Supreme Court considered whether the application of Ind. Trial Rule 5(B)(2) to an administrative review proceeding was proper. *See State Bd. of Tax Comm'rs v. LeSea Broadcasting Corp.*, 511 N.E.2d 1009 (Ind. 1987). In a circumspect decision, the Supreme Court looked to the trial rules for a clear definition as to what constituted a filing for purposes of complying with the statute governing an appeal from the agency's decision. The Court found that because the agency's statute was silent as to the method of filing and because the trial rules are available to address the silence, the trial rules applied.

The Court followed the same principle in *State ex rel. Goodman v. Rev. Bd. of the Indiana Dep't of Employment Training Servs.*, 536 N.E.2d 1023 (Ind. 1989). In other words, *LeSea* and *Goodman* stand for the proposition that where the relevant requirements of AOPA are explicit, there is no need for guidance from the trial rules. In light of longstanding precedent, wholesale application of the rules of trial procedure in the statutory review procedure for review of an administrative action is not proper.<sup>2</sup>

Finally, Wilson argues that the trial court improperly dismissed her petition for judicial review without a hearing. As noted above, because the IHRC included matters outside of the pleadings with its motion to dismiss and the trial court considered those matters, the IHRC's motion must be treated as a motion for summary judgment. *See* T.R. 12(B)(8). In such case, "all parties shall be given reasonable opportunity to present all

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<sup>2</sup> We note this court's recent decision in *St. Joseph Hosp. v. Cain*, 937 N.E.2d 903 (Ind. Ct. App. 2010), *trans. pending*, in addressing the issue as one of jurisdiction, held that T.R. 15 (regarding relation back of amendments) applied to a petition for judicial review that was not verified when filed as required by AOPA. Here, the issue we are addressing concerns the interplay between the procedures set forth in AOPA and the trial rules; we are not deciding a matter of jurisdiction.

material made pertinent to such a motion by Rule 56.” *Id.* In *Ayres v. Indian Heights Volunteer Fire Dept., Inc.*, 493 N.E.2d 1229 (Ind. 1986), our Supreme Court further explained that any procedural irregularity in the conversion of a T.R. 12 motion to a motion for summary judgment will be harmless if there is no resulting prejudice to the appellant.

Here, the IHRC filed its motion to dismiss and a brief in support thereof on October 13, 2010. Wilson responded to the motion on October 29, 2010, challenging each ground asserted by the IHRC in its motion to dismiss. On appeal, Wilson requests that we remand this case for a hearing before the trial court so that she may “present material concerning the missing certified mailing or the record and to discuss the adequacy of the materials actually submitted . . . .” *Appellant’s Brief* at 27.

To review, with regard to the issue of the certified mailing, we have held that any evidence supporting Wilson’s “excuse” for the agency record being filed three days late would be unavailing. There is no legal authority that supports Wilson’s argument that AOPA excuses the untimely filing of the agency record or that the trial court has the authority to grant an extension of time after the time for filing the record has expired. *See Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367.

With regard to Wilson’s request to discuss the adequacy of the materials attached to her petition for judicial review, Wilson does not indicate that she would introduce any additional evidence. In her response to the IHRC’s motion to dismiss, Wilson addressed the issue of the adequacy of the record. Wilson therefore had a reasonable opportunity to respond and present additional materials in support of her argument. She is simply incorrect in suggesting that she was denied the opportunity to present argument on this issue. Wilson

has not demonstrated that she was prejudiced by the trial court's failure to conduct a hearing.

Any error, therefore, was harmless.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.