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IN THE
COURT OF APPEALS OF INDIANA

LAKE COUNTY SHERIFF'S DEPARTMENT,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 93A02-0610-EX-904
	)	
LORRAINE C. EAST-MILLER,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE INDIANA CIVIL RIGHTS COMMISSION
The Honorable Robert Lange, Administrative Law Judge
Cause No. Part03110409 & Part03110410

July 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

The Lake County Sheriff's Department ("Sheriff's Department") appeals a decision of the Indiana Civil Rights Commission ("ICRC") in favor of Lorraine C. East-Miller ("East-Miller"). The Sheriff's Department raises one issue, which we restate as whether the ICRC erred by denying its motion to set aside the default judgment. We affirm.

The relevant facts follow. On November 3, 2003, East-Miller filed a complaint of discrimination with the ICRC against the Sheriff's Department for events that occurred on May 7, 2003, under ICRC Docket No. PArt03110409 ("Case 409"). East-Miller alleged that she had been retaliated against for a previous complaint. Specifically, East-Miller alleged:

> I. On or about May 7, 2003 [the Sheriff's Department] unjustly took my son from me. I believe I have been retaliated against because of my previous complaint of discrimination against [the Sheriff's Department].
> II. I believe [the Sheriff's Department] retaliated against me because:
> A. The [Sheriff's Department] unjustly released my son. The [Sheriff's Department] have not provided me with enough adequate information concerning their involvement with my child. I would like to know the facts. Who release my son and why!
> B. After requesting to speak with the Sheriff (Roy Domequez) concerning this case with my son, my request was denied. Even after requesting several meeting to discuss various concerns as well complaints that I had with the [Sheriff's Department] denied again!
> C. After speaking with the Chief of [the Sheriff's Department] I still do not know anything. The Chief himself promised to provide me with information concerning my son. To this date No one has tried to contact me, or return any of my phone calls.
> D. I feel my rights were violated. I also feel I have been retaliated against, due to my race. And also due to my

previous complaint of discrimination against the [Sheriff's Department].

III. As a remedy, I am seeking out-of-pocket expenses, compensatory damages, including damages for emotional distress, equitable relief and any others available under Indiana Civil Rights Law.

Appellant's Appendix at 20.

On the same day, East-Miller also filed another complaint of discrimination against the Sheriff's Department for events that occurred on September 4, 2003, under ICRC Docket No. PArt03110410 ("Case 410"). Again, East-Miller alleged that she had been retaliated against for a previous complaint. Specifically, she alleged:

I. On or about September 4, 2003 [the Sheriff's Department] subject me to unlawful retaliation.

II. I believe [the Sheriff's Department] retaliated against me due to my previous formal complaint of discrimination.

A. Since January 2001 I have noticed a suspicious person and vehicle within the vicinity of my home.

B. I have contacted [the Sheriff's Department] on several occasions to report the suspicious person and vehicle. [The Sheriff's Department] either shows up too late to acquire the needed information, or never shows up at my property after I place my report.

C. Further, after arriving at my property the deputies fail to properly investigate and ask questions such as "what do you want us to do."

D. I have attempted to make appointments with the Lake County Sheriff to discuss the departments' failure to properly respond to my reports, though the Sheriff has failed to acknowledge my requests.

E. It is my belief that [the Sheriff's Department] is failing to respond to my reports due to my previous formal complaint of discrimination against the [Sheriff's Department].

III. As a remedy, I am seeking any available under Indiana Civil Rights Law.

Id. at 22.

Notice of the complaints was provided to the Sheriff's Department, but the Sheriff's Department did not respond or otherwise answer either complaint. The administrative law judge ("ALJ") issued notices of proposed default orders, which informed the Sheriff's Department that the ALJ proposed to enter orders by default against the Sheriff's Department, and that the Sheriff's Department could file written motions requesting that the proposed default orders not be imposed, stating the ground, within seven days after service of the proposed default orders. However, the Sheriff's Department did not file written motions requesting that the proposed default orders not be imposed. The ALJ found that default was appropriate under 910 IAC 1-6-1 and Ind. Code § 4-21.5-3-24(a)(2). Consequently, the ALJ granted an order of default on both complaints and found that "[t]he facts alleged in East-Miller's complaint[s] are deemed admitted and established and that no evidence will be considered on the issue of liability." Id. at 11, 17. Further, the ALJ found that it "**MUST** conduct further proceedings without the participation of [the Sheriff's Department]" under Ind. Code § 4-21.5-3-24(d). Id. (emphasis in original). On May 4, 2005, hearings on both complaints were held before the ALJ. The Sheriff's Department did not appear at the hearings, and East-Miller testified on her own behalf.

With respect to the Case 409 complaint related to the May 2003 events, the ALJ issued the following proposed order:

* * * * *

> Having carefully considered the testimonial and documentary evidence and the arguments of counsel, and being duly advised in the premises, the ALJ

now proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. East-Miller is an African-American woman who has resided, at all material times, in the state of Indiana.

* * * * *

14. [The Sheriff's Department] denied East-Miller information about her son's release from school because of race and because East-Miller had filed a previous complaint against [the Sheriff's Department].
15. The COMPLAINT and East-Miller's testimony set out a prima facie case that [the Sheriff's Department] refused to communicate with East-Miller because of race and because she had filed a previous complaint against [the Sheriff's Department] with the ICRC.
16. East-Miller experienced extreme inconvenience, stress in her pregnancy, strain on her family, emotional distress, humiliation, and embarrassment as a result of [the Sheriff's Department's] actions.

* * * * *

CONCLUSIONS OF LAW

* * * * *

3. [The Sheriff's Department] offers its services to the general public and, as a result, is a "public accommodation." IC 22-9-1-3(m).
4. The ICRC's Rule 6.1 provides, in material part, that "[w]hen a party has failed to plead or otherwise defend as provided by these rules, after proper notice, and that fact is made to appear by affidavit or otherwise, the party may be defaulted." 910 IAC 1-6-1.
5. The effects of an order by default include that the allegations of the complaint are deemed admitted.
6. The [Indiana Civil Rights Law ("ICRL")] makes it a discriminatory practice to exclude a person from equal opportunities because of race. IC 22-9-1-3(l). Every discriminatory practice relating to, among other things, public accommodations is unlawful unless specifically exempted by the ICRL. Id. Because there is no such

applicable exemption, [the Sheriff's Department's] failure to communicate with East-Miller was unlawful.

7. The ICRL provides that

> [t]he commission shall prevent any person from . . . otherwise discriminating against any other person because he filed a complaint . . .

IC 22-9-1-6(h).

* * * * *

Id. at 25-27 (footnote omitted). The ALJ's proposed order would have ordered the Sheriff's Department, in part, to "cease and desist from refusing to communicate with affected persons because of race," "cease and desist from refusing to communicate with affected persons because those persons have previously filed a complaint with the ICRC," and to pay East-Miller $10,000.00. Id. at 28.

With respect to the Case 410 complaint related to the September 2003 events, the ALJ issued the following proposed order:

* * * * *

Having carefully considered the testimonial and documentary evidence and the arguments of counsel, and being duly advised in the premises, the ALJ now proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. East-Miller is an African-American woman who has resided, at all material times, in the state of Indiana.

* * * * *

18. [The Sheriff's Department] failed to timely respond to East-Miller's requests for assistance because of race and because East-Miller had filed a previous complaint against [the Sheriff's Department].
19. The COMPLAINT and East-Miller's testimony set out a prima facie case that [the Sheriff's Department] refused to communicate with

East-Miller because of race and because she had filed a previous complaint against [the Sheriff's Department] with the ICRC.

20. East-Miller experienced extreme inconvenience, stress in her pregnancy, strain on her family, emotional distress, humiliation, and embarrassment as a result of [the Sheriff's Department's] actions.

* * * * *

CONCLUSIONS OF LAW

* * * * *

3. [The Sheriff's Department] offers its services to the general public and, as a result, is a "public accommodation." IC 22-9-1-3(m).
4. The ICRC's Rule 6.1 provides, in material part, that "[w]hen a party has failed to plead or otherwise defend as provided by these rules, after proper notice, and that fact is made to appear by affidavit or otherwise, the party may be defaulted." 910 IAC 1-6-1.
5. The effects of an order by default include that the allegations of the complaint are deemed admitted.
6. The [Indiana Civil Rights Law ("ICRL")] makes it a discriminatory practice to exclude a person from equal opportunities because of race. IC 22-9-1-3(l). Every discriminatory practice relating to, among other things, public accommodations is unlawful unless specifically exempted by the ICRL. Id. Because there is no such applicable exemption, [the Sheriff's Department's] failure to communicate with East-Miller was unlawful.
7. The ICRL provides that

> [t]he commission shall prevent any person from . . . otherwise discriminating against any other person because he filed a complaint . . .

IC 22-9-1-6(h).

* * * * *

Id. at 32-34. The ALJ's proposed order would have ordered the Sheriff's Department, in part, to "cease and desist from refusing to communicate with affected persons because of race," "cease and desist from refusing to communicate with affected persons because

those persons have previously filed a complaint with the ICRC," and to pay East-Miller $15,000.00. Id. at 35.

The Sheriff's Department then filed a "Motion to Set Aside Default Judgment and Terminate Proceedings on The Basis of Settlement."[1] In support of its motion, the Sheriff's Department alleged that it had entered into a settlement agreement with East-Miller and that the "settlement requires dismissal of this action with prejudice."[2] Id. at 37. The ICRC denied the Sheriff's Department's motion and adopted the ALJ's findings of fact and conclusions thereon in both cases. Specifically, the ICRC found that the Sheriff's Department's motion was not an objection under Ind. Code § 4-21.5-3-29(d)(1) because it did "not complain of anything in the proposed decision" and the motion "in form and substance does not constitute objections to the ALJ's proposed decision." Id. at 7, 13.

The sole issue on appeal is whether the ICRC erred by denying the Sheriff's Department's motion to set aside the default judgments. Under the Administrative Orders and Procedures Act ("AOPA"), the scope of a court's judicial review is limited to a consideration of: (1) whether there is substantial evidence to support the agency's finding and order; and (2) whether the action constitutes an abuse of discretion or is

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[1] The CCS reveals that the motion to set aside was filed in Case 409 related to the May 2003 events only. The Sheriff's Department did not file a motion to set aside in Case 410 related to the September 2003 events. However, based upon the ICRC's orders, it appears that the ICRC considered the motion to be filed in both actions.

[2] The motion states that an "accompanying brief and evidentiary materials" were filed, and the CCS provides that a brief was filed in support of the motion. Appellant's Appendix at 2, 37. However, these materials were not provided in Appellant's Appendix.

arbitrary or capricious. Ind. Code § 4-21.5-5-14; Ind. Civil Rights Comm'n. v. Alder, 714 N.E.2d 632, 635-636 (Ind. 1999). An action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action. Breitweiser v. Indiana Office of Environmental Adjudication, 810 N.E.2d 699, 702 (Ind. 2004). An appellate court may reverse an agency decision only where it is purely arbitrary or an error of law has been made. Id. (citing in part Ind. Code § 4-21.5-5-14(d)).

The Sheriff's Department argues that the ICRC erred by failing to set aside the motion for default judgment because the allegations in East-Miller's complaints did not state prima facie cases of discrimination or retaliation. However, we conclude that, because the Sheriff's Department did not make this argument to the ICRC, the argument is waived.

Default judgments in the context of the ICRC are governed by 910 IAC 1-6-1, which provides:

> When a party has:
> (1) failed to plead or otherwise defend as provided by this article; or
> (2) failed to appear for a public hearing after proper notice;
> such party is in default. Upon a showing that a party is in default, the commission may enter an order by default in accordance with the procedures set forth in the [AOPA].

The AOPA provides, in part:

> (a) At any stage of a proceeding, if a party fails to:
>
> (1) file a responsive pleading required by statute or rule;

(2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or

(3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action;

the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.

(b) Within seven (7) days after service of a proposed default or dismissal order, the party against whom it was issued may file a written motion requesting that the proposed default order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(c) If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order. If the party has filed a written motion under subsection (b), the administrative law judge may either enter the order or refuse to enter the order.

(d) After issuing a default order, the administrative law judge shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings in accordance with section 23 of this chapter to resolve any issue of fact.

Ind. Code § 4-21.5-3-24. Because the Sheriff's Department failed to file a written motion requesting that the proposed default order not be imposed, the ALJ was required under Ind. Code § 4-21.5-3-24(c) to issue the default. See Breitweiser, 810 N.E.2d at 703. Further, 910 IAC 1-6-2 provides that "[a]n order by default may be entered against a governmental organization." See also 910 IAC 1-6-4.

The setting aside of a default judgment issued by the ICRC is governed by 910 IAC 1-6-3, which provides: "Upon application within a reasonable time and upon good cause shown, the Chairman of the Commission may set aside on Order by Default." Additionally, as the ICRC noted in its order, Ind. Code § 4-21.5-3-29(d) provides:

> To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:
>
> (1) identifies the basis of the objection with reasonable particularity; and
>
> (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

The ICRC denied the Sheriff's Department's motion to set aside in part because the motion did not identify an objection to the ALJ's proposed orders. The only grounds advocated by the Sheriff's Department for setting aside the default judgment was the fact that a settlement had been reached with East-Miller. The Sheriff's Department did not argue that the default should be set aside because the allegations of East-Miller's complaints failed to demonstrate prima facie cases of discrimination or retaliation. The Sheriff's Department never presented this argument to the ICRC. Because the Sheriff's Department did not present the argument to the ICRC, it cannot present the argument on appeal. See, e.g., National Rural Utilities Co-op. Finance Corp. v. Public Service Comm'n of Indiana, 552 N.E.2d 23, 29 (Ind. 1990) (holding that "an appellate court will not review issues on appeal that were never before, and therefore never ruled upon, by an administrative body"); see also Ind. Appellate Rule 5(C)(2) ("All issues and grounds for

appeal appropriately preserved before an Administrative Agency may be initially addressed in the appellate brief."). Because the Sheriff's Department made no other arguments on appeal, we conclude that the ICRC did not err by denying the Sheriff's Department's motion to set aside the default judgment.

For the foregoing reasons, we affirm the ICRC's denial of the Sheriff's Department's motion to set aside the default judgment.

Affirmed.

MAY, J. and BAILEY, J. concur