



**In the
Missouri Court of Appeals
Western District**

VICKI UNRUH,	)	
	)	
Respondent,	)	WD83507 Consolidated with
	)	WD83519
v.	)	
	)	OPINION FILED:
STATE BOARD OF NURSING,	)	December 22, 2020
	)	
Appellant.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Mark D. Pfeiffer,
Judge and Anthony Rex Gabbert, Judge

Vickie Unruh's ("Unruh") nursing license was revoked on April 16, 2018, by the Board of Nursing ("Board") after the Administrative Hearing Commission ("AHC") determined that the Board had cause to discipline Unruh's license pursuant to sections 335.066.2(6) and (13).¹ On December 12, 2019, the Circuit Court of Cole County, Missouri issued its judgment ("Judgment"), finding that the AHC's determination that Unruh violated section 335.066.2(6) was not supported by competent and substantial

¹All statutory references are to RSMo 2016 as supplemented, unless otherwise indicated.

evidence, but that the AHC's determination that Unruh violated section 335.066.2(13) was supported by competent and substantial evidence. The Judgment also found that the discipline of revocation of Unruh's license imposed by the Board was inappropriate, and instead decided that Unruh's license should be placed on probation for a period of two years, retroactive to the date Unruh filed her petition for review.

The Board filed a notice of appeal. Unruh thereafter filed a separate notice of appeal. The appeals were consolidated. Because we review the agency decisions and not the circuit court's Judgment, and because Unruh is the party aggrieved by the agency decisions, Unruh was designated as the Appellant-Respondent, and was required by Rule 84.05(e)² to file the appellant's brief.

Unruh did not file an appellant's brief as required by Rule 84.05(e), despite notice of dismissal pursuant to rule 84.08. Her appeal was dismissed. As a result, Unruh has not preserved any issue for appellate review, and is unable to sustain her burden to demonstrate that the agency decisions in this case were incorrect. Pursuant to Rule 84.08(b), we vacate the circuit court's Judgment and remand this matter with instructions to reinstate the decisions of the AHC and the Board.

Analysis

"In an appeal following judicial review of an administrative agency's decision, this court reviews the agency's decision and not the circuit court's judgment." *Ringer v. Mo. Dept. of Health & Senior Servs.*, 306 S.W.3d 113, 114 (Mo. App. W.D. 2010) (citing *Mo. Coalition for the Env't v. Herrmann*, 142 S.W.3d 700, 701 (Mo. banc 2004)). In

²All rule references are to *Missouri Court Rules, Volume I -- State, 2020* unless otherwise referenced.

conducting our review, "we presume that the agency's decision is correct, and the burden to show otherwise is placed on the party challenging the decision." *Id.* (citing *Versatile Mgmt. Group v. Finke*, 252 S.W.3d 227, 231 (Mo. App. E.D. 2008)). That is so even where the party aggrieved by the agency decision prevails before the circuit court, and is not the party who filed the appeal. *Id.*

This "procedural anomaly" is reflected in Rule 84.05(e), which describes "the briefing procedures to be followed in these types of cases." *Id.* at 115. Rule 84.05(e) provides:

If the circuit court reverses a decision of an administrative agency and the appellate court reviews the decision of the agency rather than of the circuit court, a party aggrieved by the circuit court decision shall file a notice of appeal and the record on appeal and shall file with the record on appeal a notice designating the party that is aggrieved by the agency decision. The party aggrieved by the agency decision shall file the appellant's brief and reply brief, if any, within the time otherwise required for the appellant to file briefs.

If a party who is aggrieved by an agency decision fails to file the first brief, that party shall be given notice of dismissal as required in Rule 84.08.

The Board was aggrieved by the circuit court's Judgment. As such, the Board was required to file a notice of appeal, the record on appeal, and a notice designating Unruh as the party aggrieved by the agencies' decisions. Though Unruh was also aggrieved by the circuit court's Judgment, as the Judgment did not vacate the decisions of the AHC and the Board in their totality, Unruh's separately filed appeal did not alter the fact that we review the agencies' decisions on appeal, and not the circuit court's Judgment. Nor did Unruh's separately filed notice of appeal alter Unruh's status as the party aggrieved by the agency decisions for purposes of Rule 84.05(e), or her status as the party who bears the burden to

rebut the presumption that the agency decisions are correct. Stated another way, Unruh's separately filed notice of appeal did not alter the issues on appeal, which were whether the AHC properly found cause to discipline Unruh's license for violations of sections 335.066.2(6) and (13), and whether the Board properly imposed revocation of Unruh's license as the discipline for said violations. In short, as the party aggrieved by the agency decisions, Unruh was required by the plain and unambiguous language of Rule 84.05(e) to file the appellant's brief, regardless whether she filed a separate notice of appeal.

Unruh's appellant's brief was due by July 20, 2020. Unruh's counsel was explicitly advised of the July 20, 2020 due date of his initial brief in a notice issued by the Court on May 20, 2020. When Unruh did not file her brief by this date, the clerk issued an "Important Notice to Appellant" pursuant to Rule 84.08 on July 31, 2020, advising Unruh that "[t]he appeal will be dismissed" unless her default in failing to "timely file the Initial Appellant's Brief" is remedied on or before August 17, 2020.

Unruh did not file her appellant's brief by August 17, 2020. On August 18, 2020, this Court issued an order pursuant to Rule 84.08 dismissing Unruh's appeal, and directing the Board to file a brief.

The Board filed a brief on October 16, 2020, and asked that the circuit court's Judgment be vacated pursuant to Rule 84.08(b). We agree that the circuit court's Judgment must be vacated.

Rule 84.05(e) provides that if the "party who is aggrieved by an agency decision fails to file the first brief, that party shall be given notice of dismissal as required in Rule 84.08." Rule 84.08 provides in pertinent part as follows:

(b) If the party who is aggrieved by an agency decision fails to file the first brief as required under Rule 84.05, that party shall be given notice as otherwise required in this Rule 84.08. If the party fails to remedy the default, any party aggrieved by the circuit court decision may file a motion in the appellate court requesting that the judgment of the circuit court be vacated.

The "notice as otherwise required" referred to in Rule 84.08(b) is described in Rule 84.08(a), which provides as follows:

After the timely filing of a notice of appeal, if the appellant fails to take the further steps required to secure review of the appeal within the periods of time allowed or as extended, the clerk shall place the case on a dismissal docket. The clerk shall notify all parties that the appeal will be dismissed unless the appellant remedies the default before a specified date. The date shall not be less than 15 days from the date of the notice. If the default is not remedied by that date, an order of dismissal shall be entered.

Here, Unruh failed to comply with Rule 84.08(b), as she did not file the opening brief required by Rule 84.05(e) despite the fact she was the party aggrieved by the agency decisions. As such, as required by Rule 84.08(b), the clerk provided Unruh with the "notice as otherwise required" by Rule 84.08(a), advising Unruh that her appeal would be dismissed unless she remedied her default by a date that was not less than 15 days from the date of the notice. Unruh did not remedy her default. Unruh's appeal was appropriately dismissed. In response thereto, the Board has asked this Court through its brief to vacate the circuit court's Judgment pursuant to Rule 84.08(b).

Though Unruh's appeal was dismissed, Unruh filed a brief in response to the Board's brief,³ which argued that the agency decisions were incorrect. Unruh's rights to seek appellate review of the agencies' decision had been dismissed, however, due to her

³This Court would have been within its discretion to refuse to file Unruh's responsive brief, as Unruh's right to seek appellate review of the agency decisions had been dismissed. The Court accepted Unruh's responsive brief for filing, *ex gratia*.

default in filing the appellant's brief. We therefore disregard Unruh's arguments addressing the merits, as Unruh's failed to preserve any issue with respect to the correctness of the agency decisions for appellate review.

This conclusion is consistent with the result reached in *Ringer*, 306 S.W.3d 113, where a party aggrieved by an agency decision failed to file an opening brief as required by the reverse briefing schedule imposed pursuant to Rule 84.05(e). We concluded in *Ringer* that the failure to file an opening brief meant that the party aggrieved by an agency decision failed "to carry her burden of persuading this court that [the agency] decision was in error." *Id.* at 115. The same result was reached in *McCleney v. Neese*, 288 S.W.3d 326, 328 (Mo. App. S.D. 2009), where the Southern District found that a party aggrieved by an agency decision who failed to file the opening brief required by Rule 84.05(e) had "failed to preserve any issue for appellate review and ha[d] failed to carry his burden of persuading this Court that the [agency's] decision was in error[.]" "Under these circumstances, we have no alternative but to affirm the [agency's] decision." *Id.*; see also *Ringer*, 306 S.W.3d at 115. The same is true here.⁴

⁴Rules 84.05(e) and 84.08 were modified after the decisions in *Ringer* and *McCleney*. However, the modifications to these Rules strengthen the efficacy of the results reached in *Ringer* and *McCleney*. Rule 84.05(e) was amended by Supreme Court Order dated June 25, 2010, approximately 6 months after *Ringer* was decided. Among other things, the amendment deleted a sentence that had provided that "[t]he party aggrieved by the circuit court decision shall prepare the respondent's brief and serve it in a time otherwise required for the respondent to serve briefs," and added the provision that should a party aggrieved by the agency decision fail to file the first brief, "that party shall be given notice of dismissal as required in Rule 84.08(b)." In the same Supreme Court Order, Rule 84.08 was amended effective January 1, 2011, to add new subsection (b), addressing the involuntary dismissal impact should the party aggrieved by an agency decision fail to file the first brief as required by Rule 84.05(e).

The Supreme Court's amendments to Rules 84.05(e) and 84.08 shortly after *Ringer* appear plainly intended to codify the outcomes reached in *Ringer* and *McCleney*. The amendment to Rule 84.05(e) expressly relieves the party aggrieved by the circuit court's decision from any obligation to file a brief if no opening brief is filed by the party aggrieved by the agency's decision. The Rule amendments require notice of dismissal, and describe the involuntary dismissal recourse this Court is authorized to impose should a party aggrieved by an agency decision fail to file the first brief as required by Rule 84.05(e). Rule 84.05(e); Rule 84.08(b).

Unruh's responsive brief argues that the Board is not entitled to have the circuit court's Judgment vacated pursuant to Rule 84.08(b). She argues that Rule 84.05(e) was never invoked in this case because the clerk never issued an order directing reverse briefing. And, she argues that *Ringer* is distinguishable because it did not involve a cross-appeal.

Unruh has not developed these arguments nor cited any supportive authority for her bare assertions. *Hiner v. Hiner*, 573 S.W.3d 732, 736 (Mo. App. W.D. 2019) ("Mere conclusions and the failure to develop an argument with support from legal authority preserve nothing for review.") (internal quotation marks omitted). Even disregarding these fatal deficiencies, we find no merit in either of Unruh's assertions.

Rule 84.05(e) does not require the issuance of an order by the clerk of the court to trigger the Rule's mandatory directive that the party aggrieved by an agency's' decision "**shall** file the appellant's brief and reply brief, if any, within the time otherwise required for the appellant to file briefs." (Emphasis added.) Though our clerk has the authority to issue reverse briefing orders to clarify scheduling in an appeal that implicates Rule 84.05(e), the failure to do so is immaterial to the enforceability of the briefing obligation imposed by Rule 84.05(e). Moreover, Unruh's claim that she was never advised of her obligation to file the first brief as required by Rule 84.05(e) ignores the notice sent by the Court on May 20, 2020, which advised Unruh's counsel of his obligation to file the opening brief on appeal two months before that brief was due.⁵

⁵Rule 84.05(e) and Western District Special Rule 35 both require the party aggrieved by the circuit court's judgment to file, prior to or along with the record on appeal, "a notice designating the party that is aggrieved by the agency decision." Although the Board filed the record on appeal, it did not file this required notice. However, we

Moreover, it is irrelevant that *Ringer* did not involve a cross-appeal. As we explain, *supra*, regardless who files a notice of appeal in cases of this nature, we are bound to review the agency decision and not the circuit court's judgment; the agency's decision is presumed correct; and the party aggrieved by the agency decision has the burden to demonstrate that the agency decision was incorrect. Thus, although both the Board and Unruh filed notices of appeal, Unruh was the required appellant in both appeals; had the obligation to file the appellant's brief in both appeals; bore the same burden in both appeals; and was subject to the same sanction for failure to file an appellant's brief in both appeals. As a result, when this Court involuntarily dismissed Unruh's appeal pursuant to Rule 84.08 after Unruh failed to file an appellant's brief as required, we appropriately dismissed all of Unruh's rights to seek appellate review of the agency decisions as to which she was aggrieved.

We conclude that Unruh's right to seek appellate review of the agency decisions giving rise to revocation of her nursing license was appropriately dismissed after she failed to file the appellant's brief as required by Rule 84.05(e), despite due notice of dismissal as required by Rule 84.08(a). The Board has requested in its brief that we vacate the circuit court's Judgment pursuant to Rule 84.08(b).⁶ We are obligated to afford

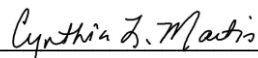
do not construe Rule 84.05(e) or Western District Special Rule 35 to require the filing of this notice as a condition precedent to the mandatory directive described in the final sentence of Rule 84.05(e) that the "party aggrieved by the agency decision **shall** file the appellant's brief," a mandatory directive that is consistent with our standard of review. (Emphasis added.) Rather, we construe the requirement to file a notice designating the party aggrieved by the agency decision as intended to assure there is no confusion on the subject. Here, there is no confusion that Unruh was the party aggrieved by the agency decisions. Moreover, Unruh has not claimed, or developed an argument suggesting, that the Board's failure to file this notice was responsible for her default in failing to file her appellant's brief.

⁶That the Board requested this relief in a brief and not in a motion is immaterial.

this relief as Unruh has preserved no issue for appellate review, and cannot sustain her burden to demonstrate that the agency decisions were incorrect.

Conclusion

The circuit court's Judgment is vacated. This matter is remanded to the circuit court with directions to reinstate the AHC's and the Board's decisions.



Cynthia L. Martin, Judge

All concur