

IN THE COURT OF APPEALS OF IOWA

No. 3-471 / 12-1505
Filed July 10, 2013

DAVID DEIBLER, ET AL.,
Plaintiffs-Appellants,

vs.

IOWA BOARD OF REGENTS,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Alan L. Pearson, Judge.

The plaintiffs appeal the district court's ruling on a petition for judicial review. **APPEAL DISMISSED.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellants.

Thomas J. Miller, Attorney General, Jeffrey S. Thompson, Deputy Attorney General, Diane M. Stahle, Special Assistant Attorney General, and Timothy L. Vavricek, Assistant Attorney General, for appellee.

Heard by Eisenhauer, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

We must decide whether a notice of appeal was filed on a timely basis.

I. Background Proceedings

The Malcolm Price Laboratory School, formerly housed on the University of Northern Iowa campus in Cedar Falls, educated pre-kindergarten through twelfth grade students. The Iowa Board of Regents was the governing body of the school. For budgetary reasons, the Board approved the closure of the school, effective June 30, 2012.

A group of Black Hawk County citizens sought judicial review of the Board's decision. They alleged that a 2009 statute "transformed" the Price lab school into a "Research and Development School." The group asserted the statute precluded the Board from closing the Price lab school.

The parties agreed the petition presented issues of law and not fact. Following a hearing, the district court reiterated that position in its ruling and stated it had "disregard[ed] fact submissions from either party unless there [was] apparent agreement to the fact at issue." The court proceeded to describe the "factual context" in which the issue of law arose and emphasized that the only issue to be decided was whether the 2009 statute "restrict[ed] the previously granted authority [of the Board] in such a way that the board lost its existing authority to close . . . the Malcolm Price Laboratory School." The court concluded that, at the time the Board ordered the school closed, it had the authority to do so, a research and development school did not exist, and the 2009 statute "provid[ed] no basis for interfering with the exercise of the board's discretion in closing the Malcolm Price Laboratory School." The court affirmed

“[t]he administrative action of the Board of Regents closing the Malcolm Price Laboratory School.” The court’s decision was dated June 25, 2012.

The plaintiffs filed a “motion for rehearing, expanded findings of fact and conclusions of law” “pursuant to Iowa Rules of Civil Procedure 1.904(2), 1.1004(6), and 1.1004(8).” The district court denied the motion on July 31, 2012, and the plaintiffs filed a notice of appeal on August 14, 2012.

The Board responded to the notice of appeal with a motion to dismiss the appeal as untimely. See Iowa R. App. P. 6.1006(1). The Iowa Supreme Court ordered the motion submitted with the appeal. We find that motion dispositive.

II. Timeliness of Notice of Appeal

“A notice of appeal must be filed within 30 days after the filing of the final order or judgment. However, if a motion is timely filed under Iowa Rule of Civil Procedure 1.904(2) or 1.1007, the notice of appeal must be filed within 30 days after the filing of the ruling on such motion.” Iowa R. App. P. 6.101(b). “This provision is mandatory and jurisdictional.” *Kunau v. Miller*, 328 N.W.2d 529, 530 (Iowa 1983) (citing the formerly numbered rules).

The plaintiffs filed their notice of appeal within thirty days of the order denying the 1.904(2) motion but not within thirty days after the ruling on the petition for judicial review. The question, therefore, is whether the post-ruling motion extended the time for filing a notice of appeal.

A “motion to reconsider must qualify as a proper motion under [Rule 1.904(2)], if it is to toll the 30-day period for taking an appeal.” *Budde v. City Dev. Bd.*, 276 N.W.2d 846, 849 (Iowa 1979); accord *Explore Info. Servs. v. Court Info. Sys.*, 636 N.W.2d 50, 54 (Iowa 2001) (“[W]e have jurisdiction of the appeal

only if the motion to reconsider was appropriate to challenge the ruling . . .”). In proceedings involving the judicial review of agency action, a rule 1.904(2) motion is only proper if the agency action was taken in a contested case proceeding or if the district court reviewing agency action other than a contested case made a determination of fact. See Iowa Ct. R. 1.1603(3) (“In proceedings for judicial review of agency action in a contested case pursuant to Iowa Code section 17A.19 . . . [t]he provision of rule 1.904(2) shall apply.”); *Osborne v. Iowa Natural Res. Council*, 336 N.W.2d 745, 747 (Iowa 1983) (citing *State ex rel. Johnston v. Iowa Dep’t of Soc. Servs.*, 328 N.W.2d 912, 913 (Iowa 1983)) (“[I]n agency adjudication other than a contested case rule, [1.904(2)] motions are limited to decisions in which the district court made a determination of fact.”).¹

The parties agree the Board’s action subject to judicial review was not the result of a contested case proceeding but involved judicial review of “other agency action.” See *Smith v. Iowa Bd. of Med. Exam’rs*, 729 N.W.2d 822, 826 (Iowa 2007) (“Other agency action is action that is neither rulemaking nor a contested case . . . taken without a hearing required by a statute or constitution or action taken after a required hearing that does not rise to the level of an evidentiary hearing.”). During the judicial review proceeding, they also agreed that the proceeding did not involve factual determinations. As noted, the district court confirmed this agreement on the record and memorialized it in the ruling. See *Explore Info.*, 636 N.W.2d at 56-57 (“[T]he district court could decide th[e]

¹ We question whether a court on judicial review of agency action may ever make a determination of fact. See *Christiansen v. Iowa Bd. Of Educ. Exam’rs*, 831 N.W.2d 179, 186 (Iowa 2013) (stating district courts exercise appellate jurisdiction over agency action). Because the district court did not make any fact findings, we need not explore this assertion further.

issue [of statutory interpretation] based on uncontroverted pleadings as restated in Explore’s statement of uncontroverted facts.”). Because the court’s ruling did not implicate issues of fact, the plaintiffs could not use a rule 1.904(2) motion to extend the time for filing a notice of appeal.

On appeal, the plaintiffs retreat from their initial concession that the judicial review proceeding did not implicate factual issues. They argue “[t]here was a fundamental fact issue that had to be decided, and apparently was decided, in order for the court to reach its legal conclusions”—namely, “whether or not, at the time of the filing of the petition, a [research and development school] was *in existence*.” Contrary to the plaintiffs’ assertion, the existence or non-existence of the research and development school was not a disputed fact; it was an uncontroverted truth. As the district court noted, the Price lab school was ordered closed before a functioning research and development school could statutorily come into existence.

The plaintiffs also assert that the rule 1.904(2) motion was proper because it “was necessary to preserve errors for review, in that the District Court failed to resolve issues, claims or legal theories properly submitted to it.” See *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (stating a rule 1.904(2) motion “is an essential post-trial procedure when used to preserve error based upon the failure of the district court to resolve an issue”). To the contrary, the issue raised by the plaintiffs in their post-ruling motion, namely whether the Board had the authority to abolish a research and development school, was an issue that the court could not address because, as the district court explained, “the research and development school could not, by statute, come into existence until after the

effective date of the board's closure decision." Accordingly, the plaintiffs' error preservation justification for filing the rule 1.904(2) motion fails. See *LaMasters v. State*, 821 N.W.2d. 856, 863 n.1 (Iowa 2012) ("[W]e have cautioned that a rule 1.904(2) motion raising a purely legal issue does not extend the time for appeal."). The motion could not be used to extend the time to file a notice of appeal.

III. Conclusion

We grant the Board's motion to dismiss the appeal as untimely.

APPEAL DISMISSED.