SIXTH DIVISION
April 15, 2016

No. 1-15-2190

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TODD MAYNOR, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF INSURANCE, an administrative agency, and ANDREW BORON, Director of the Illinois Department of Insurance, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 14 CH 20115 Honorable Thomas R. Allen, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the order dismissing plaintiff's complaint for administrative review and remanded for further proceedings finding he was not required to exhaust his administrative remedies prior to filing the complaint where to do so would have been futile.

¶ 2 Plaintiff filed a complaint for administrative review of defendants' denial of his application for an insurance producer's license. The circuit court dismissed plaintiff's complaint because he did not exhaust his administrative remedies by filing a motion for a rehearing of the denial of his license application. On appeal, plaintiff argues the circuit court erred in dismissing

his complaint for failing to exhaust his administrative remedies by requesting a rehearing when doing so would have been futile. We reverse and remand for further proceedings.

¶ 3 Plaintiff, Todd Maynor, submitted an application for an Illinois insurance producer's license, which defendant, Andrew Boron, the Director of the Illinois Department of Insurance (Department)[1], denied in April 2014 because plaintiff had a prior felony conviction and had "demonstrated untrustworthiness in conduct of business in the State." Plaintiff submitted a request for an administrative hearing, which was held in July 2014.

¶ 4 At the time of the hearing, plaintiff was 44 years old, had been married for 13 years, and was raising two children; aged 6 years old and 16 months old. Plaintiff testified that the felony conviction on which the denial was based was an isolated incident of bad judgment some 17 years earlier where plaintiff had been drinking. During this incident, plaintiff went outside and began arguing with a friend. A neighbor came out of his house and told plaintiff to be quiet. Plaintiff and the neighbor began verbally arguing, and the neighbor subsequently pulled a knife on him and plunged it toward plaintiff's chest. Plaintiff knocked the knife from the neighbor's hand, struck the neighbor, and chased the neighbor into his house. Plaintiff was subsequently convicted of unlawful restraint, a felony, as well as two counts of misdemeanor battery and one count of misdemeanor criminal trespass.

¶ 5 In 2013, plaintiff owned a restaurant with a liquor license, and he was convicted of a misdemeanor for selling two beers to two minors. Plaintiff explained that on the night of the sale, he was sitting outside talking to some patrons when the two minors walked over, sat next to him and asked for two beers. Without looking at the minors, plaintiff got up, grabbed two beers, and placed them on the bar in front of the minors. Plaintiff then looked at the minors and asked

[1] We refer to Mr. Boron individually as "Director" and to Mr. Boron and the Department collectively as "defendants."

them for their I.D.'s. He looked at their I.D.'s for several minutes but believes he "did the math backwards." Plaintiff took their money and gave them the beers. The minors left to make a phone call, and plaintiff "realized that he [had] made a mistake," so he "grabbed the beers from the bar, and put their money back, and his plan was to return their money when they came back in the restaurant." The minors later returned with two police officers, who apparently had used the minors as part of a "sting operation" against him. Plaintiff pleaded guilty to selling alcohol to the minors.

¶ 6 Plaintiff testified to his volunteer work with his church, community, and elsewhere in Illinois. Plaintiff has volunteered at his church's vacation bible school, and "assisted with kids during the church's Wednesday night club." He also coached a little league team, is attempting to become a volunteer fireman, and assisted persons affected by tornadoes in Washington, Illinois. He wants to obtain an insurance producer's license to assist people in protecting themselves from unexpected disasters. Plaintiff has a job offer from Allstate if he becomes licensed.

¶ 7 Plaintiff's pastor, Phillip Bachman, testified he has known plaintiff and his wife for four years, that plaintiff is congenial and honest, and that he has experienced spiritual growth. Mr. Bachman noted that plaintiff has been very active in service to the church and that he helps the church by running the soundboard and sound system for church services.

¶ 8 On September 29, 2014, the hearing officer issued a report recommending that plaintiff be issued the insurance producer's license because the evidence showed that he was sufficiently rehabilitated to warrant the public trust. Specifically, the hearing officer found that plaintiff showed contrition for the 17-year-old incident with the neighbor resulting in the felony conviction for unlawful restraint and the misdemeanor convictions for battery and criminal

trespass, as well as for the 2013 misdemeanor conviction for unlawful sale of alcohol to minors, and that plaintiff had made full restitution. The 17-year-old incident had been greatly influenced by plaintiff's alcohol consumption, he had presented sufficient proof that he had not had any other similar incidents, and he had maintained a pattern of non-problematic use of alcohol ever since. The hearing officer found that the 2013 misdemeanor was an isolated incident "based on a mistake," and there was no evidence it was indicative of consistent criminal conduct. The hearing officer found that plaintiff was trustworthy because he had disclosed his convictions when applying for his liquor license, he volunteered at his church, he applied to work at Allstate, and he had made considerable efforts to give back to his church and the community.

¶ 9 On November 5, 2014, the Director issued an order rejecting the hearing officer's recommendation and affirming his previous decision denying plaintiff an insurance producer's license. In pertinent part, the Director noted that plaintiff's 17-year-old crime against the neighbor was violent and showed a lack of self-control and discipline, while his more recent conviction of serving alcohol to minors reinforced his lack of discipline and awareness. The Director further noted that plaintiff was "less than two years removed from the occurrence of the unlawful sale of alcohol to a minor" which led to a misdemeanor conviction, and that this misdemeanor conviction, on top of his prior felony and three misdemeanor convictions related to the 17-year-old incident with the neighbor, showed a pattern of repeated criminal conduct.

¶ 10 The Director's order was served on plaintiff by mail on November 12, 2014. Plaintiff did not file a motion for a rehearing; instead, on November 19, 2014, plaintiff emailed his state representative, David Leitch, to request that he reach out to the Director and request reconsideration of his decision denying plaintiff's application for an insurance producer's license. Defendants have not raised any argument as to the propriety of this exchange.

¶ 11 On December 4, 2014, Representative Leitch sent plaintiff an email stating:

> "I placed [a] call to Director Boron today and just got off the phone with him. He told me that he always errors on the side of caution, so he will not change his decision. However, he stated that your appeal at this point would mean going to Circuit Court. You may want to consider appealing to the Circuit Court or at least having a consultation with an attorney to learn what your chances of success are with the courts. I regret that I was unable to do more; however, the director was uncompromising about his position on denials."

¶ 12 On December 16, 2014, without having first filed a motion for a rehearing of the Director's denial of his application for an insurance producer's license, plaintiff filed his complaint for administrative review in the circuit court.

¶ 13 On February 13, 2015, defendants filed a motion to dismiss plaintiff's complaint for administrative review pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)), because he did not exhaust his administrative remedies by filing a motion for a rehearing[2].

¶ 14 On April 9, 2015, plaintiff filed a response to defendants' motion to dismiss, asserting that exhaustion of administrative remedies is not required when, as here, those efforts would be an exercise in futility. Plaintiff attached to the response the emails to and from Representative Leitch. Defendants did not move to strike the emails, nor did they offer any evidence conflicting with Representative Leitch's statement in the December 4 email regarding the Director's refusal to change his decision regarding plaintiff's application.

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[2] Defendants also argued for dismissal based on plaintiff's failure to file an affidavit as required by section 3-105 of the Administrative Review Law (735 ILCS 5/3-105 (West 2012)). Defendants have forfeited review of this argument by failing to raise it on appeal. See Ill. S. Ct. R. 341(h)(7), (i) (eff. Jan. 1, 2016).

¶ 15 On June 29, 2015, the circuit court granted defendants' motion to dismiss even though it found that it "practically is a futile effort to go back and ask Mr. Boron for a rehearing when we know *** what is likely to be done." Plaintiff appeals.

¶ 16 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters appearing on the face of the complaint, or established by external submissions which act to defeat the claim. *Burns v. Department of Insurance*, 2013 IL App (1st) 122449, ¶ 9. In ruling on a section 2-619 motion to dismiss, the circuit court may consider pleadings, depositions, and affidavits. *Id*. On appeal, the question is whether a genuine issue of material fact exists precluding the dismissal or, in the absence of such an issue of material fact, whether dismissal is proper as a matter of law. *Id*. A section 2-619 dismissal is reviewed *de novo*. *Id*.

¶ 17 The circuit court dismissed plaintiff's complaint for administrative review because he failed to exhaust his administrative remedies by filing a motion for a rehearing within 10 days of the date of mailing of the Director's order as required by section 2402.280(c) of the Administrative Code. See 50 Ill. Adm. Code 2402.280(c) (1979) ("A motion for a rehearing or a motion for the reopening of a hearing shall be filed within 10 days of the date of mailing of the Director's Order."); *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308 (1989) (parties aggrieved by the action of an administrative agency ordinarily cannot seek review in the courts unless they have exhausted all administrative remedies available to them).

¶ 18 Plaintiff argues, though, that it would have been futile for him to file a motion for a rehearing given the Director's "unwavering policy to uphold his denials" and, thus, that exhaustion of his administrative remedies was not required in order to obtain judicial review.

See *Castaneda*, 132 Ill. 2d at 309 (holding that an exception to the doctrine of administrative remedies exists when "it is patently futile to seek relief before the agency").

¶ 19 *Constantine v. Village of Glen Ellyn*, 217 Ill. App. 3d 4 (1991), and *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008), are informative, and we proceed to analyze them in detail.

¶ 20 In *Constantine*, the plaintiffs, James and Carol Constantine, submitted an application to the Village of Glen Ellyn (Village) in January 1987 for a building permit for the construction of a single-family home on the subject property. *Constantine*, 217 Ill. App. 3d at 6-7. On February 3, 1987, William H. Hansen, the building and zoning official of the Village, sent the plaintiffs a letter denying the building permit due to minimum-lot requirements set forth in a 1974 zoning ordinance and informing them that no permit would be issued unless the plaintiffs were granted a variance by the Village board of trustees. *Id*. at 6-8. The plaintiffs did not apply for a variance but instead filed a suit for a writ of *mandamus* in the circuit court of Du Page County to compel the defendants, the Village and Mr. Hansen, to issue them the building permit. *Id*. at 6.

¶ 21 Mr. Constantine testified at trial that prior to purchasing the subject property he spoke with Mr. Hansen, who told him that the subject property was a buildable lot because it was subject to a "grandfather" provision regarding small lots. *Id*. at 7. Mr. Hansen testified he never told Mr. Constantine that the lot was buildable. *Id*. at 11.

¶ 22 The director of planning and development for the Village testified that the Village's denial of the building permit due to the minimum lot requirements was consistent with other applications of the ordinance in the past. *Id*. at 12.

¶ 23 Following the evidence, the trial court ordered the Village to issue the building permit. *Id*. at 13.

¶ 24 On appeal, the defendants argued that the *mandamus* action was premature, and that the plaintiffs failed to exhaust their administrative remedies by first appealing the denial of the building permit to the Glen Ellyn Zoning Board of Appeals (Zoning Board). *Id*.

¶ 25 The appellate court held that the futility exception applied, stating:

> "While the Village argues that judicial review could have been avoided if plaintiffs had succeeded before the Zoning Board, this argument fails to recognize that the Zoning Board's decision was not final and was subject to a decision by the Village Board. Regardless if the Zoning Board reversed Hansen's decision, the Village Board was the final decision maker. It is clear that the Village believed Hansen's interpretation of the [zoning ordinance] to be correct, and an appeal to the Zoning Board, which ultimately would be determined by the Village Board, would have been futile. *** [T]herefore, plaintiffs were not required to appeal Hansen's decision to the Zoning Board." *Id*. at 15.

¶ 26 In the present case, similar to *Constantine*, it is clear that the Director, the ultimate decision-maker regarding any rehearing petition, believed that plaintiff was not entitled to an insurance producer's license, having denied plaintiff's initial application in April 2014, rejected the hearing officer's recommendation, affirmed his previous decision on November 5, 2014, and turned down the state representative's request for reconsideration on plaintiff's behalf on December 4, 2014. Yet another attempt at a rehearing (which would have been the fourth time the director gave consideration to plaintiff's request for an insurance producer's license), on the exact same evidence that the Director had already found to be insufficient to merit the issuance of the license, would have been futile.

¶ 27 In *Morr-Fitz*, the plaintiffs, two licensed pharmacists and three corporations which own and operate pharmacies in Illinois, brought a declaratory judgment action in the circuit court of Sangamon County against various Illinois public officials and the State Board of Pharmacy. *Morr-Fitz*, 231 Ill. 2d at 477. The plaintiffs sought to invalidate an administrative rule forcing pharmacies to dispense Plan B contraception, also known as the morning-after pill or emergency contraception. *Id*.

¶ 28 The circuit court dismissed the plaintiffs' complaint with prejudice and the appellate court affirmed. *Id*. at 478. Our supreme court granted the plaintiffs' petition for leave to appeal. *Id*.

¶ 29 In pertinent part, our supreme court addressed whether the plaintiffs failed to exhaust their administrative remedies by failing to seek a variance from the rule before the Illinois Department of Financial and Professional Regulation. *Id*. at 495. Our supreme court held that the futility exception applied, stating:

> "Plaintiffs have alleged that defendants are on record via the Governor's public statements, warning that the entire point of the rule is to coerce pharmacists with religious objections into dispensing Plan B contraceptives. The Governor has allegedly publicly stated that 'pharmacists with moral objections [to dispensing Plan B contraceptives] should find another profession,' and that they 'must fill prescriptions without making moral judgments.' Defendants have also declared that the rule will be 'vigorously enforced.' Thus, it can be concluded that granting variances in these kinds of cases would eviscerate the whole purpose for the rule. Under such circumstances, exhaustion is not required." *Id*. at 501.

¶ 30 The *Morr-Fitz* court distinguished an earlier supreme court case, *Beahringer v. Page,* 204 Ill. 2d 363 (2003), relied upon by defendants to argue the inapplicability of the futility exception.

In *Beahringer*, the plaintiff inmate filed a declaratory judgment action alleging the warden violated his first amendment rights by authorizing the taking of his art supplies. *Id*. at 367. The inmate failed to exhaust his administrative remedies as he filed the declaratory judgment action prior to completion of the Illinois Department of Corrections' grievance procedure. *Id*. at 377. The inmate argued that the futility exception applied because "it was the warden who initially approved the confiscation, and grievances filed against warden-approved actions historically have failed." *Id*. at 378.

¶ 31 The *Beahringer* court held that the futility exception did not apply, stating:

> "A party will not be required to exhaust his or her administrative remedies when it would be patently useless to do so. [Citation]. 'However, the fact that there are clear indications that the agency may or will rule adversely is generally inadequate to terminate the administrative process or to avoid the exhaustion requirement. [Citations.]' " *Id*.

¶ 32 In other words, the *Beahringer* court required more than a mere "indication" or possibility of an adverse ruling by the administrative agency, based on "historical," unrelated cases in which pursuit of administrative remedies had failed, but rather required more certainty that pursuit of the administrative remedies *in the case before it* would have been futile.

¶ 33 The *Morr-Fitz* court found that *Beahringer* was "easily distinguished" because "[a]s to futility, plaintiffs rely upon more than a mere allegation that grievances have 'historically failed.' Rather, they rely upon the Governor's statements that the purpose of the rule is to coerce pharmacists into violating their religious objections. They also rely on defendants' declared intent to 'vigorously enforce' the rule without ever mentioning the possibility that variances might be granted." *Morr-Fitz*, 231 Ill. 2d at 503.

¶ 34 In the present case, as in *Morr-Fitz*, plaintiff relies upon more than a mere allegation that rehearing motions have historically been denied by the Director. Rather, plaintiff relies on the Director's multiple denials of *his* application coupled with the Director's statement to Representative Leitch regarding the futility of those applications. As we noted earlier, plaintiff emailed Representative Leitch, on November 19, 2014, within 10 days of having received the Director's decision affirming his previous decision denying plaintiff a license, asking for help in convincing the Director to reconsider. Representative Leitch emailed plaintiff on December 4, 2014, informing plaintiff that he had just spoken with the Director who stated he "always [errs] on the side of caution, so he will not change his decision" and that the Director was "uncompromising about his position on denials." Given these definitive statements by the Director on December 4, 2014, regarding the futility of plaintiff's application for an insurance producer's license, coupled with the fact that the Director had previously denied his application in April 2014 and affirmed this denial on November 5, 2014, and would have been the decision-maker yet again on the rehearing motion, we find that the futility exception applies.

¶ 35 Defendants counter that the futility exception is inapplicable here, and cite *Castaneda*. In *Castaneda*, the Illinois Department of Human Rights filed a complaint against the plaintiff's former employer, alleging violations of the plaintiff's civil rights. *Castaneda*, 132 Ill. 2d at 307. A three-member panel of the Illinois Human Rights Commission (Commission) dismissed the complaint with prejudice. *Id*. at 307-08. On review, the appellate court dismissed the plaintiff's appeal because he had failed to exhaust his administrative remedies by not requesting a rehearing by the entire Commission pursuant to section 8-107(F)(1) of the Illinois Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(F)(1)). *Castaneda*, 132 Ill. 2d at 308.

¶ 36 On appeal to our supreme court, the plaintiff argued that the futility exception applied because section 8-107(F)(2) of the Illinois Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(F)(2)), specifically provided:

> "*Applications for rehearing shall be viewed with disfavor*, and may be granted, by vote of 6 Commission members, only upon a clear demonstration that a matter raises legal issues of significant impact or that three-member panel decisions are in conflict." (Emphasis added.) *Castaneda*, 132 Ill. 2d at 328.

Our supreme court affirmed the appellate court's dismissal, holding:

> "Particularly because rehearings are conducted before the full Commission, and not just before the same three-member panel that rendered the original decision, the opportunity for the Commission to detect errors during the rehearing application process does exist, even if the Commission has a stated policy that disfavors granting rehearings. We therefore hold that the futility exception to the exhaustion of remedies doctrine is inapplicable to the case at bar." *Id.*

¶ 37 In contrast to *Castaneda*, the rehearing here would not have been decided by a different fact-finder, but rather would have been decided by the Director, who had already denied plaintiff's initial application in April 2014, affirmed this denial in November 2014, and turned down Representative Leitch's request, on behalf of plaintiff, for reconsideration in December 2014.

¶ 38 Defendants also argue that *Illinois Health Maintenance Organization Guaranty Ass'n v. Shapo*, 357 Ill. App. 3d 122 (2005), compels a different result. In *Shapo*, 24 health care providers provided services to thousands of persons enrolled in a health maintenance organization (HMO) that was later declared insolvent. *Id.* at 125-27. Following the declaration

of insolvency, the health care providers submitted payment claims to the Illinois Health Maintenance Guaranty Association (Association) for services rendered to the HMO's enrollees. *Id.* at 127. Two hearing officers conducted hearings on the providers' claims and found the Association liable to 20 of the 24 providers for the principal claims and for prejudgment interest. *Id*. The Director adopted and approved the hearing officers' findings of fact and conclusions of law on the principal claims in the stipulated amounts. *Id*. at 128.

¶ 39 The Association filed 24 separate complaints for administrative review in the circuit court. *Id*. The circuit court dismissed the Association's administrative complaints because the Association did not request a rehearing on any of the Director's orders and thus failed to exhaust its administrative remedies. *Id.*

¶ 40 On appeal, the Association argued that the futility exception applied and, in support of this contention, it cited three previous denials by the Director of motions for rehearing. *Id.* at 139. The appellate court held that the futility exception did not apply and that the Association was required to file a motion for rehearing. *Id.*

¶ 41 *Shapo* is inapposite, as the Association's argument there for application of the futility exception relied on an allegation that pursuit of administrative remedies (*i.e.*, motions for rehearing) had historically failed. In contrast to *Shapo*, plaintiff's argument for application of the futility exception here relies on evidence related specifically to the Director's treatment *of him* in this matter, as opposed to the Director's historical treatment of persons in other, unrelated cases.

¶ 42 Defendants next argue that the Director's statements to Representative Leitch contained in the emails should not be considered because they are hearsay. Defendants forfeited review by failing to file a motion to strike the emails. See *Yassin v. Certified Grocers of Illinois*, 178 Ill. App. 3d 498, 511-12 (1988). We also note that defendants never offered any counter-evidence to

refute what was said in those emails and never raised any argument as to the appropriateness of Representative Leitch speaking with the Director on plaintiff's behalf.

¶ 43 Accordingly, we hold that the futility exception applied here to excuse plaintiff's failure to file a motion for rehearing of the denial of his license application. Therefore, the circuit court erred in dismissing plaintiff's complaint for administrative review for failing to exhaust his administrative remedies.

¶ 44 For all the foregoing reasons, we reverse the order dismissing plaintiff's complaint for administrative review, and remand for further proceedings. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 45 Reversed and remanded.