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BOROUGH OF BATH,	:	IN THE COURT OF COMMON PLEAS
Petitioner,	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	
Respondent.	:	NO. <u>No. C-48-CV-2024-01039</u>

**RESPONDENT’S BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
APPEAL *NUNC PRO TUNC* DUE TO COURT ERROR AND TO DISMISS
PETITIONER’S APPEAL FOR LACK OF JURISDICTION**

INTRODUCTION

Respondent, Michael Long, a concerned resident of Bath Borough, respectfully submits this brief in support of his Motion for Leave to File Appeal *Nunc Pro Tunc* Due to Court Error and to Dismiss Petitioner’s Appeal for Lack of Jurisdiction. Respondent was unjustly prevented from timely filing his appeal from the Office of Open Records (OOR) Final Determination Upon Reconsideration due to demonstrably erroneous instructions provided by court staff. This obstruction, coupled with Petitioner’s failure to properly serve its appeal on Respondent, has created a situation that demands judicial intervention to protect Respondent's right to a fair and timely hearing on matters of significant public interest.

STATEMENT OF FACTS

1. On January 12, 2024, the OOR issued a Final Determination Upon Reconsideration in OOR Docket No. AP 2023-1598R, addressing Respondent's appeal from the Borough's response to his Right-to-Know Law (RTKL) request.
2. Determined to file his appeal within the 30-day statutory deadline, Respondent arrived at the Northampton County Courthouse on February 12, 2024, the final day of the appeal period, prepared to file and pay any necessary fees. (Exhibit B: Google Location Data). Respondent had even brought a physical credit card with him, despite typically using contactless payment, to ensure he could satisfy any fee requirement.
3. Upon approaching the filing window, Respondent was incorrectly informed by court staff that a filing fee was required, despite the fee having been previously satisfied by Petitioner on February 9, 2024, as confirmed by the Court Docket (Exhibit A). Due to this misinformation, and the late hour preventing payment by other means, Respondent was unable to file his appeal on that day. (Exhibit D: Declaration of Michael Long).
4. While seeking guidance from court staff, Respondent specifically inquired about the possibility of filing online. He was wrongly informed that online filing was not available for this matter. Respondent has since learned that online filing was indeed an option, and had he been correctly informed, he would have been able to timely file his appeal, avoiding this unfortunate situation.
5. Further compounding the error, Respondent inquired about the possibility of seeing a judge on that day to file his appeal, but was told that no judge would be available at that late hour. Respondent remained at the courthouse for nearly an hour after the filing office closed, distraught at being prevented from exercising his right to appeal. (Exhibit B:

Google Location Data). The gravity of this situation for Respondent cannot be overstated.

Respondent had spent months meticulously researching, preparing, and refining his appeal arguments, only to be thwarted by misinformation from the court itself.

6. Respondent did not receive notice of the Borough's appeal until February 19, 2024, a full week after the deadline had passed. Upon receiving the notice, Respondent diligently began working on a cross-appeal, believing he had 14 days to respond. However, due to the untimely nature of the Borough's service and the court's erroneous instructions, Respondent's cross-appeal was ultimately deemed untimely.
7. Adding to the appearance of inequity, Respondent notes that in a separate matter, when Borough Attorney Schnee requested the certified record from the OOR, he used certified mail, a practice he did not follow in this case when serving the notice of appeal on Respondent.
8. These facts demonstrate a pattern of procedural irregularities that have prejudiced Respondent's right to a fair and timely appeal.

ARGUMENT

I. RESPONDENT IS ENTITLED TO *NUNC PRO TUNC* RELIEF DUE TO COURT ERROR.

Pennsylvania law clearly provides for the filing of an appeal *nunc pro tunc* where extraordinary circumstances, such as demonstrable court error, prevent timely filing. The court's erroneous instructions regarding the filing fee constitute a clear and prejudicial error that warrants this extraordinary relief.

- **Established Precedent:** Pennsylvania courts have consistently recognized court error as a valid basis for *nunc pro tunc* relief. In *Nagy v. Best Home Servs., Inc.*, 829 A.2d 1166

(Pa. Super. 2003), the court granted such relief when a litigant was misinformed by court personnel. Similarly, in *Criss v. Wise*, 781 A.2d 1156 (Pa. 2001), the court upheld *nunc pro tunc* relief where a filing deadline was missed due to court misdirection. The principle of preventing injustice due to court error was further affirmed in *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979), where the court granted relief to a litigant misled about filing procedures by court officials.

- **Respondent's Due Diligence:** Respondent acted with the utmost due diligence, arriving at the courthouse on the final day of the appeal period, ready to file and pay. He came prepared with a physical credit card, a fact that demonstrates his preparedness and willingness to satisfy any fee requirement. Had he been correctly informed about the Borough's prior payment or the option to file online, he would have timely perfected his appeal.
- **Inequity of Denial:** Denying Respondent relief would create a fundamental inequity. He would be punished for diligently attempting to exercise his appellate rights, while the Borough, despite its improper service and obstructive tactics, would be rewarded for its errors.

II. PETITIONER'S APPEAL MUST BE DISMISSED DUE TO DEFECTIVE SERVICE.

Petitioner failed to comply with the clear and unambiguous rule requiring service of its appeal via certified mail, rendering the appeal jurisdictionally defective and warranting dismissal.

- **Mandatory Rule:** Pa.R.A.P. 1514(c) unequivocally mandates that service of a petition for review from a government agency "shall be made upon each party by *certified mail*." (emphasis added).

- **Jurisdictional Consequence:** The court in *Dept of Transp. v. Moto Transp. Servs.*, 42 A.3d 1171 (Pa. Cmwlt. 2012), explicitly held that failure to comply with the certified mail requirement under Pa.R.A.P. 1514 deprived the court of jurisdiction.
- **Borough's Awareness of Proper Service:** The fact that Borough Attorney Schnee utilized certified mail in a separate matter when requesting a record from the OOR demonstrates their awareness of this mandatory rule. Their failure to follow the same procedure in this case, directly impacting Respondent, raises concerns about their motives and casts doubt on their commitment to procedural fairness.

III. THE IMPORTANCE OF THIS CASE DEMANDS A TIMELY AND FAIR ADJUDICATION.

This case is not simply about a technical dispute over records. It concerns fundamental principles of government transparency and accountability in Bath Borough. The Borough's conduct throughout this matter has raised serious concerns about their commitment to these principles. The public has a right to know how their elected officials operate, and the integrity of the RTKL process demands that citizens be able to exercise their appellate rights without facing undue burden or deliberate obstruction.

CONCLUSION

For the foregoing compelling reasons, Respondent respectfully requests that this Honorable Court:

A. Grant Respondent leave to file his appeal *nunc pro tunc* to February 12, 2024, the date he diligently attempted to file, recognizing that all filing fees have been satisfied by Petitioner.

- B. Find that Respondent was prevented from filing a timely appeal due to court error and misinformation and that he acted with due diligence in attempting to file his appeal.
- C. Hold that the Borough's appeal is jurisdictionally defective due to its failure to properly serve the Notice of Appeal on Respondent in accordance with Pa.R.A.P. 1514(c).
- D. Dismiss the Borough's appeal for lack of jurisdiction based on its defective service.
- E. Grant Respondent such other relief as this Court deems just and equitable, including an award of reasonable attorney's fees and costs incurred in connection with this Motion and the underlying appeals.

The Court must act to remedy the injustices caused by the Borough's improper service and the court's erroneous instructions. This is essential not only to protect Respondent's right to appeal but also to ensure the integrity and effectiveness of the Right-to-Know Law in safeguarding government transparency and accountability.

Respectfully submitted,



/s/ Michael Long
Michael Long, Pro Se Respondent
Dated: September 9,, 2024