NO. 43114-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD E. SWANSON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

RESPONDENT DEPARTMENT OF RETIREMENT SYSTEMS' SUR-REPLY BRIEF

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I. INTRODUCTION

The Department of Retirement Systems submits this sur-reply brief pursuant to Commissioner Eric Schmidt's October 3, 2012 ruling. In his ruling, Commissioner Schmidt allowed the Department to file a sur-reply to address sections III(A) and (D) of appellant Richard Swanson's reply brief.[1]

As the Department explained in its response brief, Mr. Swanson's failure to comply with the 30-day filing deadline in the Administrative Procedure Act (APA) resulted in his failure to invoke the superior court's appellate subject matter jurisdiction.[2] Mr. Swanson's reply brief fails to overcome this conclusion because it misrepresents the record and contains meritless legal arguments.

II. ARGUMENT

A. The Arguments in Section III(A) of Mr. Swanson's Reply Misrepresent the Record and Are Meritless

Mr. Swanson bases Section III(A) of his reply on a false contention that the Department did not raise below the APA's 30-day deadline for seeking judicial review of agency action. Reply Brief of Appellant

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[1] Commissioner Schmidt also granted the Department's motion to strike section III(B) of Mr. Swanson's reply brief, stating that this Court will not address an argument raised for the first time in a reply. Mr. Swanson has challenged this portion of Commissioner Schmidt's ruling in a motion filed on October 17, 2012. This Court has not yet ruled on that motion.

[2] Response Br. at 23-25 (Damages Case), 26-32 (Rules Case).

(Reply Br.) at 3-6. He asserts, based on this contention, that the Court should now ignore the Department's argument that his failure to comply with the filing deadline resulted in his failure to invoke the superior court's appellate subject matter jurisdiction. Id.

Mr. Swanson's argument directly misrepresents the record. The Department expressly raised Mr. Swanson's failure to comply with the 30-day filing deadline in both the Damages Case and the Rules Case. CP at 53-54 and 324 (Damages Case), CP at 539-540, 542-544, and 568-570 (Rules Case). Mr. Swanson has conceded expressly and unequivocally that this is the case. Mr. Swanson expressly admitted to Commissioner Schmidt that "[a]ppellant's Reply Brief is inaccurate as it missed the fact that Respondents [sic] briefs at the superior court level raised the thirty (30) day deadline of RCW 34.05.542(3) on CP at 53 (Damages case) and at 542 (Rules Case). . . ." Response to the Department's Motion to Strike Portions of Appellant's Reply Brief (Appellant's Resp. to Mot. to Strike) at 3. As the Department stated below with regard to both cases, "[t]he APA requires [Swanson] to file a superior court complaint . . . within 30 days after service of the Department's decision. RCW 34.05.542(2), (3), (4) . . . ." CP at 53 (Damages Case), CP at 542.

The Department also raised in superior court the distinction

between the filing deadline for challenging the application of a rule as opposed to the deadline for challenging the rule itself in the only case in which this distinction is pertinent: the Rules Case.[3] The Department specifically argued that different statutory deadlines apply to the two sorts of challenges and that Mr. Swanson's challenge to the application of the rule is subject to the 30-day deadline:

> Instead of disputing these legal principles, Mr. Swanson attempts to avoid them by characterizing his appeal as a rule challenge to which the procedural prerequisites do not apply. His attempt is doomed to failure because mere repetition of the words "improper rulemaking" in his Amended Petition does not magically transform the nature of his claim from a challenge to the Department's actions into an APA rulemaking challenge. [citation omitted] Regardless of what he calls it, Mr. Swanson's claim is, in fact and law, a challenge to a decision of the Department to recalculate his AFC, a decision to which the procedural prerequisites do apply. Mr. Swanson's own Response concedes this reality when it explicitly states: "This case began with DRS' August 23, 2010, decision to reduce Mr. Swanson's AFC . . . retroactively to the date of his retirement . . .", Response at 2 [CP at 552], and "DRS application of the [FIFO] rule . . . represents an unconstitutional infringement on the right to contract . . . ," Response at 6 [CP at 556] (emphasis added). Mr. Swanson makes the same or similar allegations in his Amended Petition, again admitting the true nature of his claims: "DRS issued a letter to [Mr. Swanson] informing him that his monthly benefit would be diminished based upon a recalculated AFC . . .," Amended Petition at ¶ 1.9

[3] The Department did not make this argument in the Damages Case because in that case Mr. Swanson did not assert that his claim involved dissatisfaction with a rule. Compare CP at 6-10 (Complaint in Damages Case) and CP at 367-373 (Amended Petition in Rules Case), especially ¶ 1.11, which for the first time articulated a cognizable challenge to the Department's application of the rule.

> [CP at 369]; "DRS application of the [FIFO] rule" . . . represents an unconstitutional infringement on the right to contract . . .," id. at ¶ 1.11 [CP at 369]; "[t]his is a class action seeking . . . relief . . . against DRS for its application of the [FIFO] rule . . . , id. at ¶ 3.2 [CP at 370-371] (emphasis added to all citations).
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> As explained in detail in the Department's Motions, Mr. Swanson failed to meet his burden of proving he . . . filed . . . his petition within the APA's statutory deadlines. Motions at 15-18 [CP at 541-544]. As a result of these failures, Mr. Swanson failed to invoke this Court's appellate subject matter jurisdiction and his lawsuit must be dismissed.

CP 569-570.

Thus, there is no reason to ignore the Department's argument based on based on Mr. Swanson's false contention that the Department did not raise the 30-day filing deadline issue below.

In Section III(A) of his reply brief, Mr. Swanson also argues that the APA's 30-day filing deadline is a statute of limitation[4] and that the Department waived the statute of limitations as an affirmative defense by—he contends—not raising the defense below. Reply Br. at 6. In making this argument, Mr. Swanson relies on Clark-Kunzl Co. v. Williams, which held that a statute of limitations is an affirmative defense

[4] This Court should disregard Mr. Swanson's underlying contention that the APA's filing deadlines are statutes of limitations because he does not discuss or provide legal authority that this is the case in appeals that seeks to invoke the superior court's appellate subject matter jurisdiction. Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 84, 180 P.3d 874 (2008) (citing RAP 10.3). Moreover, Mr. Swanson did not proffer this theory below, CP 111-121 (Damages Case), CP 551-562, 597-603 (Rules Case). He therefore cannot raise it on appeal. Malstrom v. Kalland, 62 Wn.2d 732, 733-734, 384 P.2d 613 (1963).

that is waived when not pled.[5] 78 Wn.2d 59, 65, 469 P.2d 874 (1970). However, the Department did affirmatively plead the statute of limitations in both the Rules Case and the Damages Case, CP at 35 (Damages Case), CP at 401 (Rules Case).[6] Thus, there is no reason to ignore the Department's argument about the APA's 30-day filing deadline based on Mr. Swanson's false contention that the Department did not plead the statute of limitations as an affirmative defense.

In a similar vein, Mr. Swanson argues that the Department cannot raise "in response to an appeal" the APA's 30-day filing deadline because the superior court did not make a specific "legal finding" concerning the distinction between the filing deadline for challenging the application of a rule and the filing deadline for challenging the rule itself. Reply Br. at 4. This argument is meritless. First, as discussed above, the Department did not raise this issue "in response to an appeal." Second, the only authority that Mr. Swanson proffers for his contention is Perry v. Moran,

[5] The case did not hold, as alleged by Mr. Swanson, that a "way to waive [an affirmative defense] ... is a failure to argue and obtain a ruling on an issue." Appellant's Reply Br. at 6. Clark-Kunzl, 78 Wn.2d at 65.

[6] To the degree that Mr. Swanson may be contending that the Department was required to argue a waiver of the statute of limitations theory in superior court, as opposed to merely raising the statute of limitations as an affirmative defense, he is incorrect. Mr. Swanson has had the burden of proof throughout this legal proceeding, RCW 34.05.570(1)(a), but in superior court he did not challenge the Department's action based on any statute of limitations theory. CP at 6-31, 111-121, 551-562, 597-603, 618-645. The Department therefore bore no burden to argue in the superior court about an issue Mr. Swanson did not raise. Thus, there is no reason to ignore the Department's argument about the APA's 30-day filing deadline based on Mr. Swanson's false contention that the Department was obliged to argue a statute of limitations theory in superior court.

111 Wn.2d 885, 766 P.2d 1096 (1989) (Perry II) reconsidering 109 Wn.2d 691, 694, 748 P.2d 224 (1987) (Perry I). Reply Br. at 4. Perry II, however, does not support his theory that respondents cannot discuss an issue on appeal in the absence of a specific "legal finding" by the superior court on that issue. In Perry, II the Supreme Court was not concerned with a failure to invoke a superior court's subject matter jurisdiction[7] and did not announce a general rule that respondents cannot discuss on appeal—and reviewing courts cannot consider—an issue unless there is a specific "legal finding" to review. As Mr. Swanson admits, Reply Br. at 4, this Court may affirm the superior court's decision on any ground supported by the pleadings and proof. In re Marriage of Lukens, 16 Wn. App. 481, 487-488, 558 P.2d 279 (1976), review denied, 88 Wn.2d 1011 (1977).

Moreover, even if the Department had not raised this issue below, the Rules on Appeal and case law are clear that the Department may raise

[7] In Perry I and II, an accounting firm brought an action against a former employee for breach of a noncompetition agreement. Perry I, 109 Wn.2d at 692-694. The trial court essentially re-wrote the noncompetition agreement, held that the defendant had not violated that re-written agreement, and dismissed the case at the close of the plaintiff's case. Id. at 694-696. On appeal, the Supreme Court held that the agreement was enforceable and dismissal therefore inappropriate. Id. at 697. On reconsideration, the Supreme Court remanded the matter back to the trial court for further proceedings to establish whether the sum set by a liquidated damages provision in the noncompetition agreement was reasonable. Perry II, 111 Wn.2d at 887-888. The Court did so because it felt that it would be premature for it to determine the enforceability of the liquidated damages clause because, in the particular situation of the case, the trial court made no determination of the reasonableness of the clause and the defendant had not been permitted to introduce evidence on the issue. Id. at 887.

the issue of subject matter jurisdiction at any time during this legal proceeding. RAP 2.5(a)(1); Angelo Property Co., LP v. Hafiz, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). Thus, again, there is no basis for the Court to ignore the Department's 30-day filing deadline argument.

B. The Arguments in Section III(D) of Mr. Swanson's Reply Misrepresent the Record and Are Meritless

In Section III(D) of his reply, Mr. Swanson asserts that the Department waived its objection to service of the complaints in "these cases." Reply Br. at 10.[8] This assertion misrepresents the record in two ways. First, the Department has never argued that service was improper in "these cases," i.e., both the Rules Case and the Damages Case. As Mr. Swanson's citation to page 25 of the Department's response brief indicates, the Department has only argued that service was improper in the Damages Case. Reply Br. at. 10; CP at 35 (Answer in Damages Case pleading lack of personal jurisdiction as an affirmative defense), CP at 401-402 (Answer in Rules Case not pleading lack of personal jurisdiction as an affirmative defense), CP at 40, 53-54 (Motion to Dismiss Damages Case), CP at 543 (Motion to Dismiss Rules Case stating that Mr. Swanson failed to serve the Department in the Damages Case).

[8] Mr. Swanson also makes passing reference to this contention in Section III(A) of his Reply Brief. Reply Br. at 6.

The second reason that Mr. Swanson's assertion misrepresents the record is that in the Damages Case the Department specifically pled lack of personal service, CP at 35, specifically argued that he failed to properly serve the Department, CP at 40, CP at 54 (including n.12), and specifically supported its arguments with unrebutted testimony, CP at 64-65, 104-105, and 108. In superior court Mr. Swanson never responded to the Department's argument, CP at 111-121, and before Commissioner Schmidt Mr. Swanson expressly conceded that the Department did raise the service issue below. Appellant's Resp. to Mot. to Strike at 3 ("It also appears that Respondent raised the applicability of service rules at the Superior Court level in CP at 54 (Damages case) in footnote 12").

Thus, Mr. Swanson's assertion is meritless that the Department waived its objection to service of process and there is therefore no reason to ignore the Department's argument on appeal that Mr. Swanson failed to serve the Department in the Damages Case.

In Section III(D) of his reply brief, Mr. Swanson also argues that the Department "fail[ed] to designate affidavits of service to bring this issue before the Appellate Court." Reply Br. at 10. The Court should disregard this argument because Mr. Swanson does not discuss or cite any authority to support his allegation that this was an obligation of the Department. Saviano, 144 Wn. App. at 84.

Moreover, the Department's unrebutted testimony and unchallenged arguments in superior court demonstrated that Mr. Swanson did not properly serve the Department in the Damages Case. He is wrong that generalized service on the Office of the Attorney General meets the specific service requirements in RCW 34.05.542. Reply Br. at 10 n.7.

Generalized service on the Office of the Attorney General is required, not to serve the agency that is being sued, but as a separate requirement of the APA. RCW 34.05.542(2), (3), (6). The APA does not allow agencies to be served by generalized service on the Office of the Attorney General, but only by service on the agency's specific "attorney of record." RCW 34.05.542(6); *Cheek v. Empl. Sec. Dep't*, 107 Wn. App. 79, 84-85, 25 P.3d 481 (2001). An agency's attorney of record is not any Assistant Attorney General anywhere in the State of Washington, but is instead the specific attorney who filed a notice of appearance in the underlying administrative case before the agency or who the agency has otherwise explicitly named as its agent for receipt of process. Id.

In this case, no attorney filed a notice of appearance in the underlying administrative case because Mr. Swanson did not seek an administrative appeal before the Department. Appellant's Amended Opening Br. at 6. When Mr. Swanson served the complaint in the

Damages Case in November 2010, the Acknowledgment of Receipt of that complaint was signed by Assistant Attorney General Dionne Padilla-Huddleston. CP at 66. Ms. Padilla-Huddleston has never been assigned to represent the Department in the Damages Case or any other matter, has not filed a notice of appearance in any administrative case before the Department, and has never been named by the Department as its agent for receipt or process or for any other purpose. CP at 105. Thus, Ms. Padilla-Huddleston was not the Department's attorney of record and Mr. Swanson's service on her did not accomplish service on the Department. RCW 34.05.542(6); Cheek, 107 Wn. App. at 84-85.

III. CONCLUSION

Sections III(A) and (D) of Mr. Swanson's reply brief misrepresent the record and contain meritless legal arguments. They provide no basis for reversing the superior court's orders.

RESPECTFULLY SUBMITTED this 5th day of November, 2012.

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