No. 342026

COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

BOTANY UNLIMITED DESIGN AND SUPPLY, Appellant,

v.

STATE OF WASHINGTON, LIQUOR & CANNABIS BOARD, Appellee.

Franklin County Superior Court # 15-2-50860-4

OPENING BRIEF

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A. INTRODUCTION and SUMMARY

In 2014 Botany Unlimited ("Botany") obtained a cannabis producer/processor license in 2014 despite one of its owners having disclosed a potentially disqualifying criminal history. LCB issued a cannabis license nonetheless, consistent with agency rules. WAC 314-55-040(3)(b). In 2015, LCB changed course and denied Botany license renewal, citing the previously disclosed criminal record.

Botany exhausted its claims before the LCB and Office of Hearings and Appeals, and then sought judicial review. Botany, however, failed to properly serve the Petition on the attorney general or the LCB. WAC 10-08-110(2). Botany's "Emergency Motion for Stay" and the motion's exhibits were, however, properly and timely served upon the attorney of record and filed with the superior court. The trial court dismissed the case for lack of jurisdiction due to Botany's failure to serve the its Petition.

Botany challenges the trial court's dismissal and argues that the Emergency Motion for Stay and its exhibits met the requirements of RCW 34.05.546(1) through (8), and was timely filed and properly served on the Assistant Attorney General who had been representing the LCB throughout the administrative appeal phase, pursuant to RCW 34.05.542(6).

B. ASSIGNMENT OF ERROR and ISSUES PRESENTED FOR REVIEW

Petitioner Botany Unlimited makes the following assignments of error:

a. The Superior Court erred in holding that Botany Unlimited failed to properly serve the required pleadings under RCW 34.05.546.

b. The Superior Court erred in holding that Botany Unlimited's service of the Attorney General in lieu of service on the LCB under RCW 34.05.542(6) was moot.

The Issues are as follows:

1. As to Assignment (a): Whether Botany's Emergency Motion for Stay along with its exhibits, being timely filed and properly served, fully and substantially satisfied RCW 34.05.546(1) through (8).

2. As to Assignment (b): Whether the question of the Assistant Attorney General status as an "attorney of record" under RCW 34.05.542(6) remains moot in light of the trial court's error in Issue 1.

3. As to Assignment (b), if Issue 2 is no longer moot, whether service of the Emergency Motion for Stay — along with the motion's exhibits — met both the requirements of RCW 34.05.546(1) through (8) and the requirements of RCW 34.05.542(6) thus conferring appellate jurisdiction on the Superior Court.

C. STATEMENT OF THE CASE

Procedural facts pertaining to Botany's 2014 and 2015 licenses. In late 2013 Botany Unlimited Design and Supply, LLC ("Botany"), sought a license from the State's cannabis authority ("LCB") to produce and process cannabis under the Washington State I-502 licensing program. The license was granted and Botany held a one-year Tier II license to produce and process cannabis beginning in mid-2014. CP 8.

In 2015 Botany sought relicensing but was denied by the LCB, based upon the known and previously disclosed criminal history of one of its owners who had a federal felony for a conspiracy to manufacture/distribute marijuana. CP 111-12, 114-117, 119-124. The state mischaracterized the felony as a *substantive* offense, CP at 115 and 117, and opined that the substantive conviction was unsuitable for the mitigation provision of WAC 314-55-040(3)(b). Botany exhausted its administrative remedies, CP 121 § 4.10, CP 127-140.

The parties disputed whether the LCB granted Botany its 2014 license in error (due to its inability to confirm the self-disclosed felony against federal criminal history databases) or whether the LCB exercised its discretion in Botany's favor

under WAC 314-55-040(3)(b) in 2014 and then changed its mind in 2015.[1] Botany argued that the LCB did not notify Botany Unlimited that its 2014 license was granted contingent on future confirmation of the co-owner's accurate and timely disclosures. CP 128-131. The LCB did not challenge the assertion that its 2014 license was unconditional; it did not suggest that the 2014 license was granted in open acknowledgement of some inability on the part of the LCB to fail to complete the criminal history background; and it did not argue that the LCB had authority to issue provisional criminal history investigation under WAC 314-55-020. CP 142-146.

On September 15, 2015, the LCB issued its Final Order upholding LCB's relicensing denial, and ordered the company to cease business in 15 days. CP 147-148. The Final Order explicitly stated that the LCB would not consider petitions for stay and such petitions must be filed and served in connection with a petition for judicial review. CP 149.

Facts pertaining to LCB's counsel of record

During the entire time of Botany's administrative challenge to the 2015 license denial the LCB was actively represented by its counsel Jong Lee at the administrative level. CP 107 ¶ 2, and CP 230 ¶ 2. Counsel Lee also represented the

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[1] The LCB found that "[h]ad LCB verified the marijuana felony, it would not have issued a marijuana license to Botany." CP 8 ¶ 4.5.

LCB at the Franklin County Superior Court level. CP 222:14.

Facts pertaining to Botany's judicial review

On September 23, 2015, Botany's counsel timely faxed and mailed a copy of Botany's Emergency Motion for Stay, Declaration of Counsel, Note for Hearing and Declaration of Service to Assistant Attorney General Lee. CP 1-3, CP 286-87 § 12. The same day Botany's counsel *filed* its Petition for Review. CP 48-102. Botany *emailed* a copy of its Petition for Review to Assistant Attorney General Lee, but no copy of the Petition for Review was received by the LCB or Attorney General's office in accordance with WAC 10-08-110(2) which requires mailing, facsimile, or parcel post delivery. CP 231. The emailed version was understood by the Assistant Attorney General as a courtesy copy, CP 231 ¶ 3, and for several months the parties proceeded without regard to any irregularities in Botany's service of its Petition for Review.

On September 24, 2015, Botany sought to shorten time so that its stay motion could be heard prior to the LCB's deadline of September 30. CP 103-04.

On September 25, 2015, Assistant Attorney General Jong Lee filed his appearance and the LCB's opposition to the motion for stay. CP 222:14-15.

On September 28, 2015, Superior Court Judge Bruce A. Spanner denied Botany's stay. CP 217-18.

Facts pertaining to LCB's first challenge to jurisdiction

On December 29, 2015, the LCB challenged service and moved for dismissal arguing that the LCB itself had not received a copy of Botany's Petition for Review under RCW 34.05.542(2), (3). CP 220-225, and see CP 231 ¶ 7, CP 233-34. Botany responded that it had served the LCB's "attorney of record" in lieu of service on the LCB, as allowed by RCW 34.05.542(6). CP 239-249.

On February 1, 2016, counsel for the LCB raised a second reason for dismissal during oral argument, asserting that Botany had mis-served its Petition on AAG Lee. CP 301.

At that hearing Botany's counsel raised concerns regarding the superior court's civil rules and the APA, and sought permission to brief the LCB's new basis for dismissal. The court permitted supplemental briefing, CP 301, and on February 29, 2016, Botany presented arguments in opposition to dismissal based, in part, upon the argument that its Motion for Stay, which was properly served, satisfied the APA's requirements and constituted adequate and sufficient service to establish the Franklin County's Superior Court's appellate jurisdiction. CP 270-272.

On March 16, 2016, the court rejected Botany's arguments, holding that Botany had failed to obtain the court's jurisdiction under RCW 34.05.010(19) and WAC 10-08-110(2) and that the secondary issue of whether service on the AAG in

lieu of service on the Department was now moot. CP 302. The Superior Court dismissed the matter with prejudice. On March 25, 2016, this timely appeal followed. CP 303.

ARGUMENT

I. Appellate jurisdiction from an agency's final ruling requires that the appellant strictly comply with deadlines and service rules; the *contents* of the pleadings, however, need only be consistent with RCW 34.05.546(1) through (8).

a. A defect in appellant's service of its petition for review is fatal to jurisdiction; substantial compliance, on the other hand, is adequate for the petition's form and content.

Under the Administrative Procedures Act, limited appellate jurisdiction is granted to the superior court under statute. *Diehl v. Wash. Growth Mgmt. Bd*, 118 Wn. App. 212, 217, (2003), *rev'd on other grounds*, 153 Wn.2d 207 (2004). The statutory requirements must be strictly met in order to trigger the appellate — as opposed to general — jurisdiction of the superior court. *Diehl v. Western Washington Growth Mgmt. Bd*, 153 Wn.2d 207, 213 (2004). Failing to prove compliance with the APA's service requirements, the appellant cannot establish subject matter jurisdiction and the matter must be dismissed. *Skagit Surveyors & Eng'ers, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 555 (1998). Review of an order dismissing an administrative appeal for lack of jurisdiction is reviewed *de novo*. *Conom v. Snoshomish County*, 155 Wn.2d 154, 157 (2005).

While no case has allowed a missed deadline or failed service to "substantially comply" with the APA's jurisdictional requirements, this absolute bar does not extend to the *contents* of an otherwise timely and properly served pleading. The requirement for the contents of an appeal from the administrative body are set forth in RCW 34.05.546.[2] This statute, unlike the timing and service rules, does not require strict compliance: "We decline to hold that strict compliance with RCW 34.05.546 is a jurisdictional requirement." *Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County,* 135 Wn.2d 542, 556 (1998).

In *Skagit Surveyors v. Friends*, the court held that failure to precisely meet all eight requirements for the content of a petition for review does not strip the superior court of jurisdiction. The appellant in *Skagit* failed to identify all the parties in interest in the body of the petition. The court, however, noted that not all requirements for judicial review are jurisdictional — such as those set forth in RCW 34.05.546 — while maintaining prior decisions that dismissed judicial appeals for failure to properly serve a party. *Id.* at 556-57, citing *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp*, 127 Wn.2d 614 (1995).[3]

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[2] See Part III, post at 13, for application of RCW 34.05.546(1) through (8) to Botany's emergency motion for stay.

[3] *Union Bay*'s dismissal turned on the appellant's failure to serve all parties. Three years later RCW 34.05.542 was amended to permit service on counsel of record in lieu of service on a party, legislatively overruling the *Union Bay* decision. See, *Cheek v. Employment Security Dep't,* 107 Wn.App. 79, 83-84 (2001).

b. There is no dispute that Botany's emergency motion and supporting papers were filed and served on September 23, 2015, within the deadline required to obtain judicial review.

Botany concedes that its Petition for Review, filed but not served, cannot on its own establish jurisdiction for review at the superior court level.

But the larger record is straightforward and undisputed: Botany's counsel, on September 23, 2015, did file a timely motion for stay and served this motion via mail and fax upon AAG Lee, the Assistant Attorney General who heretofore handled the administrative portion of the appeal as counsel of record for the LCB. Along with this motion, Botany properly and timely included its supporting exhibits. CP 1-3 (proof of service), CP 38 (emergency motion), CP 4 (exhibits referenced in the motion). Fax and mail service upon an assistant attorney general — who is already counsel of record —is allowed in lieu of service on the agency. See RCW 34.05.542(6) (service on counsel of record) and WAC 10-08-110(2) (authorizing service via mail and fax).[4]

Botany indisputably filed, on September 23, 2015, a timely notice of its objection to the LCB's Final Order — in keeping with that order's bar against

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[4] Part III, post at 13, sets for the basis to hold that AAG Lee was "counsel of record" for the purposes of RCW 34.05.542(6).

staying the proceedings at the administrative level — by seeking a stay at the superior court level. CP 38.

II. Botany's Emergency Motion for Stay completely met the requirements of RCW 34.05.546(1) through (8) and Botany's motion functions as a Petition for Review.

Applying the rules above, Botany plainly — if inartfully —filed and served timely documents to obtain the superior court's jurisdiction.

The question then becomes whether the emergency motion and supporting documents that were properly served are a stand-in for a Petition for Review under RCW 34.05.546(1) through (8).

The statute reads as follows:

> **RCW 34.05.546 Petition for Review**
>
> A petition for review must set forth:
>
> (1) The name and mailing address of the petitioner;
>
> (2) The name and mailing address of the petitioner's attorney, if any;
>
> (3) The name and mailing address of the agency whose action is at issue;
>
> (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
>
> (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;
>
> (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;
>
> (7) The petitioner's reasons for believing that relief should be granted; and

> (8) A request for relief, specifying the type and extent of relief requested.

Botany's motion to stay (CP 38-46), along with its supporting documents Exhibits A-F (CP 4-37), contain the following:

1. The name and mailing address of the petitioner, CP 14 and 38, and elsewhere.
2. The name and mailing address of counsel for petitioner, CP 38 and elsewhere.
3. The name and address of the agency whose action was at issue, CP 12 and elsewhere.
4. Identification of the agency action along with a copy or brief description of the agency action, CP 14 (copy) and CP 38 (brief description).
5. Identification of parties to the adjudicative proceedings, CP 7-11, CP 14-15.
6. Fact supporting reversal, such as the agency's erroneous transformation of Botany's felony from conspiracy punished by 41 months to a substantive offense that carried a 10 year mandatory minimum and Botany's justified reliance on the 2014 license that did not indicate any provisional status or problem with the criminal history investigation. CP 39-44.

7. Statements supporting the factual basis for relief, CP 39-44.

8. A statement of the relief requested, CP 45-46 (stay action until review by court).

These eight elements provides the precise information required for a petition for review regardless of the title of the pleading. Botany asserts that its pleadings (CP 4-46) are the functional equivalent of the document normally denominated as a Petition for Review. Under the rule in *Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County,* 135 Wn.2d 542, 556 (1998) (contents of a petition are not subject to strict compliance), an immaterial variance in the titling of the document should not deprive the superior court of jurisdiction. Staying administrative action pending review by the appellate tribunal is fully compliant with RCW 34.05.546. Furthermore, a motion to stay is specifically authorized after the filing of a petition for judicial review; *service of the petition for review is not required for a party to request a stay.* RCW 34.05.550(2).

III. An Assistant Attorney General who was active at every level of the administrative review is the "attorney of record" for the purpose of RCW 34.05.542(6).

a. The court below did not reach the question of whether AAG Lee was the "attorney of record" under RCW 34.05.542(6).

This last issue was not decided by the court below. CP 302 (AAG Lee's status was moot. Nevertheless, if this Court determines that the content of the properly served and filed Emergency Motion meets the requirements of 34.05.546(1) through (8), then the question remains whether service upon AAG Lee was adequate under RCW 34.05.542(6). The matter can be resolved by remand to the superior court, which determined that the question was moot, or it may be addressed directly by this court. *But see* RCW 34.05.518 limiting direct review in non land-use cases to a certification process.

The facts regarding AAG Lee's continuous representation of the LCB in all dealings with Botany's 2015 license being agreed, Botany respectfully offers the following argument for this Court's consideration in order to resolve the remaining legal issues governing jurisdiction.

b. Service on the "attorney of record" perfects the appeal and confers jurisdiction on the superior court sitting in its appellate capacity.

By statute, service of a petition to invoke superior court review of an administrative decision must be upon the parties and agency. RCW 34.05.542(2), (3). The statute, however, provides for service upon "the attorney of record of any agency or party constitutes service upon the agency or party." RCW 34.05.542(6).

The superior court held that the question of service on AAG Lee in lieu of service upon the LCB was moot. LCB itself argued in its December, 2015, motion to dismiss that an "attorney of record" for a state agency could only be an attorney who had previously entered a formal appearance on behalf of the affected agency. CP 224:16-21. According to the LCB, because it had not yet entered a notice of appearance as of the date of Botany's motion for emergency stay, there was no "attorney of record" at the superior court level. This minor premise is factually accurate, Lee had not filed yet at the superior court level — but its conclusion does not follow. Its conclusion assumes that somehow a state agency could appear as respondent to a petition for judicial review before a petition was filed. It is difficult to imagine, short of procedural exuberance, how it would happen that a state agency would appear as respondent to the appellate phase of an administrative review before the agency was served with notice. The agency's interpretation of RCW

34.05.542(6) is overbroad. The LCB's error is based upon its unduly expansive reading of case authority that, on close inspection, was based on inapposite facts.

The LCB relied upon *Cheek v. Employment Sec. Dept of State of Washington*, 107 Wn. App. 79 (2001), for the proposition that an AAG can never been served with a request for judicial review in lieu of service directly upon an agency until after the AAG has filed a notice of appearance.

The Division I panel in *Cheek* held that the petitioner failed to perfect her judicial review over an unemployment benefits dispute because she served only the attorney general and not the state's department of employment security. But *Cheek* is inapposite: at the point in time that Cheek served the Attorney General, nothing in the decision suggests that the Attorney General's office *had already appeared in any of the administrative proceedings.*[5] If the administrative hearing in Creek followed normal routes, an AAG would not appear until the agency's decision was challenged. There being no indication that an AAG had been involved at the administrative levels, the result in *Cheek* makes perfect sense and is not adverse to

[5] The court in *Cheek* did not specifically state whether an attorney general had appeared during Cheek's administrative phase, though as a practical matter the only parties to unemployment hearings are the employer and the employee. Cheek was an employee of a community mental health service; the case is silent on whether the employer was represented at the administrative level by an assistant attorney general.

Botany's argument. During the administrative phase of the *Cheek* case the employment security department itself would not be a party and there is no indication that an attorney general had appeared appeared on behalf of the respondent employer.

When Cheek sought judicial review, by filing her petition, the matter moved to superior court acting in its appellate capacity. But at the time Cheek filed for judicial review, there *had been* no attorney general of record; Cheek simply served the attorney general's office claiming that unemployment appeals at superior court are ultimately defended by the attorney general's office. *Cheek* at 83.

Here, however, an attorney general was counsel of record since the inception of its administrative appeal and he remained counsel of record throughout.

Finally, the court's rationale in Cheek rested on Black's Law Dictionary for a definition of "attorney of record":

> The APA does not define the term "attorney of record," which is an apparent oversight that should be addressed by the Legislature. Accordingly, we look to the ordinary dictionary meaning of the phrase. *See W. Telepage, Inc. v. City of Tacoma Dep't of Fin.,* 140 Wash.2d 599, 609, 998 P.2d 884 (2000). Black's Law Dictionary defines attorney of record as: Attorney whose name must appear *somewhere in permanent records or files of the case, or on the pleadings or some instrument filed in the case,* or on appearance docket. * * * (Emphasis added).

Cheek at 84. The record in Cheek did not indicate an attorney general had been

involved in the administrative level. Had an attorney general been involved that soon, some discussion would have been necessary for the Cheek panel to address that attorney's entry into the "permanent records or files of the case or on the pleadings." Cheek's notice to the AG's office in general appears to have been the Attorney General's first formal involvement in the case and nothing in the decision points to any reference to an AAG in the permanent records or files prior to the petition to superior court.

Botany, however, did serve a specific attorney, the one who had handled the matter throughout the administrative process.

Cheek lost because the Attorney General's office had not entered an appearance at any level in the case until after Cheek filed in superior court. Not so here: Assistant Attorney General Lee was active throughout the administrative phase. Moreover, the statutory rules regarding service specifically provide for service on the attorney of record for a state agency in lieu of service on the agency itself. The statute governing who must be served a petition for review contains two relevant clauses:

> Subject to other requirements of this chapter or of another statute
> * * *
> (2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.
> * * *

> (6) For purposes of this section, *service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.*

RCW 34.05.542(2), -(6). Emphasis added.

Given that the present case is an appellate proceeding seeking relief from an administrative hearing, the phrase in sub-section (6) — "service upon the attorney of record of any agency or party..." — properly refers to Mr. Jong Lee on behalf of the LCB.

Botany is mindful that applying the phrase "attorney of record" would be awkward in an initial action, such as a suit governed by CR 4 where no respondent has generally yet appeared, or in a matter that did not have an attorney representing the agency below, such as in *Cheek*. But in the appellate setting where the agency was itself a party, the language is natural. The lawyer handling the matter at the administrative stage is a proper party for service in lieu of separate service on the agency or represented party when the case goes up on appeal. Where, as in *Cheek*, there was no counsel below representing the agency, it makes sense that a litigant cannot serve a generic attorney general who has yet to be part of the record. But in Botany's case there was an assigned attorney general, representing the affected agency throughout the administrative phase.

The statute's provision permitting service upon an historical attorney of

record makes sense. Yet LCB argued below argued that service of an appeal petition on an attorney in lieu of service on a party is only permitted after the attorney has appeared before the appellate superior court. Were that the case, the statute would be stripped of meaning and would serve no logical purpose.

Policy favors Botany's approach. In general, when a court is acting in its appellate role, service is not required on the individual parties but can be achieved merely by serving counsel of record from the proceedings that are the subject of the appeal. Further, the APA rules for service are intended to liberalize, not complicate, service. *Diehl v. Western Washington Growth Management Hearings Bd.,* 153 Wn.2d 207, 214-15 (2004). The LCB's interpretation makes sub-section -542(6) silly and would complicate, not simplify, the service requirements generally used in the appellate context.

Finally, and fortunately, there is case law squarely on point. Unlike *Cheek*, in which the Attorney General was a new entity at the appellate phase, the petitioner in *Ricketts v. Washington State Bd of Accountancy,* 111 Wn. App. 113 (2002), had engaged in extended litigation before an administrative board at which the State was represented by an attorney general. Ricketts served his notice for judicial review on the State's attorney of record who had appeared during the administrative phase of the proceedings. The court noted that sub-section RCW 34.05.542(6)

"allows 'the attorney of record of any agency' to be served in place of the agency." *Ricketts* at 118. The *Ricketts* court concluded that petitioner's timely service of its petition by mail only on the LCB's attorney of record below was sufficient to confer subject matter on the superior court acting in an appellate capacity.

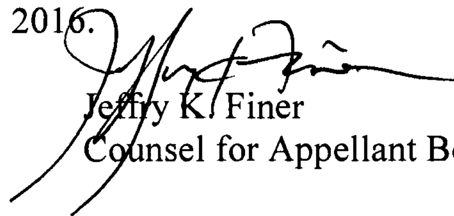
> On the thirtieth day after service of the Board's final order, Ricketts deposited a copy of the petition in the mail to the Board's attorney of record. On that day, service on the Board was perfected under the APA. As a result, the superior court had subject matter jurisdiction over Ricketts' petition for review.

Ricketts, 111 Wn. App. at 118.

Conclusion

For the above reasons, Botany Unlimited asks this Court to hold that its contemporaneous pleading seeking emergency relief was for all purposes under the statute permitting judicial review a petition to invoke the limited appellate subject matter jurisdiction of the superior court and to remand the matter for further proceedings on the merits.

DATED THIS 25th day of July, 2016.



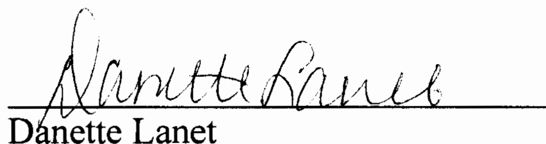
Jeffry K. Finer
Counsel for Appellant Botany Unlimited

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 25 day of July, 2016, I caused a true and correct copy of the foregoing *OPENING BRIEF* to be served, via USPS on the following:

Jong Lee, AAG
1125 Washington St. SE
PO Box 40100
Olympia, WA 98504-0100

Dated this 25 day of July, 2016.



Danette Lanet