

No. 42052-0

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH, Appellant;

v.

DEPARTMENT OF CORRECTIONS, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Paula Casey
No. 08-2-01041-1

REPLY BRIEF OF APPELLANT GREENHALGH

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ORIGINAL

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A. INTRODUCTION

Respondent Department of Corrections (the “Department”) has argued that it should be permitted to amend its complaint. It also argued that the one year statute of limitations set forth in RCW 42.56.550(6) bars Mr. Greenhalgh’s claims. The Department then argued that if the cause accrued before the statute of limitations had run then it must be remanded. It finally argued that attorney fees are not permitted for prevailing on appeal. Mr. Greenhalgh will address each argument in turn.

B. ARGUMENT

Mr. Greenhalgh will first show that the trial court abused its discretion when permitting the Department to amend its answer to raise an affirmative defense after the filing of the summary judgment motion. He will then show that the accrual date of the statute of limitations was not triggered because the Department failed to disclose responsive records to his second request for the documents containing the PRA cost formula. He next will show that the accrual date for the statute of limitations is two business days after his appeal was received by the Department. Mr. Greenhalgh will also show that he is entitled to rely on the Department’s previously written administrative rules and policies. Mr. Greenhalgh finally refutes the Department’s claim that he would not be entitled to appellate fees and costs if he prevails.

1. THE DEPARTMENT OF CORRECTIONS WAIVED ITS STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE BY FAILING TO PLEAD IT IN ITS ANSWER TO THE FIRST AMENDED COMPLAINT IN VIOLATION OF CR 8(c).

In response to Mr. Greenhalgh's claim that the trial court should not have permitted the Department to amend its Answer, the Department has argued there was no unfair surprise.¹ As was pointed out in the opening brief, Mr. Greenhalgh depended on the law as interpreted by the Department. Consequently, he did not expect a statute of limitations defense – especially since it had not been included in the original Answer as an affirmative defense.

The Department agrees that a trial court may consider many factors when determining prejudice to the non-moving party. Response, p. 9. (*citing Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987)). Certainly a court can consider that permitting a party to raise a defense after a plaintiff has shown the defendant the error of their ways is inappropriate, especially when the defendant had the opportunity to amend its Answer when

¹The Department argued that Mr. Greenhalgh incorrectly stated this issue is subject to de novo review. Response, p. 10. Mr. Greenhalgh expressly argued the permitting amending of the Answer was an abuse of discretion by the trial court and did not argue it required de novo review. Opening Brief, p. 10. The Department also claimed it did not engage in discovery. However, it clearly responded to Mr. Greenhalgh's discovery requests which resulted in the documents which proved the bad faith of the Department.

it raised the statute of limitations defense. The Department did not. Instead, only after Mr. Greenhalgh argued that the Department waived this defense, the Department then moved to amend the Answer. CR 15 permits amending pleadings “when justice so requires.” The Department sat on its hands not only once, when it filed its Answer but twice, when it responded to the summary judgment motion without moving to amend that Answer. Justice does not require a court provide a party multiple opportunities to get it right, especially when that party only gets it right after being told it had gotten it wrong. Justice does not require the amendment and the trial court abused its discretion. The trial court abused its discretion by permitting the Department to overcome its own error.

2. BECAUSE THE DEPARTMENT FAILED TO PRODUCE DOCUMENTS CONTAINING THE JUSTIFICATION FOR THE PRA PER-PAGE COST THIS CASE IS ON ALL-FOURS WITH TOBIN V. WORDEN.

a. Mr. Greenhalgh’s Request for Documents Supporting the Department’s Charge of Twenty Cents Per-Page for PRA Requests Must Be Considered Separately.

The Department has argued that Mr. Greenhalgh’s reliance on *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010), is misplaced. Nothing could be further than the truth. The Department’s response to the second clarifying request, dated April 12, 2007, when Mr. Greenhalgh clearly asked for the formula used to determine the PRA copying fee, resulted in no

documents being disclosed.² This is precisely on point with *Tobin* because the focus of this case is only on the PRA per-page cost. The two requests are separate because each request for documents is based on a different subject matter, and documents responsive to one request are irrelevant to the other. One is based upon legal per-page costs, the other based on PRA per-page costs.

It is not only the first request but any subsequent requests which are critical when determining the accrual date for the statute of limitation. Just like the Tobins, Mr. Greenhalgh received neither a claim of exemption or production of a record on a partial or installment basis in response to his April 12, 2007 question about the twenty cent formula. It is not relevant to the inquiry that several records were found because, like the Tobins, the records were non-responsive to his PRA copy cost request. Because no documents were produced relevant and no exemption log was provided to this stand-alone request, the statute of limitations had not yet started to run.

²The Washington Supreme Court has recently distinguished the definitions of “disclosed” and “produced.” *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). “A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.... Disclosed records are either ‘produced’ (made available for inspection and copying) or ‘withheld’ (not produced).” Here, the Department failed to disclose the responsive record requested by Mr. Greenhalgh, despite its existence that was clearly mandated by statute.

The fact that the Department cited exemptions to the legal cost request is irrelevant to the fact that it claimed no responsive documents showing how the Department calculated the PRA per-page cost existed. The statute of limitations accrual date must depend on each request's separate response. Each is distinct and separate and the Department responded to each request separately, even if it was on the same piece of paper.³ Notably, the Department's correspondence with Mr. Greenhalgh treated the two requests separately, referring to each as "your request," rather than "your part of the request." CP 47. The Department never provided Mr. Greenhalgh any documentation showing how the twenty cent per-page charge was calculated until discovery was propounded.

While the Department attempts to ground a legal argument on the fact that some courts have, as a matter of semantic convenience, used the term "request" to refer to a single item of correspondence comprising several PRA requests, none of the cases cited substantively deal with the separate

³There is no limitation on how the Department may respond to a request letter containing requests for documents on more than one subject matter. It is logical to assume that often, some documents are produced for the easier and smaller requests while other documents are produced later due to their complexity or size. It also makes sense when different subagencies have control over the various documents.

requests.⁴ Conversely, in cases in which courts have dealt substantively with multiple requests, courts have broken requests into multiple categories for purposes of determining the per-day penalty for failure to produce records. See, e.g., *Yousoufian v. Office of Ron Sims*, 114 Wn.App. 836, 60 P.3d 667 (2003). In *Yousoufian*, the trial court grouped the request for voluminous records into categories based on subject matter. *Id.* at 849. The grouping allowed the court to determine the agency's culpability for failure to respond that was unique to each category of records. Here, the Department treated the two separate requests in vastly different ways. Treating each request separately for purposes of determining the accrual of the statute of limitations and other substantive issues would serve the purposes of the PRA and ensure that citizens are not improperly denied the right to review public records.

b. The Department's Bad Faith Clearly Requires The Factually Different Requests To Be Treated Differently.

Our Supreme Court has determined that various factors must be considered when ruling how record requests are grouped for the purposes of penalties. Bad faith is one of those factors, perhaps the critical factor.

“When determining the amount of the penalty to be imposed ‘the existence

⁴Curiously, the request at issue in one case cited by the Department, *Greenhalgh v. Dept. of Corrections*, 160 Wn. App. 706, 248 P.3d 150 (2011), was a single request seeking a single document. So the case does not even support the Department's irrelevant point about courts treating multiple requests in the singular.

or absence of [an] agency's bad faith is the principal factor which the trial court must consider.'" *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (quoting *Yacobellis v. Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)). Bad faith is a critical element when determining whether or not an incarcerated individual is entitled to penalties. RCW 42.56.565(1). Because RCW 42.56.120 put the Department on notice that documents that supported its twenty cents per-page fee must exist, the failure to initially produce, or even disclose, those documents was done in bad faith.

While it is inconceivable that the departmental employee who drafted the original memo justifying the twenty cent charge did not remember fulfilling her statutory duty, it is not relevant to the simple truth that the Department was statutorily obligated under RCW 42.56.120 to produce the necessary documentation to any requester who asked for it.⁵ Between the time of his clarifying request sent April 12, 2007 and the Department's response dated April 23, 2007 was a period of eleven days, excluding mailing and processing time. Such a short time period for searching for records that had to exist is, again, evidence of bad faith. Because of this evidence of bad

⁵The Department claimed that the basis of Mr. Greenhalgh's claim was the lack of memory of the appeal officer who drafted the 1996 memo. Her memory clearly wasn't bad seven years after authoring the memo when she responded to another inquiry about the twenty cent charge which referenced the prior cost per page calculation. CP 52.

faith, the request for the documents supporting the PRA per page charge must be treated separately in all respects from the request that was not challenged.

3. BECAUSE IT IS MANDATORY THAT AGENCIES PROVIDE FOR AN ADMINISTRATIVE APPEAL, HARMONIZING RCW 42.56.520 AND RCW 42.56.550(6) REQUIRES THE STATUTE OF LIMITATIONS TO ACCRUE ONE YEAR AFTER THE CONDITIONS SET FORTH IN 42.56.550(6) OR TWO DAYS AFTER FILING AN ADMINISTRATIVE CLAIM IN ACCORDANCE WITH RCW 42.56.520.

The Department has argued that the language “the second business day following denial of inspection” means the actions became final and the accrual date fell on March 31, 2007 and April 25, 2007, two days after the denial letters. However, this interpretation does not harmonize RCW 42.56.520 with RCW 42.56.550(6).

The accrual date contained within RCW 42.56.550(6) was held to be quite clear.

When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. Here, the plain language of the statute is clear that the one-year statute of limitations is triggered by one of two occurrences: (1) the agency’s claim of an exemption or (2) the agency’s last production of a record on a partial or installment basis.

Tobin, 156 Wn. App. at 512-13 (citing *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009)). Contrast this language with the language of RCW 42.56.520, which states that

such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action . . . for the purposes of judicial review.

It is a given that “[a]ny statutory interpretation which would render an unreasonable and illogical consequence should be avoided.” *Puyallup v. Pacific NW Bell*, 98 Wn.2d 443, 450, 656 P.2d 1035 (1982). When examining both these statutes, a court must construe an act “as a whole, considering all provisions in relation to each other and, if possible, harmonizing all to insure proper construction of each provision.” *In re the Personal Restraint of Piercy*, 101 Wn.2d 490, 492, 681 P.2d 223 (1984). It is impossible to harmonize these two statutes using the Department’s interpretation, because *Tobin* has determined the accrual date to explicitly be based on the specific act in RCW 42.56.550(6), not two days later. Thus, harmonizing the two statutes requires that an accrual date based on an appeal be set— at a mitwo business days after receipt of that appeal. Based upon this interpretation, Mr. Greenhalgh has not exceeded the statute of limitations.

This also makes sense because it harmonizes the language contained within RCW 42.56.520. This statute not only requires agencies to set up administrative appeals but then sets a date for judicial review in the same statute. It only make logical sense to make two days after receipt of the request the accrual date for an agency to uphold denial in the appeal process.

This interpretation was so logical that the Department adopted it in its WAC and policy governing appeals of PRA denials.⁶

The Department has suggested that the above interpretation would allow a requester to manipulate the accrual of the statute of limitations by waiting for up to a year to file an administrative appeal. This argument cannot be considered by this Court because a requester is not required to file suit at the moment he or she determines there might be a violation. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 250 P.3d 113 (2011). In *City of Lakewood*, the City tried to argue Koenig was manipulating the filing date to maximize any chance of recovery of penalties. In response, the court stated that as long as a requester files within the statute of limitations, any delay is not relevant for any reason, including setting the amount of penalties. *Id.* at 894.

The Department also conveniently ignores the fact that, as an agency adopting a mechanism for administrative appeal under RCW 42.56.520, it has the authority to define reasonable deadlines for filing such appeals. If the Department wanted to prevent a requester from filing an administrative appeal a year after the initial denial, the Department could simply adopt a WAC rule that administrative appeals must be filed in a shorter amount of

⁶The Department gave as its authority for WAC 137-08-140 the former RCW 42.17.320, now recondified as RCW 42.56.520.

time. Such a rule would satisfy the Department's statutory duty to "establish mechanisms for the most prompt possible review of decisions denying inspection." RCW 42.56.520. The Department cannot use its failure to adopt a deadline mechanism against Mr. Greenhalgh by describing a hypothetical situation in which a requester acts more slowly than the Department would like.

4. WHEN A REQUESTER PREVAILS ON AN APPEAL HE IS DUE HIS ATTORNEY FEES AND COSTS IF AND WHEN HE PREVAILS.

The Department seems to be arguing that if Mr. Greenhalgh prevails, either here or below, based upon this Court's decision, he would not be entitled to fees for the work done at the appellate level. The Department is mistaken. As long as Mr. Greenhalgh prevails against the Department, he will be entitled to his fees at both the trial and appellate court levels. *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

C. CONCLUSION

For the reasons stated above, Mr. Greenhalgh respectfully requests that this Court reverse the trial court's order of dismissal and order denying summary judgment. Mr. Greenhalgh further requests that this Court to hold that the Department acted in bad faith and reward Mr. Greenhalgh the maximum amount of penalties along with reasonable attorney fees and costs.

DATED this 6th day of October, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael C. Kahrs', written over a horizontal line.

MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Shawn Greenhalgh

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on October 6, 2011, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S REPLY BRIEF

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