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SUPREME COURT
STATE OF WASHINGTON

No. 82306-5

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SUPREME COURT
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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THE CITY OF MEDINA, a municipal corporation,

Petitioner (Respondent in Court of Appeals),

v.

ROGER L. SKINNER,

Respondent (Appellant in Court of Appeals).

SUPPLEMENTAL BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

The decision of the Court of Appeals in *Skinner v. Civil Service Commission of Medina, et al.*, 146 Wn. App. 171, 188 P.3d 550 (2008).

Issues Pertaining to Assignments of Error

1. Whether or not the thirty day time for perfecting an appeal in RCW 41.12.090 is stayed by the filing of a motion for reconsideration absent statutory or local enabling legislation (ordinance) providing for a motion for reconsideration and for an automatic stay upon filing of such a motion.

2. Whether or not the doctrine of substantial compliance applies to service and filing requirements that invoke the appellate jurisdiction of the superior court.

3. If so, whether or not substantial compliance was demonstrated by the record in this case.

B. STATEMENT OF THE CASE

Petitioner City of Medina incorporates by reference its STATEMENT OF THE CASE provided in its Petition for Discretionary Review at pages 2-5.

C. ARGUMENT

1. The two reasons stated by the Court of Appeals for distinguishing State v. Brown were not well taken.

The Court of Appeals' decision is in conflict with the 1923 decision of the Supreme Court in *State v. Brown*, 126 Wn. 175, 218 P. 9 (1923). There, this Court held that the City of Seattle's Civil Service Commission, being a body of limited jurisdiction when acting in a quasi-judicial capacity, had no inherent power, irrespective of statute, to grant a rehearing or review or to annul its own order sustaining the discharge of a civil service employee. *Id.* at 177. **The Court of Appeals distinguished *Brown* on two grounds:** (1) the facts of *Brown* where "markedly" different from those in the present case; and (2) The appeals court in *Hall v. Seattle Sch. Dist. No. 1*, 66 Wn. App. 308, 314, 831 P.2d 1128 (1992), more recently established that administrative agencies retain jurisdiction to reverse their orders/decisions until jurisdiction is lost by appeal or until a reasonable time has run that is coextensive with the time required by statute for review. *Skinner*, 146 Wn. App. at 174-75.

Although the facts in *Brown* are not on all fours with the facts of the instant case, the legal issue decided by this Court in *Brown* applies to the facts of the instant case as well as it did to the facts in *Brown*. The fact that in *Brown*, the former employee sought a new trial five months after

the original decision of the commission was entered, is a distinction without a difference. *Brown* held that the civil service commission, being a body of limited jurisdiction when acting in a quasi-judicial capacity, had no inherent power to grant a rehearing on the merits. *Brown*, 126 Wn. at 177. The length of time between the original order and the motion for rehearing is simply not relevant to the conclusion regarding inherent authority to hear the motion in the first place.

The reliance by the Appeals Court on *Hall v. Seattle Sch. Dist. No. 1* where the Appeals Court held that administrative agencies retain jurisdiction to reverse their orders/decision until jurisdiction is lost by appeal or until a reasonable time has run that is coextensive with the time required by statute for review, is misplaced. Here, the Medina Civil Service Commission did not reverse their decision as did the Hearing Officer in *Hall v. Seattle Sch. Dist. No. 1*. Here also, the Medina Civil Service Commission refused to reconsider their decision well before the 30-day appeal time mandated by RCW 41.12.090 would expire. Nothing was done by the Commission to alter, amend or change their decision within a time coextensive with the time required by statute for review, as was the case in *Hall*.

Therefore, the reasons stated by the Court of Appeals for distinguishing *Brown*, are not well taken.

2. Equitable Estoppel, as a matter of law, cannot be applied to the statements of the Commission in its Decision, regarding the time for appeal.

The Court of Appeals also mistakenly relied on an equitable estoppel argument. Though not directly framed as an equitable estoppel argument, the Court of Appeals essentially called upon this doctrine, stating: “More importantly, . . . here, the Commission’s own rules provide for a party to move for reconsideration within 10 days after entry of its decisions. In addition, the Commission’s September 1 order expressly stated that the rules of Chapter 41.12 RCW (allowing 30 days to appeal) applied only *absent* a motion for reconsideration.” *Skinner*, 146 Wn. App. at 175.

The Court of Appeals reasoning is contrary to well established law. In *Snoqualmie Valley School District No. 410 v. Van Eyk*, 130 Wn. App. 806, 813, 125 P.3d 208 (2005), the Court of Appeals correctly stated the law:

. . . Equitable estoppel against the government is not favored. *Campbell & Gwinn, L.L.C.*, 146 Wash.2d at 20, 43 P.3d 4. **Where the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be**

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applied. *Paxton*, 129 Wash.App. at 448, 119 P.3d 373; *Dep't of Ecology v. Theodoratus*, 135 Wash.2d 582, 599, 957 P.2d 1241. **Nor will it be applied to frustrate the clear purpose of state laws.** *Hitchcock v. Retirement Systems*, 39 Wash.App. 67, 73, 692 P.2d 834 (1984). (Emphasis added.)

Here, application of equitable estoppel principals based upon an errant statement of law in the Commission's decision is reversible error. Application of estoppel principals clearly frustrate the clear intent of RCW 41.12.090 to require a timely appeal from the decision of the Commission within 30 days the decision is entered by Commission.

The fact that the Civil Service Commission promulgated rules that it had no inherent authority to promulgate will prevent the application of equitable estoppel.¹ For example, *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 27-28, 182 P.2d 643 (1947), held that where a contract is void for illegality, the doctrine of estoppel cannot be invoked to enforce it, and additionally, that the doctrine of estoppel cannot be invoked to enforce the promise of an officer or agent against a corporation or government, if such representative person had no legal capacity or power to enter into such an obligation. *See also Finch v. Matthews*, 74 Wn.2d 161, 169-71, 443 P.2d

¹ The elements of equitable estoppel are (1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the

833 (1968) (citing *State v. City of Pullman*, 23 Wn. 583, 592, 63 P. 265, (1900)) (“The true principle . . . is well settled that one cannot do indirectly what cannot be done directly, and where there is no power or authority vested by law in officers or agents no void act of theirs can be cured by aid of the doctrine of estoppel.”). Because the Civil Service Commission had no authority to promulgate rules either authorizing motions for reconsideration or to stay the running of the statute of limitations provided in RCW 41.12.090, the Commissions actions were ultra vires and cannot be the basis of equitable estoppel.²

3. The Court of Appeals’ decision is in conflict with policies demanding speedy review of Civil Service Commission cases and the limited authority allowed quasi-judicial tribunals.

In its decision, the Court of Appeals stated that there are “compelling” policy reasons to hold that the Civil Service Commission has the inherent authority to reconsider its own decisions. *Skinner*, 146 Wn. App. at 176. Before examining the misapplication of the policies

first party to contradict or repudiate such admission, statement, or act. 15 Karl B. Tegland, *Washington Practice* § 44.17 (2003).

² If the Court of Appeals has followed, indirectly, an equitable estoppel argument, the respondent has also failed to prove by clear, cogent, and convincing evidence that a substantial injustice has occurred. Given that Respondent failed to make an effort to serve the Commission within thirty days after the original order was entered, even where he had ample time to serve it after the motion for reconsideration was denied within the thirty days, the Respondent fails to prove a substantial injustice occurred. *Kramarevcky v. Dept. of Soc. and Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (when a

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cited, it is important to consider that the Court of Appeals' decision itself is in conflict with several policies favoring speedy review by the Civil Service Commission.

First, if this Court accepts that as a matter of law, without amendment by the legislature of RCW 41.12.090, a local Civil Service Commission has no inherent authority to hear motions for reconsideration and to stay the running of the thirty day statute of limitations on judicial appeals, the Court of Appeals and the Respondent's policy arguments become moot. If the Civil Service Commission has no inherent authority to hear motions for reconsideration and stay the thirty day statute, there is no concern about the need to file an appeal while awaiting an order on a motion for reconsideration or increased filing fee costs.³

Second, these concerns regarding timing and potential cost of appealing when an order granting or denying reconsideration has not yet been issued are outweighed by the need for speedy review by the Civil Service Commission. This policy was discussed in *Brown*: "The purpose to be subserved . . . in creating the civil service board was to establish a tribunal for the speedy and final determination of investigations relating to

party asserts equitable estoppel against the government, the doctrine must be necessary to prevent a manifest injustice).

³ *Skinner*, 146 Wn. App. at 176.
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the alleged improper removal or discharge from the classified list of persons who had been permanently employed.” *Brown*, 126 Wn. at 178. By creating additional opportunities to lengthen the review period, the terminated employee suffers from uncertainty in the process and the city experiences increased instability in its police force. Prejudice to the City is avoided and public policies are served by the strict adherence to the thirty day statute of limitations in RCW 41.12.090.

Furthermore, even if this Court finds that the Civil Service Commission may entertain motions for reconsideration in certain limited circumstances, for example, in cases of fraud, mistake, or misconception of the facts, the reasons listed in the local rule, the policy reasons cited by the Court of Appeals are not compelling. In such cases, the Civil Service Commission would presumably quickly identify fraud, mistake, or misconception of the facts such that providing additional time to file an appeal with the superior court would not be necessary. In other words, as occurred in this case, the Civil Service Commission, would make its decision quickly, giving the terminated employee ample time to file a motion for reconsideration, receive a responsive order, and file an appeal with the superior court all within thirty days of the original order issued by the Civil Service Commission. It would be an extremely rare

circumstance in which an employee did not have sufficient time within the provided thirty days to file an appeal with the superior court for any other reason than his own neglect.

4. The “compelling policy reasons” cited by the Court of Appeals are not compelling in the instant case.

The Court of Appeals at page 176 of its decision stated the following:

Here as in *Hall*, there are compelling policy reasons to hold that the Commission has the authority to reconsider its decision. Filing an appeal before awaiting an order on a motion for reconsideration subjects parties to potential costs that may prove to be unnecessary. Further, reconsideration may remove the need for superior court to address the issue. Because both the order and the Commission’s own rule allow a party to seek reconsideration, such reconsideration was proper here and the 30 days did not begin to run until entry of the Commission’s September 18 order denying reconsideration.

The Commission had already denied the motion for reconsideration well before the thirty day appeal period expired. Skinner was not awaiting a decision on his motion for reconsideration at the time the thirty day period proscribed in RCW 41.12.090 expired. A stay of the thirty day appeal period was not needed or necessary in this case to remove the need for the superior court to address the issue. The errant

statements of law regarding reconsideration and the time for filing an appeal in the Commission's decision are not a proper basis for application of equitable estoppel and application of estoppel principals by the Court of Appeals is not in furtherance of any public policy, but rather, contrary to established policy.

In addition, the policy reasons cited by the court of appeals are more appropriately to be asserted to the state legislature as a basis for amendment of RCW 41.12.090. It is for the legislature to amend the statute, not the Court of Appeals.

5. Service upon the Medina City Clerk was not sufficient because strict compliance is required to invoke appellate jurisdiction of the superior court.

The Court of Appeals' discussion and rejection of the holding of *Nitardy v. Snohomish County*, 105 Wn.2d 133, 712 P.2d 296 (1986) was ill-conceived. The Court of Appeals distinguished *Nitardy*, which held that an employee's service to the secretary of the county executive was insufficient where the statute specifically required service on the county auditor, by stating that, unlike the Snohomish County Auditor, the Commissioners here are not full-time employees of the City and, therefore, substantial compliance is sufficient. *Skinner*, 146 Wn. App. at 178.

This analysis misses two fundamental points. First, the Civil Service Rules designated the City Manager, who is a full-time employee of the City, or his designee as the Commission's Secretary. MCSR 3.01. Therefore, no argument should be entertained that because the Commissioners are part-time volunteers, strict compliance is not required. The City Manager is a full time employee of the City. And although his designee Carol Wedland may not be a full-time City employee, there is no evidence of record that service on Ms. Wedland was even attempted or that efforts at locating her for service were frustrated or failed. Significantly, no affidavits in the records mention any attempt whatsoever to contact the City Manager or Ms. Wedland, or any commissioner for purposes of service.

Second, the doctrine of substantial compliance does not apply to service and filing requirements that invoke the appellate jurisdiction of the superior court. 14 Karl B. Tegland, *Washington Practice: Service of Process* § 8.2 (2003); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 793, 943 P.2d 341 (1997); *See also, Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 554, 958 P.2d 962 (1998). Therefore, Respondent's effort to serve the Commission was deficient.

Third, the Court of Appeals factual assumption, that the Commission *timely received actual notice, so there is no prejudice*, is not supported by the record. There is no record evidence that the Commission received the Notice of Appeal within thirty days of either the entry of the Commission's Decision, or entry of its order denying reconsideration.

Timely service of the notice of appeal on the Commission is not demonstrated from the record whether or not the thirty day appeal period commenced upon entry of the decision or entry of the order denying the motion for reconsideration.

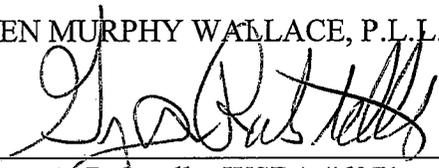
D. CONCLUSION

The Court of Appeals decision reversing the Superior Court should be reversed on this appeal.

RESPECTFULLY SUBMITTED this 28th day of April, 2009.

Respectfully submitted,

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