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NO. 62704-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN - 1 PM 4:30

CHIN HAYNEN,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY

Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

The Commissioner of the Employment Security Department issued a final order finding Ms. Haynen ineligible for unemployment benefits, and Ms. Haynen appealed to superior court. The superior court dismissed Ms. Haynen's appeal, on jurisdictional grounds, after determining that Ms. Haynen failed to serve the Department with her petition for review within thirty days after service of the Commissioner's order. At the hearing on the motion to dismiss, the Department produced the envelope in which Ms. Haynen mailed her petition for review to the Department. The envelope was postmarked two days after the thirty-day deadline for serving the Department had elapsed, and could not have been received by the Department in a timely manner. The superior court's decision to dismiss Ms. Haynen's petition was therefore correct.

The Administrative Procedure Act's requirements for perfecting an appeal to superior court from an agency decision are jurisdictional; thus, a failure to strictly comply with the timeframes set forth in the statute renders the superior court without subject matter jurisdiction to entertain the merits of the petition. Ms. Haynen has not shown that the superior court's decision was in error. Accordingly, this Court should affirm the superior court's decision.

II. STATEMENT OF THE CASE

On March 7, 2008, the Department's Commissioner found Ms. Haynen ineligible to receive unemployment benefits under the training benefits provisions of the Employment Security Act (Act). Commissioner's Record (CR) at 104-07.¹ The Commissioner's final order indicated that if Ms. Haynen wished to file a petition for review to superior court, her petition had to be filed with the court and served on both the Department and on the Office of the Attorney General within thirty days of the decision becoming final. CR at 106-07. Ms. Haynen's deadline for filing her petition for review was thus April 7, 2008.

The Commissioner's order also notified Ms. Haynen of her right to file a petition for reconsideration of the Commissioner's decision under RCW 34.05.470, and indicated that any such petition needed to be filed within ten days of the Commissioner's order becoming final. CR at 107. Ms. Haynen filed a petition for reconsideration, but her petition was not postmarked until April 3, 2008, sixteen days past the filing deadline. CR at 115. Accordingly, the Commissioner dismissed Ms. Haynen's petition as untimely. CR at 117.

¹ The Commissioner's Record is a Certified Appeal Board Record. This brief references pages in the Commissioner's Record (CR) rather than pages from the Clerk's Papers. Cited portions of the Commissioner's Record are attached to this brief as "Appendix A."

Ms. Haynen then filed a timely petition for review with the superior court. However, Ms. Haynen did not mail her petition for review to the Department until April 9, 2008, two days after the service deadline had elapsed. *See* Photocopy of Envelope Containing Petition For Review, Declaration of Pedro Bernal (Bernal Decl.).² The Department received Ms. Haynen's petition for review in due course, but the petition was untimely as it had been mailed after the deadline had elapsed. On the Department's motion, the superior court dismissed the petition for review for lack of subject matter jurisdiction as a result of Ms. Haynen's failure to comply with the statutory service requirements of the Administrative Procedure Act (APA). Ms. Haynen now appeals.

III. ISSUE STATEMENT

Under RCW 34.05.542, a petitioner seeking judicial review of a final agency decision must, in order to invoke the superior court's appellate jurisdiction, file a petition for judicial review with the court and serve the agency, the Attorney General, and all parties of record, all within thirty days after service of the final order. RCW 34.05.542(2).

Did the superior court properly dismiss Ms. Haynen's Petition for Judicial Review for lack of subject matter jurisdiction, when Ms. Haynen

² For the Court's convenience, a photocopy of the envelope in which Ms. Haynen mailed her petition for review to the Department, which was introduced at the hearing on the motion to dismiss, has been attached to this brief as "Appendix B."

served the Department with her petition for review several days after the thirty-day deadline expired as required in RCW 34.05.542?

IV. STANDARD OF REVIEW

The sole question presented in this appeal is whether Ms. Haynen properly invoked the subject matter jurisdiction of the superior court by complying with the jurisdictional service requirements of the APA. Whether a court has jurisdiction is a question of law subject to *de novo* review. *Crosby v. Spokane Cy.*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

V. ARGUMENT

The superior court properly dismissed Ms. Haynen's Petition for Review for lack of subject matter jurisdiction, as Ms. Haynen failed to serve the Department with her petition within the thirty-day timeline set forth in the APA. *See* RCW 34.05.542. Case law makes clear that the service requirements of the APA are jurisdictional, thereby requiring petitioners seeking judicial review of an agency's decision to file their petition with the superior court, serve the agency, the Attorney General, and all parties of record within thirty days after service of the final order. *City of Seattle v. Pub. Empl. Relations Comm'n (PERC)*, 116 Wn.2d 923, 926-27, 809 P.2d 1377, 1379-1380 (1991); *see* RCW 34.05.542. As Ms. Haynen failed to serve the Department within thirty days of the Commissioner's decision, she failed to invoke the subject matter

jurisdiction of the superior court. This Court should therefore affirm the superior court's decision to dismiss Ms. Haynen's petition.

Judicial review proceedings under the APA are statutory proceedings which invoke the superior court's limited appellate jurisdiction, not the court's general or original jurisdiction. *City of W. Richland v. Dep't of Ecology*, 124 Wn. App. 683, 695, 103 P.3d 818 (2004). This means that all statutory procedural requirements must be met before the superior court's appellate jurisdiction is properly invoked. *Fay v. N.W. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990).

Under the APA, superior courts do not obtain jurisdiction over an appeal from an agency decision unless the appealing party files a petition for review in the superior court and serves the petition on all parties. *PERC*, 116 Wn.2d. at 926-27. Specifically, a claimant seeking to obtain superior court review of an agency decision must: (1) file a petition for judicial review with the superior court, (2) serve the agency and all parties of record, and (3) serve the office of the Attorney General, all within thirty days of the agency's final decision. RCW 34.05.542(2). That statute goes on to specify what constitutes "service" by distinguishing service on the agency from service on the attorney general and other parties of record. For purposes of serving the attorney general and other parties of record, service is complete when the petition, if mailed, is deposited in the mail,

as evidenced by the postmark. RCW 34.05.542(4). In contrast, service on the agency is complete when the petition is delivered to the agency head. RCW 34.05.542(4).

While RCW 34.05.542(5) makes clear that service on the attorney general within thirty days of the agency's final order is not a jurisdictional prerequisite for perfecting an appeal to superior court, service on the agency within the thirty-day appeal deadline is jurisdictional. *See* RCW 34.05.542(2). A failure to timely serve the agency therefore renders the superior court without subject matter jurisdiction to entertain the merits of the petition. The APA contains no "good cause" exception to the thirty-day filing and service requirement. *Clymer v. Empl. Sec. Dep't*, 82 Wn. App. 25, 30, 917 P.2d 1091 (1996).

In *PERC*, the City of Seattle sought judicial review of a decision of the Public Employees Relations Commission ordering it to engage in good-faith bargaining with several union organizations. *Id.* at 925-26. Two unions in particular, the International Federation of Professional and Technical Engineers and the Seattle Police Management Association, had been parties of record to the administrative litigation, and were therefore entitled to notice of the City's intent to seek judicial review in superior court of the Commission's final order. *Id.* at 926. Although the City timely filed and served its petition on the agency, the attorney general and

some of the parties of record, the City did not serve the two unions until three days after the thirty-day deadline had elapsed. *Id.*

The Court found that by failing to serve its petition on all parties within the thirty-day time frame set forth in the APA, the City “failed to invoke the appellate jurisdiction” of the superior court. *Id.* Moreover, the Court noted that the doctrine of substantial compliance did not apply to statutes involving time limits, as the statute “is either complied with or it is not.” *Id.* at 928–29. Accordingly, the Court affirmed the superior court’s decision to dismiss the City’s appeal on jurisdictional grounds. *Id.* at 929.

In this case, the Commissioner entered a final order on Ms. Haynen’s application for benefits on March 7, 2008. CR at 104-07. The Commissioner determined that Ms. Haynen had failed to establish her eligibility for training benefits under the Act, and issued an order delineating Ms. Haynen’s rights and deadlines for further review. CR at 106-07. The order indicated that if Ms. Haynen wished to file a petition for judicial review with the superior court, she would have to file her petition for review with the court and serve both the Department and the office of the Attorney General, all within thirty days after issuance of the order. CR at 106-07.

Although Ms. Haynen timely filed her petition with the superior court, she failed to timely serve the Department within the thirty-day

deadline. Ms. Haynen mailed her petition for review to the Department on April 9, 2008, two days after the deadline had elapsed. The envelope containing Ms. Haynen's petition for review bears a postmark of April 9, 2008, which means that it was mailed over thirty days after the Commissioner's decision was issued. *See* Appendix B. Although the Department eventually received the petition in due course of the mail, it would have been impossible for the Department to have received it in a timely manner, since it was mailed after the deadline had elapsed. Ms. Haynen therefore failed to invoke the appellate jurisdiction of the superior court, and the court correctly dismissed her appeal.³

Ms. Haynen's primary contention is that the Department improperly denied her application for training benefits. Appellant's Brief (App. Brief) at 2. However, having dismissed Ms. Haynen's petition for review on jurisdictional grounds, the superior court did not address whether Ms. Haynen was entitled to benefits under the Act. This Court

³ Ms. Haynen did, however, file a petition for reconsideration of the Commissioner's final order. CR at 109. Under RCW 34.05.470 and WAC 192-04-190, an unemployment claimant has the right to file a petition for reconsideration within ten days after service of the Commissioner's final order. If the petition is timely filed, the time for filing a petition for judicial review to superior court does not commence until the Commissioner disposes of the petition for reconsideration. RCW 34.05.470(3). In this case, Ms. Haynen's petition for reconsideration was sixteen days late, and was dismissed accordingly. CR at 117. Since Ms. Haynen's petition for reconsideration was untimely, the deadline for filing a petition for judicial review never changed; it was still thirty days from the Commissioner's March 7, 2008 order, or April 7, 2008. Ms. Haynen's decision to file a petition for reconsideration, therefore, had no effect on the deadline for complying with the requirements of RCW 34.05.542(2).

should, therefore, decline to address the underlying merits of Ms. Haynen's application for benefits, as it was not an issue decided below. RAP 2.5(a); *see Pascua v. Heil*, 126 Wn. App. 520, 534, 108 P.3d 1253, 1261 (2005) (the Court of Appeals generally will not address issues the trial court has not decided).

Ms. Haynen also argues that she has proof demonstrating that she served her petition for review on the Department in a timely manner. App. Brief at 3. But Ms. Haynen already had an opportunity to present evidence of timely service the day of the superior court hearing on the motion to dismiss. When faced with overwhelming evidence that her petition for review was untimely—the very envelope in which she mailed the petition to the Department bearing a postmark of April 9, 2008, the authenticity of which has not been challenged—Ms. Haynen failed to present any evidence in opposition. Moreover, as this Court is simply reviewing the propriety of the superior court's order of dismissal, it would be improper for this Court to consider evidence not presented below. *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258, 1266 (1995). In any event, even if this Court were inclined to permit Ms. Haynen to present new evidence on appeal, Ms. Haynen has not indicated what this evidence is or where it comes from. Thus, Ms. Haynen's statements relating to proof of timely service constitute mere unsupported factual

assertions unworthy of this Court's consideration. RAP 10.3(a)(5); *Tennant v. Roys*, 44 Wn. App. 305, 310, 722 P.2d 848 (1986).

In sum, the requirements under the APA for perfecting a petition for review to superior court are well-settled. A failure to strictly comply with the service requirements, of RCW 34.05.542, renders the superior court without subject matter jurisdiction to entertain the underlying merits of the petition. As Ms. Haynen failed to serve the Department within thirty days of the Commissioner's order, the superior court was without jurisdiction to hear the appeal. The superior court's decision should therefore be affirmed.

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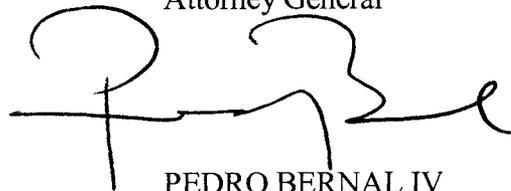
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VI. CONCLUSION

Based on the foregoing, the Department respectfully requests this Court affirm the superior court's decision dismissing Ms. Haynen's Petition for Review for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 29 day of May 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Pedro Bernal IV', written over a horizontal line.

PEDRO BERNAL IV
WSBA # 39400
Assistant Attorney General
Attorney for Respondent
PH: (206) 464-7676

Attachment A
Copies of Pages from the
Commissioner's Record

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on March 7, 2008.

Representative, Commissioner's Review Office,
Employment Security Department

UIO: 770
BYE: 10/20/2007

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2008-0377

In re:

CHIN Y. HAYNAN
SSA No. [REDACTED]

Docket No. 02-2007-18194-R

DECISION OF COMMISSIONER

On February 13, 2008, CHIN Y. HAYNAN petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on January 18, 2008. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law, adds the following.

A claimant may be eligible for training benefits if, after an assessment of demand for the individual's skills, he or she is determined to need job-related training to find suitable employment in his or her labor market. The assessment of demand for the individual's skill set must be substantially based on declining skill sets identified in local labor market areas by the local work force development councils in cooperation with the Department's labor market information division. RCW 50.22.150(1)(c). Accordingly, the local workforce development councils, in cooperation with the Department's labor market information division, have provided information on specific occupations within particular labor market areas. This information is found at the following website: <http://www.wilma.org/wdclists/>.

Here, the claimant's occupation or skill set is that of a janitor or custodian. As of August 28, 2007, that skill set has been determined to be in demand in the claimant's labor market area of King County. While the claimant may have difficulty finding work as a janitor because of a language barrier, the fact remains that her skill set and occupation is not in diminishing demand. It would render superfluous the above cited statute to find the claimant eligible for training benefits when the local workforce council has, pursuant to legislative

direction, determined that her occupation and skill set is in demand. Accordingly, we concur in the conclusions that the claimant is not eligible for training benefits as her current occupation or skill set is not in decline.

Fortunately, in 1970, the Federal Unemployment Tax Act (FUTA) was amended to encourage states to enact legislation providing that claimants for regular unemployment benefits would not be denied those benefits while participating in training approved by the state employment security agency (Commissioner Approved Training in Washington state). The federal objective was to assure that the unemployment insurance system would not constitute an impediment to training claimants in occupational skills. The federal legislation left the states free to determine what training would be appropriate and to establish criteria for approval of training as well as safeguards to assure that claimants were participating in the training. While the commentary accompanying the federal legislation indicates that the legislation contemplates vocational rather than academic training, the legislation does not expressly limit the training to vocational training. Basic education which is a prerequisite to skill training and other short-term vocationally-directed academic courses may be approved. *See* § 3304(a)(8), FUTA; Commentary to Draft Legislation to Implement the Employment Security Amendments of 1970, p.62.

The practical effect of Commissioner Approved Training on a claimant's eligibility for regular benefits is to relieve him or her from the availability and job search requirements of RCW 50.20.010(E)(c) while he or she is in training. *See* RCW 50.20.043.

The claimant's situation is precisely what Commissioner Approved Training is designed to address. Claimant's occupation or skill set is not in decline, but in order for her to find employment she needs to improve her language skills. Commissioner Approved Training would allow her to draw regular unemployment benefits while updating her language skills.

Finally, the legislature has imposed strict time frames for submitting one's training application and for being enrolled in training. In enacting the training benefits program the legislature did not provide a "good cause" exception for failing to meet these time frames. Claimant was informed of the requirements of the program when she opened her claim in October 2006. She did not submit her training benefits application until June 19, 2007. Claimant's application was submitted more than 60 days after she learned of the program's requirements. As such, the administrative law judge's findings and decision on that point are supported by substantial evidence and will not be disturbed.

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on January 18, 2008, is AFFIRMED. The Office of Administrative Hearings' Default Order of November 1, 2007 is VACATED as claimant had good cause for her failure to appear. Claimant does not meet the eligibility requirements for receiving training benefits set forth at RCW 50.22.150.

DATED at Olympia, Washington, March 7, 2008.*

Donald K. Westfall III

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND**
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.**

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

Chin Hansen
401 Jewell St.
Ft. Stevens, WA 98024

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Olympia, WA 98507-90416

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Employment Security Dept.
Commissioner's Review Office

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on April 18, 2008.

Representative, Commissioner's Review Office,
Employment Security Department

UIO: 770
BYE: 10/20/2007

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2008-0377-RC

In re:

CHIN Y. HAYNEN
SSA No. [REDACTED]

Docket No. 02-2007-18194-R

**ORDER DISMISSING PETITION
FOR RECONSIDERATION**

On April 3, 2008, CHIN Y. HAYNEN filed a Petition for Reconsideration of a Decision of Commissioner issued on March 7, 2008, pursuant to RCW 34.05.470 and WAC 192-04-190.

The Decision of Commissioner was issued by the undersigned and mailed on March 7, 2008. The written request for reconsideration was postmarked April 3, 2008.

A Petition for Reconsideration must be filed within ten days of the mailing of the Decision of Commissioner, WAC 192-04-190. As it was not timely filed, this office has no jurisdiction to reconsider the matter. Now, therefore,

IT IS HEREBY ORDERED that the Petition for Reconsideration is **DISMISSED** pursuant to RCW 34.05.470.

DATED at Olympia, Washington, April 18, 2008.*

Donald K. Westfall III

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

JUDICIAL APPEAL

If you are a party aggrieved by the Decision of Commissioner issued on March 7, 2008, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty days from March 7, 2008. If no such appeal is filed, the Decision of Commissioner issued on March 7, 2008, will become final.

Attachment B
Declaration of Pedro Bernal and
copy of Envelope

NO. 62704-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHIN HAYNEN,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY

Respondent.

DECLARATION OF PEDRO BERNAL

ROBERT M. MCKENNA
Attorney General

Pedro Bernal IV
Assistant Attorney General
WSBA #39400
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
PH: (206) 464-7676

ORIGINAL

PEDRO BERNAL IV hereby declares:

1. I am over the age of eighteen and competent to be a witness.

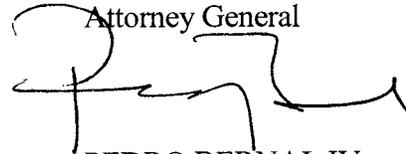
This declaration is based upon my personal knowledge.

2. I am employed by the State of Washington as an Assistant Attorney General for the Licensing and Administrative Law Division. My duties include representing the Department of Employment Security (Department) in judicial review actions under the Administrative Procedure Act (APA), RCW 34.05.

3. I declare under penalty of perjury under the laws of the state of Washington that the attachment to this declaration is true and correct copy of the envelope in which the Department received Ms. Haynen's petition for judicial review.

DATED: May 29, 2009, at Seattle, Washington.

ROBERT M. MCKENNA
Attorney General



PEDRO BERNAL IV
WSBA # 39400
Assistant Attorney General
Attorney for Respondent
PH: (206) 464-7676

CHINA HAYWARD
401 JEWELL ST.
BIRMINGHAM, WA 98002

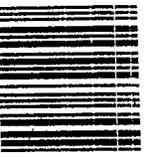
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Olympia, WA 98507-9040