

66007-1

66007-1

No. 66007-1-I

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

ANDREW APRIKYAN,

Appellant,

vs.

**MARK EMMERT, PHYLLIS WISE, PAUL RAMSEY, and
CHERYL CAMERON**

Respondents.

BRIEF OF RESPONDENTS

HILLIS CLARK MARTIN & PETERSON P.S.
Louis D. Peterson, WSBA #5776
Mary E. Crego, WSBA #31593
Jake Ewart, WSBA #38655
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745

Attorneys for Respondents

FILED
COURT OF APPEALS
DIVISION I
2011 JAN 24 PM 1:57

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	1
A. Background.....	1
B. Service.....	3
1. <i>Aprikyan filed a petition naming four respondents.</i>	3
2. <i>Aprikyan never personally served the four named Respondents.</i>	4
C. Procedural History.	7
III. ARGUMENT	8
A. The APA Expressly Requires Separate Service on the Agency, the Office of the Attorney General, and All Parties of Record.	9
B. The Trial Court Properly Dismissed Aprikyan’s Petition Because He Did Not Serve All Parties of Record.	13
1. <i>The trial court lacked jurisdiction because Aprikyan did not properly serve his petition.</i>	13
2. <i>Service on the attorney general does not substitute for actual service on the agency and other parties of record.</i>	16
3. <i>Substantial compliance is insufficient under the APA.</i>	18
C. Respondents Timely Raised the Service of Process Defense.	23

1. *Aprikyan did not reasonably rely on service on the attorney general as being sufficient.....*23

2. *Respondents raised this defense promptly in their first brief before the Superior Court.....*25

D. **Aprikyan Failed to Name the University as a Party.....**27

IV. **CONCLUSION**31

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adkinson v. Digby, Inc.</i> , 99 Wn.2d 206, 660 P.2d 756 (1983)	25
<i>Banner Realty, Inc. v. Dep't of Revenue</i> , 48 Wn. App. 274, 738 P.2d 279 (1987)	31
<i>Cheek v. Employment Sec. Dep't of Wash.</i> , 107 Wn. App. 79, 25 P.3d 481 (2001)	passim
<i>French v. Gabriel</i> , 57 Wn. App. 217, 788 P.2d 569 (1990)	16, 17, 23
<i>Gerean v. Martin-Joven</i> , 108 Wn. App. 963, 33 P.3d 427 (2001)	15, 23
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 744 P.2d 1032 (1987)	23
<i>In re Marriage of Logg</i> , 74 Wn. App. 781, 875 P.2d 647 (1994)	23
<i>Kitsap County Fire Prot. Dist. No. 7 v. Kitsap County Boundary Review Bd.</i> , 87 Wn. App. 753, 943 P.2d 380 (1997)	30, 33
<i>Landreville v. Shoreline Cmty. Coll. Dist. No. 7</i> , 53 Wn. App. 330, 766 P.2d 1107 (1989)	16, 17, 23
<i>Lejeune v. Clallam County</i> , 64 Wn. App. 257, 823 P.2d 1144 (1992)	30
<i>Lenca v. Employment Sec. Dep't of the State of Wash.</i> , 148 Wn. App. 565, 200 P.3d 281 (2009)	8
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000)	27, 28
<i>Meadowdale Neighborhood Comm. v. City of Edmonds</i> , 27 Wn. App. 261, 616 P.2d 1257 (1980)	16, 17, 23
<i>Muckleshoot Indian Tribe v. Wash. Dep't of Ecology</i> , 112 Wn. App. 712, 50 P.3d 668 (2002)	10, 15

<i>Quality Rock Products, Inc. v. Thurston County</i> , 126 Wn. App. 250, 108 P.3d 805 (2005)	32, 33
<i>Romjue v. Fairchild</i> , 60 Wn. App. 278, 803 P.2d 57 (1991).....	28
<i>Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998)	14, 19
<i>Skinner v. Civil Serv. Comm'n of the City of Medina</i> , 168 Wn.2d 845, 232 P.3d 558 (2010)	20, 21, 24
<i>Sprint Spectrum, LP v. Dep't of Revenue</i> , 156 Wn. App. 949, 235 P.3d 849 (2010)	22, 31
<i>Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.</i> , 127 Wn.2d 614, 902 P.2d 1247 (1995)	21

STATUTES

RCW 4.28.080(15)	15
RCW 28B.10.510	16
RCW 34.05.010(12)	10, 11
RCW 34.05.010(19)	13
RCW 34.05.010(2)	10
RCW 34.05.542	11
RCW 34.05.542(2)	3, 9, 13
RCW 34.05.542(4)	12, 13, 14
RCW 34.05.542(6)	16
RCW 34.05.546(4)-(5)	10
RCW 41.12.090	18
RCW 43.10.040	16

RULES

CR 10(a)(1).....27

I. INTRODUCTION

Petitioner-Appellant Andrew Aprikyan was employed as a Research Assistant Professor at the University of Washington's School of Medicine until his employment was terminated for scientific misconduct. Aprikyan intentionally falsified seven figures and tables in two published research papers. He also falsely reported the methods he used to conduct his experiments and falsely described the results of his experiments. After a thorough internal investigation, Aprikyan's employment was terminated.

Aprikyan filed a Petition for Judicial Review pursuant to Washington's Administrative Procedure Act ("APA"). However, Aprikyan failed to name the University as a respondent, and he failed to serve any of the named Respondents as required by the APA. Following well-established Washington law, the trial court dismissed Aprikyan's Petition. That decision should be affirmed.

II. STATEMENT OF THE CASE

A. Background.

Before Aprikyan was terminated for scientific misconduct, the University conducted a thorough internal process to investigate whether he committed scientific misconduct. The allegations were first reviewed by a committee of three scientists with relevant expertise. CP 216 at ¶¶ 4-5, 8. The committee combed through Aprikyan's research records, reviewed

extensive written responses from Aprikyan, and interviewed Aprikyan and other witnesses. *Id.* The committee concluded that Aprikyan committed scientific misconduct, and detailed its findings in a more than 450-page report. *Id.*

The next step in the University's process required Dr. Paul Ramsey, Dean of the School of Medicine, to review the committee's findings. Ramsey spent more than 100 hours personally reviewing the record. *Id.* at ¶¶ 6-8. He appointed three additional scientists to assist him in that process. *Id.* His review included reading the extensive written materials submitted by Aprikyan and meeting with Aprikyan personally. *Id.* Ramsey also concluded that Aprikyan committed scientific misconduct. *Id.* Ramsey found that Aprikyan intentionally falsified seven figures and tables in two published research papers. CP 219-44 (Dean Paul Ramsey's Decision). Aprikyan also falsely reported the methods he used to conduct his experiments and falsely described the results of his experiments. *Id.* Ramsey's written decision described each of Aprikyan's intentional falsifications and attached the curricula vitae of the experienced scientists who assisted in the review. *Id.*

Following Ramsey's finding of misconduct, Dr. Phyllis Wise, the University's Provost, sought to end Aprikyan's employment. The process to terminate a faculty member includes review by a faculty hearing panel

and the University President. Wise and Ramsey, as petitioners, named Aprikyan as the respondent in a University proceeding intended to approve his termination. CP 217 at ¶ 10. At the same time, Aprikyan filed a petition of his own against Ramsey and Dr. Cheryl Cameron, a University Vice Provost, complaining about the investigation. CP 2, 363. The two petitions were jointly considered by a faculty hearing panel (the “Hearing Panel”) that did not include scientists with expertise relevant to Aprikyan’s misconduct. CP 217 at ¶ 10, 363. The Hearing Panel did not support termination of a fellow faculty member. CP 154-55. Dr. Mark Emmert, the University’s President, reviewed the matter pursuant to University procedures, agreed with Ramsey that Aprikyan had committed scientific misconduct, and authorized Aprikyan’s termination in a decision dated March 4, 2010. CP 153-63. Aprikyan asked Emmert to reconsider, and that request was denied in a letter dated March 23, 2010. CP 165-66. Aprikyan received that letter on March 26, 2010. CP 38 at ¶ 13.

B. Service.

1. Aprikyan filed a petition naming four respondents.

Aprikyan filed a Petition for Judicial Review pursuant to the APA on April 16, 2010, ten days before the 30-day deadline imposed by the APA. CP 1; RCW 34.05.542(2). Aprikyan had filed an identical petition earlier the same day, but because of a clerical error by his counsel, he

chose to dismiss that petition and refile. CP 456 at ¶¶ 3-4. This appeal involves the second Petition, which was assigned Cause Number 10-2-14242-8 SEA.

The Petition did not name the University as a Respondent. CP 1. Instead, Aprikyan named Emmert, Wise, Ramsey, and Cameron. *Id.*

2. Aprikyan never personally served the four named Respondents.

On April 22, 2010, Mia Karlsson, a legal assistant employed by Aprikyan's attorneys, filed a declaration of service in which she stated that, on April 19, 2010, she "personally served" copies of the Petition and Case Schedule on "the President of the University of Washington" and on Respondents Emmert, Wise, Ramsey, and Cameron. CP 16-17.

In fact, she did not. Emmert, Wise, Ramsey, and Cameron each filed a declaration stating they were not personally served with the Petition. CP 208-09 (Emmert), 372-73 (Wise), 374-75 (Cameron) and 376-77 & 493-94 (Ramsey). Their declarations were filed on May 11, 2010, the same day Respondents' counsel learned the Respondents had not been personally served. CP 475-76 (Respondents' Reply in Support of Motion to Dismiss), CP 365 (Respondents' Opposition to Petitioner's Motion for a Preliminary Injunction), CP 489-90 at ¶ 2 (Crego Declaration).

Aprikyan later filed a new declaration from Karlsson on May 13, 2010, in which she explained her unsuccessful attempts to make personal service. CP 378-80. On July 7, 2010, Aprikyan filed yet another declaration from Karlsson explaining her service attempts in more detail. CP 446-54. Those declarations make clear she did *not* personally serve any of the Respondents. *Id.*

a. Aprikyan attempted to serve his first Petition.

Karlsson's declarations describe three trips to the University to attempt service. CP 446-50. During the first trip on Friday, April 16, she attempted to serve the petition that was dismissed by Aprikyan later that day. CP 446-51. She delivered that petition, along with a motion for a temporary restraining order, to the Attorney General's Office, which prompted an assistant attorney general to call Aprikyan's counsel to discuss scheduling for the temporary restraining order proceedings. CP 448 at ¶ 11. Karlsson also personally delivered a copy of the dismissed petition to Cameron and left copies for the other Respondents with unnamed staff members. CP 448-50.

b. Aprikyan attempted again to serve his second, refiled Petition.

After learning that a clerical error had been made in filing the first petition, Aprikyan decided to dismiss that petition and refile an identical

petition the same day. CP 451 at ¶ 20. After dismissing the first petition, Aprikyan's counsel directed Karlsson to return to the University later the same day to personally serve the refiled petition on the Respondents and the Attorney General's Office. *Id.* at ¶ 21. During the second trip, Karlsson served a copy of the refiled petition on the Attorney General's Office, but felt it was too late to attempt service on any of the Respondents. *Id.* Aprikyan's counsel directed her to return on Monday and personally serve the Respondents. *Id.*

c. Aprikyan attempted to serve his refiled Petition again.

During the third trip, on Monday, April 19, Karlsson attempted personal service on the individual Respondents. She explained that she delivered the Petition to a "staff member" in Ramsey's office, not to Ramsey personally. CP 378 at ¶ 2. Similarly, she delivered the Petition to a "receptionist" in Emmert's office, not to Emmert personally. *Id.* at ¶ 3. She also delivered the Petition to "Wise's assistant" and to a "receptionist" in Cameron's office. *Id.* She did not personally hand the documents to any of the Respondents.

d. Aprikyan's counsel filed a declaration attempting to explain the various attempts at service.

Counsel for Aprikyan filed a declaration explaining his decisions related to service. He describes talking with an Assistant Attorney

General after the original petition was filed, then directing his assistant to personally serve the refiled petition. CP 456-59. He knowingly rejected the APA's simple option of service by mail: "Not confident that placing the documents in the U.S. Mail would mean that they would get to President Emmert, et al., I wanted to take what I determined to be appropriate steps to ensure that those persons would receive the documents." CP 458 at ¶ 10 (Gautschi Declaration). Those steps did not include personal, hand-to-hand delivery to the Respondents.

C. Procedural History.

Aprikyan's Petition was accompanied by a Motion for a Temporary Restraining Order, seeking to require the University to continue his employment. The parties were able to agree to temporary relief until a motion for a preliminary injunction could be heard. CP 459 at ¶ 12. Aprikyan filed his motion for a preliminary injunction on April 30, 2010. CP 22. The Respondents filed their opposition on May 11, 2010. CP 360. Among other things, the Respondents argued that Aprikyan was not entitled to his requested relief because he had not properly served the individual Respondents and because he had not named the University as a party. CP 360, 365-66. Following oral argument on May 21, 2010, King County Superior Court Judge Joan DuBuque denied Aprikyan's motion for a preliminary injunction, "finding that Petitioner

cannot demonstrate a clear legal or equitable right in this matter, or a well-grounded fear of immediate invasion of any such right, or actual and substantial harm” CP 487-88. Aprikyan does not appeal that ruling.

On June 23, 2010, the Respondents moved to dismiss Aprikyan’s Petition because he failed to serve the Respondents as required by the APA and failed to name the University as a respondent. CP 386-93. After hearing argument, Judge DuBuque granted the University’s motion on August 13, 2010. CP 477-78. Aprikyan appeals that order.

III. ARGUMENT

Aprikyan contests the trial court’s Order Granting Respondents’ Motion to Dismiss. CP 477-48. The Court of Appeals reviews that Order de novo. *Lenca v. Employment Sec. Dep’t of the State of Wash.*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009) (questions of law relating to the APA are reviewed de novo).

Aprikyan contends, primarily, that he named the Respondents in their “official capacities,” and that an official capacity suit against the Respondents is tantamount to a suit against the University itself. Accordingly, Aprikyan contends that the APA required service only on the University, and that his failure to serve the individual Respondents is irrelevant.

Aprikyan is wrong. The APA plainly required Aprikyan to serve the Respondents, the University, and the attorney general separately. Aprikyan cannot avoid that explicit requirement by invoking substantial compliance, waiver, or any of the other theories he raises. Because Aprikyan failed to serve the Respondents personally, the trial court properly dismissed his Petition.

A. The APA Expressly Requires Separate Service on the Agency, the Office of the Attorney General, and All Parties of Record.

Aprikyan contends that he named the Respondents in their “official capacities” and that, for purposes of this APA review, the Respondents and the University are the same. Aprikyan’s Brief at 22-32. They are not. Regardless of what the law might be in other contexts, the APA explicitly distinguishes between the “agency” and the “parties of record” and requires individual service on each of them. RCW 34.05.542(2). The APA states:

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.

Id. The court must dismiss the petition if the petitioner fails to serve any one of those distinct parties in the time allowed. *E.g., Muckleshoot Indian Tribe v. Wash. Dep’t of Ecology*, 112 Wn. App. 712, 728, 50 P.3d 668 (2002) (dismissing petition for failure to serve all parties of record).

The APA defines “agency” to include “institution[s] of higher education,” so the “agency” requiring service in this case was the University. RCW 34.05.010(2) (defining “agency”). The APA defines the “parties of record” to be the “person[s] to whom the agency action [was] specifically directed” or the “person[s] named as [parties] to the agency proceeding or allowed to intervene or participate as [parties] in the agency proceeding.” *Muckleshoot*, 112 Wn. App. at 724-25 (quoting RCW 34.05.010(12)). Here, the parties of record—as properly identified by Aprikyan in his Petition (CP 2)—were Aprikyan, Wise, Ramsey, and Cameron, each of whom was specifically named as a party in the administrative proceedings. *E.g.*, CP 64 (caption of Hearing Panel decision). Because Wise, Ramsey, and Cameron, along with Aprikyan, were the named “parties of record” in the agency proceedings below, the APA required Aprikyan to serve his Petition on each of them.

When Aprikyan filed his Petition, he agreed that the University was the “agency” for purposes of review, and that Aprikyan, Wise, Ramsey, Cameron were the “parties of record.” The APA requires that a petition separately identify “the agency action at issue” along with the “persons who were parties in any adjudicative proceedings that led to the agency action.” RCW 34.05.546(4)-(5). Aprikyan’s Petition identified the “agency action at issue” to be “the March 4, 2010, Final Decision of

the University of Washington,” and the “persons who were parties to the adjudicative proceedings” to be Aprikyan, Wise, Ramsey, and Cameron. CP 2.

Having failed to serve each of those parties as required by the APA, Aprikyan now suggests that the distinction between those “parties of record” and the “agency” is meaningless here because the “parties of record” were agency employees. Aprikyan’s Brief at 23-33. The text of the APA permits no such conclusion. The APA plainly does *not* disqualify agency employees from also being “parties of record,” and it would not be unusual for employees to be “parties of record” in intra-agency proceedings like those here. *See, e.g.*, RCW 34.05.010(12); RCW 34.05.542.

In this case, agency employees were pitted against one another in adversarial proceedings below, so the distinction between the “agency” and the “parties of record” is significant. Wise, Ramsey, and Cameron, each a University employee, were on the opposite side of a dispute with Aprikyan, another University employee. The University’s internal process routed that dispute through a faculty hearing panel consisting of five other University employees. Ultimately, the President of the University reviewed the case and approved Aprikyan’s termination. This dispute did not involve a monolithic group of individuals acting in concert on behalf

of the “agency;” instead, it featured individuals with different views, duties, and interests in the scientific misconduct investigation at issue. Pursuant to the APA, each of the stakeholders who participated as a party in the agency proceedings is entitled to notice of the petition for judicial review.

Adequate service on those parties could not be assured simply by leaving a copy of the Petition with a receptionist in the president’s office. *See* RCW 34.05.542(4) (describing service on the agency). Aprikyan plainly agreed, since he separately named the individual University employees as Respondents and attempted three times to personally serve *each* of them. The APA rightly requires service on the agency *and* the adversarial parties of record below, and nowhere suggests that the “parties of record” need not be individually served if they are also employees of the agency involved.

None of the “official capacity” cases cited by Aprikyan involves the APA, and none has anything to say about the proper review of agency proceedings under the APA’s particular requirements. The APA explicitly distinguishes between the agency and the parties of record regardless of whether that distinction would be relevant in other legal contexts. Aprikyan recognized that distinction in his Petition. As explained below,

the trial court properly applied the APA to hold that Aprikyan failed to serve all parties of record.

B. The Trial Court Properly Dismissed Aprikyan's Petition Because He Did Not Serve All Parties of Record.

Despite what he claims now, Aprikyan recognized his obligation to serve all "parties of record" along with the agency and the attorney general. Indeed, he attempted to personally serve the Respondents on three separate occasions. CP 446-54. Because he failed, the trial court properly dismissed his petition.

1. The trial court lacked jurisdiction because Aprikyan did not properly serve his petition.

The APA requires that "[a] petition for judicial review . . . 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." RCW 34.05.542(2). Service on the agency must be accomplished by delivering "a copy of the petition to the office of the . . . chief administrative officer . . . at the principal office of the agency." RCW 34.05.542(4). **Service on all other parties, including the individual Respondents, must be accomplished by (1) mail or (2) "personal service."** RCW 34.05.010(19). The APA is explicit about the requirement.

Washington courts have repeatedly emphasized that the APA's requirements must be followed or a case will be dismissed. "[A]ll statutory procedural requirements" of the APA "must be met before jurisdiction is properly invoked." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). If those requirements are not met, a petition for review must be dismissed. *E.g., id.* at 557 (failure to serve all necessary parties required dismissal); *Muckleshoot*, 112 Wn. App. at 728 (same); *Cheek v. Employment Sec. Dep't of Wash.*, 107 Wn. App. 79, 84-85, 25 P.3d 481 (2001) (petition dismissed because it was not served within 30 days).

Here, Aprikyan never attempted to serve the Respondents by mail, as the APA allows. Instead, he attempted to serve Emmert, Wise, Ramsey, and Cameron personally, but he failed to do so.¹ *E.g.*, CP 378-80. "Personal service is accomplished in one of two ways: either by delivering a copy of the summons to the defendant herself, or by leaving a copy . . . at the defendant's usual abode" *Gerean v. Martin-Joven*,

¹ Aprikyan contends that, even if he did not serve each of the Respondents properly, he at least managed to serve the University. Aprikyan's Brief at 32-33. The record is not clear on that point. Although no party disputes that a copy of Aprikyan's Petition was delivered to President Emmert's office on April 19, 2010, the record does not show whether that copy was intended for Emmert himself (a named respondent) or the University. Karlsson's affidavit of service declared that, on April 19, 2010, she had "personally served" the Petition on the "President of the University of Washington" and on Respondents Emmert, Wise, Ramsey, and Cameron, CP 16-17, but we know now that the affidavit was inaccurate. Even if the University was properly served pursuant to RCW 34.05.542(4), none of the Respondents was served at all.

108 Wn. App. 963, 969, 33 P.3d 427 (2001) (citing RCW 4.28.080(15)). Aprikyan did neither. Instead, it is undisputed he attempted to serve his Petition by leaving it with receptionists or other staff at the Respondents' business offices. CP 378-80.

It is well established that personal service cannot be accomplished in that way. *French v. Gabriel*, 57 Wn. App. 217, 225-26, 788 P.2d 569 (1990) (service on defendants' secretary did not constitute personal service); *Landreville v. Shoreline Cmty. Coll. Dist. No. 7*, 53 Wn. App. 330, 331-32, 766 P.2d 1107 (1989) (service on Assistant Attorney General's assistant insufficient when service on Assistant Attorney General required); *Meadowdale Neighborhood Comm. v. City of Edmonds*, 27 Wn. App. 261, 262-70, 616 P.2d 1257 (1980) (service on mayor's secretary insufficient to serve city when service on mayor required).

Indeed, Aprikyan asks the Court to approve a new method of personal service—delivery to a staff member at the defendant's place of employment—that has not been adopted by the Legislature, and has already been soundly rejected by Washington courts. *Id.* The trial court properly dismissed Aprikyan's petition because he did not personally serve it or mail it as required by the APA.

2. Service on the attorney general does not substitute for actual service on the agency and other parties of record.

Under the APA, “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(6). Aprikyan argues that, pursuant to RCW 28B.10.510, the attorney general is necessarily the “attorney of record” for the University and the Respondents, and that, because he properly served the attorney general, he did not need to serve the University or the Respondents separately.² Aprikyan’s Brief at 33-34. That argument has already been rejected by the Court of Appeals in an analogous case.

In *Cheek v. Employment Sec. Dep’t of the State of Wash.*, the trial court dismissed Cheek’s petition for review because, although she served her petition on the attorney general within 30 days, she did not serve the Employment Security Department until the 34th day. 107 Wn. App. at 82. On appeal, Cheek argued that the attorney general was “per se the attorney of record for the Department pursuant to RCW 43.10.040,” and that timely service on the attorney general constituted timely service on the Department as well.³ *Id.* The Court of Appeals disagreed, holding that,

² Pursuant to RCW 28B.10.510, “[t]he attorney general of the state shall be the legal advisor to . . . institutions of higher education and he shall institute and prosecute or defend all suits in behalf of the same.”

³ Under RCW 43.10.040, “[t]he attorney general shall . . . represent . . . agencies of the state in the courts”

even though the attorney general represents the Department pursuant to statute, and ultimately represented the Department in the proceedings, the attorney general is not the attorney of record until he “file[s] a formal notice of appearance.” *Cheek*, 107 Wn. App. at 84. Any other interpretation would render meaningless the APA’s requirement that petitioners serve the agency “and the attorney general” separately. *Id.* at 83 (emphasis in original). Because the attorney general did not file a notice of appearance on behalf of the Department until after Cheek’s time for service had expired, the Court of Appeals affirmed dismissal of Cheek’s petition. *Id.* at 84-85.

Likewise, in this case, the attorney general did not file a notice of appearance on behalf of the Respondents until after Aprikyan’s deadline to serve the University and all parties of record had passed. CP 20-21. Therefore, Aprikyan could not serve the University or the Respondents simply by serving the attorney general. Aprikyan’s attorney understood that requirement, because he sent Karlsson back to attempt personal service on the Respondents even after serving the attorney general and talking with an assistant attorney general about the case. CP 458 at ¶ 9. Karlsson was not successful, and Aprikyan’s Petition was properly dismissed.

3. Substantial compliance is insufficient under the APA.

Aprikyan next argues that the Court should excuse his failure to serve each of the Respondents personally because he handed copies of the Petition to other unidentified employees at the University and thereby “substantially complied” with the APA’s requirements. Aprikyan’s Brief at 36-39. Aprikyan cites no case applying the doctrine of substantial compliance to the APA’s service requirements. *Id.* In fact, to the contrary, Washington courts have made clear that “[s]ubstantial compliance with the service requirements of the APA does not invoke the appellate, or subject matter, jurisdiction of the superior court.” *Cheek*, 107 Wn. App. at 85 (citing *Skagit Surveyors & Eng’rs*, 135 Wn.2d at 556).

Because the doctrine of substantial compliance does not apply to the APA, the Supreme Court’s decision in *Skinner v. Civil Serv. Comm’n of the City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010), does not apply either. In *Skinner*, a non-APA case, the Court analyzed the service requirements imposed by a civil service statute, RCW 41.12.090, and the City of Medina’s Civil Service Commission rules. 168 Wn.2d at 853. Those rules required that certain appeal papers be served on “the Commission staff at the Commission Office.” *Id.* No other method of service was available. *Id.* When the appellant, Skinner, attempted to

serve the Commission at its office address in the Medina City Hall, he found that the Commission had no office space there and that Commission staff were not regularly present in the building. *Id.* at 848-49. Skinner left three copies of his appeal papers with the Medina city clerk, who delivered the papers to the Commission. *Id.* at 849. Citing non-APA case law, the Court held that substantial compliance with the applicable service requirements was sufficient on the highly unusual facts presented:

In these circumstances, where the Commission's office address (at which a notice of appeal must be served) contains no office or Commission staff and the municipality is relatively small, we hold that Skinner's service on the city clerk, located at that address, was reasonably calculated to give notice to the Commission.

Id. at 856.

Although the Court applied the doctrine of substantial compliance to those unique facts, the Court did not suggest that its holding would pertain to cases analyzed under the APA. *See id.* at 854-56. In fact, the Court explicitly distinguished its own APA-related precedents, noting that those decisions, which did not apply the doctrine of substantial compliance, had "no bearing on other statutes and other requirements of service." *Id.* at 855 (quoting *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995)). The Court also suggested that its holding would apply only in cases where an

appellant faced significant structural obstacles in effecting service; for example, where, as in *Skinner*, only one method of service was available and could be accomplished only with great difficulty. *Id.* at 855-56 (highlighting the difficulties associated with serving part-time government employees).

In sharp contrast to *Skinner*, Aprikyan had two choices for serving the Respondents: personal service or the simple option of serving by mail. Although the APA requires strict compliance with its service provisions, it balances that requirement by making service easier and more convenient than is ordinarily the case. Aprikyan did not take advantage of that added convenience. In fact, Aprikyan's counsel was aware of the option to serve by mail but he intentionally chose not to utilize it. CP 458 at ¶ 10. When he was unable to personally serve the Respondents after three attempts at the Respondents' places of employment, he still had seven days to mail the Petition before the statutory appeal period ended on April 26, 2010. He did not mail it, nor did he make additional attempts at personal service at the Respondents' places of work or their homes. Indeed, Aprikyan can point to no *Skinner*-like obstacles that prevented him from accomplishing service by April 26, 2010, and his Petition was properly dismissed. *E.g.*, *Cheek*, 107 Wn. App. at 84-85 (failure to serve within 30 days requires dismissal).

Even if a petitioner were permitted to accomplish service under the APA by substantial compliance, Aprikyan did not do that here.

“Substantial compliance does not encompass noncompliance” *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 958, 235 P.3d 849 (2010). Aprikyan claims, without citation, that the Respondents had “actual notice” of the petition by April 25, 2010, but the record contains no such evidence. Aprikyan’s Brief at 38 (citing nothing in the record to support assertion that “actual notice” was achieved). In any event, Washington courts consistently hold that actual notice alone does not constitute personal service. *E.g., Haberman v. WPPSS*, 109 Wn.2d 107, 177-78, 744 P.2d 1032 (1987) (“mere receipt of process and actual notice alone do not establish valid service of process”); *Gerean*, 108 Wn. App. at 969-72 (service on defendant’s father, who later delivered papers to defendant, was ineffective); *In re Marriage of Logg*, 74 Wn. App. 781, 784, 875 P.2d 647 (1994) (service of divorce papers by wife on husband was ineffective: “Notice without proper service is not enough to confer jurisdiction.”); *French*, 57 Wn. App. at 225-26 (service on secretary, who delivered papers to defendants, was ineffective); *see also Landreville*, 53 Wn. App. at 332, 766 P.2d 1107 (“Actual notice to the State, standing alone, is not sufficient.”); *Meadowdale*, 27 Wn. App. at 267-68

(“Meadowdale concedes that actual notice, standing alone, is insufficient to bring the City within the court’s jurisdiction.”).

Aprikyan also cannot show that he attempted service “in a manner reasonably calculated to give notice.” *Skinner*, 168 Wn.2d at 855. Rather than accomplish service by mail, Aprikyan’s attorney directed his assistant to attempt personal service even though she had been unsuccessful in accomplishing personal service of Aprikyan’s first (and later dismissed) petition. CP 458 at ¶ 10. Indeed, Aprikyan’s attorney concedes that he took “what [he personally] determined to be appropriate steps to ensure that [Respondents] would receive the documents” rather than use one of the two methods (*i.e.*, personal service or mail) specifically authorized by the Legislature. *Id.* Then, after his assistant was again unsuccessful in accomplishing personal service on April 19, 2010, Petitioner’s counsel still failed to mail the Petition. Instead, he filed Karlsson’s inaccurate declaration of service that wrongly stated personal service had been made. CP 16-17. None of those actions was “reasonably” calculated to accomplish the service required by the APA.

In short, Washington courts strictly construe the APA’s service requirements and do not apply the doctrine of substantial compliance to APA review. Because Aprikyan did not properly serve the Respondents, the trial court correctly dismissed his Petition.

C. Respondents Timely Raised the Service of Process Defense.

Aprikyan contends the Respondents waived service, or are equitably estopped from contesting service, because an assistant attorney general, William Nicholson, called Aprikyan's lawyer on April 16, 2010, to discuss the timing of Aprikyan's requested temporary restraining order hearing. That conversation had no such effect.

1. Aprikyan did not reasonably rely on service on the attorney general as being sufficient.

Equitable estoppel requires an act inconsistent with a later asserted defense and reasonable reliance upon that act by the other party.

Aprikyan's Brief at 39. The first element is not met because there was no inconsistent act by the Respondents. There is no evidence in the record that assistant attorney general Nicholson ever claimed to represent the individual Respondents or that the parties discussed service at all. Even if Nicholson had represented the Respondents, appearance by an attorney does not preclude a party from challenging sufficiency of service.

Adkinson v. Digby, Inc., 99 Wn.2d 206, 209, 660 P.2d 756 (1983). More importantly, Nicholson called Aprikyan's counsel on Friday, the same day the Attorney General's Office received notice of the lawsuit, to discuss a TRO Aprikyan planned to seek in court on Monday. TRO proceedings

happen quickly, and Aprikyan cites no case holding a party waives an affirmative defense merely by discussing the scheduling of TRO hearing.

Aprikyan's argument also fails because even if Nicholson's conduct is attributed to the Respondents, Aprikyan did not rely on it. Nicholson and Aprikyan's lawyer spoke *after* Nicholson received a copy of the dismissed petition, and "*while* Ms. Karlsson was preparing copies of the [refiled petition] for service." CP 457 at ¶ 6 (emphasis added). After the conversation with Nicholson ended, Aprikyan's counsel *still* directed his legal assistant to serve the refiled petition on the Respondents. CP 458 at ¶ 9. When she later reported that it was too late in the day to serve the Respondents, Aprikyan's counsel told her that he "would like her to serve those persons on Monday, April 19, 2010." CP 458 at ¶ 10.

In other words, Aprikyan's counsel did not cease his efforts to personally serve the Respondents after talking to Nicholson. Instead, by his own admission, after speaking to Nicholson, Aprikyan's counsel directed his assistant to return to the University campus to attempt personal service. When she was unable to personally serve the Respondents on Friday, he sent her back on Monday. These actions demonstrate he did not rely on his communication with Nicholson.

Finally, any reliance must be reasonable. In *Lybbert v. Grant County*, 141 Wn.2d 29, 36, 1 P.3d 1124 (2000), a case cited by Aprikyan,

the court noted that reliance is not reasonable where the statutory requirements for service are explicit and a plaintiff fails to follow them. The APA's service requirements are straightforward, and Aprikyan's counsel attempted to do precisely what the statute requires: personally serve the University, the attorney general's office, and each individual Respondent. It was not until service was challenged that Aprikyan's counsel claimed he did not need to serve the Respondents because he had already talked to Nicholson. Because Aprikyan did not reasonably rely on any actions taken by the Respondents, his equitable estoppel argument fails.

2. Respondents raised this defense promptly in their first brief before the Superior Court.

When the requirements for equitable estoppel have not been met, Washington courts may still consider whether a party waived a defense by raising it too late. Aprikyan's claim that the Respondents waited too long in this case is meritless. The Respondents raised the defense in their first brief to the court, less than a month after the case was filed. By contrast, the waiver-related cases cited by Aprikyan involve long delays and significant litigation activities, including discovery, before a defense was asserted. *Lybbert*, 141 Wn.2d at 44 (waiving service defense by engaging in discovery for several months and delaying answering questions

regarding service); *Romjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57 (1991) (finding defendant waived service of process defense by waiting four months, engaging in discovery, and failing to respond to letter from plaintiff's counsel regarding service). The Respondents here raised improper service in their first brief, which is more than sufficient to preserve the defense.

Aprikyan also claims "it is impossible to conceive that Mr. Nicholson had no knowledge of the alleged 'service' issue . . . prior to the expiration of the 30-day statute." Aprikyan's Brief at 42. Aprikyan's speculation is utterly without foundation. Rather, it is Aprikyan who attempted to hide the service issue by filing the Karlsson Declaration on April 22 claiming that each respondent was "personally served." CP 16-17. It was not until May 13 that Aprikyan filed a new Karlsson declaration explaining what she actually did (CP 378-80), which was leave a copy at the offices of various Respondents, which is not an approved method of personal service in Washington. Had her initial declaration accurately described her attempted service, the issue may have come to light sooner.

Regardless, the record is undisputed that Respondents first learned that service was insufficient on the same day their Opposition to Petitioner's Motion for Preliminary Injunction was filed. CP 475, 489-90.

The issue was promptly raised with Aprikyan and the court that same day. The defense was timely raised, and the Superior Court properly dismissed the case for failure to follow the APA's requirements.

D. Aprikyan Failed to Name the University as a Party

Although Aprikyan's failure to personally serve the Respondents as required by the APA is sufficient standing alone to affirm the dismissal of his case, his Petition was also dismissed because he failed to name the University as a party. In his Petition, Aprikyan identified the University of Washington as the "Agency Whose Action Is at Issue," but did not name the University as a respondent. CP 1-2. The only Respondents in this case are Emmert, Wise, Ramsey, and Cameron.

Aprikyan makes a number of arguments to attempt to obfuscate this fundamental flaw. He argues the Respondents should be considered the same as the agency, but that contention has previously been refuted in this brief. He also argues the APA does not contain specific requirements for naming parties in the case caption, so he should not have to do so. Aprikyan's Brief at 18. The requirement to identify parties comes not from the APA, but from the basic rules that govern every case. Civil Rule 10 requires the names of all parties to be included in the caption. CR 10(a)(1); *Kitsap County Fire Prot. Dist. No. 7 v. Kitsap County Boundary Review Bd.*, 87 Wn. App. 753, 763, 943 P.2d 380 (1997)

(dismissing case for failure to name agency as party in the caption).

Moreover, a court may order relief only against a party to the action.

Lejeune v. Clallam County, 64 Wn. App. 257, 268, 823 P.2d 1144 (1992)

(“A person generally is not bound by orders entered in a proceeding to which he or she is not a party. . . .”). Here, the relief Aprikyan is seeking—re-employment—can be performed only by the University. In order to obtain this relief, the University must be a party before this court.

Aprikyan relies primarily on three cases for his argument that “there was no need for the petition to include the words ‘University of Washington’ in the caption.” Aprikyan’s Brief at 17-21. None of these cases deals with a situation where a petitioner is seeking relief against an agency not named as a party.

In the first two cases, the Court of Appeals affirmed dismissals by the trial courts for failure to follow procedural requirements. *Sprint Spectrum*, 156 Wn. App at 952; *Banner Realty, Inc. v. Dep’t of Revenue*, 48 Wn. App. 274, 276, 738 P.2d 279 (1987). The *Banner Realty* court dismissed a taxpayer’s appeal of a Board of Tax Appeals decision for failure to serve the Board as required by the APA. *Id.* at 276. In that case, the taxpayer was seeking relief against the Department of Revenue, but was also required to serve the Board because it was the state agency that issued the decision. The court explained that even if the Board was not a

party, it needed to be served to trigger production of the administrative record to facilitate review. *Id.* at 278. The *Sprint Spectrum* court reached the same conclusion. *Sprint Spectrum*, 156 Wn. App. at 952, 955 (noting the distinction between the Board as the agency who issued the ultimate decision and parties of record).

Thus, the APA requirement that the petition must include “the name and mailing address of the agency whose action is at issue” puts the agency on notice it must produce the administrative record, but is not equivalent to naming the agency as a party. Although his Petition listed the University as the agency that issued the ultimate decision, he did not identify the University as a party to the judicial review proceeding.

The third case relied on by Aprikyan to justify his failure to name the University as a party also involves significantly different key facts. Aprikyan cites *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005), to support his contention that he need not follow Civil Rule 10’s requirement of providing the names of all he intends to make parties in the caption. In *Quality Rock*, the Court of Appeals allowed a LUPA petitioner who failed to list a required party in the caption to proceed with judicial review. *Id.* at 253. The court noted that the petitioner “did not seek any form of relief or damages from the organization [omitted from the caption], and the petition clearly indicated

that Black Hills was a necessary party.” *Id.* at 274. The petitioner in *Quality Rock* specifically identified Black Hills Audubon Society—the party missing from the caption—in a section of the petition titled “parties to the action.” *Id.* at 255. The petitioner also moved to amend the complaint to reform the caption, but the trial court denied that motion. *Id.* at 273-74. Because no relief was being sought against Black Hills and it was clearly identified as a party in the body of the petition, the court concluded the omission from the caption was a mere procedural error. *Id.* at 274.

In contrast, Aprikyan is seeking relief against the University but did not clearly identify it as a party at any time. He did not include the University in the caption of his Petition where parties must be named, nor did he clarify elsewhere in his petition that the University was a party to the action. He did identify the University as the agency whose action is at issue, but as cases cited by Aprikyan point out, identification of the agency pursuant to the APA is necessary to trigger production of the administrative record; it does not make the agency a party. Aprikyan’s case is analogous to *Kitsap Fire Protection*, where the court affirmed dismissal because the pleading did not list the entity as a party elsewhere and the plaintiff did not attempt to amend. *Kitsap Fire Prot.*, 87 Wn. App. at 763. Aprikyan’s failure to name the University as a party leaves him

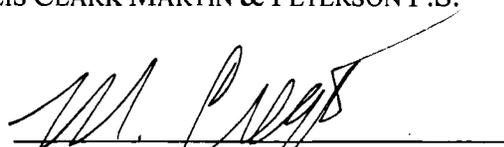
unable to obtain his requested relief, and his case was properly dismissed by the Superior Court.

IV. CONCLUSION

This is a simple case of failed personal service. Aprikyan failed to comply with the statutory requirements necessary to trigger judicial review. The APA's service requirements are straightforward. The agency, the parties of record, and the attorney general must all be served either personally or by mail. Aprikyan correctly identified the individuals he needed to serve, and set out to personally serve them. He did not personally serve all the Respondents. The trial court properly dismissed his case based on a long line of Washington cases holding that improper service of an APA petition requires dismissal. The trial court also dismissed his petition because he was seeking relief against a state agency but did not name the agency as a party to his case. The trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of January, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By: 

Louis D. Peterson, WSBA #5776

Mary E. Crego, WSBA #31593

Jake Ewart, WSBA #38655

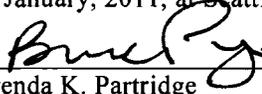
Attorneys for Respondents

CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via legal messenger service, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of January, 2011, at Seattle, Washington.



Brenda K. Partridge

ND: 12662.03702 4844-6888-2952v1

FILED
2011 JAN 24 PM 4:37
CLERK OF SUPERIOR COURT
JAN 24 2011