

69808-7

COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2010 OCT -4 PM 1:36

69808-7

69808-7

Court of Appeals No. ~~68407-8~~

Skagit County Superior Court No. 07-2-02415-1

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IN THE COURT OF APPEALS - STATE OF WASHINGTON  
DIVISION I

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**PACIFIC RIM PAVING,**

Defendant-Appellant,

v.

**DEPARTMENT OF LABOR AND INDUSTRIES,**

Plaintiffs-Respondents.

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**OPENING BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

<b>I. INTRODUCTION.....</b>	<b>5</b>
<b>II. ASSIGNMENTS OF ERROR.....</b>	<b>5</b>
<b>III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....</b>	<b>6</b>
<b>IV. STATEMENT OF THE CASE .....</b>	<b>6</b>
<b>V. ARGUMENT</b>	
A. STANDARD OF REVIEW.....	8
B. STATUTORY SCHEME REQUIRES SERVICE UPON THE CONTRACTOR.....	10
C. DEPARTMENT'S MAILING WAS NOT PROPERLY ADDRESSED. ....	12
D. APPEAL AND BOND WERE TIMELY.....	13
E. THE DEPARTMENT'S PRACTICE VIOLATES BOTH THE ADMINISTRATOR PROCEDURES ACT AND DUE PROCESS.....	13
<b>VI. CONCLUSION.....</b>	<b>15</b>

TABLE OF AUTHORITIES

Cases

*Diehl v. Western Washington Growth Mgmt. Hearings Board*,  
153 Wn.2d 207, 103 P.3d 193 (2004).....4

*Dep't of Ecology v. Campbell & Gwinn, LLC*,  
146 Wn.2d 1, 9-10, 11, 43 P.3d 4 (2002).....5

*State v. Dolson*,  
138 Wn.2d 773, 777, 982 P.2d 100 (1999).....5

*Mathews v. Eldridge*,  
424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). ....6, 10

*Morrison v. Dep't of Labor & Indus.*, 168 Wn.App. 269, 273, 277 P.3d 675,  
*review denied*, 175 Wn.2d 1012 (2012) .....5

*Retail Store Emps. Union, Local 1001 v. Wash. Surveying & Rating Bureau*,  
87 Wn.2d 887, 898, 558 P.2d 215 (1976).....5

*Soundgarden v. Eikenberry*,  
123 Wn.2d 750, 768, 871 P.2d 1050 (1994).....5

*Estate of Haselwood v. Bremerton Ice Arena, Inc.*,  
166 Wn.2d 489, 497, 210 P.3d 308 (2009).....4, 5

Statutes

RCW 18.27.005.....2

RCW 18.27.200(1)(b).....2,4

RCW 18.27.010(4).....10

RCW 18.27.010(11).....6, 8

RCW 8.27.370.....6

RCW 18.27.370(2).....7

RCW 34.05.413.....10

Rules

CR 6(e).....3

## APPENDIX

- A. NON-COMPLIANCE INFRACTION
- B. May 4, 2010 letter from the Department to Pacific Rim Paving
- C. United State Post Office Tracking Confirmation
- D. Appeal of Infraction

## **I. INTRODUCTION**

A contractor mailed his appeal of an infraction four days after receiving it. The Department of Labor and Industries (“the Department”) denied the contractor a hearing on the merits of the infraction, deemed it to have been committed, and fined him.

The Department asserts that the 20 day period for appealing an infraction commences upon mailing, and can only be met by physical delivery of an appeal to the Department. The Department takes the position that it does not matter whether or not the contractor receives the infraction, because service is complete when the infraction is mailed.

The contractor argues that the Department's position violates the Administrative Procedures Act, constitutional due process, and basic fairness.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in upholding the Department's refusal to allow a hearing on the merits of the infraction.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Can the Department initiate an infraction proceeding by mailing the infraction to a nonexistent entity?
2. Must the Department allow 20 (now 30) days to contest an infraction after it is received by the contractor?
3. Is an “appeal” of an infraction jurisdictional, or should the Department accept an appeal if the contractor substantially complies by filing an appeal within 20 days of receipt of the infraction.

### **IV. STATEMENT OF THE CASE**

Pacific Rim Paving, Inc. is a small corporation that installs and repairs blacktop. It meets the statutory definition of a contractor. RCW 18.27.005. Mr. James Hanson is a principal in the corporation.

The Department issued a notice of infraction to “Pacific Rim Paving” on April 29, 2012.<sup>1</sup> Appendix A, CP 11. However it did not mail the infraction until May 4, 2010. Appendix B, CP 12. The infraction cited and quoted RCW 18.27.200(1)(b) which prohibits contractors engaging in contracting activities when suspended or revoked. The Department then

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<sup>1</sup> Issuance date is on the left side of the infraction, second entry field from the bottom.

wrote “Submitted bid to registered general contractor for paving work when not registered as required.” [*sic*]. Appendix A, CP 11. It is not clear from this phrase which of the two contractors involved was unregistered. The name of the second contractor does not appear on the infraction.

The infraction was delivered to Mr. Hanson by the United States Post Office on May 20, 2010, sixteen days after it was mailed.<sup>2</sup> Appendix C, CP 85, 86. Mr. Hanson did not believe the infraction had been committed. He therefore mailed an appeal on May 24, 2010, only four days after receipt of the infraction, and 20 days from when it was mailed to him. Appendix D, CP 13. The stamp at the top of the appeal shows it was received May 26, 2010 in the Mount Vernon office of the Department of Labor and Industries.

Although the appeal was mailed exactly 20 days after the Department mailed its infraction to the contractor, the Department deemed the appeal late because it was not actually stamped received until May 26, 2010. (There is no way to know when it was actually delivered to the Department.) Hanson filed the required \$200 bond on June 9, 2010: the Department rejected it on June 14, 2010. CP 14.

The Department claims that if a person is away from home,

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<sup>2</sup> If the 3 days additional time for mailing required by the Civil Rules applied the appeal would have been timely. CR 6(e).

perhaps out of town on a contracting job, incapacitated, or even dead, service is valid and complete upon mailing, even though the infraction is never received, or received after the period allowed to challenge it has passed.

Mr. Hanson contends that the Notice of Infraction was improperly addressed, that the charged infraction was not committed, and that he either complied, or substantially complied, with law the in filing an appeal, and therefore should be allowed a hearing on the merits.

## V. ARGUMENT

### A. STANDARD OF REVIEW

Construction of a statute is a question of law which is reviewed de novo. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009). The Administrative Procedures Act was intended, at least in part, to aid pro se litigants. *Diehl v. Western Washington Growth Mgmt. Hearings Board*, 153 Wn.2d 207, 103 P.3d 193 (2004). The court discerns plain meaning from the ordinary meaning of the language at issue. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 11, 43 P.3d 4 (2002). If a term is undefined in the statute, the court looks to the statute's purpose, context, and subject matter. *Retail Store Emps. Union, Local 1001 v. Wash. Surveying & Rating Bureau*, 87

Wn.2d 887, 898, 558 P.2d 215 (1976). The court may also use the dictionary to discern the plain meaning of an undefined term. *Estate of Haselwood*, 166 Wn.2d at 498.

At a minimum, due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Notice must be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). The opportunity to be heard must be meaningful in time and manner. *Morrison v. Dep't of Labor & Indus.*, 168 Wn.App. 269, 273, 277 P.3d 675, review denied, 175 Wn.2d 1012 (2012) (quoting *Downey v. Pierce County*, 165 Wn.App. 152, 165, 267 P.3d 445 (2011)). To determine how much process is due we balance the private interest involved; the risk of erroneous deprivation through the procedures involved and the value of additional procedures; and the government's interest, including the burdens that accompany additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process is a flexible concept and the procedures required depend on the circumstances of a particular situation. *Mathews*, 424 U.S. at 334.

**B. STATUTORY SCHEME REQUIRES SERVICE UPON THE CONTRACTOR**

The legislature has permitted the Department to use either service by registered mail or personal service to initiate an infraction proceeding.

Service is defined as:

"Service," except as otherwise provided in RCW 18.27.225 and 18.27.370, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. Service by mail is complete upon deposit in the United States mail to the last known address provided to the department.

RCW 18.27.010(11). *Emphasis supplied.*

The "service" definition applies except as otherwise provided in

RCW 8.27.370:

A notice of infraction becomes final thirty days from the date it is served upon the contractor unless a timely appeal of the infraction is received as provided in RCW 18.27.270.

RCW 18.27.370(2).<sup>3</sup> *Emphasis supplied.*

Service may be completed by mailing, but the date of service upon the contractor must be proved by the return receipt. Allowing service to be shown by a mail return receipt is a service shortcut given to the Department by the legislature. But the Department asserts that the statute

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<sup>3</sup> At the time the department mailed this infraction the statute provided 20 rather than 30 days. But in either case, the time period commences from the date the notice of infraction is served upon the contractor.

gives it the power to fine without showing actual notice of any kind.

When the language of the statute is simply accepted at face value a familiar procedural scheme results. A contractor has 20 days from service upon it to appeal. Service can be in person, or established by a return receipt showing service by mail. Once service “on the contractor” is established jurisdiction and the timelines for appeal are established. The statute is thus in compliance with the APA, due process, and established standards of fairness.

The statute requires the department to mail “return receipt requested”. There would be no reason for this requirement if, as the Department argues, it does not matter if its mailing is ever received.

The trial court accepted the Department's argument below that the statute allows the contractor to lose by default even if the infraction was never received. Interpreting the statute this way makes the statutory requirement of a return receipt meaningless. The trial court should be reversed.

**C. DEPARTMENT'S MAILING WAS NOT PROPERLY ADDRESSED**

The definition of “Service” requires that the infraction be “properly addressed”:

"Service," except as otherwise provided in RCW 18.27.225 and 18.27.370, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. Service by mail is complete upon deposit in the United States mail to the last known address provided to the department.

RCW 18.27.010(11). *Emphasis supplied.*

The Department did not properly address the infraction as required by law. The Department addressed the infraction to a Pacific Rim Paving. Appendix A, CP 11. Its records list Pacific Rim Paving Inc. as the license holder. CP 18. The Department did not "properly address" the infraction because it did not address it to the holder of the contractor's license.

The Department claimed below that it does not have to properly address the infraction, it just has to come close. The legislature required that the infraction be properly addressed, it wasn't. The trial court should be reversed.

**D. APPEAL AND BOND WERE TIMELY**

Hanson mailed his appeal 20 days from when the Department mailed the infraction. If either the date Hanson received the infraction, or the date he mailed it back were used, the appeal was timely.

The Department claims it mailed the notice of infraction on May 4,

2012. Under its view an appeal would therefore be due by May 24.

However the infraction was not delivered until May 20, 2012. Exhibit C. If this date of “service upon the contractor” is used, the appeal was due by June 9, 2012.

The Department admits receiving the appeal on May 26, 2012, only 4 days after it was received by Hanson. The appeal was therefore timely. The Department also admits receiving the bond on June 9, 2012. The bond was therefore timely as well.

**E. THE DEPARTMENT'S PRACTICE VIOLATES BOTH THE ADMINISTRATIVE PROCEDURES ACT AND DUE PROCESS**

When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The practice of the Department appears designed to deprive contractors of their right to contest infractions.

The Administrative Procedures Act provides: “The agency shall allow at least 20 days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.” RCW 34.05.413. The Department's position violates the statute. There is simply

no way that 20 days could be provided if the date of mailing is the date of service..

Beginning the period on the mailing date will never provide the required 20 days. If the Department sends out an infraction on a Monday the 20 day period is down to 18 because the last two days are weekend days, and the appeal must be filed with the Department during its business hours. RCW 18.27.010(4).<sup>4</sup> Take off three days for mailing to the contractor and the period drops to 15 days. If the contractor wants to mail it back he better allow at least three days, so now he has a 12 day window.

If the date the infraction is served, whether in person or as established by a "return receipt", commences the appeal period the statutory scheme is consistent and sensible. The Department's interpretation renders language in the statute meaningless, and violates procedural due process as well as the Administrative Procedures Act.

The trial court should be reversed. Doing so in a published opinion will prevent the Department from continuing to deprive contractors of an opportunity for a hearing on the merits of infractions it issues.

## **VI. CONCLUSION**

The Department's position is at odds with both the APA and the

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<sup>4</sup> The Department allows citizens no credit for mailing.

statutory scheme for registration of contractors (RCW 18.27). It is also at odds with due process, and notions of basic justice. The Petitioner's appeal should be granted.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of September, 2013.

  
K. GARL LONG, WSBA #13569  
Attorney for Defendant/Appellant

Department of  
Labor & Industries  
Specialty Compliance  
PO Box 44450  
Olympia, WA 98504-4450



# NON-COMPLIANCE INFRACTION

**NSUMJ00457**

Consumer complaint

**Infraction Issued To:**

Last name (if infraction issued to individual)		First Name		Middle		Certificate or License # PACIFRP930JC	
Business or DBA name Pacific Rim Paving						UBI: 602705556	
Address 18047 Webster Ln.					Phone 360-424-5451		
City Mt. Vernon		State WA		Zip+4 98273		Drivers License Number	
Sex	Date of Birth	Height	Weight	Eyes	Hair	Lic Exp Date	

**Additional Information:**

Name of		Address		Phone	
City		State		Zip+4	

**Non-compliance Location:**

Address POB 347							
Address		State		Zip+4		County	
Address		State		Zip+4		County	
Property Owner John & Elaine Wright		Phone 360-856-5285		State WA		Zip+4 98284	
Effective Date: Month/Day/Year 1 or about 3/24/2010		Statute: 18.27.200(1)(b) RCW					

**Description:** Advertising, offering to do work, submitting a bid or performing work when the contractors registration is suspended or revoked. Submitted bid to registered general contractor for paving work when not registered as required.

Contractor's Signature via Certified Mail		Compliance Inspector SUMRALL, JOE 1720 ELLIS STREET SUITE 200 BELLINGHAM, WA 982254600	
Infraction Issued 9/2010	Compliance Inspector ID # 10319		
Penalty Amount 1000.00	Compliance Inspector Telephone # 360-647-7341		

Infraction is a non-criminal offense that does not carry an imprisonment penalty, but failure to respond to the notice of infraction within 20 days is a gross misdemeanor and may be punishable by fine or imprisonment in jail. See RCW 18.27.240(9).

Party may pay the full amount of the penalty to the Department at the address indicated above. The amount of the penalty has been set by RCW 18.27.100; RCW 18.27.340; WAC DA-400, as amended. Payment will close the case.

Unregistered contractor becomes registered within ten days of service of the infraction for a violation of RCW 18.27.200 and the infraction is the Contractor's first offense, the Director may reduce the penalty. In no case can the Director reduce the penalty below five hundred dollars (\$500).

Party may contest this infraction at a hearing conducted pursuant to RCW 34.05. To contest (appeal) this infraction a written request specifying the grounds for the appeal and a check in the amount of two hundred dollars (\$200) must be received within twenty (20) days of the mailing of this infraction. Appeals should include the infraction number(s) mailed to the Department of Labor and Industries at the address at the top of this infraction. Unless contested, the determination of the violation shall be final and penalty immediately due. If you are an unregistered contractor you bear the burden of proof that this infraction did not occur. If the infraction is against a registered contractor the burden of proof will be the responsibility of the Department. The hearing allows for all parties to subpoena witnesses, including the compliance officer who issued this infraction.

*Appendix A*

Exhibit /  
Page 1



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
PO BOX 44450 OLYMPIA, WA 98504-4450

May 04, 2010

PACIFIC RIM PAVING  
18047 WEBSTER LN  
MT. VERNON WA 98273

Infraction No: NSUMJ00457  
Statute Violated: 18.27.200(1)(b) RCW  
Date Issued: 4/29/2010  
Penalty Assessed: \$1,000.00

**TAKE THIS NOTICE SERIOUSLY**

Enclosed is an infraction for violation of the Washington State Contractor Registration Law. You must respond to this notice by doing one of the following:

1. **Register as a contractor within 10 days:**  
If this is your first offense, your penalty may be reduced to \$500 and will be due at the same time you register as a contractor.
2. **Pay the fine within 20 days. Please include your infraction number:** Send a check or money order payable to the Department of Labor and Industries to the above address or pay by credit or debit card at a local Labor and Industries office.
3. **File an appeal:** Per RCW 18.27.250, you may appeal your infraction in writing.
  - a. A statement with your specific reason for appealing, *AND*
  - b. A \$200 CASHIERS CHECK (required) for each infraction, *AND*
  - c. Both must be received by this office within 20 days from the date of this letter (that date is located in the upper left hand corner). *If you do not submit both your statement and the \$200 certified check, it will not be considered an appeal, and your request will not be processed and will be denied.*

To prevent any further legal action against you or your company, you must comply with the options listed above. If you fail to comply with these options, the account will be referred to a private collection agency and legal actions will begin..

Per RCW 18.27.030, the department will deny registration or renewal until this infraction is paid.

If you have any questions concerning the infraction, please contact the inspector listed on the attached infraction.

*Appendix B*

Exhibit 1  
Page 2 of 2



**Track/Confirm - Intranet Item Inquiry**  
**Item Number: 9171 0821 3339 3751 6167 09**

**This item was delivered on 05/20/2010 at 11:02**

Signature:	Delivery section
	<i>J. Hausen</i>
Address:	<i>18047 Webster Ln.</i>

Enter Request Type and Item Number:

Quick Search  Extensive Search

[Explanation of Quick and Extensive Searches](#)

Version 1.0

Inquire on [multiple items](#).

Go to the Product Tracking System [Home Page](#).

*Appendix C-1*

*F. 10*



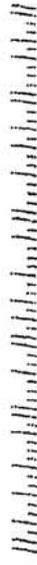
91 7108 2133 3937 5161 6709

*Handwritten:* 2/10/90  
R/S  
5/20

PACIFIC RIM PAVING  
18047 WEBSTER LN  
MT. VERNON WA 98273

S

98273889754 R012



*Handwritten:* Appendix C-2

602-705-556

RECEIVED

MAY 26 2010

MT. VERNON  
DEPT. OF L&I

PAGES: 1

DATE: MAY 24, 2010

TO: DEPT. OF LABOR AND INDUSTRIES WAFAX

PO BOX 44450

OLYMPIA WA 98504-

FROM: PACIFIC RIM PAVING

FAX

MAY 28 2010

18047 WEBSTER LN

PHONE 360-424-5451

CONTRACTOR REG

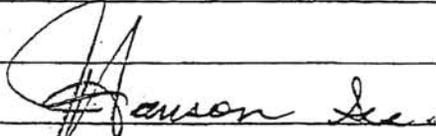
MOUNT VERNON WA 98273

MEMO: THIS NOTICE IS IN PROTEST OF YOUR INFRACTION (#NSUMJ00457).  
L & I WAS UNJUSTIFIED IN SUSPENSION OF CONTRACTOR'S LICENSE.  
INFRACTION WAS NOT JUSTIFIED, SO IS MUTE;

L & I CONTINUES TO BE IN VIOLATION OF THE FEDERAL COURT OREDR.

THANK YOU FOR CORRECTING THIS ISSUE.

PACIFIC RIM PAVING

  
BY: J HANSON SEC.

Appendix 2

Exhibit 2  
Page 1 of 1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

69808-7

~~68407-8~~

NO. 6908-7-1

PACIFIC RIM PAVING,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

**DECLARATION OF SERVICE**

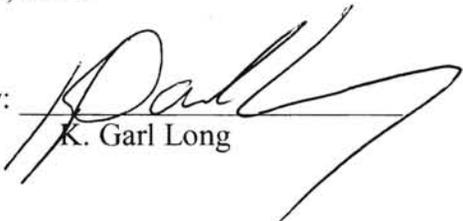
I certify that I served in the manner indicated below, a true and correct copy of the **Opening Brief of Appellant** and this **Declaration of Service** in the manner indicated below:

Clerk of the Court Court of Appeals, Division I 600 University Street One Union Square Seattle, WA 98101	<input checked="" type="checkbox"/> U. S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivered by  <input type="checkbox"/> Electronic Mail
Ailene Limric Assistant Attorney General Labor and Industries Division PO Box 40121 Olympia, WA 98504-0121	<input checked="" type="checkbox"/> U. S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivered by  <input type="checkbox"/> Electronic Mail

Under penalty of perjury of the laws of the State of Washington I declare the above to be a true, accurate and correct statement to the best of my knowledge and belief.

DATED this 3<sup>rd</sup> day of September, 2013.

By:

  
K. Garl Long