No. 43114-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

RICHARD E. SWANSON, Appellant,

vs.

DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.

REPLY BRIEF OF APPELLANT

JEFFREY D. STIER, WSBA No. 6911
Attorney for Richard E. Swanson

pm 8/3/12

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Treatises

RCWs

WACS

WASHINGTON STATE COURT OF APPEALS, DIV. II

RICHARD E. SWANSON, Appellant, vs. DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.	COA, Div. II No. 43114-9-II Superior Court No. 10-2-02666-2 REPLY BRIEF OF APPELLANT

I. INTRODUCTION

In its forty-eight (48) page Response Brief, Respondent engages in considerable obfuscation of Appellant's rather straightforward argument presented in his seventeen (17) page Opening Brief. A lot of what Respondent says is marginally relevant, or not relevant at all, to the issues of this case. Appellant will attempt to address NEW MATTER in this Reply Brief.

II. SUMMARY OF RESPONDENT'S ARGUMENTS

Respondent has elected not to meet Appellant's multiple assignment of errors, as defined by issues, head on. Instead, Respondent

attempts to define the "true issues"[1] of this case and argues to those "true issues" in its Response Brief, being:

1. Whether, in the Damages Case, the superior court lacked original subject matter jurisdiction because agencies such as the Department have original jurisdiction over their decisions and challenges to such decisions must invoke the superior court's appellate subject matter jurisdiction, not the court's original subject matter jurisdiction;

2. Whether, in the Rules Case, the superior court lacked appellate subject matter jurisdiction because Mr. Swanson failed to file his appeal within the jurisdictional deadline set by the Administrative Procedure Act;

3. Whether, in the Rules Case, Mr. Swanson is relieved from his obligation to exhaust administrative remedies when he has failed to offer material, non-speculative evidence to overcome the presumption that the Department would properly consider any appeal and to demonstrate that such an appeal would be futile; and

4. Whether this court should grant summary judgment for the Department because Mr. Swanson failed to proffer material, non-speculative evidence that the Department's action violated Mr. Swanson's vested pension rights.

Appellant addresses all of these points below.

[1] Not conceded by Appellant.

III. REPLY ARGUMENT

A. RCW 34.05.542(3) barring Petitions for Review rules "as applied" was not raised at the superior court level and this argument was waived.

Respondent argues that the Superior Court did not have appellate jurisdiction because Appellant did not seek review by the court of the "application" of WAC 425-108-510 to Appellant within thirty (30) days. See RCW 34.05.542(3). Appellant supposes that this argument is the entire reason for Respondent's lengthy dissertation on the distinction between "exhaustion of remedies"[2] and "original appellate jurisdiction."[3]

According to Respondent's Response Brief, on the issue regarding a challenge to the "applicability" of WAC 425-108-510 in the Rules Case, Appellant should have his Petition for Review of the agency decision filed and served in superior court within thirty (30) days of the decision of the agency. That is different from the argument in the Damages Case which is that before this matter could be considered by the Court under its "original appellate jurisdiction," there had to be an "exhaustion of remedies" before the agency. In other words, the objection in the Rules Case is the failure to satisfy the alleged bar of RCW 34.05.542(3) requiring that the petition for review be filed in the superior court (and served) within thirty (30)

[2] An agency concept-i.e. the Damages Case.
[3] A court concept-i.e. the Rules Case.

days of the agency decision when the Rule is being challenged, as opposed to failure to seek agency review of its initial findings within thirty (30) days of the agency decision in the case of a claim of damages. What this means is that even if Respondent prevails on the bar of RCW 34.05.542(3), it should only extend to the Rules Case and not to the Damages Case.

In addition, the alleged bar of RCW 34.05.542(3) was not argued at all in either the Damages Case or the Rules Case Motions to Dismiss. The fact is, there is not any legal finding on the "application" subject in either case to cite, or appeal. Even though the trial court's decision may be affirmed on any grounds supported by proof (*In Re Marriage of Lukins*, 16 Wa.App. 481, 558 P2d 279, rev den. 88 Wn. 2d 1011 (1976)) however, it still must be decided by the superior court to be appealed or raised in response to an appeal. *Perry v Moran*, 111 Wn.2d 885, 766 P.2d 1096, cert. den. 109 S.Ct. 3222, 492 US 911, 106 L.Ed.2d 577 (1989).

The fact that this argument was not raised at the superior court level prohibited any reconstitution of this case by Appellant to include a rule challenge, as opposed to a challenge to the "application of a rule." That could have been done for various reasons, including that nowhere in RCW 34.05.542 does it create a distinction between a challenge to a rule and a challenge to "application" of a rule. That is something that

Respondent has developed through analysis of RCW 34.05.010 and Respondent's failure to raise this issue at the superior court level denied Appellant his right to argue against that construction.

Also, it can readily be argued that a challenge to the extension of the "first-in, first-out" (FIFO) rule to Appellant, is a challenge to the rule itself, not the application of the rule.

Also, by its failure to raise this bar at the superior court level, Respondent effectively gutted the intent of *Bowles v. Wash. Dep 't of Ret. Sys., 121 Wn.2d 52, 63, 64, 847 P.2d 440 (1993)* to prohibit modification of vested pension rights by imposing a bar on it on procedural grounds. . That cannot be the intent of the Supreme Court in *Bowles*, especially where case law holds constitutional claims inviolate (i.e. exhaustion of administrative remedies may be waived when the claimant has made a colorable constitutional claim, as constitutional questions are not suited for resolution in the administrative process. *James v Shalala*, 156 F.R.D. 660 (E. District of WA, 1994)). The logic in *Bowles* is a constitutional theory.

If the thirty (30) day requirement to submit this issue to the agency is inapplicable, there is no good reason why alleged thirty (30) day limitations[4] on "direct review" by the superior court should also not stand.

[4] As contended by Respondent, but not conceded by Appellant.

Even though Appellant did not file and serve his Petition for Review in the Rules Case within thirty (30) days of the agency decision, the alleged bar of RCW 34.05.542(3) must be a statute of limitations and can be waived. A way to waive, like at bar is a failure to argue and obtain a ruling on an issue. *Clark-Kunzl Co. v Williams*, 78 Wn.2d 59, 469 P.2d 874 (1970). This argument (and the closely related one of failure to serve the agency) has been waived.

Appellate courts are hesitant to rule on an issue that has not been raised below. *In Re Detention of Ambers*, 160 Wn. 2d 543, 158 P. 3d 1144 (2007); *Clapp v Olympic View Pub. Co, LLC*, 137 Wa. App. 470, 154 P.3d 230, rev den. 162 Wn.2d 1013, 175 P.3d 1093 (2007). Thus, it is here argued that it should not consider the procedural bar of RCW 34.05.542(3) that was never raised at the superior court level in this matter.

Finally, if Respondent's interpretation is adopted by this Court, then it would deny Appellant his right to argue that Respondent's interpretation of RCW 34.05.010 to require a petition for review of the "application" of a valid rule within thirty (30) days of the agency decision on the subject is unconstitutional.[5]

[5] See argument in §III.B below.

B. In the alternative, the interpretation urged by Respondent of RCW 34.05.010(3) is unconstitutional.

From what Respondent argues, the thirty (30) day requirement to file a Petition for Review in superior court in cases challenging "application of a rule" rather than the rule itself is an issue of original appellate jurisdiction of the superior court. As such, the alleged thirty (30) day requirement to file a Petition for Review in superior court would be a statute of limitation intended to prevent stale claims. *Hudson v Condon*, 101 WA App. 866, 6 P.3d 615 rev. den. 143 Wn2d 1006, 21 P.3d 290 (2000).

The Supreme Court of the United States has said on many occasions that a statute of limitation should be upheld "if a reasonable time is given for the commencement of an action before the bar takes effect." *Wilson v Iseminger*, 185 US 55, 63, 22 S. Ct. 573, 46 L.Ed.804 (1902). Anything short of that is ". . .an unlawful attempt to extinguish rights arbitrarily. . ." Cooley, *Constitution Limitation* 451(1874). Pursuant to that doctrine Appellant submits that thirty (30) days is not "reasonable" especially where it requires a forfeiture of rights guaranteed by *Bowles*. Respondent is challenged to show this Court any statute of limitation in this State that is of such a short duration.

At least Appellant should be allowed to present evidence on this point.

C. Assignment of Error 1 applies to the Damages case as well as the Rules case.

Respondent states that no Assignment of Error addresses the superior court's appellate subject matter jurisdiction in the Damages Case, as well as the Rules Case. Respondent's COA Response Brief at 22-23. Appellant's Assignment of Error No. 1 specifically speaks to the superior court's appellate subject matter jurisdiction in both the Damages Case and the Rules Case. Appellant's Assignment of Error No. 1 is as broad as possible to avoid just the problems that Respondent raises in its Response Brief:

> Error of law in ruling that Appellant insufficiently invoked the Court's limited appellate subject matter jurisdiction in this case by challenging application of a rule to Appellant and those similarly situated.

Appellant's Assignment of Error No. 1

Essentially, Respondent bootstraps its own failure to invoke "appellate subject matter jurisdiction" in the Order Dismissing the Damages Case (CP 331-332) to say that Appellant has inadequately assigned error to something that did not exist, through no fault of Appellant.

Frankly, the broad reach of Appellant's Assignment of

Error 1 gives the Respondent something it never asked for at the superior court level in the Damages case, the application of Respondent's theory in the later Rules Case that a challenge to the rule was subject to the superior court's "appellate subject matter jurisdiction" even though Respondent did not include that theory in the final Order in the Damages Case.

Appellant challenged the rule interpretation generally in Assignment of Error 1, and all its sub-issues, and both the Damages Case (CP 6-30) and the Rules Case (CP 618-645)[6] alleged that the application of the FIFO rule (WAC 425-108-510) to Appellant was erroneous.

Finally, it is clear that Respondent was aware that this case involved a challenge to WAC 425-108-510 as that issue was briefed extensively on the merits in the superior court, as it has been briefed extensively in Respondent's Court of Appeals Response Brief.

[6] Supplemental Clerk's papers are being requested to get the Amended Petition in the Rules Case before this Court

D. The original complaint/petition were properly served, and any objections to service were waived at the superior court level.

Respondent raises an issue regarding service of the Summons and Complaint/Petition in these cases. Respondent's COA Response Brief at 25. First of all, Respondent never raised this objection before and took these cases all the way through Motions to Dismiss. In other words, this argument is waived. *Clark-Kunzl Co.*, supra.

Closely related is Respondent's failure to designate affidavits of service to bring this issue before the Appellate Court.[7]

E. This appeal relates to a thirty (30) day requirement, whether it is for agency review (the Damages Case), or a petition for review at the superior court level (the Rules Case).

Appellant relied upon a shorthand term to describe its arguments in this matter: exhaustion of remedies. Why? Because that is how the statutes phrase the problem. However, unconstitutional is unconstitutional-whether it is facial or as applied; whether it is 30 days for agency review, or 30 days for superior court review. Assignment of Error No. 1 is broad enough to cover review in either forum. The Respondent's reduction of Appellant's retirement benefits under the guise of WAC 425-108-510

[7] Even if Respondent had designated affidavits of service in these matters, RCW 34.05.542 allows service upon the Office of the Attorney General and this occurred

should be subject to scrutiny in light of *Bowles*. Bottom line, whichever basis of jurisdiction is used, whether it is direct review by the superior court (the Rules Case) or by the superior court because the exhaustion principle in inapplicable (the Damages Case), an examination of the constitutionality of Respondent's extension of WAC 425-108-510 in this case should occur. An esoteric procedural argument should not be allowed to bar review of a colorable constitutional claim, as constitutional questions are not suited for resolution in the administrative process. *James v Shalala*, supra).

Also where exhaustion of administrative remedies is at issue,[8] it is clear that rule is only applicable when (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought. *Smith v Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000). While it is arguable that (1) and (2) do not exist in this case, it is Appellant's contention that (3) isn't satisfied in this matter. Indeed, the administrative remedies cannot provide the relief sought.

The Respondent-agency in this case cannot rule that an applicable WAC is invalid-it only has authority to follow that rule:

[8] The Damages Case?

> Agencies may exercise only those powers conferred on them expressly or by necessary implication . . .

Washington Federation of State Employees v State Dept. of General Administration, 152 Wa.App. 368, 216 P.3rd 1061 (2009); Also see *Alpine Lakes Protection Soc. V Washington State Dept. of Ecology*, 135 Wa.App. 376, 144 P.2d 385, as amended, rev. den. 162 Wn.2d 1014, 178 P.3rd 1032 (2006); *Fisher Flouring Mills Co. v State*, 35 Wn.2d 482, 213 P.2d 938 (1950).

> . . . [the rule is] that when an adequate administrative remedy is provided, it must be exhausted before the courts may intervene is particularly appropriate where questions involve matters within the expertise of the agency, but where questions are purely legal and beyond authority and expertise of administrative agency to resolve, and it appears that further administrative proceedings would be ineffective or useless, court may relax its requirement of exhaustion of administrative remedies.

Schreiber v Riemcke, 11 Wa.App. 873, 526 P2d 904 (1974). Also see *Yakima Clean Air v Glascam Builder*s, 85 Wn.2d 255, 534 P.2d 33 (1975).

In the case at bar, it is clear that the administrative agency does not have the expertise to resolve legal matters growing from *Bowles*. It is also clear that even if the administrative agency has that expertise, it cannot depart from what it believes is the meaning of the statutory FIFO rule. It is very clear from the response to the

Appellant's public disclosure request,[9] from the AGO Opinion 1976 No.1 (CP 519-526), and from Respondent's argument on the merits at superior court (CP 573-575) and at the Court of Appeals level (Respondents COA Response Brief at 37-43)[10] Clearly, Respondent had made up its mind that its application of the FIFO rule was appropriate (and was bound to follow that determination) and it was not something the agency could address differently in an administrative hearing.[11]

It must be added that Petitioner is not contesting the amount of the recalculated retirement benefit or the amount of the overpayment assessment. There is no factual challenge involved with this Amended Complaint. All that is being challenged in this case is the oft-stated assumption that Respondent is compelled to apply the FIFO Rule whenever AFC is not in the last 24 months of employment.

---

[9] This document was incorporated by reference by the Declaration of Jeffrey D. Stier (CP 563-566) in Response to Second Motion to Dismiss. Appellant overlooked the need for the November 21, 2011, Declaration of Jeffrey D. Stier in his Designation of Clerk's Papers and has sought to Supplement the record in that regard by Motion.

[10] That the agency has concluded that its "long-standing" policy is to apply FIFO (even though it mistakenly did not apply it to Appellant) and thus "no corresponding benefit" was necessary because Appellant never was entitled to count two (2) years of annual leave toward his AFC.

[11] This argument applies to the futility exception to the exhaustion principle that is addressed in §F below.

F. It would be a "vain and useless act" to say that further exhaustion of administrative remedies was necessary.

RCW 34.05.534(3)(b) states that it is not necessary to exhaust administrative remedies where the exhaustion of remedies would be futile (the "Futility Exception"). The futility exception to the exhaustion of administrative remedies requirement does not apply unless the proponent of the exception shows that pursuing an administrative appeal would be a vain and useless act. *D/O Center v. Department of Ecology*, 119 Wn.2d 761, 778, 837 P.2d 1007 (1992).

In the instant case pursuing administrative remedies would be a vain and useless act. DRS has stated in many contexts the application of the FIFO rule to Petitioner and those similarly situated-e.g. DRS' August 2010 letters to Petitioner; DRS' PDR response to Mr. Stier indicating that the FIFO rule applied to Plaintiff's case;[12] and in Respondent's extensive argument on the merits of its view of the FIFO rule as applied to Appellant. (CP 573-575)

As stated above, Respondent is compelled to follow the law in any administrative proceeding and it cannot modify or alter the statute by

[12] The documents described in the last two items of this sentence were incorporated by reference by the Declaration of Jeffrey D. Stier (CP 563-566) in Response to Second Motion to Dismiss. Appellant overlooked the need for the November 21, 2011, Declaration of Jeffrey D. Stier in his Designation of Clerk's Papers and has sought to Supplement the record in that regard by Motion

regulations. *Fisher Flouring Mills Co. v State*, supra. Respondent clearly has asserted that it believes that the law compels it to apply the FIFO Rule whenever "AFC is not in the last 24 months of employment." What could be a more "vain and useless act" than attacking the alleged applicable law in an administrative proceedings? All an administrative agency can do is follow the law that the agency has decreed applicable.

Again, construction of a law is something for the courts to do (*Yakima Clean Air v Glascam Builder*s, supra) and that is exactly what Appellant asked the superior court to do in this proceeding.

Respondent contends that Appellant did not satisfy his burden at the superior court level because he did not present specific, non-speculative facts that pursuing his argument before the agency would be a vain and useless task. Appellant presented ample evidence probative to this issue including DRS' August 2010 letters to Petitioner; DRS' PDR response to Mr. Stier indicating that the FIFO rule applied to Plaintiff's case,[13] and in AGO Opinions cited by Ms. Essko (CP 515-526). Respondent's extensive argument on the merits of this case at the superior court level is ample evidence that further review of the legal proposition at the agency level would have been a vain and useless act. In fact, it is clear

[13] Refer to comment in footnote 11 above.

that Appellant has carried his burden on this issue and Respondent did nothing to rebut the issue.

Finally, there was no ruling at all on the futility contention so the substantial evidence rule is completely inapplicable to this argument.

G. It is not an appellate court function now to decide if *Bowles* applies.

Respondent alternatively asks this court to grant it a summary judgment on the merits of this matter-does *Bowles* prohibit the application of FIFO to Appellant, and those similarly situated, to possibly diminish, or eliminate, inclusion of annual leave in the AFC calculation?

This matter was decided on procedural grounds at the superior court level and the ruling did not remotely address the merits of this dispute. There has been no cross-appeal raising this argument. Obviously this argument is hotly disputed by the parties. The issues before this Court should relate only to those procedural issues that were decided at the superior court level. *Perry v Moran*, supra; *Alverado v Washington Public Power Supply System (WPPS)*, 111 Wn.2d 424, 759 P.2d 427, cert. den 109 S.CT. 1637, 490 U.S. 1004, 104 L.Ed. 2d 153 (1988).

H. In the alternative, Bowles prohibits the action taken by Respondent in this matter.

Respondent contends that *Bowles v Retirements System*, supra, is inapplicable to the instant case. In fact, the *Bowles* case recognized the seminal constitutional rule that the State cannot infringe on the retiree's right to contract by restricting any retirement rights that a PERS 1 employee (and eventual retiree) worked for prior to retirement, without offering a corresponding benefit.

The Court looked at the "duration and nature of the administrative practice" in question, holding that because the Department had "consistently and routinely refused to take into account employers' [leave cash out lids] for a period of 4 to 10 years after learning of the existence of these limitations," the Department could not formally change .its "established policy." In this case, Respondent admits that it did not enforce the FIFO rule against Appellant when he retired. Respondent's COA Response Brief at 1-2.

Respondent also attempts to distinguish the *Bowles* case from the instant case claiming that the use of the FIFO rule "demonstrates that the Department's "established policy" is to apply the FIFO principle to annual leave cash outs." Respondent's COA Response Brief at 39. Frankly, passage of the FIFO after Appellant was hired does nothing to

demonstrate that the Department's established policy was to apply the FIFO principle to annual leave cash outs.

Here is why the *Bowles* rationales are relevant here. Appellant became employed before the FIFO rule was enacted. Essentially, he "contractually" relied on the fact that 100% of his vacation pay would be used to determine his AFC. Later on the FIFO rule was promulgated without an offer to a "corresponding benefit" by DRS to Appellant.

Respondent says that its "long-standing" policy is to apply FIFO[14] and thus "no corresponding benefit" was necessary even though the FIFO policy was first introduced after Appellant was first employed. First of all, two wrongs don't make a right-e.g. the fact that Appellant had a vested contractual right changed without being offered a "corresponding benefit" by DRS proves nothing. In fact, it proves that DRS has violated *Bowles* with Appellant. An erroneous and illegal policy is just that, not a "long-standing" policy. No matter how long an erroneous and illegal policy is applied, it is still erroneous. The mere passage of time does not cure that.

What is clear is that the FIFO rule was not originally applied to Appellant. In Appellant's case Respondent originally calculated two (2) years of vacation pay undiminished by FIFO into Appellant's AFC at the time of his retirement in January 1999. This fact wasn't "adjusted" for

[14] Even though it "mistakenly" did not apply it to Appellant.

eleven plus years until Appellant was notified of his reduced retirement and retroactive collection efforts in August 2010. Apparently, not even all at DRS knew of the "long standing" policy to apply FIFO in cases where the AFC period was not in the last two years preceding a PERS 1 employee's retirement.

Finally, Respondent argues that Appellant did not present specific, non-speculative facts to support his burden in attacking Respondent's action in this matter. To the contrary, Appellant presented the following facts that are not speculative: It is undisputed that the FIFO WAC was enacted after he was hired and that the agency did not recognize the applicability of FIFO to Appellant when he retired and for 11.8 years thereafter. This is not speculative, these are the undisputed facts.

Apparently, Respondent is relying upon the "long-standing" practice allegations set forth in the Declaration of Karla Phillips.[15] CP 97-102, 404-415. By her own admission, Ms. Phillips was not even employed by the agency when Appellant first was hired. In addition,[16] Ms. Phillips' statement of a "long-standing" policy is based on lore, and must be completely speculative. Once the burden was carried by the Appellant, it became the responsibility of the movant to produce non-speculative

[15] Even Ms. Phillips does not say that FIFO was the practice when Appellant was hired.
[16] Even though Ms. Phillip's declaration concedes that the FIFO policy was not in place when Appellant was hired.

evidence of contested facts. Respondent has not satisfied this burden, so it cannot prevail-at least on a Motion to Dismiss or Motion for Summary Judgment.

Without a doubt, the superior court could and should address whether, or not, *Bowles* prohibited the actions taken by Respondent in this matter. That is another good reason not to decide the issue in the Court of Appeals, but to remand the issue for a decision on the merits at the superior court level.

IV.
CONCLUSION

Respondent has elected not to meet Appellant's multiple assignment of errors, as defined by issues, head on. Instead, Respondent attempts to define the "true issues" of this case and argues to those "true issues" in its Response Brief, this is misleading, at best.

The issue in this case is plain and simple, did Respondent unconstitutionally infringe on Appellant's vested pension rights by applying the FIFO rule to him. This appeal relates to a thirty (30) day requirement, whether it is for agency review (the Damages Case), or a petition for review at the superior court level (the Rules Case).

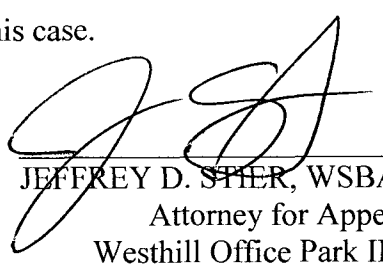
RCW 34.05.542(3) barring Petitions for Review rules "as applied" was not presented to the superior court and this matter should be remanded

for a decision on that issue. In the alternative, the interpretation urged by Respondent of RCW 34.05.542(3) is unconstitutional.

It would be a "vain and useless act" to say that further exhaustion of administrative remedies was necessary.

In response to the other procedural arguments, Appellant counters that Assignment of Error 1 is very broad and applies to the Damages Case as well as the Rules Case and the original complaint/petition were properly served, and any objection to service was waived at the trial level.

Finally, it is not an appellate court function to decide if *Bowles* applies to the facts at bar. However, in the alternative, *Bowles* does apply prohibiting the agency action in this case.



JEFFREY D. STIER, WSBA No. 6911
Attorney for Appellant
Westhill Office Park II, Bldg. 15
1800 Cooper Point Rd. SW
Olympia, WA 98502

JEFFREY D. STIER
Attorney at Law

Westhill Office Park II, Bldg. 15
1800 Cooper Pt. Rd. SW
Olympia, WA 98502

E-mail: StierLaw@gmail.com
Telephone 1-360-753-2078

August 3, 2012

Clerk
Court of Appeals, Div. II
950 Broadway, Suite 300
Tacoma, Washington 98402-4454

Re: Swanson, Appellant, v DRS, Respondent, COA, Div. II, Cause No. 43114-9-II

To Whom it May Concern,

Enclosed please find an original and a copy of Appellant's Reply Brief in this matter for filing. Also enclosed is a copy of the Cover Page. return a conformed copy of the Cover Page to me in the enclosed, self-addressed, and stamped, envelope.

Very Truly Yours,

JEFFREY D. STIER
Attorney at Law

Cc: Ann C. Essko

Enclosures