

18396-1

18396-1

NO. 72396-1-I

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

SHAW RAHMAN,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, requires a petition for judicial review of a final agency order to be filed with the superior court and served on the agency within 30 days after service of the agency's final order. Appellant Shaw Rahman failed to file or serve his petition for judicial review of a final decision of the Employment Security Department's Commissioner within the statutorily-required time period. The sole issue before this Court is whether the superior court's subsequent dismissal of Mr. Rahman's petition was proper.

On December 13, 2013, the Department served Mr. Rahman with a final order. Forty-eight days later, Mr. Rahman filed his petition for judicial review with the King County Superior Court. Then, in March 2014, he served the Department with a copy of his petition. The Department respectfully asks this Court to affirm the superior court's dismissal of Mr. Rahman's appeal because Mr. Rahman failed to comply with the filing requirements of the APA. Alternatively, this Court should affirm the superior court's dismissal order because Mr. Rahman did not serve the Department with a copy of his petition for judicial review until well beyond the time period for service allowed by statute.

II. COUNTERSTATEMENT OF THE ISSUES

1. Under Washington's Administrative Procedure Act, a petition for judicial review of a final agency order must be filed with the superior court within 30 days after service of the final order. Did the superior court properly dismiss Mr. Rahman's appeal when he filed his petition for judicial review 47 days after service of the Department's final order?
2. Washington's Administrative Procedure Act requires a petition for judicial review of a final agency order to be served on the agency within 30 days after service of the final order. Should this Court affirm the superior court's dismissal of Mr. Rahman's petition for judicial review when it was served on the Department 81 days after service of the Department's final order?

III. COUNTERSTATEMENT OF THE CASE

On December 13, 2013, the Department's Commissioner¹ issued a final decision concluding that Appellant Shaw Rahman had fraudulently obtained unemployment benefits and was liable for the resulting overpayment. Certified Administrative Record (AR)² at 219-20. That same day, the Commissioner's review office mailed a copy of the decision to Mr. Rahman. AR at 219.

¹ Decisions on petitions for Commissioner review are made by review judges in the Commissioner's review office but are treated as decisions of the Commissioner due to statutory delegation. *See* RCW 50.32.070; WAC 192-04-020(5).

² The superior court transmitted the Certified Administrative Record as a stand-alone document. *See* Index to Clerk's Papers (CP). Because it is separately paginated from the clerk's papers, this brief cites to the administrative record as "AR."

The final decision advised Mr. Rahman that he had 30 days to appeal. AR at 220. Specifically, the decision stated:

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34 05 510 through RCW 34 05 598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

AR at 220. The advisement further explained the process for filing a judicial appeal:

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

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. *See* RCW 34 05 514 (The Department does not furnish judicial appeal forms) AND

Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

AR at 220.

The Commissioner's decision further informed Mr. Rahman that he had ten days to file a petition for reconsideration. AR at 220. Specifically, the decision stated, "Pursuant to RCW 34 05 470 and WAC 192-04-190 you have ten (10) days from the mailing and/or

delivery date of this decision/order, whichever is earlier, to file a Petition for Reconsideration.” AR at 220.

Mr. Rahman filed an untimely petition for reconsideration.³ See AR at 225, 230, 302. Accordingly, on January 13, 2014, the Commissioner issued an order dismissing Mr. Rahman’s petition for reconsideration. AR at 302 (“As it was not timely filed, this office has no jurisdiction to reconsider this matter.”). The order advised Mr. Rahman:

If you are a party aggrieved by the Decision of the Commissioner issued on December 13, 2013, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the Superior Court within thirty (30) days from December 13, 2013. If no such appeal is filed, the Decision of Commissioner issued on December 13, 2013 will become final.

AR at 303.

On January 30, 2014, Mr. Rahman filed his judicial appeal in King County Superior Court. Clerk’s Papers (CP) at 1, 106, 135. The Attorney General’s Office received correspondence from Mr. Rahman on February 5, 2014. CP at 124-130. He did not serve the Department with a copy of his judicial appeal until March 4, 2014. CP at 132, 134-35.

³ Although the record contains the envelope Mr. Rahman used to mail his petition for reconsideration to the Commissioner’s review office, the postmark on the envelope is too faint to determine the date of mailing. AR at 230. Nevertheless, given that Mr. Rahman signed his petition for reconsideration on December 30, 2013—17 days after the Commissioner issued the final decision in Mr. Rahman’s case—it is evident he filed the petition for reconsideration after the 10-day deadline. AR at 225.

The Department filed a motion to dismiss Mr. Rahman's appeal because he failed to comply with the statutory requirements set forth in the APA. CP at 114-247. The superior court granted the Department's motion, determining that Mr. Rahman failed to file his petition for judicial review of the Commissioner's order within 30 days, as required by statute. CP at 248-49. The superior court's order did not address Mr. Rahman's untimely service on the Department. *Id.*

Mr. Rahman subsequently filed a "motion to amend" the order of dismissal, arguing for the first time that he had attempted to timely file his petition for judicial review but it "was 'rejected for procedure.'" CP at 250. The superior court denied Mr. Rahman's motion. CP at 259. This appeal follows. CP at 260.

IV. ARGUMENT

Judicial review of an agency's action is governed by Washington's Administrative Procedure Act (APA), chapter 34.05 RCW. Under the APA, "[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." RCW 34.05.542(2). Therefore, to satisfy the statute's requirements and have a timely appeal, the petition for judicial review must be filed with the

superior court and served on the agency within 30 days of service of the agency's final decision.

Mr. Rahman both filed and served his petition for judicial review more than 30 days after service of the Department's final order. This Court should affirm because the superior court correctly dismissed Mr. Rahman's untimely request for judicial review of the Commissioner's final order.

A. The Superior Court Properly Dismissed Mr. Rahman's Petition for Judicial Review Because He Failed to Timely File His Petition With the Superior Court

This Court reviews de novo a superior court's order of dismissal for failure to comply with the requirements of Washington's Administrative Procedure Act (APA). *See Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002). The superior court's findings of fact are reviewed for substantial evidence. *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011). Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). On appeal, review is limited to those facts in the record that were considered by the trial court. *Ripley v. Lanzer*, 152 Wn. App. 296, 325 n.125, 215 P.3d 1020 (2009).

As stated above, under the APA, a petition for judicial review must be filed with the superior court within 30 days after service of the final order. RCW 34.05.542(2). “All time requirements necessarily involve a judgment by the legislature or a court as to the amount of time necessary to achieve the legislative or judicial purpose.” *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 318, 53 P.3d 993 (2002).

The 30-day period for timely appeal of an administrative decision begins to run upon service of the final decision of the agency. RCW 34.05.542(2). Service of an agency decision is complete when the agency mails the decision. RCW 34.05.010(19); *City of Seattle v. Pub. Emp't Relations Comm'n (PERC)*, 116 Wn.2d 923, 927, 809 P.2d 1377 (1991).

A party's failure to timely file a petition for judicial review is grounds for dismissal. *See Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 362-63, 271 P.3d 268 (2012) (failure to file petition for judicial review within 30 days of final agency action required dismissal); *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 26-27, 917 P.2d 1091 (1996) (dismissal appropriate when claimant's attorney filed petition for judicial review one day after the deadline for filing expired).

The Department mailed Mr. Rahman its final decision on December 13, 2013. AR at 220. Mr. Rahman filed his petition for judicial

review in superior court on January 30, 2014—48 days after service of the final order. CP at 1-110; AR at 220. The superior court properly dismissed Mr. Rahman’s petition for judicial review due to his failure to comply with the statutory requirements of RCW 34.05.542(2).

Mr. Rahman’s untimely motion for reconsideration to the Commissioner did not extend his deadline for filing a petition for judicial review with the superior court. A petition for judicial review may be filed within 30 days after an agency disposes of a *timely* petition for reconsideration; however, an *untimely* request for reconsideration does not extend the 30-day deadline. See RCW 34.05.470(3); see also RCW 50.32.090; WAC 192-04-190(1). Because Mr. Rahman’s petition for reconsideration was untimely, he was required to file his petition for judicial review within 30 days of service of the Commissioner’s final decision. See AR at 303.

Mr. Rahman appears to argue that dismissal was improper because he unsuccessfully attempted to file a petition for judicial review within the statutory timeframe and thus “the appeal was on time.”⁴ Appellant’s Br. at 7-8. Mr. Rahman did not raise this argument to the superior court until *after* the court had granted the Department’s motion to dismiss and an

⁴ Mr. Rahman’s argument is in contravention of RAP 10.3(a)(6), as he cites to no legal authority to support his assertion that his alleged actions were sufficient to comply with the requirements of the APA.

Order of Dismissal had been entered. *See* CP at 248-50. This Court’s review of his assertion would be improper because it would rely on facts that have not been developed or established before the trier of fact—here, the superior court.⁵

Nevertheless, even if this Court considers his argument, it should determine that Mr. Rahman’s assertions of fact are not supported by the evidence that was before the superior court. In support of his argument, Mr. Rahman depends on unsworn statements in his “Notice of Appeal”⁶ and postal documents. Appellant’s Br. at 5 (citing CP at 261). First, his allegations in his petition for judicial review are merely unsworn assertions; thus, they constitute argument rather than evidence. *See Lemond v. Dep’t of Licensing*, 143 Wn. App. 797, 807, 180 P.3d 829 (2008) (assertions by counsel do not constitute competent evidence). Second, the petition for judicial review in the record—the petition that Mr. Rahman ultimately filed in the King County Superior Court—was drafted after the 30-day time period had expired. CP at 5 (“Appellant, on this very day of 29th Jan, 2014 resent the appeal for review, without having

⁵ After the superior court issued its Order of Dismissal, Mr. Rahman raised this argument in a motion for reconsideration. CP at 250. However, “CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Mr. Rahman improperly waited until his motion for reconsideration to raise these arguments before the superior court.

⁶ Mr. Rahman labeled his petition for judicial review a “Notice of Appeal.” CP at 4.

received, written declined notice of procedure, by king county superior court, having spoken over the phone of the status.”).

Third, it is unclear what, precisely, Mr. Rahman allegedly sent to the superior court within the statutory time period, as he contends that he submitted a motion for reconsideration with the Commissioner’s review office and a petition for judicial review to the King County Superior Court at approximately the same time. CP at 4-5. In his petition for judicial review, Mr. Rahman states he mailed a “petition for reconsideration” on December 31, 2013 to the Commissioner’s review office, which was received on January 6, 2014, and ultimately rejected as untimely. CP at 4; *see also* AR at 302 (rejecting petition for reconsideration as untimely on January 13, 2014). However, he also asserts that the “clerk’s office” received “the appeal” on January 7, 2014 but “refused” the appeal. CP at 5. Finally, Mr. Rahman’s petition for judicial review does not set forth any specific reason the King County Superior Court allegedly rejected his petition for judicial review. *See* CP at 4-5. Thus, it is impossible to determine whether Mr. Rahman’s actions amounted to compliance with the requirements of the APA.

Mr. Rahman's reliance on an illegible envelope and a "Track a Package Printout"⁷ is also unhelpful. The copy of the envelope, which Mr. Rahman alleges contained a petition for judicial review and was mailed to the King County Superior Court on December 31, 2013, is unreadable. CP at 251. Moreover, the copy of the envelope is not helpful for determining what the envelope contained on the date it was mailed. CP at 251. Nor is the "Track a Package Printout"⁸ helpful, as it does not describe the item that was sent or the location to which the package was delivered. CP at 261.

Even if Mr. Rahman's acted as he alleges, he has failed to establish that substantial compliance is sufficient to comply with the APA's statutory time requirements for filing a petition for judicial review. *See PERC*, 116 Wn.2d at 929 (holding that "failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute"); *Cheek v. Emp't Sec. Dep't*, 107 Wn. App. 79, 85, 25 P.3d 481 (2001) (concluding that substantial compliance with service

⁷ Mr. Rahman did not submit this document to the superior court until he filed his motion for reconsideration of the superior court's Order of Dismissal. CP at 261, 266-68. However, this document was not "[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). Accordingly, this evidence was not properly before the superior court when it considered Mr. Rahman's motion for reconsideration.

⁸ Mr. Rahman submitted this printout to the superior court after he filed his Notice of Appeal to this Court. CP at 260-62, 266-68.

requirements was not sufficient to invoke appellate jurisdiction of the superior court); *Clymer*, 82 Wn. App. at 28 (assuming, without deciding, that a person seeking review of an administrative decision can substantially comply with the APA's judicial review filing requirement).

Moreover, Mr. Rahman has not proven that his actions amounted to substantial compliance. “Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.” *PERC*, 116 Wn.2d at 928 (quoting *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)). “In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.” *PERC*, 116 Wn.2d at 928.

Appellate courts have consistently held that an individual's failure to comply with a statutory deadline does not constitute substantial compliance. See *Medina*, 147 Wn.2d at 317 (“[W]here time requirements are concerned, [our Supreme Court] has held that ‘failure to comply with a statutorily set time limitation cannot be considered substantial compliance’ with the statute.” (quoting *PERC*, 116 Wn.2d at 929)); *Forseth v. City of Tacoma*, 27 Wn.2d 284, 297, 178 P.2d 357 (1947) (“[T]here can be no ‘substantial compliance’ with the provision concerning the time within which a claim must be filed, except by filing it within that time.”),

overruled on other grounds by *Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). “Noncompliance with a statutory mandate is not substantial compliance.” *Petta v. Dep’t of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 1006 (1992) (holding that substantial compliance with the Industrial Insurance Act did not occur where process server failed to carry out attorney’s instructions and attorney failed to discern failure from return paperwork).

In *Clymer*, this Court held that dismissal was appropriate when claimant’s counsel filed his client’s petition for judicial review one day after the deadline for filing expired. 82 Wn. App. 25. Before the statutory deadline, claimant’s counsel left the original petition for review for a legal messenger, instructing the legal messenger to file it in superior court. *Id.* at 27. The messenger did not take the petition because it was not accompanied by a check. *Id.* No one at counsel’s office realized that the petition had not been filed until one day after the 30-day period for filing had expired. *Id.* On that day, counsel filed the petition for judicial review. *Id.* This Court held that the claimant’s failure to comply with the APA’s time requirements for filing did not constitute substantial compliance. *Id.* at 28-29 (“A failure to comply with the filing requirement of RCW 34.05.542(2), resulting from a messenger’s failure or refusal to

accept a Petition for Review for filing, does not constitute substantial compliance.”).

Similarly, Mr. Rahman failed to file his petition for judicial review within 30 days after service of the Department’s final order. Mr. Rahman asserts that he unsuccessfully attempted to file the petition; however, his noncompliance with the filing requirements of the APA does not constitute substantial compliance. This Court should affirm the superior court’s dismissal of Mr. Rahman’s petition for judicial review.

B. This Court Should Affirm the Superior Court’s Dismissal of Mr. Rahman’s Petition for Judicial Review Because He Failed to Timely Serve the Department

Under the APA, a petition for judicial review of a final agency order must also be served on the agency within 30 days of service of the agency’s final order. RCW 34.05.542(2). Although service of an agency decision occurs when the agency *mails* the decision, RCW 34.05.010(19), service of the petition for judicial review on the agency occurs when the judicial appeal *has been received* by the agency. *See* RCW 34.05.542(4) (“Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency” but service on other parties of record and the office of the attorney general is deemed complete upon deposit in the United States mail.); WAC 192-04-210

(“Delivery pursuant to RCW 34.05.542(4) shall be deemed to have been made when a copy of the petition for judicial review has been received by the Commissioner’s Office at 212 Maple Park Drive SE, Olympia, WA 98504 or received by mail at the Commissioner’s Review Office, Post Office Box 9555, Olympia, WA 98507-9555.”). Thus, in order to properly serve the Department by mail, Mr. Rahman’s judicial appeal must have been received by the Department within 30 days from December 13, 2013—the date he was served with the Department’s final order.

“[D]ismissal is required if timely service of a copy of the petition for judicial review is not accomplished.” *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 960, 235 P.3d 849 (2010). In *Sprint Spectrum*, Sprint timely filed its petition for judicial review of a Board of Tax Appeals final order but failed to serve the Board with its petition. *Id.* at 952. The superior court dismissed Sprint’s petition for judicial review and this Court affirmed, holding that dismissal was appropriate based on Sprint’s failure to comply with the APA’s requirement to serve the Board with a copy of the petition for judicial review within 30 days after service of the agency’s final order. *Id.* at 952, 963. The same result is appropriate here.

The 30-day judicial appeal period ended on January 13, 2014. Mr. Rahman served the Department with his petition for judicial review on

March 4, 2014, nearly three months after December 13, 2013.⁹ CP at 132, 134-247; AR at 220. Because Mr. Rahman failed to comply with the APA's service requirements, this Court may affirm the superior court's dismissal of Mr. Rahman's petition on this basis.¹⁰

C. The Superior Court Properly Denied Mr. Rahman's Motion for Reconsideration

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327 (2014). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard." *Id.* (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is manifestly unreasonable when it "falls 'outside the range of acceptable choices, given the facts and the applicable legal standard.'" *State v. Dye*,

⁹ Mr. Rahman did not file a response to the Department's motion to dismiss. In his motion for reconsideration, Mr. Rahman alleged that he had complied with the service requirement by sending the Department a motion of prejudice on January 17, 2014, which the Department received on January 27, 2014. CP at 250; AR at 296. Mr. Rahman's argument fails to acknowledge that (1) the motion of prejudice is not the petition for judicial review that he filed in superior court and was required to timely serve on the Department and (2) the statutory deadline for serving the Department was January 13, 2014—30 days after December 13, 2013.

¹⁰ Mr. Rahman's untimely service of correspondence on the Attorney General's Office on February 4, 2014, did not satisfy the requirement that he timely serve his petition for judicial review on the Department. CP at 121; 124-30.

178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). “Issues raised in a motion for reconsideration must not be dependent upon new facts and must be closely related to already raised allegations.” *Breuer v. Presta*, 148 Wn. App. 470, 477, 200 P.3d 724 (2009).

As stated above, the record does not support Mr. Rahman’s assertion that he complied with the requirements of the APA. *See supra* pp. 8-13. Moreover, Mr. Rahman waited until he filed his motion for reconsideration to raise this allegation to the superior court. CP at 248-29 (Order of Dismissal filed on July 30, 2014); CP at 250 (motion for reconsideration filed on August 1, 2014). Mr. Rahman has failed to establish that the superior court’s denial of his motion for reconsideration was manifestly unreasonable or rested upon untenable grounds or reasons.

D. This Court’s Review Is Limited to the Superior Court’s Dismissal of Mr. Rahman’s Untimely Petition for Judicial Review

Mr. Rahman devotes a significant portion of his opening brief to his argument that the Commissioner’s final decision was in error. Appellant’s Br. at 3-4, 7-10. The merits of Mr. Rahman’s petition for judicial review were never addressed by the superior court and are therefore not before this Court on appeal.¹¹

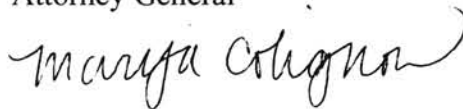
¹¹ Mr. Rahman also appears to ask for a stay of the Department’s collection of an overpayment of unemployment benefits. Appellant’s Br. at 11. In making this argument, Mr. Rahman references a statutory warrant filed under a separate superior

V. CONCLUSION

The superior court correctly dismissed Mr. Rahman's petition for judicial review because it was untimely filed. In the alternative, this Court may affirm the superior court's decision on the basis that Mr. Rahman failed to timely serve the Department with his petition. The superior court did not err in denying Mr. Rahman's motion for reconsideration. For the foregoing reasons, the Department asks this Court to affirm the superior court's order dismissing Mr. Rahman's petition for judicial review.

RESPECTFULLY SUBMITTED this 30th day of December, 2014.

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court cause number. *Id.* The matter before this Court concerns the superior court's dismissal of Mr. Rahman's petition for judicial review of the Commissioner's decision, not the statutory warrant that has been filed against Mr. Rahman.

PROOF OF SERVICE

I, Judy St. John, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.
2. That on the 30th day of December, 2014, I caused to be served a copy of **Brief of Respondent** on the Appellants of record on the below date as follows:

Via United States Postal Service,
Shaw Rahman
4739 University Ave NE #1422
Seattle, WA 98105

Original filed via ABC Legal Messenger
Court of Appeals, Division 1
600 University St.
Seattle, WA 98101-4170

I DECLARE UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON that the
foregoing is true and correct.

Dated this 30th day of December, 2014 in Seattle,
Washington.



Judy St. John, Legal Assistant