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SUPREME COURT OF THE STATE OF WASHINGTON

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BOOKER MCCLINTY,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF EMPLOYMENT SECURITY

Respondent.

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**AMENDED BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Mr. McClenty failed to perfect his petition for judicial review in superior court when he did not serve the Department of Employment Security with his petition within thirty days of the Commissioner's final order, as required under the Administrative Procedure Act (APA). The superior court therefore properly dismissed his petition for lack of subject matter jurisdiction. The superior court's decision is entirely consistent with this Court's decision in *City of Seattle v. Public Employees Relations Commission (PERC)*, 116 Wn.2d 923, 809 P.2d 1377 (1991), where this Court found the service requirements of the APA to be jurisdictional, thereby requiring petitioners seeking judicial review of an agency's decision to file their petition with the superior court, serve the agency and all parties of record within thirty days after service of the final order. Accordingly, the superior court's decision should be affirmed.

## **II. STATEMENT OF THE ISSUE**

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

Did Mr. McClenty fail to invoke the superior court's appellate jurisdiction under the APA when he served the Department with his petition for review several days after the thirty-day deadline in RCW 34.05.542 had expired?

## **III. STATEMENT OF THE CASE**

On September 16, 2007, the Department denied Mr. McClenty's application for unemployment benefits under the Employment Security Act (Act). Commissioner's Record (CR) at 26.<sup>1</sup> Mr. McClenty filed a timely appeal to the Office of Administrative Hearings (OAH). CR at 28. Following an administrative hearing, an administrative law judge issued an initial order affirming the Department's decision to deny Mr. McClenty's application for benefits. CR at 32-4. Mr. McClenty appealed

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<sup>1</sup> The Commissioner's Record is a Certified Appeal Board Record, and was transmitted to this Court by the superior court clerk in its original form, not as Clerk's Papers. Thus, where appropriate, this brief references pages in the Commissioner's Record (CR) rather than pages from the Clerk's Papers. Portions of the record other than the Commissioner's Record are properly referenced as Clerk's Papers.

the initial order to the Department's Commissioner (Commissioner), who affirmed.

Mr. McClenty then sought judicial review in superior court by filing his petition with the court within thirty days of the Commissioner's final order. Although he timely filed his petition with the court, he did not serve a copy of his petition on the Department until forty-one days had elapsed since the Commissioner's decision was served. On the Department's motion, the superior court dismissed Mr. McClenty's petition for review, finding that his failure to serve the Department in a timely manner rendered the court without subject matter jurisdiction to entertain the merits of his petition. Clerk's Papers (CP) at 79-80.

On February 3, 2009, Mr. McClenty filed a document entitled "Notice of Appeal to Supreme Court or Court of Appeals" in the superior court. CP at 81-86. Since Mr. McClenty's notice did not specify to which court he wished to appeal, the superior court treated Mr. McClenty's Notice of Appeal as an appeal only to this Court. *See* Rules of Appellate Procedure (RAP) 5.3(g). On March 6, 2009, Mr. McClenty filed a Statement of Grounds for Direct Review. Shortly thereafter, the Department filed its response. The Department now submits this memorandum in response to this Court's request for briefing on the merits.

#### IV. STANDARD OF REVIEW

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

#### V. ARGUMENT

The superior court properly dismissed Mr. McClenty's petition for judicial review for lack of subject matter jurisdiction, as he failed to serve the Department with his petition within the thirty-day timeline set forth in the APA. *See* RCW 34.05.542(2). This Court's precedent makes clear that the service requirements of the APA are jurisdictional, thereby requiring petitioners seeking judicial review of an agency's decision to file their petition with the superior court, serve the agency, the Attorney General, and all parties of record within thirty days after service of the final order. *City of Seattle v. Pub. Empl. Relations Comm'n (PERC)*, 116 Wn.2d 923, 926-27, 809 P.2d 1377, 1379-1380 (1991); *see* RCW 34.05.542. As Mr. McClenty did not serve the Department within thirty days of the Commissioner's decision, the superior court never acquired subject matter jurisdiction over his appeal. This Court should

therefore affirm the superior court's decision to dismiss Mr. McClenty's petition.

**A. Failure To Comply With The APA Service Requirements Renders The Court Without Subject Matter Jurisdiction**

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

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

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

While RCW 34.05.542(5) makes clear that service on the attorney general within thirty days of the agency's final order is not a jurisdictional prerequisite for perfecting an appeal to superior court, the statute does specify that service on the agency within the thirty-day appeal deadline is jurisdictional. *See* RCW 34.05.542(2); *Cheek v. Empl. Sec. Dep't*, 107 Wn. App 79, 25 P.3d 481 (2001). A failure to timely serve the agency therefore renders the superior court without subject matter jurisdiction to entertain the merits of the petition. The APA contains no "good cause" exception to the thirty-day filing and service requirement. *Clymer v. Empl. Sec. Dep't*, 82 Wn. App. 25, 30, 917 P.2d 1091 (1996).

This Court has held that timely service is a jurisdictional requirement when a party seeks judicial review under the APA. In *PERC*, the City of Seattle sought judicial review of a decision of the Public Employees Relations Commission ordering it to engage in good-faith bargaining with several union organizations. *PERC*, 116 Wn.2d. at 925-27. Two unions in particular, the International Federation of Professional and Technical Engineers and the Seattle Police Management Association,

had been parties of record to the administrative litigation, and were therefore entitled to notice of the City's intent to seek judicial review in superior court of the Commission's final order. *Id.* at 926. Although the City timely filed and served its petition on the agency, the attorney general and some of the parties of record, the City did not serve the two unions until three days after the thirty-day deadline had elapsed. *Id.*

This Court held that by failing to serve its petition on all parties within the thirty-day time frame set forth in the APA, the City "failed to invoke the appellate jurisdiction" of the superior court. *Id.* Moreover, this Court noted that the doctrine of substantial compliance did not apply to statutes involving time limits, as the statute "is either complied with or it is not." *Id.* at 928–9. Accordingly, the Court affirmed the superior court's decision to dismiss the City's appeal on jurisdictional grounds. *Id.* at 929. Similarly, in this case, Mr. McClenty failed to comply with the APA's strict service requirements, and the superior court properly dismissed his appeal as a result.

**B. Mr. McClenty Failed To Comply With The Service Requirements Of The APA In Seeking Judicial Review Of The Commissioner's Decision**

In this case, the Commissioner issued a final order on April 25, 2008. CR at 47–8. In order to comply with RCW 34.05.542, and perfect his petition for review to superior court, Mr. McClenty was required to

serve his petition on the Department on or prior to May 26, 2008. The envelope in which Mr. McClenty mailed his petition for review to the Commissioner bears a postmark of May 28, 2008, and a “RECEIVED” stamp of June 2, 2008. CP at 74-78. Since, under the APA, service on the agency is only accomplished by delivery of the petition, the effective date of service of the petition on the Department was June 2, 2008. *See* RCW 34.05.542(4). Mr. McClenty’s petition was served seven days late, depriving the superior court of subject matter jurisdiction to hear his appeal. The order dismissing the Mr. McClenty’s petition for judicial review was thus proper.

In his brief, Mr. McClenty offers several reasons why he believes the Department’s decision denying his application for benefits should be reversed. *See generally* Appellant’s Brief. However, having dismissed Mr. McClenty’s petition for review on jurisdictional grounds, the superior court did not address whether Mr. McClenty was entitled to benefits under the Act. This Court should, therefore, decline to address the underlying merits of Mr. McClenty’s application for benefits, as the issue was not decided below. RAP 2.5(a); *see Pascua v. Heil*, 126 Wn. App. 520, 534, 108 P.3d 1253, 1261 (2005) (appellate courts generally will not address issues the trial court has not decided).

The superior court's decision to dismiss Mr. McClenty's petition for lack of subject matter jurisdiction was consistent with established precedent in the area, obligating petitioners seeking judicial review of a final agency order to comply with the strict jurisdictional service requirements for perfecting an appeal to superior court. *See PERC*, 116 Wn.2d. at 926-27. Since Mr. McClenty failed to serve the Department with his petition for review within the thirty-day statutory deadline, the superior court never acquired subject matter jurisdiction over his appeal, and therefore had no choice but to dismiss.

## VI. CONCLUSION

Based on the foregoing, the Department respectfully requests this Court affirm the superior court's decision dismissing Mr. McClenty's petition for review for lack of subject matter jurisdiction, or, in the alternative, transfer this matter to the Court of Appeals, as this case is not properly before this Court on direct review.

RESPECTFULLY SUBMITTED this 19 day of October 2009.

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Dated October 19, 2009, in Seattle, Washington.

Jennifer Ponicsan  
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SUBSCRIBED AND SWORN to before me the day and year first  
above written.



Linda J. Borla

NOTARY PUBLIC, in and for the State of  
Washington, residing at Seattle, WA  
My appointment expires 6-9-10