

65879-4

65879-4

NO. 66074 18
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CAROLYN BILAL, an individual,
Appellant,

Vs.

OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, agency,
Respondent

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Gregory Canova, Judge

BRIEF OF APPELLANT

Address:
P O Box 21162
Seattle, WA 98111

CAROLYN BILAL
Pro se

Address:
P O Box 40100
Olympia, WA 98504

WASHINGTON STATE ATTORNEY GENERAL
Dierk Meierbachtol, Assistant Attorney General
WSBA #
Attorney for Respondent

2018 DEC 28 PM 1:20

COURT OF APPEALS
DIVISION I
CLERK



Division I Appellate Court

No. 66074 B 3

Brief of Appellant Carolyn Bilal

I Nature of the Case

This case involves the Washington Administrative Procedure Act's ("APA") requirement that "...a petition for judicial review of an agency order must be 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.

Carolyn Bilal, appellant, in this matter and the Office of Superintendent of Public Instruction (OSPI) respondent, aka the agency, were parties to an adjudicative proceeding before the Office of Administrative Hearings (OAH). OAH issued a decision upholding a final order of revocation against appellant's teaching certificates that had been issued by OSPI. Appellant filed a petition for judicial review under the APA. The petition was served upon OAH and served upon OSPI through the Assistant Attorney General (AAG) who is attorney of record for OSPI.

Superior Court dismissed appellant's case based upon a motion and declaration from the AAG alleging appellant was required to provide notice of the administrative appeal directly, to OSPI, but did not and allege when notice of service provided it was untimely.

II Assignment of Error

- A. The superior court erred in granting respondent's motion dismissing petitioner's appeal of an administrative agency's final order as a matter of law when the appeal was timely
- B. The superior court erred by not accepting the US Postal evidence of service upon the parties presented by petitioner and contained within the record
- C. The superior court erred in interpreting RCW 34 05 542 regarding service upon parties
- D. The superior court erred in concurring with the AAG that the court lacked subject matter jurisdiction in the matter.

Issues Pertaining to Assignments of Error

- A. Was the respondent entitled to summary judgment as a matter of law based upon improper or untimely service per RCW 34 05 542 when evidence contained within the court file demonstrated service was neither improper nor untimely (Clerks Papers 24, pgs 70 – 74 & Exhibit 1)?
(Pertaining to assignment of error A-B-C)
- B. Did the superior court erroneously and unnecessarily commit prejudicial error through misinterpretation of RCW 34 05 542 based on the AAG's motion and declaration versus analyzing the statute Chapter 34 05 542 RCW prior to granting respondent's motion for dismissal of petitioner's case?
(Pertaining to assignment of error D)
- C. Did superior court have subject matter jurisdiction when it dismissed petitioner's case for untimely, improper or lack of service upon the parties of record?
(Pertaining to assignment of error D)

Statement of the Case

A Final Order of Revocation was issued against petitioner's teaching certificates by OSPI December 23, 2009. Petitioner appealed the Final Order of Revocation due to OSPI misinterpreting the law, violating constitutional provisions, violating its agency's rules and petitioner's right to privacy.

April 2010 petitioner's case was heard by an OSPI Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) that resulted in the OSPI Final Order of Revocation being upheld June 28, 2010. Appeal of the OAH decision was filed July 21, 2010 in superior court. Appellant contends that the ALJ erred through upholding the Final Order of Revocation whereas the order is lacking clear and convincing evidence as mandated by statute.

The Final Order of Revocation is rife with misinterpretation of the statutes WAC 181 86 075, WAC 181 87 050 and WAC 181 86 013, erroneous application of law and fraught with capricious and arbitrary allegations evidenced in the June 2010 OAH decision whereby the ALJ confirms "...unfounded..." allegations. Notwithstanding the ALJ willingly upheld the OSPI Final Order of Revocation.

Summary of Argument

OSPI wants the matter dismissed because they can not meet the requisite "...clear and convincing evidence..." to support the allegations used in issuing an order of revocation against appellant's teaching certificates.

The AAG on behalf of OSPI asserts through a motion and declaration for dismissal (Clerks Papers Exhibit 24, pg 6, lines 19 – 20) "...petitioner failed to timely serve the petition for judicial review under RCW 34 05 542 ... and ...petitioner did not provide *any* copies of the petition for judicial review to OSPI nor the Attorney General until approximately one month after the petition for appeal was filed..." (Clerks Papers Exhibit 24, pg 7, lines 5 – 10).

The AAG asserted superior court lacked subject matter jurisdiction to hear petitioner's appeal according to RCW 34 05 542 (2) because petitioner "...did not hand deliver a copy of the petition to the office of the agency head, at the agency's principal office, ...within thirty days after service of the final order..." (Clerks Papers Exhibit 24, pg 7, lines 20 – 24).

The AAG overlooks the fact petitioner served the petition for judicial review July 28, 2010 and he received it at his Olympia office via US certified mail, postage pre paid July 29, 2010 on behalf of the office of Washington State Attorney General and respondent OSPI; (Clerks Papers 24, pgs 70 – 74 & Exhibit 1). The AAG attempts to negate the fact he represents the office of the Attorney General and is attorney of record, for OSPI, the agency.

The AAG misinterprets the law by utilizing subsection (4) Chapter 34 05 542 RCW in asserting OSPI should have received "... a hand-delivered copy of the judicial review petition ..." from petitioner; (Clerks Papers Exhibit 24, pg 8, lines 13 – 15. RCW 34 05 542 (4) is not the relevant part of the statute at issue here. Subsection (6) Chapter 34 05 542 RCW is.

The AAG cites the Skagit Surveyors and Eng'rs, LLC v Friends of Skagit Cy., 135 Wn.2d 542, 555, 958 P.2d 962 (1998) case to support respondent's argument of service being both untimely and improper; (Clerks Papers Exhibit 24, pg 7, lines 18 – 20) yet the Skagit Surveyors and Eng'rs, ET, al case is based upon former language of RCW 34 05 542.

The Final Order of Revocation issued by OSPI December 23, 2009 was upheld by the OAH - ALJ June 28, 2010. Petitioner received information regarding administrative appeal rights with the OAH - ALJ decision June 28, 2010; (Clerks Papers 24, pg 55, 2nd paragraph). The

appeal rights information referred petitioner to RCW 35.04.542 which petitioner adhered to in preparing the appeal and serving notice to the parties of record.

Argument

The superior court erred in accepting the Skagit Surveyors and Eng'rs, LLC v Friends of Skagit Cy., 135 Wn.2d 542, 555, 958 P.2d 962 (1998) case as authority for dismissing petitioner's case based on the motion and declaration from the AAG for summary judgment in the matter. The Skagit case was decided on a former version of RCW 34 05 542 that was not inclusive of subsection (6) the amended version of the statute which appellant argues here.

The Skagit case originated in 1997 and was decided in July 1998. Counsel for plaintiffs in the Skagit matter did not argue the case on the June 1998 amendment that was made to Chapter 34 05 542 RCW that clarified the APA rules regarding service upon parties. The amended Chapter 34 05 542 RCW is inclusive of subsection (6) that overrides subsections (2) and (4) as clearly cited in the Skagit Surveyors; ET, al. case.

556 SKAGIT SURVEYORS v. FRIENDS June 1998
135 Wn.2d 542

In section [4-6] of the Skagit Surveyors case the court states "...The procedural and jurisdictional requirements are set forth in former RCW 34.05.542(2), «7»

Which states: "...A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

«7» This Section of the statute was amended by the Legislature after we heard oral argument in [the Union Bay case, 127 Wn.2d at 617]... LAWS OF 1998, ch. 186. The amendment added the following subsection:

"... (6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record..."

The court states "...In Union Bay, we held that a superior court did not obtain jurisdiction over an appeal from an agency decision unless the appealing party timely filed a petition for review in the superior court and timely served the petition on all of the parties. Union Bay, 127 Wn.2d at 617-18..."

“...The question before the court in Union Bay was whether service on a party's attorney of record satisfied the service requirements of the APA. Based on the statutory definition of “party” contained in the APA, and in light of the legislative history of RCW 34.05, this court held that attorneys of record were excluded from the phrase "parties of record" as that term is used in RCW 34.05.542(2).

Thus, in order to invoke the superior court's jurisdiction to review an administrative order at times pertinent here, an appellant was required to file a petition for review and serve the petition on the parties of record, not just on their attorneys.«8»

Union Bay, 127 Wn.2d at 619-20 Substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court.«9»

[7-9] Lack of jurisdiction over the subject matter renders controversy [of] the superior court [being] powerless to pass on the merits of the controversy brought before it... Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time. RAP 2.5(a) (1)

The issue raised in relation to the motion to dismiss the petition of Surveyors is identical to the issue raised in Union Bay. That is, does the superior court acquire jurisdiction to make rulings in an appeal under the APA if service is made on an attorney of record in lieu of service on a party. Union Bay strictly construed and applied the APA and dismissed the petition for review because Union Bay Preservation Coalition had served the attorneys rather than the parties in the case; thus Union Bay did not perfect jurisdiction in the superior court. Union Bay, 127 Wn.2d 614

Similarly, Surveyors did not properly invoke the jurisdiction of the superior court in this case.

“[10] While we recognize this is a harsh result and that a different result would be reached in this case now, under the amended version of the statute...”

«8» Beginning June 11, 1998, RCW 34.05.542, as recently amended, authorizes service upon an attorney of record for any agency or party in order to invoke the superior court's appellate jurisdiction.

«9» None of the parties discusses the applicability of Union Bay to appeals, like this one, that - ire heard initially by an appellate court under RCW 34.05.518.

Subsections RCW 34 05 542 (2) and (4) which respondent argued and superior court used for dismissing petitioner's case based on the Skagit Surveyors; ET, al. case was in error because RCW 34 05 542 (6) clearly states "...service upon the attorney of record constitutes service upon the agency..."

While the AAG asserts respondent was not served properly and asserts neither the Office of the Attorney General or respondent was served timely the following has never been disputed:

1. The AAG accepted receipt of appeal documents from the petitioner July 29, 2010 via certified US mail postage pre paid mail date of July 28, 2010 (Clerks Papers 24, pgs 70 – 74 & Exhibit 1)

2. The documents received by the AAG were inclusive of petitioner's judicial appeal and administrative review case schedule detailing the date, time, superior court number and assigned judge for the matter (Clerks Papers 24, pgs 70 – 74 & Exhibit 1)

3. The AAG engaged in discussions with petitioner concerning receipt of the appeal documents and petitioner's request that a transcript of the OAH hearing be prepared, as required by OSPI, for the appeal via phone and email (Clerks Papers Exhibit 24, pgs 99 – 101)

4. Neither the AAG nor respondent disputes the 1998 amendment and language of the statute RCW 34.05.542 (6) "...service upon the attorney of record constitutes service upon the agency..."

5. Neither the AAG nor respondent dispute a document for judicial appeal must "...set forth..." the following information and that such document were inclusive of the documents the AAG received from petitioner:

RCW 34.05.546

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the agency whose action is at issue;
- (4) Identification of the agency action at issue, together with a duplicate copy, summary,

- or brief description of the agency action;
- (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;
 - (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;
 - (7) The petitioner's reasons for believing that relief should be granted; and
 - (8) A request for relief, specifying the type and extent of relief requested.

The superior court had subject matter jurisdiction over the matter because authority for judicial review was invoked when petitioner filed for judicial appeal July 21, 2010 then mailed and served the parties notice of the appeal July 28, 2010. (Exhibit 1) The notice of appeal was timely and in accordance with RCW 34.05 542 (6).

The superior court erred in dismissing petitioner's case based upon the motion and declaration of the AAG; (Clerks Papers Exhibit 24, pgs 108-109), the APA guidelines and statute of Chapter 34 05 542 RCW.

Conclusion

"...The [appellate] court employed the principle of substantial compliance to hold that ...appeals were properly before the courts, stating: "The requirement of notice contained in RCW 51.52.110 is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions." Saltis, 94 Wn.2d at 895. The court implemented this rule as follows:

[W]e hold that proper service ... occurred if: (1) the Director received actual notice of the appeal to the Superior Court or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the Director. (Court's emphasis.) Id. at 896..."

Similarly, in Vasquez, the Court of Appeals found that service on the attorney of a self-insurer as opposed to the self-insurer was sufficient to comply with the service requirements under Title 51 RCW. The court again emphasized the question of whether the process was reasonably calculated to give notice to the appropriate parties required by the rule or the statute. Vasquez, 44 Wn. App. at 384. The Vasquez court specifically held "an administrative appeal invokes appellate, not general or original superior court jurisdiction." Id. at 383.

The majority's view conflicts with the use of substantial compliance in education personnel appeals as well. [Appellant's case is an education appeal].

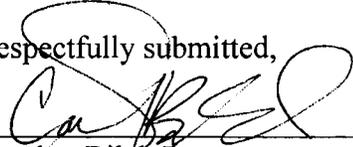
In Hall v. Seattle Sch. Dist. 1, 66 Wn. App. 308, 831 P.2d 1128 (1992), the Court of Appeals held that service of a notice of appeal on the secretary of the chair of the school board substantially complied with the statutory requirement of service on the board's chair, a part-time unpaid position. Noting that such a chair might be unavailable for prolonged periods, the court stated: "...As in Saltis, the District in the case...timely received actual notice, so there is no prejudice. Service ...was within the statute and was calculated to give notice.... Service on the chair achieved the same result as if the agency had been served personally..." In Union Bay the court stated "... [any] defect in service is purely formal, without practical importance, and not a proper basis to deny ... access to the courts.

Respondent's argument that superior court lacks subject matter jurisdiction to consider petitioner's appeal under the APA was incorrect. Superior court erred in accepting respondent's argument and erred in granting the agency's motion to dismiss. There is no substantial or reasonable evidence for inference to support the allegation that petitioner either untimely, improperly or untimely served the parties of record. Respondent's argument of direct service upon the agency is clearly contradicted by the language of the APA and the amended statute RCW 34.05.542 not its predecessor.

Appellant respectfully request this Court reverse the superior court's order dismissing judicial review of the OSPI Final Order Of Revocation.

December 27th, 2010

Respectfully submitted,



Carolyn Bilal, Pro se
Appellant

TABLE OF AUTHORITIES

Washington Cases

Skagit Surveyors and Engineers, LLC v. Friends of Skagit County,
135 Wn.2d 542, 958 P.2d 962 (1998)

Union Bay,
127 Wn.2d 614 (1995)

Hall v. Seattle Sch. Dist. 1,
66 Wn. App. 308, 831 P.2d 1128 (1992)

Saltis,
94 Wn.2d at 895

Vasquez,
44 Wn. App. at 384

Statutes

RCW 34.05.542.....

RCW 34.05.542(2).....

RCW 34.05.542(4).....

RCW 34.05.542(6).....

RCW 34.05.546.....

Exhibits

NAME	PAGE NO
Senate Bill 6172	1 – 3
Proof of Service - July 28	- 4

RECEIVED
 2010 DEC 27 PM 4:24
 KING COUNTY
 SUPERIOR COURT CLERK
 SEATTLE, WA

7007 2560 0000 6264 9486

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OLYMPIA, WA 98504

Postage	\$ 2.75	0036 RIVERTON STA Postmark Here JUL 28 2010 07/28/2010 SEA WA 98188-9998
Certified Fee	\$2.80	
Return Receipt Fee (Endorsement Required)	\$0.00	
Restricted Delivery Fee (Endorsement Required)	\$0.00	
Total Postage & Fees	\$ 5.55	

Sent To: Dirk Meierbach
 Street, Apt. No., or PO Box No.: P.O. Box 40100
 City, State, ZIP+4: Olympia WA 98504

PS Form 3800, August 2006 See Reverse for Instructions

7007 2560 0000 6264 9479

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

SEATTLE, WA 98101

Postage	\$ 2.75	0036 RIVERTON STA Postmark Here JUL 28 2010 07/28/2010 SEA WA 98188-9998
Certified Fee	\$2.80	
Return Receipt Fee (Endorsement Required)	\$0.00	
Restricted Delivery Fee (Endorsement Required)	\$0.00	
Total Postage & Fees	\$ 5.55	

Sent To: Michelle Metzger ALS
 Street, Apt. No., or PO Box No.: DAH 1600 Union St, Ste 1500
 City, State, ZIP+4: OSPT / Seattle, WA 98101

PS Form 3800, August 2006 See Reverse for Instructions

Exhibit I
 #4

RECEIVED

2010 DEC 27 PM 4:21

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

CERTIFICATION OF ENROLLMENT

SENATE BILL 6172

Chapter 186, Laws of 1998

55th Legislature
1998 Regular Session

SERVICE OF PETITIONS FOR JUDICIAL REVIEW OF AGENCY ACTIONS--
CLARIFICATION OF PERSONS TO BE SERVED

EFFECTIVE DATE: 6/11/98

Passed by the Senate February 12, 1998

YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 4, 1998

YEAS 98 NAYS 0

CLYDE BALLARD

Speaker of the
House of Representatives

Approved March 27, 1998

CERTIFICATE

I, Mike O Connell, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 6172** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MIKE O'CONNELL

Secretary

FILED

March 27, 1998 - 3:28 p.m.

GARY LOCKE

Governor of the State of Washington

Secretary of State
State of Washington

Exhibit 2
1 of 3

SENATE BILL 6172

State of Washington

55th Legislature

1998 Regular Session

By Senator McCaslin

Read first time 01/12/98. Referred to Committee on Government Operations.

1 AN ACT Relating to service of petitions for judicial review of
2 agency actions; and amending RCW 34.05.542.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 34.05.542 and 1988 c 288 s 509 are each amended to
5 read as follows:

6 Subject to other requirements of this chapter or of another
7 statute:

8 (1) A petition for judicial review of a rule may be filed at any
9 time, except as limited by RCW 34.05.375.

10 (2) A petition for judicial review of an order shall be filed with
11 the court and served on the agency, the office of the attorney general,
12 and all parties of record within thirty days after service of the final
13 order.

14 (3) A petition for judicial review of agency action other than the
15 adoption of a rule or the entry of an order is not timely unless filed
16 with the court and served on the agency, the office of the attorney
17 general, and all other parties of record within thirty days after the
18 agency action, but the time is extended during any period that the
19 petitioner did not know and was under no duty to discover or could not

1 reasonably have discovered that the agency had taken the action or that
2 the agency action had a sufficient effect to confer standing upon the
3 petitioner to obtain judicial review under this chapter.

4 (4) Service of the petition on the agency shall be by delivery of
5 a copy of the petition to the office of the director, or other chief
6 administrative officer or chairperson of the agency, at the principal
7 office of the agency. Service of a copy by mail upon the other parties
8 of record and the office of the attorney general shall be deemed
9 complete upon deposit in the United States mail, as evidenced by the
10 postmark.

11 (5) Failure to timely serve a petition on the office of the
12 attorney general is not grounds for dismissal of the petition.

13 (6) For purposes of this section, service upon the attorney of
14 record of any agency or party of record constitutes service upon the
15 agency or party of record.

--- END ---

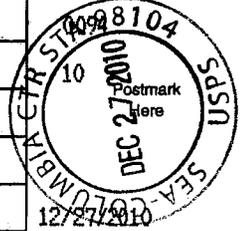
7010 2780 0001 0280 2297

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OL 00 IA WA 98514 **OFFICIAL USE**

Postage	\$	\$1.22
Certified Fee		\$2.80
Return Receipt Fee (Endorsement Required)		\$0.00
Restricted Delivery Fee (Endorsement Required)		\$0.00
Total Postage & Fees	\$	\$4.02



Sent To AAG Moresbald
 Street, Apt. No.; or PO Box No. 1125 wa st SE
 City, State, ZIP+4 P.O. Box 40100 Oly, WA 98104