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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 300439

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

ANDREA BECK

Appellant,

vs.

DEPARTMENT OF EMPLOYMENT SECURITY,

Respondents.

BRIEF OF APPELLANT

MINNICK • HAYNER, P.S.

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I. PRELIMINARY STATEMENT

This is an appeal of a final Order dismissing the administrative appeal of appellant Andrea L. Beck ("Beck"). The Findings, Conclusions, and Order Dismissing Administrative Appeal was filed on May 9, 2011, granting respondent State of Washington, Department of Employment Security ("ESD") Motion to Dismiss the Petition for Review. The Order was based on the argument submitted by ESD that the superior court lacked subject matter jurisdiction because the ESD was not timely served with the Petition for Review pursuant to RCW 34.05.542(2)(3).

The central issue in this appeal is whether the failure to serve the agency within the thirty (30) day time period established by the Administrative Procedures Act deprives the superior court of jurisdiction to hear the Petition for Review where the petitioner has substantially complied with the statute and that the purpose for the thirty (30) day service requirement was served.

II. ASSIGNMENTS OF ERROR

1. The superior court erred as a matter of law in granting ESD's motion to dismiss the Petition for Review.

Appellant Beck had substantially complied with the statute and the purpose for the 30-day service requirement was fulfilled in that the administrative record was timely submitted.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did appellant Beck substantially comply with the filing and service requirements of RCW 34.05.542(2)(3) so that the superior court should have exercised its subject matter jurisdiction and determined the petition for review filed by Beck?

IV. FACTUAL AND PROCEDURAL HISTORY

Beck worked for Providence St. Mary Medical Center ("PSMMC") as a cardiac services technician for approximately 20 years before she was wrongfully discharged. Clerk's Papers ("CP") 168. The initial ground for discharge asserted

by PSMMC was that Beck "was discharged for claiming time worked when actually not working." CP 168-69. When the ESD denied benefits based upon its finding of deliberate misconduct, Beck appealed to the Office of Administrative Hearing. CP 169. In the administrative hearing, PSMMC shifted position and alleged that Beck was discharged for insubordination and not for "falsifying hours not worked." CP 169. Beck was insubordinate by her alleged refusal to follow the directive of the employer to perform all work at the hospital and not to continue to perform some work at home as she had historically done. CP 169.

The ALJ concluded that the employer did not carry its burden establishing misconduct in connection with work. CP 169. The employer appealed to the Commissioner's Review Office. CP 169. The Commissioner's Review Office found that disqualifying misconduct had been established and that Beck was not eligible for unemployment benefits. CP 169.

Beck filed a Petition for Review with the superior court on September 17, 2010. CP 1-19, 197. The Decision of

Commissioner was dated August 20, 2010 and that meant pursuant to RCW 34.05.542(2), the Petition for Review had to be filed and served on the parties within 30 days. CP 198. The Petition was filed within the 30-day appeal period and PSMC was served by mail on September 17, 2010, also within the 30-day period. CP 197-198.

On September 17, 2010, Beck's counsel sent a letter via email to ABC Legal Messengers in Olympia, requesting that the Petition and Summons filed by Beck be personally served on the Commissioner of ESD, and the Office of the Attorney General. CP 198-200. However, due to a mistake in the email address, the email correspondence did not reach ABC Legal Messengers on Friday, September 17 and ABC was unable to serve the Petition and Summons until the following week. CP 198. The Washington State Attorney General's Office received the Petition for Review on September 23 and the Commissioner received the Petition on September 24. CP 193. All parties required to be served by

RCW 34.05.542(2) were in fact served, but a few days after the 30-day period. CP 193.

V. ARGUMENT

A. BECK SUBSTANTIALLY COMPLIED WITH THE SERVICE REQUIREMENT OF THE STATUTE.

The Petition was filed on September 17, 2010, within the 30-day appeal period provided by RCW 34.05.542(2). CP 193, 197. However, due to a mistake the email request for service was sent to the wrong address and did not reach ABC Legal Messengers in Olympia until the next week. CP 193, 198. The ESD Commissioner was served on September 24, 2010 and the Washington State Attorney General's Office was served on September 23, 2010. CP 193. Both documents were served by ABC Legal Messengers. CP 193. Providence Health was served by mail on September 17, 2010. CP 193. All parties required to be served by RCW 34.05.542(2) were served. CP 193.

It is clear from the record that Beck substantially complied with the filing and service requirements of the

Administrative Procedures Act. CP 193. The issue is whether the substantial compliance doctrine is applicable to RCW 34.05.542(2). ESD contends that the late service on the Commissioner deprives the superior court of subject matter jurisdiction over the appeal.

The recently decided case of *Sprint Spectrum v. Department of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010) provides legal analysis on the central issue of substantial compliance. In *Sprint Spectrum*, the appellant never served the Board of Tax Appeals, the agency whose final order was being challenged. The appeals court ruled that it was a case of noncompliance with the statutory service requirements of RCW 34.05.542(2), not substantial compliance as is the case at bar. Substantial compliance with a statute requires that a statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. *Sprint Spectrum*, 156 Wn. App. at 958. The principal objective of the 30-day service requirement is to ensure that judicial review is promptly sought and accomplished. *Id.* Service on

the agency, in this case the ESD, triggers the transmittal of the administrative record to the court. RCW 34.05.566(1). In this case, the administrative record was sent to the court on October 19, 2010.

The fact that the Petition was served on ESD on September 24, 2010, a few days after the 30-day period expired, did not in any fashion impede the transmittal of the administrative record to the superior court for timely review. The attorney for the ESD also promptly appeared in the action on September 28, 2010, four days after service on the agency.

Not one single aspect of the statute was undermined by the late service of the Petition on ESD. The agency transmitted the administrative record to the court for timely review. Furthermore, ESD knew that the Petition was served on September 24, 2010, and discussed the service issue with counsel for Beck, yet waited until January 18, 2011 to file the Motion to dismiss for lack of jurisdiction. ESD's dilatory action in filing a motion to dismiss after more than three months had elapsed and a week before the hearing on the motion to

dismiss, demonstrated that there was no substantive procedural violation of the APA.

ESD takes the position that there is no "substantial compliance" with the service requirements of RCW 34.05.542(2). ESD relies on the authority of *City of Seattle v. Public Employment Relations Commission*, 116 Wn.2d 923, 809 P.2d 1377 (1991). However, the *Sprint Spectrum* case refers to cases that discussed and analyzed the application of the substantial compliance doctrine in regard to service of the Petition on the agency, the very issue we have in this appeal.

Assuming that substantial compliance still applies to the APA, the question is whether substantial compliance in this case is sufficient according to the legal standards of the doctrine.

Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out intent for which the statute was adopted. *What constitutes substantial compliance with the statute is a matter depending on the facts of each particular case.*

***Banner Realty, Inc. v. Department of Revenue*, 48 Wn. App. 374, 378, 738 P.2d 279 (1987) (emphasis added).**

The *Banner Realty* case was cited extensively in *Sprint Spectrum* dealing with the very statute that is at issue in this case. It is clear from this record that Beck achieved compliance in respect to the substance essential to the reasonable objective of the statute. The Petition was served on the agency as required under RCW 34.05.542(2), ensuring the timely transmittal of the administrative record as well as prompt judicial review. The fact that the Petition was served on ESD a few days after the 30-day period expired is trivial and inconsequential to the objectives of the statute.

Elevating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice.

***Okanogan Wilderness League, Inc. v. Town of Twist*, 133 Wn.2d 769, 791, 947 P.2d 732 (1997) (Durham, C.J., Concurring).**

In this case, the superior court held that a trivial procedural error in service deprived the court of subject matter

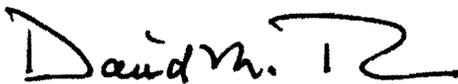
jurisdiction over the Petition for Review of Beck seeking unemployment benefits to which she may be entitled under Washington law. The Order of the superior court should be reversed and Beck should be given her day in court on the Petition for Review.

VI. CONCLUSION

The superior court order dismissing the petition of Beck should be reversed as the record clearly establishes that Beck substantially complied with the APA filing and service requirements and actually complied in respect to the substance essential to every reasonable objective of the statute. Beck is entitled to her day in court on the Petition for Review and the trivial procedural error should not interfere with the subject matter jurisdiction of the superior court to hear the Petition.

DATED this 7th day of October, 2011.

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