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No. 93759-1

WASHINGTON SUPREME COURT

CYNTHIA STEWART,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT.,

Defendants/Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The Employment Security Department (“ESD”) denied Appellant Cynthia Stewart unemployment benefits after she was fired for allegedly being impaired at work by a migraine medication she received pursuant to a written disability accommodation. Ms. Stewart timely filed a petition for judicial review of that decision four days in advance of the deadline, served the Attorney General’s office by legal messenger, and mailed a copy of the petition for service on ESD the same day. But the copy mailed to ESD took five days to go from Seattle to Olympia, and it arrived at the agency the morning after the filing deadline.

Nine months later, long after it had appeared in the case and transmitted the agency record for review, ESD filed a motion to dismiss, arguing that Ms. Stewart had failed to timely serve its copy of the petition for review. ESD relied on a regulation it had promulgated stating that service on the Department “shall be deemed to have been made when a copy of the petition for judicial review has been received” by the agency, and it argued to the trial court that “received” meant physical receipt. ESD did not make any argument that it was prejudiced by the supposed late service, but nevertheless argued that untimely service was a jurisdictional defect and required dismissal of Ms. Stewart’s case. Although the trial court expressed reluctance to deny Ms. Stewart a hearing on the merits based on such a technical defect, it ultimately agreed with ESD’s arguments and granted the motion to dismiss.

This Court should reverse the trial court’s dismissal for several reasons. First, the trial court erred in concluding that Ms. Stewart’s service upon ESD was late. The Employment Security Act states plainly that a petition for review sent through the mail is deemed “received” by the agency on the date shown by the postmark. ESD’s regulation stating that service occurs when the petition is “received” by the agency must be read consistently with that authorizing statute, and the trial court erred by accepting

the agency's contrary argument that "received" pursuant to the regulation meant physical receipt, not date of mailing. Second, if the regulation did mean physical receipt, it would be inconsistent with both its authorizing statute and the Administrative Procedures Act, and the trial court should have invalidated the rule. And third, even if Ms. Stewart had served the agency a day late, the trial court erred by concluding that timely service was a jurisdictional requirement in light of this Court's major shifts in precedent regarding the meaning of subject-matter jurisdiction.

II. ASSIGNMENTS OF ERROR

1. The Employment Security Act states that a petition for review sent through the mail "shall be deemed . . . received by the addressee on the date shown by the United States postal service cancellation mark." The Administrative Procedures Act states that service by mail is complete on the date a Petition for Review is placed in the U.S. Mail as evidenced by the postmark. The Trial Court erred here by ruling that service is only complete upon actual physical receipt at the Employment Security Agency and thus that Ms. Stewart served the agency a day late.

2. The Employment Security Department promulgated a rule dictating that service on the Department "shall be deemed to have been made when a copy of the petition for judicial review has been received" by the agency. The Trial Court erred in defining "received" as actual physical receipt and dismissing the Petition for Review because it was physically received one day after the appeal period had lapsed, and in failing to interpret the rule consistent with its authorizing statute, or in the alternative, in failing to invalidate the rule.

3. Subject matter jurisdiction relates to the Court's authority to hear a particular class of case. A timeline for service is a "procedural rule" designed to ensure that Respondents are not prejudiced from untimely notice, and upon which jurisdiction does not depend. The Trial Court erred in dismissing the Petition for Review for lack of

jurisdiction, or failure to “invoke” jurisdiction, because the Employment Security Department physically received its copy of the petition one day after the timeline for service elapsed.

III. STATEMENT OF THE CASE

Snohomish County Public Utility District No. 1 had employed Claimant Cynthia Stewart for 23 years when it terminated her employment in April 2015. Ms. Stewart suffered from frequent migraine headaches throughout her employment. Clerk’s Papers (CP) 4-6. Ms. Stewart’s manager fired her after he claimed she had come to work impaired by a prescription medication, which had been administered by a physician to treat Ms. Stewart’s migraine earlier that day. CP 5. The manager did this even though Ms. Stewart had a written disability accommodation, with which she complied, allowing her intermittent leave to receive the medications and to return to work four hours after the treatment. CP 10. Ms. Stewart adamantly denies being impaired at work and argues that her firing violated the Washington Law Against Discrimination, the Washington Family Leave Act, and their federal analogues. CP 5.

ESD initially granted unemployment benefits to Ms. Stewart, but after a hearing on August 14, 2015, an administrative law judge set that decision aside. CP 10. The ESD Commissioner affirmed the denial of benefits on October 9, 2015. CP 11. ESD mailed a copy of the Commissioner’s decision to Ms. Stewart that same day. CP 15. The process for judicial review of that decision is governed by Washington’s Administrative Procedure Act (APA). Under RCW 34.05.010(19), which defines “Service” for purposes of the APA, ESD served Ms. Stewart when it put the Commissioner’s decision in the mail on October 9, starting the 30-day clock for Ms. Stewart to petition the superior court for review under RCW 34.05.542.

Ms. Stewart filed a petition for judicial review of the Commissioner’s decision on November 5, 2015, well within the 30-day limit. CP 4. That same day, she served a

copy of her petition on the Office of the Attorney General by legal messenger, and she mailed a copy to the Commissioner's office in order to serve ESD via Certified Mail. CP 13. The copy mailed on November 5 reached the Commissioner's office at 8:41 a.m. on November 10, less than nine hours after the 30-day deadline for filing and serving the petition for review. CP 34.

The Attorney General's office appeared in the case on behalf of ESD on November 16, 2015, but it did not at that time object to the timeliness of service on the Department. CP 21. ESD then filed the administrative record with the superior court on December 8, 2015, but it still did not object to the timeliness of service. CP 23. Ms. Stewart filed her opening brief on July 26, 2016.

Then, on August 15, 2016—the same day it filed its substantive brief responding to Ms. Stewart's petition—ESD filed a motion to dismiss Ms. Stewart's case, arguing that she had failed to timely serve the agency with her petition the previous November. CP 24. ESD argued that although service *by* the agency is complete upon mailing under RCW 34.05.010(19), service *on* the agency is complete only upon physical receipt under WAC 192-04-210, and thus ESD's copy of Ms. Stewart's petition was served one day too late. CP 26-29. ESD did not claim that it was prejudiced in any way by late service, but it argued that the APA's 30-day timeline for service was a requirement to invoke the superior court's subject matter jurisdiction, and that the court thus had no choice but to dismiss the case. *Id.* It also did not explain why it had waited a full nine months to raise the issue of late service.

At the hearing on the motion to dismiss, the Superior Court noted that “the State is making an argument that receipt one day late through the mail precludes Ms. Stewart from essentially having any case or having her day in court,” and inquired, “Could the state simply overlook that and waive that?” VRP 11:8-9. ESD responded that because the service requirements of the APA are jurisdictional, they could not be waived: “A

petition is either on time or it is not, and if it is not, then the petitioner has failed to invoke the appellate jurisdiction of the Court.” VRP 11:16-18. After noting again its reluctance to “dismiss this case for failure to timely provide a copy,” when “it was provided a day late because it was mailed,” VRP 19:14-20:9. the court granted the motion to dismiss, concluding that “I believe any other ruling would be contrary to the case law in this area.” VRP 21:15-18.

IV. STANDARD OF REVIEW

The requirements for timely service under the Employment Security Act and the Administrative Procedure Act are questions of statutory interpretation, which the appellate courts review de novo. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Whether an agency’s rule is inconsistent with the statute it implements is also a question of statutory interpretation. *See id.* at 716-17. Questions of subject matter jurisdiction are also issues of law that are reviewed de novo. *Buecking v. Buecking*, 179 Wn.2d 438, 443, 316 P.3d 999 (2013).

V. ARGUMENT

In passing the Employment Security Act, the Washington Legislature expressly mandated that “this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.” RCW 50.01.010; *see also W. Ports Transp., Inc. v. Employment Sec. Dep’t of State of Wash.*, 110 Wn. App. 440, 450, 41 P.3d 510, 516 (2002). In passing the Administrative Procedures Act, the Legislature intended “to provide greater public and legislative access to administrative decision making,” going on to say that “to the greatest extent possible and *unless this chapter clearly requires otherwise*, current agency practices and court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, *shall remain in effect.*” RCW 34.05.001 (emphasis added). It is through these lenses that the Superior Court’s decision must be viewed in this case.

1. **The Plain Language of Both the Employment Security Act and the Administrative Procedures Act State that Service is Complete Upon Mailing as Shown by the Cancellation Post Mark.**

“When interpreting a statute, we first look to its plain language.” *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn. 2d 444, 451, 210 P.3d 297, 300 (2009). “Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.” *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). “Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wash.2d 392, 396, 103 P.3d 1226 (2005).

The Employment Security Act provides that:

The appeal or petition from a determination, redetermination, order and notice of assessment, appeals decision, or commissioner's decision which is (1) transmitted through the United States mail, shall be deemed filed and received by the addressee on the date shown by the United States postal service cancellation mark stamped by the United States postal service employees upon the envelope or other appropriate wrapper containing it . . .

RCW 50.32.025 (emphasis added).

Applied to this case, Ms. Stewart’s petition from the ESD Commissioner’s decision must be “deemed filed and received” by the agency on the postmark date: November 5, 2015, well within the timeline for service. RCW 50.32.025 has never been repealed, and its language is unambiguous. The Court’s analysis can end here.

The Department does not suggest that this language is not clear, but instead it argued below that this provision should simply be ignored because the Legislature amended the ESA in 1973, at which time the judicial review procedures outlined elsewhere in the statute were replaced with RCW 50.32.120, stating that “Judicial review of a decision of the commissioner involving the review of an appeals tribunal decision

may be had only in accordance with the procedural requirements of [the Administrative Procedure Act] RCW 34.05.570.” According to the Department, this shift to using the APA’s procedures implicitly nullified the application of RCW 50.32.025 to “petition[s] from a . . . commissioner’s decision,” regardless of the plain language of the statute. Yet the 1973 Amendment did not repeal RCW 50.32.025, or remove the relevant language, and if the Legislature had intended to repeal that aspect of the statute, it could have clarified such intent in any of the subsequent amendments to the act (1977, 2000, 2003, etc.). But the Legislature has never done so. This Court must give purpose to this statutory provision in accordance with its plain language. *See State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (“We may not delete language from an unambiguous statute. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous” (internal quotation marks omitted)).

But even if the Court were to accept the Department’s argument, the Administrative Procedure Act also focuses on the common-sense approach of having service of papers be “complete” upon deposit in the United States mail.

“Service,” except as otherwise provided in this chapter, **means posting in the United States mail**, properly addressed, postage prepaid, or personal or electronic service. **Service by mail is complete upon deposit in the United States mail.** Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

RCW 34.05.010(19) (emphasis added). This language is also clear, and needs no interpretation. Ms. Stewart’s petition should be deemed served on November 5, 2015, when she deposited it in the U.S. Mail.

The Department will argue that this definition of service does not apply because the APA (“this chapter”) “otherwise provided” that service on the agency be by “delivery” in the following section:

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. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

RCW 34.05.542(4).

The APA does not define “delivery.” But the Employment Security Department did:

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 Avenue S.E., Olympia, WA or **received by mail** at the Commissioner's Review Office, Post Office Box 9555, Olympia, WA 98507-9555.

WAC 192-04-210 (emphasis added). But that simply begs the question of what “received by” means. As discussed above, under the plain language of the ESA, the petition is “deemed . . . received by the addressee on the date shown by the United States postal service cancellation mark.” RCW 50.32.025.

Nowhere in either the ESA or the APA is the word “received by” defined as actual physical receipt, as argued by the Department in this litigation, and there is no reason for the Court to defer to the interpretation the agency advances. This Court “has the ultimate authority to interpret a statute, and deference is accorded an agency’s interpretation only if (1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise.” *Bostain*, 159 Wn.2d at 716. Here, there is nothing ambiguous about the Employment Security Act’s definition of when a petition sent by mail is received by the agency. “Accordingly, no deference is due the agency’s interpretation.” *Id.* “Moreover, deference to an agency’s interpretation is never appropriate when the agency’s interpretation conflicts with a statutory mandate.” *Id.* In this case, the agency’s interpretation is in stark conflict with the mandate and liberal construction of the Employment Security Act to “reduc[e] involuntary unemployment

and the suffering caused thereby to the minimum” by promoting procedural default over merits-based determinations of entitlement to unemployment compensation benefits.

Instead, the liberal interpretation of the ESA, and the interpretation that preserves the pre-APA practices of the Employment Security Department as contemplated by the Legislature, is that service on an agency is deemed complete up on mailing. Under that interpretation, there is no dispute that Ms. Stewart’s petition for review was timely served on the Department when she placed it in the mail on November 5, 2015.

2. If ESD’s Interpretation of its WAC is Accepted, the WAC is Invalid.

If this Court were to accept ESD’s interpretation of WAC 192-04-210 that “received” by the Commissioner’s office means actual physical receipt, it would have to invalidate that regulation as inconsistent with the statute it implements, the Employment Security Act. ESD promulgated this regulation under its authority to “adopt . . . rules and regulations” that are “not inconsistent with the provisions of” the Employment Security Act. RCW 50.12.010(1). In general, “an administrative rule is invalid and unenforceable if it contravenes the statute which it implements.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 713, 153 P.3d 846 (2007). “Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment.” *Wash. Pub. Ports Ass’n v. State, Dep’t of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). An administrative rule is invalid not only if it conflicts with the plain language of the statute, but also if it “is in conflict with the intent and purpose.” *Id.*

The Employment Security Act states plainly that “[t]he appeal or petition from a . . . commissioner’s decision which is (1) transmitted through the United States mail, shall be deemed filed and received by the addressee on the date shown by the United States postal service cancellation mark” RCW 50.32.025. This is squarely contradicted by ESD’s interpretation of WAC 192-04-210, under which service is not complete until the mailed petition actually arrives at the Commissioner’s Office. As

discussed above, ESD's interpretation is also inconsistent with the intent and purpose of the Employment Security Act, which the legislature has directed "shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. "The mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage of the unemployment compensation laws." *Shoreline Cmt. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992)

As noted previously, Ms. Stewart anticipates that ESD will argue that its regulation is based on the language of RCW 34.05.542, from the APA, which states:

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

...

(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. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

RCW 34.05.542(4). According to ESD, it is using WAC 192-04-210 to define "delivery" under this statute as physical receipt at the office of the Commissioner, and this definition is consistent with the APA.

But this argument, like the WAC itself, conflicts with the language and purpose of both the APA and the Employment Security Act. First, as discussed earlier, the APA does not define "delivery." But it does define "Service," stating plainly: "Service by mail is complete upon deposit in the United States mail." RCW 34.05.010(19).

Second, this Court has interpreted that definition to apply to service of a petition for judicial review upon the relevant agency, which is precisely the circumstance at issue in this case. In *Diehl v. Western Washington Growth Management Hearings Board*, the Supreme Court considered whether a petitioner had complied with the service requirements of the APA when the Certificate of Service attached to his petition said

only: “I certify that on April 30, 2000, I mailed by First Class Mail, postage prepaid, or personally delivered a copy of this Petition For Judicial Review to all parties or their attorneys.” 153 Wn.2d 207, 210, 103 P.3d 193 (2004). In the course of deciding that Diehl was not required to file a Certificate of Service in compliance with Civil Rule 4, the Supreme Court analyzed the requirements for service under the APA.

After reciting the language of RCW 34.05.542, including that “[s]ervice of the petition on the agency shall be by delivery . . . to the office of the director,” and the definition of service in RCW 34.05.010(19), the Court concluded that “[t]he statutes read together clearly allow service either by mail or personal service,” and “a postmark is acceptable under the statute as evidence of completion of service.” *Diehl*, 153 Wn.2d at 214. Later, in summarizing its holding, the Court reiterated:

The APA service requirements are met when parties are served in person or by mail under RCW 34.05.010(19), within 30 days of the agency decision under RCW 34.05.542(2),(4). Diehl listed the agency and parties to the action on page one of his petition for judicial review and certified that he either mailed or personally delivered a copy of the petition to all parties and their attorneys. Notwithstanding a typographical error in Diehl’s certificate of service (April 30, 2000 rather than April 30, 2001), *the date of filing and service in the certificate complies with the 30 day rule* in RCW 34.05.542.

Id. at 219 (emphasis added). “The date of filing and service in the certificate” was the date that Diehl “either mailed or personally delivered a copy of the petition to all parties”—the Supreme Court’s holding did not depend upon which parties were served by mail versus in person, or look to the date upon which any party received the petition in the mail, or distinguish between service by mail upon the agency as opposed to the other listed parties. In reaching its holding, the Court also observed that service under the APA is supposed to be less rigorous than the civil rules, *id.*, and that the legislature intended the APA to have “service and filing rules that would allow pro se litigants to seek judicial review without the need to hire an attorney or process server,” *id.* at 215. Allowing service by mail is an essential part of that intent to provide access to pro se litigants, and

deeming service complete on the date of mailing is the only practicable way for litigants to know with certainty that a petition sent through the mail will be served on time.

Finally, even if ESD could interpret “delivery” under RCW 34.05.542(4) to mean physical receipt at the office of the agency, rather than the date of the postmark, that section of the APA is qualified by the language: “Subject to other requirements of this chapter *or of another statute.*” RCW 34.05.542 (emphasis added). The Employment Security Act is “another statute” that, as discussed above, plainly states that service by mail of a petition for review of a commissioner’s decision is complete upon deposit in the mail.

In summary, what ESD does is this: it takes advantage of the definition of service in RCW 34.05.010(19) to make service *by* ESD of a commissioner’s decision complete upon mailing, regardless of when the person seeking unemployment benefits receives it. Then it purports to use a regulation to define service by mail of a petition for review *upon* ESD as complete only upon physical receipt, regardless of when the person seeking unemployment benefits mailed it. The obvious purpose of these inconsistent definitions of service by mail is to give the person seeking benefits the shortest possible window of time in which to seek judicial review of an adverse decision by the commissioner. This is contrary to both the liberal construction that must be applied to the Employment Security Act and the intent of the APA to make the process of seeking judicial review of agency action simple and accessible to pro se litigants.

3. Even if Ms. Stewart’s petition was served on the agency one day late, timely service under the APA should not be a jurisdictional requirement.

Finally, even if this Court were to adopt ESD’s interpretation and conclude that service was not complete until the agency physically received its copy of Ms. Stewart’s petition for review, that should not require automatic dismissal of Ms. Stewart’s petition. It arrived only one day late, and ESD does not so much as attempt to argue that it was

prejudiced by late service. ESD did not even raise the issue of service until 9 months into the case, at the same time it filed its substantive brief on the merits. But the trial court felt bound by previous decisions of this Court stating that timely service of a petition for review under the APA is a jurisdictional requirement, and it thus dismissed Ms. Stewart's case despite acknowledging the lack of prejudice to the Department and the unfairness to Ms. Stewart.

RCW 34.05.542(2) provides that 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." This Court's existing precedent holds that the superior court does not obtain subject matter jurisdiction over a petition for judicial review under the APA unless the petition is timely served. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (citing *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995) and *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991)).

But in the decades since these cases were decided, this Court has recognized that Washington courts "have been inconsistent in their understanding and application of jurisdiction," and it has accordingly "narrowed the types of errors that implicate a court's subject matter jurisdiction." *Buecking v. Buecking*, 179 Wn.2d 438, 447, 448, 316 P.3d 999 (2013). In a parallel series of rulings, the United States Supreme Court has similarly recognized that its prior cases "have more than occasionally misused the term 'jurisdictional,'" *Scarborough v. Principi*, 541 U.S. 401, 413 (2004) (internal quotation marks and alterations omitted), and in order "to bring some discipline to the use of this term," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), it has discarded these earlier cases as "unrefined . . . drive-by jurisdictional rulings that should be accorded no

precedential effect,” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted). If it is necessary to reach the issue of whether late service is a jurisdictional error, the Court should take this opportunity to (1) overrule *Skagit Surveyors* and the cases upon which it relies to the extent they are inconsistent with this more recent precedent; and (2) clarify, as the U.S. Supreme Court has done, that earlier “jurisdictional” rulings by this Court that conflict with the new narrower understanding of jurisdiction should no longer be afforded precedential effect.

Under its more recent cases, this Court has clarified that “if a court can hear a particular class of case, then it has subject matter jurisdiction.” *Buecking*, 179 Wn.2d at 448; *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003) (“Subject matter jurisdiction refers to the authority of a court to adjudicate a particular type of controversy, not a particular case.”). “If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *ZDI Gaming, Inc. v. Wash. State Gambling Comm’n*, 173 Wn.2d 608, 618, 268 P.3d 929 (2012) (internal quotation marks and citation omitted). “Simply put, the existence of subject matter jurisdiction is a matter of law and does not depend upon procedural rules.” *Id.* at 617.

These holdings are inconsistent with and would seem to implicitly overrule this Court’s earlier decisions that the APA’s deadline for serving a petition for review is jurisdictional. A timeline for service is a quintessential “procedural rule” upon which jurisdiction does not depend. *See id.*; *cf. Henderson v. United States*, 517 U.S. 654, 671 (1996) (“Service of process . . . is properly regarded as a matter discrete from a court’s jurisdiction to adjudicate a controversy of a particular kind, or against a particular individual or entity.”); *see also Miles v. Jepsen*, 184 Wn.2d 376, 387, 358 P.3d 403 (2015) (Stephens, J., dissenting) (personal service requirement is a classic non-jurisdictional claim processing rule). Whether or not a petition for review in any

particular case is a day late has nothing to do with whether review of an agency order is the “type of controversy” the superior court has authority to adjudicate. *See ZDI Gaming*, 173 Wn.2d at 618.

The Supreme Court’s earlier decisions in *Skagit Surveyors* and *Union Bay* relied on the idea that because “[a]n appeal from an administrative tribunal invokes the appellate, rather than the general, jurisdiction of the superior court,” the superior court “is of limited statutory jurisdiction, and all procedural requirements must be met before jurisdiction is properly invoked.” *Skagit Surveyors*, 135 Wn.2d at 555 (citing *Union Bay*, 127 Wn.2d at 617). But this principle was rejected by the Court’s more recent decision in *Dougherty*, which held that the statutory venue requirements for filing worker’s compensation appeals were not jurisdictional. 150 Wn.2d at 313.

Like the APA, the worker’s compensation statute provides that “the Department possesses original jurisdiction . . . and the superior courts possess appellate jurisdiction.” *Id.* at 314. But after acknowledging in *Dougherty* that “[o]ur courts have often repeated that the superior court’s appellate jurisdiction . . . is invoked only if there has been compliance with all of the statute’s procedural requirements,” the Washington Supreme Court concluded that this analysis incorrectly “intertwin[ed] procedural requirements with jurisdictional principles,” and “[a]s a result, unfortunately, procedural elements have sometimes been transformed into jurisdictional requirements.” *Id.* at 315. After reiterating that jurisdiction refers to the “type of controversy” and “does not depend on procedural rules,” *id.* at 315–16, and noting that interpreting the requirements as jurisdictional was not “mandated by the clear language of the statute,” *id.* at 317, the Court held that the venue requirements were not jurisdictional.

This analysis applies with equal force to the deadlines for service within the APA. *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 964, 235 P.3d 849 (2010) (Becker, J., concurring) (observing that in light of *Dougherty*, the authorities supporting

the position that the APA's service procedures are jurisdictional are "outdated and harmful"). "The Administrative Procedure Act itself does not state or imply that its procedural requirements are limitations on the subject matter jurisdiction of a superior court." *Id.* at 966. "Without question, determining whether or not the Department of Revenue assessed taxes correctly is a type of controversy that a superior court acting in its appellate capacity is empowered to resolve." *Id.* at 965. "Therefore, any error or defect in . . . compliance with the statutory service requirements must go to something other than the superior court's subject matter jurisdiction." *Id.*

If the Court concludes that Ms. Stewart did in fact serve her petition late, this case presents an ideal opportunity to resolve the inconsistency in these precedents and align the interpretation of the APA's timeline for service with the reasoning in more recent cases such as *Dougherty*. This Court's effort to narrow the scope of "jurisdictional" requirements is grounded in the observation that "[e]levating 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." *Id.* at 319. For that reason, "[i]t is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties." *Dougherty*, 150 Wn.2d at 319–20.

In this case, there is no contention that ESD suffered *any* prejudice from receiving its copy of Ms. Stewart's petition for review in the mail the morning after the thirty-day deadline. ESD promptly appeared in the case and filed the administrative record (the only actions which might possibly be impacted by untimely service), and it did not assert its defense of untimely service until nine months later, after Petitioner had expended significant resources drafting the Opening Brief, at the same time it filed its responsive brief on the merits. The Superior Court noted on the record its reluctance to deny Ms. Stewart a hearing on the merits of her claims based on such a trivial procedural

defect, a decision that the Court lamented would deny Ms. Stewart her day in court, but it concluded that it was left without the discretion to consider other equitable remedies given the Supreme Court's existing precedents holding that the service deadline is jurisdictional.

4. The Attorney General's Interpretation of these Statutes and Administrative Rule Raises Serious Due Process Concerns

"When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571, 575 (2006) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The opportunity to be heard must be " 'at a meaningful time and in a meaningful manner,' " appropriate to the case. *Id.*

Due process is flexible and calls for such procedural protections as the particular situation demands. *Mathews*, 424 U.S. at 334, 96 S.Ct. 893. To determine the process due, courts balance (1) the private interests involved, (2) the likelihood of erroneous deprivation, and (3) the government interest involved. *City of Bremerton v. Hawkins*, 155 Wash.2d 107, 110, 117 P.3d 1132 (2005) (citing *Mathews*, 424 U.S. 319, 96 S.Ct. 893). "A process satisfies minimum constitutional requisites inherently due when it provides adequate safeguards to the citizen confronted by an action instigated against him by the state." *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wash.2d 516, 524, 29 P.3d 689 (2001).

Prostov v. State, Dep't of Licensing, 186 Wn. App. 795, 810–11, 349 P.3d 874, 882 (2015).

Here, it is well-established that unemployment compensation benefits are a significant property interest, and that a state must afford due process before finally depriving a person of that interest. Under the specific circumstances involved in the present case, that same private interest is still present. However, the Department's reading of the statutes and WAC would significantly increase the risk of erroneous deprivation through technical procedural default by shortening what is statutorily a 30-day period that a person has to consider and evaluate the Commissioner's order, decide

whether to pursue an appeal, research how to do so both procedurally and substantively, and to draft and file that response. The Department wants to benefit from the served-when-mailed date at the start of the period, *lessening* the meaningfulness of the time and manner of the citizen's petition.

But the Department does not stop there, seeking to also shorten the time to respond on the back end, too. Rather than abide by the APA provisions that require service of the petition and that service is deemed complete upon mailing, the Department seeks to define the time of service as the time the petition is *actually received* by the agency—a notion that is only found in an unemployment compensation regulation, and not in either the APA or Unemployment Compensation statutes. In the Department's view, when a petitioner files and serves by mail, she must divine how long the United States Postal Service will take to deliver the petition, and back up at least that number of days to ensure timely service.

This case is a good example of the would-be results of the Department's tortured reading of these statutes. The Commissioner's decision took six (6) days travel from Olympia to Seattle and to be received by the Petitioner. The Petition for Review apparently took five (5) days to travel from Seattle to Olympia where it was "received" by the Agency. In this case, the period for notice and opportunity to be heard was reduced from 30 to 19 days, if the Department's view is accepted.

This would inevitably lead to even more absurd results. What would happen if the United States Postal Service took 31 days to deliver the Commissioner's determination? Or what if the Petition took 15 days to arrive at the Agency, but the Petitioner had only sent their Petition 10 days in advance of the due date? Even if one could say that the 19 effective days to respond in this case would not deprive the Petitioner of due process, how long would be too long? Where would the courts draw the line? Five effective days to respond? Ten?

The far more clear reading of these statutes—and the reading that comports with fundamental notions of fair play and due process—is exactly the opposite of what that Attorney General is advocating. A petitioner is required to “serve” the agency. RCW 34.05.542(2). “Service” is defined by statute as “complete” upon deposit in the United States mail. RCW 34.05.010(19). That is all that is required. A citizen should have fair notice of when “service” is complete, not have to guess when it might arrive at the agency in the mail.

Simply put, the Department’s reading of these statutes results in technical procedural default rather than the general judicial preference for determination on the merits, greatly increasing the risk of erroneous deprivation of legitimate property interests. On the other hand, the plain meaning of the statutory language as set forth here provides clarity of notice and timing of the opportunity to respond, which respects due process and protects legitimate property interests from improper government seizure and deprivation.

Under final *Mathews* factor—the nature of the government interests at stake—it is difficult to imagine what (legitimate) interest the State has in making the notice period shorter, less clear, and confusing. Protecting the state fisc through procedural technicality rather than legitimate debate on the merits cannot justify what the Department asserts here.

VI. CONCLUSION

Ms. Stewart filed her petition for judicial review and mailed a copy to ESD well within the 30-day timeline set forth by the APA. ESD suffered no prejudice from receiving the copy through the mail the morning after the 30 days had elapsed. Ms. Stewart deserves to have a hearing on the merits of her claim. This Court should hold either that (1) the ESD’s interpretation of WAC 192-04-210 is incorrect in light of the plain language of the Employment Security Act defining a petition mailed to the agency

as “received by” the agency on the date it is mailed; (2) WAC 192-04-210 as interpreted by ESD is invalid because it is inconsistent with the Employment Security Act and the APA, or (3) that late service of a petition for review under the APA is not a jurisdictional bar and the superior court had discretion to consider whether ESD suffered any prejudice before dismissing Ms. Stewart’s case.

DATED this 2nd day of February, 2017.

MacDONALD HOAGUE & BAYLESS

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CERTIFICATE OF SERVICE

I certify that on the date noted below I caused to be filed electronically this forgoing document entitled APPELLANTS' OPENING BRIEF with the Clerk of the Court, and I also served a copy on all parties or their counsel via electronic mail as follows:

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DATED this 2nd day of February, 2017, at Seattle, Washington.

/s/ Esmeralda Valenzuela
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Dear Court Clerk,

Attached please find Appellant Cynthia Stewart's Opening Brief and Certificate of Service. All counsel of record are included in this email.

I am submitting this document for filing on behalf of Mr. Joe Shaeffer (WSBA # 33273), and Ms. Tiffany Cartwright (WSBA # 43564), counsel of record for Appellant. Mr. Shaeffer may be reached via e-mail at Joe@mhb.com and Ms. Cartwright may be reached via e-mail at TiffanyC@mhb.com, or by telephone at 206/622-1604.

Thank you,

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