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SUPREME COURT OF THE STATE OF WASHINGTON

CYNTHIA STEWART,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Defendants/Respondents.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. ARGUMENT IN REPLY

Respondent the Employment Security Department for the State of Washington goes to great lengths in its brief to defend a strained interpretation of its own statute and regulations, all in order to prevent Appellant Cynthia Stewart from simply having a day in court where a judge can review the denial of her unemployment benefits on the merits. None of ESD's arguments is persuasive.

A. ESD's interpretation of RCW 50.32.025 and WAC 192-04-210 contradicts the plain language and intent of the Employment Security Act and is not supported by any authority.

Appellant Cynthia Stewart's interpretation of the relevant statutes and regulations in this case is simple and in accordance with their plain language. The APA says at RCW 34.05.542(4) that service upon the agency is complete upon "delivery." The APA does not define delivery. But an ESD regulation, WAC 192-04-210, defines delivery as when the petition is "received by" the agency. And the Employment Security Act itself states that a "petition from a . . . commissioner's decision which is transmitted through the United States mail, shall be deemed . . . *received by* the addressee on the date shown by the United States postal service cancellation mark . . . ." RCW 50.32.025(1) (emphasis added). Therefore, Ms. Stewart's petition for review of the commissioner's decision was delivered to and received by ESD on the postmark date. This interpretation does not require reading a dictionary, consulting the legislative history, or divining whether RCW 50.32.025 applies only to

certain types of petitions for review of a commissioner's decision but not others.

Ms. Stewart's interpretation is also consistent with the legislative intent of the Employment Security Act, which requires that the act "be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. This mandate "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. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992); *see also Wash. Trucking Assocs. v. Emp't Sec. Dep't*, ___ Wn.2d ___, No. 93079-1, Slip Op. at 3 (Apr. 27, 2017) ("Consistent with the statutory mandate for liberal construction, RCW 50.01.010, courts construe exemptions to the ESA narrowly.").

ESD's interpretation of the service requirements, in contrast, requires pages of unsupported explanation of the meaning of RCW 50.32.025 and an interpretation of the legislative history that contradicts this Court's case law. ESD argues in its response brief that the language "petition from a . . . commissioner's decision" in RCW 50.32.025 applies only to "the filing of appeals or petitions with the Department or the Office of Administrative Hearings" and not to "the filing or service of petitions for judicial review." Resp. Br. at 8–9, 9 n. 3, 10–13. ESD presents no authority for this distinction; it obviously does not appear in the language of the statute, and ESD cites no case law construing the statute in that manner. Instead, ESD takes four pages to explain that, in

certain cases, an unemployment benefits claimant or an employer *may* appeal or petition from a commissioner's decision to the Office of Administrative Hearings. *See id.* at 10–13. Therefore, ESD argues, because there exist certain types of "petition[s] from a . . . commissioner's decision" other than petitions for judicial review, those must be the *only* types of petitions that are covered by the statute. But when the plain language of the statute applies broadly to all "petitions," this is not a logical inference, nor one that an unemployment benefits claimant trying to figure out how to serve their petition for judicial review could reasonably be expected to make.

ESD also argues that RCW 50.32.025 does not apply to the service requirements for petitions for judicial review because it does not use the word "service," only the words "received by." Resp. Br. at 11. But "received by" are the key words used in WAC 192-04-210, ESD's own regulation that defines when service copies of petitions for judicial review are "delivered" to the agency. ESD's decision to use the same words in its regulation that appear in its authorizing statute should be presumed to be intentional and refer to the same thing. *See Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 112–13, 75 P.3d 497 (2003) ("use of the same word or words in different parts of the same statute gives rise to a presumption they are intended to have the same meaning" (citing *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300–01, 944 P.2d 1014 (1997))).

B. The legislative history of the Employment Security Act and the APA does not support ESD's argument.

ESD then argues that even if RCW 50.32.025 "could be read as applying to the service of petitions for judicial review . . . the Court should find the APA's service requirements control because it is the later-enacted statute." Resp. Br. at 13. This argument fails for at least three reasons.

First, this argument completely mischaracterizes this Court's case law on resolving conflicts between general and specific statutes using legislative history. ESD asserts that "Washington courts have held that the APA overrides conflicting statutes that were enacted prior to the APA, even if the older statute is more specific." Resp. Br. at 14. But that is not true. The cases cited by ESD do not say that. What those cases say is that "provisions of a specific statute . . . will prevail if there is a conflict with provisions of a general statute, such as the APA, and the specific statute is passed subsequent to the APA." *Muije v. Dep't of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982); *see also In re Dependency of KB*, 150 Wn. App. 912, 923, 210 P.3d 330 (2009) ("[T]he provisions of a specific statute prevail over those of a more general statute when the specific statute is passed subsequent to the general statute."). They do *not* say that the more general statute prevails if it was passed later in time.

More importantly, as recently as 2014, this Court has said the opposite: "Under the principle of statutory construction, the specific statute prevails over a general statute. In situations where the legislature enacts a general statute after a specific statute, we construe the original

specific statute as an exception to the general statute, unless *expressly* repealed." *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 701, 335 P.3d 416 (2014) (emphasis added) (internal citations and quotation marks omitted). Of course, RCW 50.32.025 has not been expressly repealed or changed to exclude petitions for judicial review. And this Court "disfavor[s] repeal by implication, and will not find repeal by implication 'where earlier and later statutes may logically stand side by side and be held valid.'" *O.S.T.*, 181 Wn.2d at 701–02 (quoting *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 123, 691 P.2d 178 (1984), superseded by statute on other grounds as recognized by *Wash. MLB Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 513, 296 P.3d 821 (2013)).

Second, construing the more specific statute from the Employment Security Act as an exception to the APA's general service provisions is also supported by the text of the APA itself. As noted in Appellant's Opening Brief at page 12 and conceded by Respondents at page 15 of their brief, the section of the APA that contains the requirement that service of the petition on the agency be by "delivery" states at the outset that its provisions are "subject to other requirements of this chapter *or of another statute*." RCW 34.05.542 (emphasis added).[1] Additionally, the section of

[1] ESD argues that this introductory clause does not apply here because RCW 50.32.025 does not contain "requirements" for service in that it is not "a directive to *an appellant* to take a certain action." Resp. Br. at 15 (emphasis added). This is nonsensical. RCW 50.32.025 imposes requirements for service on *the agency*: it requires ESD to deem a petition for review of a commissioner's decision received on the date shown by the postmark.

the APA that contains the statement of legislative intent says 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). There is nothing about the APA that prevents ESD from complying with its preexisting policies for service by mail as contained in RCW 50.32.025.

C. ESD mischaracterizes the *Diehl* decision.

As explained in Appellant's Opening Brief at pages 10–12, this Court has previously held that the APA's service requirements contained in RCW 34.05.010(19) and RCW 34.05.542, when "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 v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 214, 103 P.3d 193 (2004). ESD dismisses this as dicta, arguing that the meaning of "delivery" under RCW 34.05.542(4) was not before the Court. Resp. Br. at 9. But this Court expressly stated that one of the issues it was deciding was: "Did Diehl comply with the service requirements of the APA?" *Diehl*, 153 Wn.2d at 213, 217. And in the first paragraph of its answer to that question, this Court wrote:

> To invoke the superior court's jurisdiction over his petition for review, Diehl was required to file and serve his petition on the agency at its principal office, serve the other parties of record, and serve the office of the attorney general within 30 days after service of the final order. RCW 34.05.542(2), (3), (4). Under RCW 34.05.010(19), Diehl

> could serve his petition by mail or by personal service. *Diehl's service by mail was "deemed complete upon deposit in the United States mail, as evidenced by postmark."* RCW 34.05.542(4).

Id. at 217 (emphasis added). This Court made no distinction between service by mail on the agency and service by mail on the other parties.

It is also significant that this Court noted that its interpretation of the APA service requirements in *Diehl* hinged on reading RCW 34.05.542 and RCW 34.05.010(19) together, *id.* at 214, and that it characterized RCW 34.05.542 as requiring Diehl to "serve his petition on the agency *at its principal office*," whether "by mail or by personal service," *id.* at 217 (emphasis added). This suggests that this Court read the language of RCW 34.05.542(4) regarding "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" as instructing the petitioner *where* to serve the agency, not *how*. This reading gives meaning to the word "delivery" in that part of the statute while harmonizing it with the definition of service contained in RCW 34.05.010(19).

D. ESD ignores this Court's recent precedent on the meaning of "jurisdiction."

ESD's argument regarding whether late service should be considered a jurisdictional error fails to grapple with the implications of this Court's recent precedent on the meaning of "jurisdiction," particularly this Court's decision in *Dougherty v. Dep't of Labor and Industries*, 150 Wn.2d 310, 314–15, 76 P.3d 1183 (2003). ESD dismisses the *Dougherty* case as concerning "questions of venue, which are not at issue here."

Resp. Br. at 19. It then goes on to argue that this Court has been "remarkably consistent" in its precedent that "[w]hen reviewing an administrative decision, the superior court is acting in its limited appellate capacity, and all statutory procedural requirements must be met before the court's appellate jurisdiction is properly invoked." Resp. Br. at 20 (citing *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995)).

But that is not true—this concept of "invoking" the superior court's appellate jurisdiction is exactly what this Court rejected in *Dougherty*, concluding that despite years of precedent, this analysis had incorrectly "intertwine[ed] procedural requirements with jurisdictional principles," and reiterating that jurisdiction refers only to the "type of controversy" and "does not depend on procedural rules." 150 Wn.2d at 315–16. Similarly, although ESD writes that "the Court of Appeals has consistently implemented the Supreme Court's application of this principle," Resp. Br. at 17, that is not true either. In *Sprint Spectrum, LP v. Department of Revenue*, the Court of Appeals consciously chose not to use the word "jurisdictional" in its ruling, and in a lengthy concurrence, Judge Becker wrote that this was because in light of *Dougherty*, the precedent deeming the APA's service requirements jurisdictional was "outdated and harmful." 156 Wn. App. 949, 964, 235 P.3d 849 (2010).

Ultimately, Ms. Stewart does not believe that the Court needs to reach this issue, because the dismissal of her petition for review should be reversed under the plain language of the relevant statutes. But if this

Court concludes that she did serve ESD with its copy of her petition late, this case presents an ideal opportunity to resolve the inconsistency between *Dougherty* and the earlier cases such as *Union Bay* that are cited by ESD.

E. ESD concedes it suffered no prejudice.

Finally, ESD makes no attempt to argue that it was prejudiced by receiving Ms. Stewart's petition in the mail the morning after the deadline. Nor does it deny that the intent of its desired interpretation—under which the commissioner's decision is served when mailed, but claimant's petition for review of that decision is served only when physically received—is to give the unemployed claimant less actual time in which to write, file, and serve their petition, and to require the claimant to either hire a messenger or travel to Olympia in order to be certain that the agency's copy of their petition will arrive on time. This attempt to erect additional and unnecessary barriers to judicial review is completely contrary to the legislative intent of the Employment Security Act, especially when simply following the plain language of its own statute would be cheaper for claimants, more predictable, and easier to understand.

II. CONCLUSION

For the foregoing reasons, the decision of the superior court dismissing Ms. Stewart's petition for judicial review should be reversed and the case remanded for a determination on the merits.

DATED this 4th day of May, 2017.

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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 REPLY 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 4th day of May, 2017, at Seattle, Washington.

s/ Esmeralda Valenzuela
Esmeralda Valenzuela, Legal Assistant

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Dear Court Clerk,

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

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