

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

CLERK'S OFFICE

4/5/2017 3:35 pm

RECEIVED ELECTRONICALLY

NO. 93759-1

SUPREME COURT OF THE STATE OF WASHINGTON

CYNTHIA STEWART,

Appellant,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

ERIC A. SONJU
Assistant Attorney General
WSBA No. 43167
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702
OID No. 91029



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUE.....1

III. STATEMENT OF THE CASE.....2

IV. STANDARD OF REVIEW.....3

V. ARGUMENT3

 A. To Timely Perfect an Appeal of an Agency Order, the
 APA Requires an Appellant to Deliver a Copy of the
 Petition for Judicial Review to the Agency Within 30
 Days After the Agency Mailed Its Order.....4

 1. Service of the petition on the agency is complete
 upon delivery of the petition to the agency4

 2. The word “delivery” is to be given its common
 dictionary meaning7

 3. RCW 50.32.025 does not govern service of a petition
 for judicial review.....10

 B. The Superior Court Properly Dismissed Stewart’s Late-
 Served Appeal Because She Failed to Meet the APA’s
 Procedural Requirements for Obtaining Judicial Review.....16

 C. The APA’s Service Requirements Did Not Violate
 Stewart’s Right to Procedural Due Process Because She
 Received Notice and a Meaningful Opportunity to Be
 Heard.....23

VI. CONCLUSION26

TABLE OF AUTHORITIES

Cases

<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571, (2006).....	23
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).....	20
<i>Cheek v. Emp't Sec. Dep't</i> , 107 Wn. App. 79, 25 P.3d 481 (2001).....	passim
<i>Citizens Alliance for Prop. Rights Legal Fund v. San Juan County</i> , 184 Wn.2d 428, 359 P.3d 753 (2015).....	6, 8
<i>City of Seattle v. Pub. Emp't Relations Comm'n</i> , 116 Wn.2d 923, 809 P.2d 1377 (1991).....	16, 17
<i>Clymer v. Emp't Sec. Dep't</i> , 82 Wn. App. 25, 917 P.2d 1091 (1996).....	4, 14
<i>Conom v. Snohomish Cty.</i> , 155 Wn.2d 154, 118 P.3d 344 (2005).....	18
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	15
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 153 Wn.2d 207, 103 P.3d 193 (2004).....	9, 14
<i>Dougherty v. Dep't of Labor & Indus.</i> , 150 Wn.2d 310, 76 P.3d 1183 (2003).....	19
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	25
<i>Fay v. Nw. Airlines, Inc.</i> , 115 Wn.2d 194, 796 P.2d 412 (1990).....	21

<i>Henderson v. Shinseki</i> , 562 U.S. 428, 179 L. Ed. 2d 159 (2011).....	19
<i>In re Botany Unlimited Design & Supply, LLC</i> , No. 34202-6-III, 2017 WL 962511 (Wash. Ct. App. Mar. 7, 2017)	5, 17, 18
<i>In re Dependency of KB</i> , 150 Wn. App. 912, 210 P.3d 330 (2009).....	14
<i>In re Stranger Creek & Tributaries in Stevens Cty.</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	22
<i>Litowitz v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 93 Wn. App. 66, 966 P.2d 422 (1998).....	17, 18
<i>MacVeigh v. Div. of Unemployment Comp.</i> , 19 Wn.2d 383, 142 P.2d 900 (1943).....	20
<i>Muije v. Dep't of Soc. & Health Servs.</i> , 97 Wn.2d 451, 645 P.2d 1086 (1982).....	14
<i>Nafus v. Dep't of Labor & Indus. of Wash.</i> , 142 Wash. 48, 251 P. 877 (1927)	20
<i>Quadrant Corp. v. Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	7
<i>Ricketts v. Wash. State Bd. of Accountancy</i> , 111 Wn. App. 113, 43 P.3d 548 (2002).....	3
<i>Scarborough v. Principi</i> , 541 U.S. 401, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004).....	19
<i>Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cty.</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	16, 17, 18, 21
<i>Sprint Spectrum, LP v. Dep't of Revenue</i> , 156 Wn. App. 949, 235 P.3d 849 (2010).....	17

<i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997).....	24
<i>Torres v. Oakland Scavenger Co.</i> , 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).....	25
<i>Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.</i> , 127 Wn.2d 614, 902 P.2d 1247 (1995).....	16, 17, 20
<i>Wash. Trucking Ass'ns v. Emp't Sec. Dep't</i> , 192 Wn. App. 621, 369 P.3d 170 (2016), review granted, 186 Wn.2d 1016 (2016).....	12
<i>ZDI Gaming Inc. v. Gambling Comm'n</i> , 173 Wn.2d 608, 268 P.3d 929 (2012).....	18, 21

Statutes

Laws of 1969, Ex. Sess., ch. 200, § 1	13
Laws of 1975, 1st Ex. Sess., ch. 228, § 4.....	11, 13
Laws of 1988, ch. 288, § 509.....	14
RCW 34.05.001	17
RCW 34.05.010(19).....	6
RCW 34.05.030	14
RCW 34.05.510	4, 14
RCW 34.05.542	13, 14, 15
RCW 34.05.542(2).....	1, 4, 5, 23
RCW 34.05.542(4).....	1, 2, 5
RCW 34.05.542(6).....	5
RCW 34.12.040	12

RCW 34.05.542(6).....	5
RCW 34.12.040	12
RCW 50.20.160	12
RCW 50.20.160(1).....	12, 13
RCW 50.29.070	12
RCW 50.29.070(2).....	12, 13
RCW 50.32.010	12
RCW 50.32.020	11
RCW 50.32.025	passim
RCW 50.32.030	11
RCW 50.32.070	11

Other Authorities

<i>Black's Law Dictionary</i> (10th ed. 2014)	7
<i>Webster's Third New Int'l Dictionary Unabridged</i> 2117 (1993).....	15
<i>Webster's Third New Int'l Unabridged</i> 597 (1993)	7

Regulations

WAC 192-04-170.....	11
WAC 192-04-210.....	2, 8, 9

I. INTRODUCTION

Washington precedent is clear: if an appealing party does not strictly comply with the Administrative Procedure Act's deadlines for filing and serving a petition for judicial review of an agency order, the court should dismiss the petition. The APA and Employment Security Department final orders clearly notify an appealing party that she must deliver her petition to the agency within 30 days of when the agency mailed its order. The order Stewart sought to appeal explained this requirement, but Stewart failed to meet it when the Department did not receive her petition until after the 30-day deadline.

The superior court applied the APA's plain language according to this Court's well-established precedent and dismissed Stewart's appeal because it was served late on the agency. Stewart now asks this Court to ignore the APA and its own decisions and reverse the superior court. The Court should decline this extraordinary request and affirm.

II. STATEMENT OF THE ISSUE

The APA requires a party to serve her petition for judicial review of an agency order "by delivery of a copy of the petition to" the agency head at the agency's principal office within 30 days of when the agency mailed its order. RCW 34.05.542(2), (4). Did the superior court properly dismiss Stewart's petition when the Department did not receive the

petition within 30 days of when it mailed its final order denying unemployment benefits to Stewart?

III. STATEMENT OF THE CASE

After the Department's Commissioner issued a final decision denying Stewart's application for unemployment benefits, Stewart decided to seek superior court review of the Commissioner's decision. Clerk's Papers (CP) 36-38, 51-54. The Department's order provided clear instructions on the requirements for filing and serving a petition for judicial review under the APA. CP 53. The order advised Stewart to file her petition with the superior court and serve a copy on the Department's Commissioner, the Office of the Attorney General, and all parties of record within 30 days of the date of mailing shown on the order. *Id.* The order further explained: "To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the thirtieth (30th) day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210." *Id.*

The Department mailed the Commissioner's decision to Stewart on October 9, 2015. CP 51-52. On November 5, 2015, Stewart's attorney filed the petition with the Thurston County Superior Court and engaged a legal messenger to hand deliver a copy to the Office of the Attorney General. CP 13, 36. However, Stewart's attorney mailed the petition to the

Department, only days before the 30-day service deadline. CP 13. The Department did not receive the petition until November 10, 2015—one day late.¹ CP 34, 42-44.

The superior court granted the Department's motion to dismiss Stewart's late-served petition. CP 125-26. Stewart then sought the Supreme Court's direct review.

IV. STANDARD OF REVIEW

Review of an order of dismissal for failure to comply with the APA's service requirements is de novo. *See Ricketts v. Washington State Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002).

V. ARGUMENT

The superior court correctly dismissed Stewart's appeal based on this Court's longstanding determination that a petitioner seeking appellate review of an agency order must meet all statutory requirements for filing and serving a petition, including strictly complying with statutory time limits for service. The APA, not the Employment Security Act, governs the service of petitions for judicial review and requires delivery of a petition to an agency within 30 days of when the agency mailed its order under appeal. Citing this APA provision and the Department's

¹ Page 2 of the Department's Answer to Statement of Grounds contains a scrivener's error. The Department received Stewart's petition on November 10, 2015, not 2016.

complementary rule, the Department's order instructed Stewart that the Department must receive her petition for judicial review within 30 days of when the Department mailed its order. Stewart managed to deliver her petition within 30 days to the superior court and to the Attorney General's Office, but not to the agency whose order she appealed. The Court should affirm the superior court.

A. To Timely Perfect an Appeal of an Agency Order, the APA Requires an Appellant to Deliver a Copy of the Petition for Judicial Review to the Agency Within 30 Days After the Agency Mailed Its Order

The APA "establishes the exclusive means of judicial review of agency action," RCW 34.05.510, and "[f]or unemployment compensation cases, the procedural requirements for superior court review are contained in the [APA]." *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 27-28, 917 P.2d 1091 (1996) (citing RCW 50.32.120 and 34.05.510). The Employment Security Act does not govern service of petitions for judicial review of the Department's orders, as Stewart erroneously argues. At issue in this case are the APA's procedural requirements for serving a petition for judicial review on the agency whose order is under review.

1. Service of the petition on the agency is complete upon delivery of the petition to the agency

RCW 34.05.542(2) directs that "[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.” RCW 34.05.542(4) provides specific and distinct requirements for serving the agency and for serving the other parties of record and the Office of the Attorney General:

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.

(Emphasis added). Thus, while service upon other parties and the Attorney General is accomplished upon deposit in the mail within 30 days after service of the final order, service upon the agency is accomplished only upon *delivery* to the agency’s principal office within 30 days of service of the final order.² RCW 34.05.542(2), (4).

The APA includes a general definition of “service”: “‘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

² The APA provides that service upon the agency’s attorney of record constitutes service upon the agency. RCW 34.05.542(6). But this provision does not apply to appeals of unemployment benefit decisions because the Office of the Attorney General does not participate in the Department’s administrative proceedings below the superior court level and thus is not the Department’s attorney of record at the time of service. *Cheek v. Emp’t Sec. Dep’t*, 107 Wn. App. 79, 84-85, 25 P.3d 481 (2001); *In re Botany Unlimited Design & Supply, LLC*, No. 34202-6-III, 2017 WL 962511, at *3 (Wash. Ct. App. Mar. 7, 2017).

mail.” RCW 34.05.010(19) (emphasis added). Thus “service” is accomplished by posting in the U.S. mail, “except as otherwise provided” elsewhere in the APA. RCW 34.05.542(4) is a statute that “otherwise provide[s]” a specific standard for serving petitions for judicial review upon agencies: it is complete only upon delivery. RCW 34.05.542(4). Stewart failed to accomplish that within 30 days after the Department’s final order was mailed to her.

In RCW 34.05.542(4), the Legislature addressed the service of petitions for judicial review upon three entities: the agency, any other parties of record, and the Office of the Attorney General. The separate and distinct treatment of service on the agency on the one hand and service on other parties and the Attorney General’s Office is clear and must be deemed intentional. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous,” and “[w]hen the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.” *Citizens Alliance for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 440, 359 P.3d 753 (2015).

2. The word “delivery” is to be given its common dictionary meaning

Stewart is correct that the APA does not define “delivery.” See Appellant’s Opening Br. 8. Therefore, the Court should give the word its common dictionary meaning. *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Black’s Law Dictionary defines “delivery” to mean: “The formal act of voluntarily transferring something; esp., the act of bringing goods, letters, etc. to a particular person or place.” *Black’s Law Dictionary* (10th ed. 2014). Similarly, Webster’s defines “deliver,” in relevant part, as “give, transfer, yield possession or control of: make or hand over: make delivery of.” *Webster’s Third New International Dictionary Unabridged* 597 (1993).

Based on these definitions, under the APA, service of a petition for judicial review on an agency is accomplished when the appealing party transfers or brings the petition to the agency’s principal office within 30 days of when the agency mailed its order. The Court of Appeals applied the APA’s service requirements in this manner in *Cheek v. Employment Security Department*, 107 Wn. App. 79, 25 P.3d 481 (2001). The court characterized the APA’s service provision, including the requirement of delivery of the petition to the agency head at the agency’s principal office, as “straightforward,” when it affirmed the dismissal of the appellant’s

petition because the Department did not receive it until four days after the 30-day appeal deadline. *Id.* at 82-83, 85.

Moreover, if the legislature had intended “delivery” to mean the date the petition was *mailed*, there would have been no reason to distinguish between the service methods in RCW 34.05.542(4) for serving the agency on the one hand and other parties and the Attorney General’s Office on the other. “[T]he use of different terms in a statute suggests a different meaning for each term and all language in a statute must be given effect.” *Citizens Alliance*, 184 Wn.2d at 440.

Despite this “straightforward” analysis, Stewart asserts that the Department’s rule, WAC 192-04-210, makes “delivery” mean something different. Appellant’s Opening Br. 8. But that rule reflects the ordinary meaning of “delivery” described above and clarifies that the Department is served when it receives a copy of a petition for judicial review at its main office or at the Commissioner’s Review Office:

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. The Department promulgated this rule in 1989, the year after the Legislature enacted the current APA in 1988. Thus by

statute and Department rule, a petition for judicial review is timely served on the Department when it is brought to the Department's principal office within 30 days of when the Department mailed the order being appealed.³

Stewart asserts that the Supreme Court's decision in *Diehl v. Western Washington Growth Management Hearings Board*, 153 Wn.2d 207, 103 P.3d 193 (2004), supports her argument that delivery of a petition for judicial review under the APA is complete upon mailing, not transfer of possession or receipt. Appellant's Opening Br. 10-11. But the meaning of "delivery" in RCW 34.05.542(4) was not before the Court in *Diehl*. The issue before the Court was whether Civil Rule 4 governs service requirements in an APA appeal. *Id.* at 213. The Court held that CR 4 does not apply because it is inconsistent with the APA's service requirements. *Id.* at 217. The Court did not consider whether service upon an agency is complete upon receipt under the APA, and for good reason. The agency in *Diehl* in fact physically received a copy of the petition by the appeal deadline. *Id.* at 210-11.

³ Stewart argues that, because RCW 50.32.025 deems certain appeals of Department action "filed and received" on the date of mailing, that provision of the Employment Security Act must also apply to WAC 192-04-210 to deem a petition for judicial review "received by" the Department on the date of mailing. But, as explained below, RCW 50.32.025 does not apply to APA petitions for judicial review. RCW 50.32.025 deems when appeals and petitions are *filed* with the Commissioner and the Office of Administrative Hearings. It does not apply to petitions for judicial review that are filed with the superior court and *served* upon the Department.

The Commissioner's decision clearly informed Stewart of the service requirements by providing the following instructions: "To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the thirtieth (30th) day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210." CP 53. She was thus instructed by statute, rule, and the Department's order to ensure that the Department received her petition within 30 days of when the Department mailed its order. She provided her petition to the superior court and the Attorney General's Office by the deadline, but failed to heed the instructions and provide her petition to the Department on time.

3. RCW 50.32.025 does not govern service of a petition for judicial review

Stewart strains to avoid applying the plain meaning of RCW 34.05.542(4) by arguing for the application of a different statutory provision altogether, RCW 50.32.025, a provision of the Employment Security Act. Appellant's Opening Br. 6-7. But that statute governs only the filing of appeals or petitions with the Department or the Office of Administrative Hearings. It does not govern the filing or service of petitions for judicial review under the APA, which are filed with the superior court. Even if the statute applied to service of petitions to judicial review, the statute predates the enactment of the "exclusive means" of

seeking judicial review under the APA, and thus its requirements should be read to no longer apply to service of petitions for judicial review.

RCW 50.32.025 provides that “[t]he appeal or petition from a determination, redetermination, order and notice of assessment, appeals decision, or commissioner's decision which is” sent by mail is “deemed filed and received by the addressee on the date shown by” the cancellation mark or, if illegible, erroneous, or omitted, the date the sender proves it was deposited in the U.S. mail. This language was adopted in 1975. Laws of 1975, 1st Ex. Sess., ch. 228, § 4. Stewart asserts that the statute governs service of petitions for judicial review. But the statute says nothing about service. It designates only when appeals and petitions are “filed and received.”

RCW 50.32.025 pertains only to those appeals or petitions filed with the Department or the Office of Administrative Hearings. It applies to claimant appeals of the Department's unemployment benefit determinations or redeterminations, RCW 50.32.020, and to employer appeals of notices of assessment of unemployment insurance taxes, RCW 50.32.030. The provision applies as well to petitions for review of OAH decisions filed with the Commissioner. RCW 50.32.070; WAC 192-04-170.

Stewart incorrectly asserts that RCW 50.32.025 governs the service of petitions for judicial review under the APA because it includes “petition[s] from a . . . commissioner’s decision.” Appellant’s Opening Br. 7. But RCW 50.32.025 applies to petitions from a Commissioner’s decision that are filed with the Office of Administrative Hearings under RCW 50.20.160 or RCW 50.29.070, not APA petitions for judicial review filed with the superior court and served upon the Department. Stewart ignores or is unaware of these provisions of the Employment Security Act that permit appeal of a Commissioner’s decision to OAH.

RCW 50.20.160(1) authorizes an unemployment benefits claimant to request reconsideration and/or redetermination by the Commissioner of a determination of amount of benefits potentially payable. If the Commissioner denies the request, the claimant has the right to appeal the Commissioner’s decision to the appeal tribunal, RCW 50.20.160(1), which is the Office of Administrative Hearings, RCW 34.12.040; *Washington Trucking Ass'ns v. Emp't Sec. Dep't*, 192 Wn. App. 621, 636, 369 P.3d 170 (2016), *review granted*, 186 Wn.2d 1016 (2016) (“The ‘appeal tribunal’ is a disinterested ALJ from the Office of Administrative Hearings. RCW 50.32.010.”).

RCW 50.29.070(2) permits an employer to file with the Commissioner a request for review and redetermination of the benefit

charges made to the employer's unemployment tax account or of the employer's tax rate. If the Commissioner denies the employer's request, the employer may file a petition for hearing with OAH. RCW 50.29.070(2).

In sum, a claimant may file an "appeal" from a Commissioner's decision with OAH under RCW 50.20.160(1). And an employer may file a "petition" from a commissioner's decision with OAH under RCW 50.29.070(2). Under RCW 50.32.025, such "appeal[s] or petition[s] from a . . . commissioner's decision" are deemed filed and received by OAH on the date of mailing. RCW 50.32.025 does not govern the *service* of APA petitions for judicial review on the Department, as Stewart erroneously argues. It governs the *filing* of petitions from Commissioner's decisions with OAH.

Even if RCW 50.32.025 could be read as applying to the service of petitions for judicial review and thus conflicting with the service requirements of the RCW 34.05.542(4), the Court should find the APA's service requirements control because it is the later-enacted statute. RCW 50.32.025 was originally adopted in 1969 with similar language that appears today. Laws of 1969, Ex. Sess., ch. 200, § 1. It has been amended only once, in 1975. Laws of 1975, 1st Ex. Sess., ch. 228, § 4. The APA's service provision, RCW 34.05.542, was enacted 13 years later, in 1988.

The service requirements in RCW 34.05.542 were not a carryover from the previous version of the APA codified at chapter 34.04 RCW. They were enacted in a new section of the 1988 APA to provide a uniform method of filing and serving petitions for judicial review. *See* Laws of 1988, ch. 288, § 509.

As noted above, the Legislature expressly provided that the later-enacted APA “establishes the exclusive means of judicial review of agency action” and “[a]ll . . . agencies . . . shall be subject to the entire act.” RCW 34.05.510, .030; *Diehl*, 153 Wn.2d at 213; *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 178–79, 979 P.2d 374 (1999). And “[f]or unemployment compensation cases, the procedural requirements for superior court review are contained in the [APA].” *Clymer*, 82 Wn. App. at 27–28 (citing RCW 50.32.120, 34.05.510). 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. *See, e.g., Muije v. Dep’t of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982) (stating “We adhere to the principle 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.”); *In re Dependency of KB*, 150 Wn. App. 912, 923, 210 P.3d 330 (2009). Stewart offers no

authority in support of her position that the Employment Security Act overrides the later-enacted APA. *Cf. DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (stating that where no authority is cited, the court may assume counsel found none after a diligent search). The APA's service requirements apply to judicial appeals of the Department's orders.

Finally, Stewart asserts that the introductory clause in RCW 34.05.542—"Subject to other requirements of this chapter or of another statute"—means that RCW 50.32.025's language deeming filing and receipt complete upon deposit in the mail governs service of petitions for judicial review under the APA. But even if RCW 50.32.025 applies to "service" of a petition for judicial review, it does not contain "requirements" for service. A "requirement" is a "requisite or essential condition," and to "require" is "[t]o demand or exact as necessary or appropriate . . . to impose a command or compulsion upon (one) to do something." *Webster's Third New International Dictionary Unabridged* 2117 (1993). RCW 50.32.025 simply states that, if an appeal or petition is mailed, it is deemed filed and received upon the date of mailing. This is not a directive to an appellant to take a certain action. It is not a "requirement[] of another statute" for purposes of RCW 34.05.542.

The APA deems service of a petition for judicial review upon an agency complete upon delivery, which occurs when the agency actually receives the petition. Stewart was expressly informed of this requirement in the Department's order, which referenced the governing statute and agency rule. Stewart managed to deliver her petition to the superior court and the Attorney General by the deadline, but she failed to timely deliver her petition to the Department. She did not meet the straightforward requirements of the APA, which provides the exclusive means for obtaining judicial review of an agency order.

B. The Superior Court Properly Dismissed Stewart's Late-Served Appeal Because She Failed to Meet the APA's Procedural Requirements for Obtaining Judicial Review

Washington precedent is clear: an appealing party must strictly comply with the APA's procedural requirements for filing and serving a petition for judicial review, and if she does not, the petition should be dismissed. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 809 P.2d 1377 (1991) (strict compliance with the APA's filing and service deadlines is required); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *Cheek*, 107 Wn. App. at 85; *Litowitz v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 93 Wn. App. 66, 68, 966 P.2d 422

(1998); *In re Botany Unlimited Design & Supply, LLC*, No. 34202-6-III, 2017 WL 962511, at *4 (Wash. Ct. App. Mar. 7, 2017). In *PERC*, the appellant served its petition late but argued that dismissal was unwarranted because it substantially complied with the APA's service requirements.

The Court affirmed the dismissal and held unequivocally:

It is impossible to substantially comply with a statutory time limit It is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit. We therefore hold that failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.

PERC, 116 Wn.2d at 929.⁴

The Court reiterated its holding that strict compliance with the APA's filing and service requirements is required in *Union Bay Preservation Coalition v. Cosmos Development & Administration Corporation*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995), and *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). And the Court of Appeals has consistently implemented the Supreme Court's application of this principle. *See, e.g.*,

⁴ The *PERC* decision construed the former APA's requirement that a petition for judicial review be served upon the agency within 30 days of service of the agency's order. *Id.* at 926-27. The Court's decisions construing the predecessor APA remain in effect. RCW 34.05.001 ("The legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, . . . court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in effect."); *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 960, 235 P.3d 849 (2010).

Cheek, 107 Wn. App. at 85; *Litowitz*, 93 Wn. App. at 68; *Botany Unlimited*, 2017 WL 962511, at *4.

Here, Stewart failed to strictly comply with the APA's statutory deadline for serving the Department with a copy of her petition. The superior court properly dismissed Stewart's petition in accordance with the clear precedent of this Court and the Court of Appeals. *Skagit Surveyors*, 135 Wn.2d at 556; *Conom v. Snohomish Cty.*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

The Court's inquiry can end there. Stewart seeks to avoid this straightforward application of the APA and Washington courts' controlling authority by engaging in an academic debate about subject matter jurisdiction. Appellant's Opening Br. 12-17. But the courts' precedent is clear and easily applied to the facts of this appeal. The Court need not entertain Stewart's diversion to resolve this case.

Not only is Stewart's discussion of subject matter jurisdiction irrelevant and unnecessary to resolve this case, the cases she discusses do not relate to the issue before the Court. *See* Appellant's Opening Br. 13-14 (citing *Buecking v. Buecking*, 179 Wn.2d 438, 447, 316 P.3d 999 (2013) (dissolution statute at issue did not limit the courts' constitutional original jurisdiction over divorce cases); *ZDI Gaming Inc. v. Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012) (criminal statute limiting

“jurisdiction” over actions against the Gambling Commission to the Thurston County Superior Court should be read as limiting venue because Legislature cannot limit the superior courts’ constitutional original jurisdiction county-by-county); *Dougherty v. Dep’t of Labor & Industries*, 150 Wn.2d 310, 314-15, 76 P.3d 1183 (2003) (Industrial Insurance Act provision requiring appeals to be filed in certain superior courts governed venue, not jurisdiction)). The cases all concern the courts’ constitutional original jurisdiction or questions of venue, which are not at issue here. None of the cases Stewart cites involves the statutory filing and service requirements for obtaining judicial review of agency action under the APA.

Stewart also discusses certain United States Supreme Court cases to advance her inapposite jurisdictional argument. Appellant’s Opening Br. 13-14. But at issue here is Washington courts’ application of the procedural requirements of Washington’s APA. This case does not involve applications for attorney fees and expenses under the federal Equal Access to Justice Act, *see Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L. Ed. 2d 674 (2004); appeals to the United States Court of Appeals for Veterans Claims, *see Henderson v. Shinseki*, 562 U.S. 428, 179 L. Ed. 2d 159 (2011); or claims of sex discrimination under Title VII of the

federal Civil Rights Act of 1964, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

Although the Court need not engage with this irrelevant argument, the Department notes that the Washington Supreme Court has been remarkably consistent in its decisions concerning the authority of courts to hear appeals of agency action. For 90 years, the Court has repeatedly reinforced the same principle underlying judicial review of agency action: “When 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.” *Union Bay*, 127 Wn.2d at 617; *see also Nafus v. Dep't of Labor & Indus. of Washington*, 142 Wash. 48, 52, 251 P. 877 (1927) (“A court of special, limited, or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction. This rule also applies to jurisdiction over special statutory proceedings exercised in derogation of, or not according to, the course of the common law. So the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such court.”); *MacVeigh v. Div. of Unemployment Comp.*, 19 Wn.2d 383, 386-87, 142 P.2d 900 (1943) (“[F]rom the record before us it does not appear that appellant ever perfected her appeal from

the ruling of the unemployment compensation division to the superior court. The statute governing such appeals is plain, and it appears therefrom that the superior court obtains no jurisdiction to review an order of the division unless the steps prescribed by the statute have been followed.”); *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990) (“Acting in its appellate capacity, the superior court is of limited statutory jurisdiction, and all statutory requirements must be met before jurisdiction is properly invoked.” (Internal quotation marks and citation omitted)); *Skagit Surveyors*, 135 Wn.2d at 555 (“Acting in its appellate capacity, the superior court is of limited statutory jurisdiction, and all statutory procedural requirements must be met before jurisdiction is properly invoked.” (Internal citation omitted)); *ZDI Gaming*, 173 Wn.2d at 625 (“Because an appeal from an administrative body invokes the superior court's appellate jurisdiction, all statutory requirements must be met before jurisdiction is properly invoked.” (Internal quotation marks and citation omitted)).

“The Washington Constitution distinguishes between two types of subject matter jurisdiction: ‘original jurisdiction’ and ‘appellate jurisdiction.’ An appeal from an administrative agency invokes a superior court's appellate jurisdiction.” *ZDI Gaming*, 173 Wn.2d at 625 (internal citations omitted). The cases raised by Stewart that address the courts’

constitutional original jurisdiction have no bearing on the judicial review of agency action at issue here.

Based on her discussion of cases addressing wholly unrelated jurisdictional issues, Stewart asks the Court to overturn its decisions enforcing strict compliance with the statutory filing and service deadlines for judicial review of agency action under the APA. Appellant's Opening Br. 14. Stewart's request for the Court "to reject its prior decision[s] . . . is an invitation [the Court] do[es] not take lightly." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The Court should decline this extraordinary invitation. The doctrine of *stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *In re Stranger Creek & Tributaries in Stevens Cty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). "[T]he question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent." *Ottom*, 185 Wn.2d at 678 (emphasis in original). The Court's consistent decisions requiring compliance with the statutory filing and service deadlines for obtaining judicial review of agency action are neither incorrect nor harmful. Stewart is understandably frustrated by the result dictated by this Court's precedent, but she harmed herself by failing to heed the APA, the Department's rule, the Department's order, and this Court's decisions. The superior court

properly dismissed Stewart's petition for judicial review in accordance with the APA's terms and Washington precedent. The Court should affirm.

C. The APA's Service Requirements Did Not Violate Stewart's Right to Procedural Due Process Because She Received Notice and a Meaningful Opportunity to Be Heard

Stewart's final argument is that the APA's requirement that an appealing party deliver her petition for judicial review to the agency within 30 days of when the agency mailed its order violates due process. Appellant's Opening Br. 17-19. This argument fails for a number of reasons.

Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571, (2006). The APA requires an appealing party to ensure that her petition is filed with, as in actually received by, the superior court by the 30-day deadline. RCW 34.05.542(2). Stewart does not allege that this requirement violates due process. It strains credulity to argue that being required to deliver a petition to the court within 30 days respects due process, but requiring delivery to the agency whose order is under appeal does not.

Stewart points to no authority establishing that a 30-day deadline for delivery of a petition for judicial review of an agency order violates the

petitioner's opportunity to be heard. Indeed, petitioners have an opportunity to be heard that expires after the thirtieth day after the agency's decision is mailed if the procedural requirements for exercising that opportunity are not met. Stewart complains that shortening the 30-day appeal period under the APA would violate due process. Appellant's Opening Br. 17-18. But due process does not require a 30-day appeal period. The Supreme Court has held that a 10- or 15-day appeal period comports with due process. *See State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997) (concluding there was no due process violation where agency notice incorrectly stated hearing must be requested in 10 days when statute provided 15 days in which to request hearing).

Stewart received extensive due process protections to challenge the Department's decision concerning her eligibility for unemployment benefits. She received a full administrative hearing before the Office of Administrative Hearings, at which she was able to present evidence and argument. CP 15. She received review by the Commissioner of the administrative law judge's initial order, with consideration of her written arguments. CP 15-16. And she was entitled to judicial review of the agency's final order, provided that she timely file and serve her petition, which requires preparing a document containing basic information about

her appeal.⁵ She managed to timely deliver her petition to the court and the Office of the Attorney General. And she simply had to direct the courier to bring a copy to the Department's office as well. The oversight of Stewart's attorney does not remake the APA's 30-day service deadline into a violation of due process.

Much of Stewart's argument boils down to her belief that deeming service complete upon actual receipt by the agency is unfair. But it is not the Court's role to "question the wisdom of a statute even though its results seem unduly harsh." *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (internal quotation marks and citation omitted). RCW 34.05.542(4)'s service requirements reflect what the Legislature has deemed to be fair and their consistent application "secur[es] a fair and orderly process [that] enables more justice to be done in the totality of cases." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) (J. Scalia, concurring). The Court, the

⁵ A petition for review must set forth:

- (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.
- RCW 34.05.546.

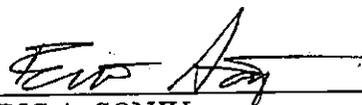
Department, and Stewart alike are bound by the Legislature's determination.

VI. CONCLUSION

The Department's order clearly instructed Stewart to ensure that the Department received her petition for judicial review within 30 days of when the Department mailed its order, as required by the APA. Stewart failed to satisfy this requirement. The superior court properly dismissed Stewart's appeal. The Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of April, 2017.

ROBERT W. FERGUSON
Attorney General



ERIC A. SONJU
Assistant Attorney General
WSBA No. 43167
Attorneys for Respondent
OID No. 91029

PROOF OF SERVICE

I, DIANNE S. ERWIN, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 5 day of April 2017, I sent a copy of, **Brief of Respondent**, for service on the all parties or counsel of record on the below stated date as follows:

U.S. mail postage prepaid and e-mail to:

Joseph Shaeffer
Tiffany Cartwright
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, WA 98104-1745
Email: josephs@mhb.com
tiffanyc@mhb.com

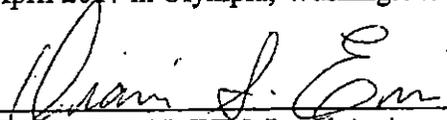
Kathleen A. Kline
Suzanne Kelly Michael
Michael & Alexander, PLLC
701 Pike St. Suite 1150
Seattle, WA 98101-3946
Kathleen@michaelandalexander.com
suzanne@michaelandalexander.com

E-filed via e-mail to:

supreme@courts.wa.gov

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 5 day of April 2017 in Olympia, Washington.


DIANNE S. ERWIN, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 05, 2017 3:36 PM
To: 'Erwin, Dianne (ATG)'
Cc: Sonju, Eric (ATG)
Subject: RE: Stewart v. Employment Security Department; No. 93759-1;

Rec'd 4/5/17

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Erwin, Dianne (ATG) [mailto:DianneE1@ATG.WA.GOV]
Sent: Wednesday, April 05, 2017 3:33 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Sonju, Eric (ATG) <EricS5@ATG.WA.GOV>
Subject: Stewart v. Employment Security Department; No. 93759-1;

Good afternoon. Please see attached Brief of Respondent for filing today.

Case name: Cynthia Stewart v. State of Washington Department of Employment Security.

- Case No. 93759-1
- Eric Sonju, AAG
- Ph. 360-664-2475
- WSBA No. 43167
- QID No. 91029
- Email: EricS5@atg.wa.gov

Dianne S. Erwin

Legal Assistant 4

Office of the Attorney General

Licensing and Administrative Law Division

PO Box 40110, Olympia WA 98504-0110

360-753-2261

• ~ Please print only when necessary ~

THIS EMAIL AND ANY ATTACHMENTS IS INTENDED ONLY FOR THE NAMED ADDRESSEE(S). THIS E-MAIL AND ANY ATTACHMENTS MAY CONSTITUTE A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION AND/OR WORK PRODUCT. REVIEW, DISSEMINATION, OR USE OF THIS TRANSMISSION OR ITS CONTENTS BY PERSONS OTHER THAN THE ADDRESSEE(S) MAY BE PROHIBITED. IF YOU RECEIVE THIS MESSAGE IN ERROR, PLEASE DELETE IT.