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**SUPREME COURT
STATE OF WASHINGTON**

SHAW RAHMAN,

PETITIONER,

v.

DEPARTMENT OF EMPLOYMENT SECURITY,

RESPONDENT.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, requires a petition for judicial review of a final agency order to be filed with the superior court and served on the agency within 30 days after service of the agency's final order. Petitioner Shaw Rahman filed his Petition for Judicial Review of a final decision of the Employment Security Department 17 days late. The superior court dismissed Mr. Rahman's Petition, and the Court of Appeals properly affirmed the dismissal. This case does not present a significant question of law under the Washington or U.S. Constitutions under RAP 13.4(b)(3). The dismissal of Mr. Rahman's judicial appeal was due to his own failure to comply with the statutory filing requirements. Further review by this Court is unwarranted.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth below, the issues raised in Mr. Rahman's Petition for Review are not appropriate for this Court's discretionary review under RAP 13.4(b). If the Court were to accept review, however, the issue before this Court would be:

Under the APA, a petition for judicial review of a final agency order must be filed with the superior court within 30 days after service of the final order. Did the superior court properly dismiss Mr. Rahman's

appeal when he filed his Petition for Judicial Review 48 days after service of the Department's final order?

III. COUNTERSTATEMENT OF THE CASE

On December 13, 2013, the Employment Security Department's Commissioner¹ issued a final decision concluding that Petitioner Shaw Rahman had fraudulently obtained unemployment benefits and was liable for the resulting overpayment. Certified Administrative Record (AR)² at 200-06, 219-20. That same day, the Commissioner's review office mailed a copy of the decision to Mr. Rahman. AR at 219.

The decision advised Mr. Rahman that he had 30 days to appeal the decision to the superior court.³ AR at 220. The advisement set forth a detailed explanation of the process for filing a judicial appeal:

If you choose to file a judicial appeal, you must both

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. See RCW 34 05 514 (The Department does not furnish judicial appeal forms) AND

¹ Decisions on petitions for Commissioner review are made by review judges in the Commissioner's review office but are treated as decisions of the Commissioner due to statutory delegation. See RCW 50.32.070, .080; WAC 192-04-020(5).

² The Certified Administrative Record is separately paginated from the clerk's papers. See Index to Clerk's Papers. Thus, this brief cites to the administrative record as "AR."

³ Mr. Rahman's deadline was January 13, 2014, because January 12, 2014, the thirtieth day, fell on a Sunday. See CR 6(a).

Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

AR at 220. The Commissioner's decision also informed Mr. Rahman that he had 10 days to file a petition for reconsideration. AR at 220.

Mr. Rahman filed an untimely Petition for Reconsideration of the Commissioner's decision, signing his Petition for Reconsideration on December 30, 2013—17 days after the Commissioner issued a final decision in Mr. Rahman's case. AR at 225. The Commissioner denied Mr. Rahman's Petition for Reconsideration because it was untimely. AR at 225, 302. The order again advised Mr. Rahman that further appeal had to be taken to the superior court within 30 days from December 13, 2013—the date the Commissioner's final decision was issued. AR at 303.

Mr. Rahman did not file his Petition for Judicial Review in King County Superior Court until January 30, 2014—17 days late. CP at 1, 106, 135. He did not serve the Department with a copy of his Petition until March 4, 2014. CP at 132, 134-35.

The Department filed a motion to dismiss Mr. Rahman's appeal because he failed to timely comply with the APA's statutory filing and service requirements. CP at 114-247. The superior court granted the Department's motion because the Petition was untimely filed. CP at 248-

49. The superior court's order did not address Mr. Rahman's untimely service on the Department. *Id.*

Mr. Rahman subsequently filed a "Motion to Amend" the dismissal order, arguing for the first time that he had attempted to timely file his Petition for Judicial Review with the superior court but it "was 'rejected for procedure.'" CP at 250. The superior court denied Mr. Rahman's motion, treating it as a motion for reconsideration. CP at 259.

Mr. Rahman then appealed to the Court of Appeals. CP at 260. In an unpublished decision, the Court of Appeals affirmed the superior court's order of dismissal, concluding that Mr. Rahman's Petition was not filed within the statutory time period and that dismissal is an appropriate response to noncompliance. *Rahman v. Dep't of Emp't Sec.*, No. 72396-1-I, slip op. at 3 (Wash. Ct. App. July 27, 2015) at *2.⁴ Mr. Rahman filed a motion for reconsideration, which the Court of Appeals denied. Mr. Rahman now petitions this Court for review.

⁴ A copy of the Court of Appeals' decision is attached to this brief as Appendix A.

IV. ARGUMENT

Dismissal of an Untimely Petition for Judicial Review Does Not Raise a Constitutional Question

This Court should deny Mr. Rahman's Petition for Review because he has not established any of the criteria set forth in RAP 13.4(b). Mr. Rahman seeks review under RAP 13.4(b)(3), asserting that there is a significant constitutional question because dismissal of his Petition violated his constitutional and human rights. Pet. for Review at 4-5. He is mistaken.

Mr. Rahman did not raise this issue before the Court of Appeals until he filed a motion for reconsideration of the Court of Appeals' decision. Thus, this should not be a basis for review by this Court. RAP 2.5(a); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) (declining to consider belatedly raised arguments that were never raised in prior administrative or judicial proceedings). Moreover, Mr. Rahman does not provide any analysis as to how his constitutional rights have been violated by the superior court's application of the strict requirements of the APA. “[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.” *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) (quoting *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691

(1997)). Because this case does not present a significant constitutional question, this Court should deny review.

The Court of Appeals properly affirmed the superior court's dismissal of Mr. Rahman's untimely request for judicial review. Judicial review of an agency's action is governed by the APA, chapter 34.05 RCW. In order to timely perfect an appeal of a final agency order 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." RCW 34.05.542(2). The 30-day appeal period begins to run upon service of the final decision of the agency, which is complete when the agency mails the decision. RCW 34.05.010(19), .542(2); *City of Seattle v. Pub. Emp't Relations Comm'n (PERC)*, 116 Wn.2d 923, 927, 809 P.2d 1377 (1991). Dismissal is appropriate when a party fails to follow the APA's filing requirements. *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 27, 917 P.2d 1091 (1996) (dismissal appropriate when claimant's attorney filed petition for judicial review one day after the deadline for filing expired).

Mr. Rahman did not comply with the filing requirements of the APA. The Department mailed Mr. Rahman its final decision on December 13, 2013. AR at 219-20. Mr. Rahman filed his Petition for

Judicial Review with the superior court on January 30, 2014—48 days after service of the final order. CP at 1-110, 135; AR at 219-20.

In reaching its decision, the Court of Appeals properly noted that there are no “good cause” exceptions excusing a failure to comply with the APA’s strict filing and service requirements. *Rahman*, slip. op. at 2. This Court has held that substantial compliance is not sufficient to comply with the APA’s procedural requirements. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (substantial compliance with the service requirements of the APA is not sufficient).

In addition, the Court of Appeals properly concluded, “even if the doctrine of substantial compliance applies, Rahman’s alleged attempt to file his petition on time does not satisfy it.” *Rahman*, slip. op. at 3. Mr. Rahman’s “excuse that a timely petition was returned because it lacked a cover sheet is not supported by competent evidence” that was considered by the superior court. *Rahman*, slip op. at 3. After the superior court denied his motion for reconsideration, Mr. Rahman submitted a “Track a Package Printout,” which does not describe the item that was sent or the delivery location.⁵ CP at 261; Pet. for Review at 10.

⁵ Mr. Rahman submitted this printout to the superior court after he filed his Notice of Appeal to the Court of Appeals. CP at 260-62, 266-68.

The Court of Appeals also correctly determined that Mr. Rahman did not provide his excuse to the superior court until after the dismissal order had been entered. *Rahman*, slip op. at 3; CP at 248-50. “CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Finally, the Court of Appeals noted that Mr. Rahman “does not explain why he should be excused from providing a cover sheet if that was necessary to get his petition filed on time.” *Rahman*, slip op. at 3. The Court of Appeals properly affirmed the superior court’s order of dismissal.

Mr. Rahman also argues the merits of his case and alleges that the Department committed a tort when it denied him unemployment benefits. Pet. for Review at 12-14. The merits of the Commissioner’s final decision or any other alleged complaints Mr. Rahman may have against the Department are not properly before this Court since Mr. Rahman did not timely appeal the agency’s final order.

V. CONCLUSION

For the foregoing reasons, the Department asks this Court to deny Mr. Rahman's Petition for Review.

RESPECTFULLY SUBMITTED this 9th day of October, 2015.

ROBERT W. FERGUSON
Attorney General



MARYA COLIGNON,
WSBA # 42225
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Roxanne Immel, 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 9th day of October 2015, I caused to be served a copy of **Answer to Petition for Discretionary Review**, on all parties as stated below:

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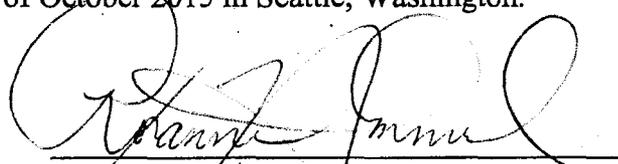
SHAW RAHMAN
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Filed by e-mail

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 9th day of October 2015 in Seattle, Washington.


Roxanne Immel, Legal Assistant

Appendix A

COURT OF APPEALS OF THE STATE OF WASHINGTON

2015 JUL 27 AM 11:15

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHAW RAHMAN,)	
)	No. 72396-1-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
WASHINGTON STATE DEPARTMENT)	
OF EMPLOYMENT SECURITY,)	
)	UNPUBLISHED OPINION
Respondent.)	
)	FILED: July 27, 2015
)	

BECKER, J. — Because the petition for review of the administrative agency’s final order was not timely filed, we affirm the order of dismissal.

On November 12, 2013, appellant Shaw Rahman petitioned the Commissioner of the Employment Security Department for review of an employment benefit decision. The commissioner ruled on Rahman’s petition on December 13, 2013. A copy of the decision was mailed to Rahman that same day.

On January 6, 2014, Rahman asked the commissioner to reconsider the decision. Under WAC 192-04-190(1), a petition for reconsideration must be filed no more than 10 days after the commissioner’s decision has been mailed. The commissioner dismissed Rahman’s petition for reconsideration as untimely.

On January 30, 2014, Rahman petitioned the superior court for review of the commissioner's ruling of December 13, 2013. Rahman served the commissioner with a copy of the petition on March 4, 2014. The commissioner moved to dismiss, arguing that Rahman's petition for judicial review was not timely filed or served. The superior court granted the commissioner's motion and dismissed Rahman's petition for review on the basis that the filing on January 30, 2014, was beyond the 30-day time limit.

Rahman filed a "motion to amend" the order of dismissal, alleging that he timely delivered the petition to the court on January 6. The court treated the "motion to amend" as a motion for reconsideration and denied it.

Rahman appeals. Rahman contends his petition for review should be considered because of his alleged attempt to file it with the superior court on January 6, before the 30-day deadline. According to Rahman's brief, the clerk of the superior court did not file his petition because it lacked a cover sheet. Rahman contends the clerk then returned his petition to his Washington residence even though he provided a temporary mailing address in Canada.

Judicial review of an agency's decision is governed by the Washington Administrative Procedure Act (APA), chapter 34.05 RCW. 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." RCW 34.05.542(2).

There are no "good cause" exceptions excusing a failure to comply with the strict filing and service requirements of the APA. Clymer v. Emp't Sec. Dep't.

No. 72396-1-I/3

82 Wn. App. 25, 30, 917 P.2d 1091 (1996). And even if the doctrine of substantial compliance applies, Rahman's alleged attempt to file his petition on time does not satisfy it. See City of Seattle v. Pub. Emp't Relations Comm'n, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991). First, the excuse that a timely filed petition was returned because it lacked a cover sheet is not supported by competent evidence. Second, Rahman did not provide this excuse to the trial court until after the court had already granted the agency's motion to dismiss for untimely filing and service. Third, Rahman does not explain why he should be excused from providing a cover sheet if that was necessary to get his petition filed on time.

Rahman had 30 days from December 13, 2013, to file his petition for review with the superior court. It is undisputed that Rahman's petition was not filed within the statutory time period. Rahman has not cited authority, and we are not aware of any, that would permit this court to find that he complied with the filing deadline.

Dismissal is an appropriate response to noncompliance. Sprint Spectrum, LP v. Dep't of Revenue, 156 Wn. App. 949-50, 953-54, 963, 235 P.3d 849 (2010) (noncompliance with service requirements of the statute supports dismissal), review denied, 170 Wn.2d 1023 (2011).

No. 72396-1-I/4

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

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Dear Clerk,

Attached for filing is Answer to Petition for Discretionary Review by the Employment Security Department in *Shaw Rahman v. Employment Security Department; No. 92087-7*

Mr. Rahman is receiving this email as a courtesy copy. Hard copy will also be mailed.

Sincerely,

Roxanne Immel

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