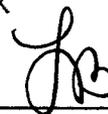


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NO. 92255-1

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SUPREME COURT OF THE STATE OF WASHINGTON

DONALD BAKER,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

RESPONSE TO
PETITIONER'S
MOTION TO
SUPPLEMENT THE
RECORD UNDER RAP
9.11

I. INTRODUCTION

Petitioner Donald Baker's petition for review is pending before the Court. On February 22, 2016, Baker filed a document entitled "Additional Evidence Per RAP 9.11." The Respondent Department of Employment Security is construing that document as a motion, and submits this response.

II. RESPONSE TO MOTION

Baker asks the Court to consider a two-page contract that was not signed by him or his employer, and which was not before the agency decisionmakers, the superior court, or the Court of Appeals. Baker contends the contract was his employment contract with his former employer, Maintech. The Court should decline to consider this evidence.

Under RAP 9.11, an appellate court may take additional evidence only if all of the following six conditions are met:

The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a); *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990) (citing *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 640, 762 P.2d 1141 (1988)); *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). The Court has rejected motions under RAP 9.11(a) where the proponent of new evidence fails to argue that all six criteria apply. *Feetham*, 149 Wn.2d at 872-73. Baker has failed to argue or demonstrate that any of the six criteria of RAP 9.11(a) apply. His motion, therefore, should be denied.

In any event, Baker cannot prove that "additional proof of facts is needed to fairly resolve the issues on review." This case is an appeal of an agency's decision under the Administrative Procedure Act (APA), chapter 34.05 RCW. See RCW 50.32.120 (judicial review of a decision of the

Department's commissioner is under the APA). A court's review under the APA is limited to the agency record, RCW 34.05.558, and new evidence is generally inadmissible. *Motley-Motley, Inc., v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). The reviewing court may receive additional evidence only when it:

relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1). Baker made no argument that the additional submission satisfied the APA, and it does not. There is no dispute about the constitution of the decision-making body or the lawfulness of the procedure or process to determine Baker's eligibility for benefits, and the decision in this case was determined on the agency record. Therefore, the contract argument Baker makes does not satisfy the APA requirements for supplementing the agency record. The Court should not consider Baker's proposed new evidence.

III. CONCLUSION

The Department respectfully requests that this Court deny Baker's motion for consideration of additional evidence.

RESPECTFULLY SUBMITTED this 29th day of February, 2016.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Katie Mocerri, hereby state and 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 29th day of February 2016, I caused to be served by mailing and emailing a true and correct copy of Response to Petitioner's Motion to Supplement the Record Under Rap 9.11, with proper postage affixed thereto to:

By US mail and email:

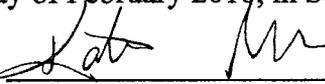
DONALD W. BAKER
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BOTHELL, WA 98012
donaldwaynebaker38@yahoo.com

Original e-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 29th day of February 2016, in Seattle, Washington.



Katie Mocerri, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Mocer, Katie (ATG)
Cc: Benson, April (ATG); 'donaldwaynebaker38@yahoo.com'
Subject: RE: Donald Baker v Employment Security Dept., No. 92255-1

Received on 02-29-2016

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.

From: Mocer, Katie (ATG) [mailto:KatieB2@ATG.WA.GOV]
Sent: Monday, February 29, 2016 2:37 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Benson, April (ATG) <AprilB1@ATG.WA.GOV>; 'donaldwaynebaker38@yahoo.com' <donaldwaynebaker38@yahoo.com>
Subject: Donald Baker v Employment Security Dept., No. 92255-1

Dear Clerk,

Attached for filing is the Response to Petitioner's Motion to Supplement the Record Under RAP 9.11 in *Donald Baker v Employment Security Dept., No. 92255-1*.

The Petitioner is receiving this email as a courtesy copy. A hard copy will also be delivered via US mail.

Sincerely,
Katie Mocer
Legal Assistant to April Benson, Leah Harris, and Dionne Padilla-Huddleston
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