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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/28/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JASON A. GIARDINO,) No. 1 CA-CV 10-0020
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
TEMPE MERIT SYSTEM BOARD, an) Civil Appellate Procedure)
)
administrative body; CITY OF)
TEMPE, a governmental entity;)
JAMES P. FOLEY, WAYNE E.)
HOCHSTRASSER, and DR. RUSSELL)
SCHOENEMAN, all in their)
official capacities as members)
of the TEMPE MERIT SYSTEM BOARD;)
CHARLIE MEYER, in his capacity)
as Tempe City Manager,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000164-001 DT

The Honorable Paul J. McMurdie, Judge

REMANDED

Law Office of Dale Norris, LLC
By Dale F. Norris
Attorney for Plaintiff/Appellant

Phoenix

Andrew B. Ching, Tempe City Attorney
And Kara L. Stanek
Attorneys for Defendants/Appellees

Tempe

S W A N N, Judge

¶1 Jason A. Giardino ("appellant") timely appeals the superior court's decision to decline jurisdiction of his special action complaint. Because this is a statutory special action, the court lacked the discretion to decline jurisdiction. We therefore remand.

FACTS AND PROCEDURAL HISTORY

¶2 The City of Tempe terminated appellant's employment as a police officer in September 2008. He appealed to the Tempe Merit System Board ("Board"), which unanimously upheld the termination.¹ When the Tempe City Manager upheld the Board's decision, appellant sought special action review in Maricopa County Superior Court. He claimed that the Board, its members and the City Manager acted arbitrarily, capriciously and contrary to law, and that they deprived him of his due process rights. After full briefing and oral argument, the superior court declined to accept jurisdiction and dismissed the petition without comment.

¶3 Appellant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(B).

¹ Appellant was charged with violation of the Police Department's General Orders Use of Force policy, and two violations of the City of Tempe's Personnel Rules and Regulations.

DISCUSSION

¶4 A.R.S. § 38-1004(A) provides: "A classified law enforcement officer who is . . . dismissed by the department head, after a hearing and review before the merit system council, may have the determination of the council reviewed upon writ of certiorari in the superior court."² This case seeks review of just such a decision, and the matter before the superior court was a statutory special action. See Ariz. R.P. Spec. Act. 1(b) (explaining that a "statutory special action" occurs "[w]here a statute expressly authorizes proceedings under certiorari"); see also A.R.S. § 9-957(C) (allowing any person aggrieved by a decision of the Fire Fighters Relief and Pension Fund board to apply for a writ of certiorari, upon which the court may reverse, affirm or modify the board decision); A.R.S. § 23-951(A) (allowing any party to file a writ of certiorari to review the lawfulness of a worker's compensation award).

¶5 "Unlike special actions, statutory special actions 'are not at all discretionary and they are not subordinate to a right of appeal -- they are the right of appeal.'" *Circle K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199 (App. 1993) (quoting Ariz. R.P. Spec. Act. 1

² Appellees' answer to the complaint below admitted that appellant was a "classified" law enforcement officer.

state bar committee note at 192). The superior court was therefore required to accept jurisdiction of appellant's special action complaint.

¶16 Our review of the record suggests that the superior court believed it had discretionary jurisdiction because neither party cited § 38-1004(A) below. Appellant's complaint simply asserted that the superior court had jurisdiction to hear the matter pursuant to the "Rules for Special Action Ariz. Rev. Stat. volume 17B." In response, appellees erroneously asserted that the matter was "not a statutory special action as Tempe is not governed by A.R.S. § 12-901 through § 12-904."³ Indeed, the first mention of the governing statute in this case is found in appellees' answering brief on appeal. Appellant then asserted for the first time in his reply brief that § 38-1004 provided a "right to a statutory petition for writ of certiorari."⁴

³ The reference is to Arizona's administrative procedures act, A.R.S. §§ 12-901 through -914. This citation is unavailing because A.R.S. § 38-1004 creates the right to judicial review in this situation. *Cf. Sackey v. Cochise County Merit Comm'n*, 122 Ariz. 586, 588, 596 P.2d 724, 726 (App. 1979) (holding that county merit board is an agency of the county, and therefore not an "agency" as defined by the administrative procedures act).

⁴ Even after raising § 38-1004(A) in its answering brief on appeal to this court, appellees erroneously contended that the superior court's "review" was discretionary because § 38-1004(A) provides that a law enforcement officer "may" employ a writ of certiorari to review the Board's decision. A plain reading of § 38-1004(A) makes discretionary the law enforcement officer's decision to seek review of the Board decision, not the court's jurisdiction to hear the matter. See *Hayes v. Cont'l Ins. Co.*,

¶17 While we generally do not consider arguments made for the first time on appeal, *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (citation omitted), challenges to subject matter jurisdiction may be raised for the first time on appeal. *Health for Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 12, 57 P.3d 726, 728 (App. 2002) (citation omitted); see also *Fry v. Garcia*, 213 Ariz. 70, 72 n.2, ¶ 9, 138 P.3d 1197, 1199 n.2 (App. 2006) ("Jurisdiction does 'not relate to the right of the parties. . . but to the power of the court . . . [it] is an abstract inquiry, not involving the existence of an equity (right) to be enforced, nor of the right of the plaintiff to avail himself of it if it exists. It precedes these questions. . . .'" (citation omitted). Cf. *Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶ 6, 86 P.3d 944, 947 (App. 2004) (allowing for de novo review of a trial court's denial of subject matter jurisdiction) (citation omitted).

¶18 Here, the superior court's decision was based solely upon an erroneous conception of its own subject matter jurisdiction. It would be anomalous to permit correction of jurisdictional errors in favor of defendants who fail to plead defects in jurisdiction, while failing to correct errors in

178 Ariz. 264, 268, 872 P.2d 668, 672 (1994) (allowing courts to apply clear and unambiguous statutory language without resorting to other methods of statutory interpretation) (citation omitted).

favor of plaintiffs whose pleadings fail to set forth the correct basis for jurisdiction. Though such failures (whether occasioned by the error of plaintiffs or defendants) necessarily result in inefficiency, faithful adherence to jurisdictional statutes requires us to consider subject matter jurisdiction de novo even when raised for the first time on appeal.

CONCLUSION

¶19 Because this case is a statutory special action, the trial court erred when it declined to accept jurisdiction and consider the merits of the complaint. We therefore remand the case for litigation on the merits. In our discretion, we deny appellant's request for attorney's fees.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

SHELDON H. WEISBERG, Judge