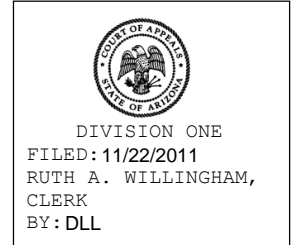


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



JAMES MARTIN HOUSTON,) 1 CA-CV 10-0634
)
Plaintiff/Appellant,) DEPARTMENT T
)
v.) MEMORANDUM DECISION
)
STATE OF ARIZONA BOARD OF) (Not for Publication -
EDUCATION, a political) Rule 28, Arizona Rules of
subdivision of the State of) Civil Appellate Procedure)
Arizona,)
)
Defendant/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC 2009-000541-001 DT

The Honorable William Schafer, Judge Pro Tempore
The Honorable Crane McClennen, Judge

AFFIRMED

James M. Houston
In Propria Persona

Roseburg, Oregon

Eric Bistro, Chief Deputy Attorney General
By Debra Sterling, Assistant Attorney General
Jinju Park Jurtado, Assistant Attorney General
Attorneys for Defendant-Appellee

Phoenix

H A L L, Judge

¶1 James M. Houston appeals from the superior court's order dismissing his petition for judicial review of a decision by the State of Arizona Board of Education (the Board). For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The facts relevant to the issues on appeal are not disputed. In May 2006, Houston applied for teacher certification in Arizona. In his application, he disclosed that he had previously been convicted of a crime. Houston's application was then referred to the Professional Practices Advisory Committee (the Committee) and Houston was directed to appear before the Committee on February 14, 2007. After hearing from Houston and reviewing his various application materials, the Committee found that he was convicted of (1) three counts of driving under the influence in the late 1970s and early 1980s, (2) disorderly conduct in 1979, (3) unlawful possession of a firearm in 1983, and (4) phone harassment in 1986. The Committee also found, however, that Houston had displayed considerable candor, offered a "well thought-out presentation," and expressed a sincere effort to address his alcohol abuse problem. Ultimately, the Committee concluded that Houston's conduct was "unprofessional," but nonetheless recommended that the Board grant his application for certification.

¶13 On March 26, 2007, the Board rejected the Committee's recommendation to approve Houston's application. Houston then requested a continuance so that he could consult an attorney, and the Board agreed to continue its final decision on the application. On May 19, 2008, the Board reconvened to consider Houston's application. Following Houston's presentation, the Board unanimously voted to reject the Committee's recommendation and deny Houston's application for a teaching certificate. In addition to making findings mirroring those of the Committee regarding Houston's previous convictions and pattern of alcohol abuse, the Board also found that Houston's presentation to them "indicated a number of factors that should not be considered the professional state of mind of a teacher, including, but not limited to, stereotypical statements made about racial groups." Based on these findings, the Board concluded that Houston's conduct rendered him "unfit to teach." Houston moved for a rehearing, which the Board denied.

¶14 On July 27, 2009, Houston filed a petition for judicial review of the Board's decision. On August 7, 2009, Houston filed a motion to stay the Board's decision denying his application (that is, the Board's publication of its decision in a national database) pending the superior court's review. On August 20, 2009, Houston filed a motion for an evidentiary hearing.

¶15 On November 17, 2009, the superior court scheduled oral argument on Houston's motions for stay and an evidentiary hearing. After hearing oral argument on the motions, the superior court denied Houston's request for an evidentiary hearing and took his motion to stay under advisement. The superior court also ordered Houston to file an opening brief within 45 days of receiving a copy of the administrative record and advise the Board's attorney if it had not been received by February 26, 2010.¹ On March 15, 2010, the superior court denied Houston's motion to stay the Board's decision.

¶16 The following day, Houston filed a motion notifying the superior court that he was seeking special action review of the court's denial of his motion to stay and requesting that the court stay all its proceedings pending the outcome of his special action. Two days later, Houston filed a motion for change of judge. On March 23, 2010, Houston requested that he be granted an additional 45 days to submit his opening brief. On March 23, 2010, Houston requested that all proceedings be stayed pending a verdict in a tort lawsuit he had filed against the Board for defamation of character. On April 12, 2010, another superior court judge denied Houston's motion for change of judge. On May 17, 2010, the superior court (1) denied

¹ On February 11, 2010, the Board submitted a certified administrative record with the superior court.

Houston's motion to stay the proceedings pending the court of appeal's special action ruling, (2) denied Houston's motion to stay all further proceedings pending a verdict in the tort lawsuit, and (3) granted Houston's motion to extend the time to file his opening brief to June 15, 2010.

¶7 On May 18, 2010, after the Honorable Crane McClennen disqualified himself, the case was transferred to the presiding judge for reassignment and then assigned to Judge Pro Tempore William Schafer, who was a superior court judge before his retirement. On May 25, 2010, Houston filed a motion for change of judge, arguing that a retired judge should not be permitted to preside over the matter. On May 26, 2010, Judge Schafer denied Houston's motion for change of judge.

¶8 On June 1, 2010, Houston filed another motion to extend the time to file his brief. On June 2, 2010, the superior court denied his motion, noting that, as of June 15, 2010, "Houston will have had 112 days to write his brief." On June 10, 2010, Houston filed a sworn affidavit explaining that he was experiencing medical problems and attached a note from an attending physician stating that Houston needed to "limit his stress for the next 3-4 weeks." On June 11, 2010, Houston filed a notice in the superior court that he was seeking supreme court review of his petition for special action, in which the court of appeals had declined jurisdiction.

¶9 On June 16, 2010, the Board filed a motion to dismiss Houston's complaint on the basis that Houston failed to timely file his opening brief by June 15, 2010. The Board noted that on June 14, 2010, Houston traveled from Oregon to Phoenix to conduct "five depositions of Board members pertaining to a civil case he filed against the Board." Houston had requested the depositions and "made no attempt to continue them." On June 18, 2010, the superior court entered a minute entry stating that the "case will be dismissed on June 25, 2010" unless Houston filed "his brief before noon on that day." In a minute entry dated June 25, 2010, the superior court stated that it had received a fax from Houston in which he claimed he did not receive notice that the case would be dismissed until that day. The superior court ordered that Houston's case would be dismissed if he did not "file his brief with the Clerk by 3 p.m. on June 30, 2010." The superior court noted, for the record, that the parties had been advised telephonically of the new deadline.

¶10 On July 6, 2010, Houston's opening brief was filed with the superior court. On July 7, 2010, the superior court dismissed Houston's petition for review because he had failed to timely file his opening brief. Houston filed a motion for reconsideration, which the superior court denied. The superior court entered a signed minute entry dismissing Houston's petition for review on November 15, 2010.

¶11 Houston timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION²

I. Appointment of a Retired Judge to Preside Over the Case

¶12 Houston asserts that he was entitled to a have a randomly appointed, regularly seated superior court judge who is "accountable to both the voters and Arizona's Judicial Performance Review Commission" preside over this case rather than Judge Schafer, a retired judge who was selected to serve as judge pro tempore in this matter.

¶13 As noted by the Board, no rule or statute requires superior courts to make random selections. *State v. Eastlack*, 180 Ariz. 243, 254, 883 P.2d 999, 1010 (1994) ("[T]here is no basis either by rule or by statute for random selection of judges in capital (or other) cases.") (internal quotations omitted). Indeed, Maricopa County Superior Court Local Rule of Procedure 3.1(b) expressly contemplates that the presiding judge may select a particular judge to preside over a case. Therefore, we find no merit to Houston's claim that the

² In his reply brief, Houston moves to strike the Board's answering brief as untimely. Arizona Rule of Civil Appellate Procedure 15(c) is a discretionary rule and, as a matter of course, we routinely grant litigants thirty-day extensions to file their briefs. Therefore, in our discretion, we deny Houston's motion to strike.

presiding judge "committed judicial error" by selecting Judge Schafer to preside over the case.

¶14 We likewise find no merit to Houston's assertion that he was entitled to a regularly seated judge to preside over his case. The Arizona Supreme Court addressed a similar issue in *State v. White*, 160 Ariz. 24, 32, 770 P.2d 328, 336 (1989), in which the defendant argued he was entitled to a trial by a regularly seated superior court judge rather than a judge pro tempore. The supreme court held that the defendant's position was "completely at odds with the Arizona Constitution," which provides that the "Legislature may provide for the appointment of members of the bar having the qualifications . . . as judge pro tempore" and that "such person shall have all the judicial powers of a regular elected judge of the court to which he is appointed." *White*, 160 Ariz. at 32, 770 P.2d at 336 (quoting Ariz. Const. art. 6, § 31).

¶15 Similarly, and as relevant here, Article 6, Section 20, of the Arizona Constitution provides that "[a]ny retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court." The Arizona Constitution further states that "[p]residing judges shall exercise administrative supervision over the superior court and judges thereof in their counties, and shall have such other duties as may be provided by law or by rules of the

Supreme Court.” Ariz. Const. art. 6, § 11. Thus, as noted by the Board, under these constitutional provisions, the presiding judge is authorized to call a retired judge to perform judicial duties and a litigant does not have a constitutional right to have a regularly seated superior court judge preside over his case. Therefore, Houston’s claim that he was entitled to a regularly seated judge is without merit.

II. Dismissal of Petition for Review

¶16 Houston contends that the superior court erred by dismissing his petition for review based on his failure to timely file an opening brief. He also argues that the court erred by failing to grant his motion to extend the time to file an opening brief.

¶17 We uphold a superior court’s order dismissing a complaint absent an abuse of discretion. *Coconino County v. Antco, Inc.*, 214 Ariz. 82, 85, ¶ 6, 148 P.3d 1155, 1159 (App. 2006). We likewise uphold a superior court’s refusal to grant an extension of time absent an abuse of discretion. *Strategic Dev. and Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 66, ¶ 24, 226 P.3d 1046, 1052 (App. 2010); see also *Findlay v. Lewis*, 172 Ariz. 343, 346-47, 837 P.2d 145, 148-49 (1992) (an appellate court will not substitute its judgment for the superior court’s management of its docket in determining whether to grant a motion for extension of time). A court

abuses its discretion when it "commits an error of law in reaching a discretionary conclusion that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Antco*, 214 Ariz. at 85, ¶ 6, 148 P.3d at 1158 (internal quotations omitted).

¶18 Pursuant to Arizona Rules of Procedure for Judicial Review of Administrative Decisions (ARPJRAD) 6(a), the plaintiff "shall" file an opening brief "within forty-five days after service of the Certification of Record on Review." As set forth in subsection (b), the court may, upon notice, dismiss the complaint if the plaintiff fails to timely file an opening brief.

¶19 Here, the Board filed the certified record with the superior court on February 11, 2010 and mailed a copy to Houston on the same date. The superior court ordered that the 45-day period be calculated from February 26, 2010,³ which placed the deadline for filing the opening brief at April 12, 2010. Based on Houston's motion to continue, the superior court later extended the time for filing until June 15, 2010. Houston subsequently filed another motion to extend time, which the superior court denied. Nonetheless, when Houston failed to file his opening brief by the June 15, 2010 deadline, the superior

³ To ensure that Houston received his mailed copy of the certified record before the 45-day period commenced, the superior delayed the start date.

court ordered that he have until noon on June 25, 2010 to file the opening brief. After Houston failed to file his opening brief by this deadline, arguing inadequate notice, the superior court granted Houston until 3:00 p.m. on June 30, 2010 to file his opening brief with the clerk.

¶20 As reflected in an attachment to Houston's motion to reconsider the order of dismissal, he mailed his opening brief from Oregon at approximately 4:00 p.m. on June 30, 2010. He argues that, pursuant to Arizona Rules of Civil Appellate Procedure (Appellate Rule) 15(a),⁴ his opening brief should be deemed filed at the time it was mailed.

¶21 Houston's reliance on Appellate Rule 15(a) is misplaced. As noted by the Board, the Arizona Rules (Rule) of Civil Procedure, not the Arizona Rules of Civil Appellate Procedure, apply to proceedings for administrative review. ARPJRAD 1(b). Under Arizona Rule of Civil Procedure 5(g), all papers "shall be filed with the Court" within the time specified. Moreover, pursuant to Rule 5(h) a document is not "filed" with the court until it is filed *with the clerk* of the court. Thus, contrary to Houston's claim, his mailing did not comply with the governing rules or the superior court's express

⁴ The relevant portion of Appellate Rule 15(a) provides that a brief is "deemed timely" when it is "addressed to the Clerk of the Court and picked up by or delivered either to a third party commercial carrier for delivery within three calendar days or to the United States Postal Service."

order to file the opening brief *with the clerk* no later than 3:00 p.m. on June 30, 2010.⁵

¶122 Moreover, Houston repeatedly missed the court-ordered deadlines for filing his opening brief. In its final sua sponte grant extending time, the superior court noted for the record that it had telephonically informed Houston of the final deadline, thus providing Houston adequate notice that his petition would be dismissed if he failed to timely file his opening brief pursuant to the court's order. The superior court acted within its authority to dismiss the complaint pursuant to ARPJRAD 6(b), and we find no abuse of discretion.

¶123 Houston also argues that the superior court erred by denying his motion to extend the time to file his opening brief because he was impaired by medical problems at the time. In requesting additional time, Houston submitted a sworn affidavit stating that he was suffering from health complications and a letter from an attending physician stating that he needed to limit the stress in his life for a three to four week period.

¶124 In *Maher v. Urman*, 211 Ariz. 543, 545, 549, ¶¶ 4, 16, 124 P.3d 770, 772, 776 (App. 2005), an analogous case, the

⁵ To the extent Houston contends that the superior court's dismissal of his complaint was erroneous because the court did not expressly find that the untimely filing of his opening brief prejudiced the Board, we note that prejudice is only one factor to be considered by the court in determining cause for dismissal. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 154-55, ¶ 46, 211 P.3d 15, 32-33 (App. 2009).

unrepresented litigant "was facing a medical situation requiring surgery" and simultaneously pursuing other complex litigation when the trial court dismissed his complaint because he had failed to timely serve the defendants. On appeal, we upheld the dismissal of the plaintiff's complaint because he failed to demonstrate due diligence in trying to serve the defendants; therefore, he did not demonstrate good cause to extend the time for service. *Id.* at 549-50, ¶ 19, 124 P.3d at 776-77.

¶25 Like the plaintiff in *Maher*, Houston has also failed to demonstrate that he diligently attempted to comply with the filing deadlines. Indeed, he repeatedly missed the superior court's deadlines. The record also reflects that Houston not only continued to pursue a special action in the supreme court after he requested an extension of time to file his opening brief due to medical emergency, but he traveled to Arizona to depose five of the Board members in furtherance of his concurrent tort litigation. Although Houston argued to the superior court that participating in the depositions, in contrast to preparing an opening brief, was not stressful and was the best use of his "limited capacity," we are not persuaded by this argument. Given the amount of time the superior court granted Houston to file his opening brief in excess of the time

allotted under ARPJRAD 6(a),⁶ and his efforts to pursue other litigation during his medical emergency, we cannot conclude that the superior court abused its discretion by denying his motion to further extend the time.⁷

⁶ Contrary to Houston's argument, the time period for filing his opening brief was not tolled by his motions to stay the proceedings. Rather, Houston's decision to place "the matter of researching and composing the brief on hold" until the superior court ruled on his motions for stay was at his own peril and did not extend the 45-day window proscribed by ARPJRAD 6(a).

⁷ Because we conclude that the superior court acted within its discretion in dismissing Houston's petition for failure to timely file his opening brief, we need not determine whether the court erred by denying his requests for oral argument, motions to stay, and request for an evidentiary hearing. Even assuming the superior court erroneously denied Houston's motions and requests, such error would be harmless given the court's ultimate dismissal of the case for failure to timely file an opening brief. See *Town of Paradise Valley v. Laughlin*, 174 Ariz. 484, 487, 851 P.2d 109, 112 (App. 1992) (explaining judicial error is harmless if "there is no reasonable probability" that the result may have been different but for the error).

CONCLUSION⁸

¶26 For the foregoing reasons, we affirm the superior court's dismissal of Houston's petition for administrative review.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge

⁸ Seizing upon Judge McClennen's characterization of the statutes and rules governing judicial review of administration decisions as "schizophrenic," Houston also argues that he was denied due process. We disagree. Although Judge McClennen acknowledged that the judicial review process can be confusing, he explicitly informed Houston that he was required to file an opening brief within 45 days after the Board filed the certified record. Given Judge McClennen's unambiguous instruction regarding the filing of an opening brief, we find Houston's claim that Judge McClennen's comments left him unsure of how he needed to proceed to be without merit.

Finally, because we affirm the superior court's dismissal of Houston's petition on procedural grounds, we will not address whether the Board should have permitted Houston to withdraw his application for certification.