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SUMMARY
May 28, 2020

2020C0A84

No. 18CA2373, *Day v. Secretary of State* — Election Law — Campaign Finance; Administrative Law — State Administrative Procedure Act — Judicial Review; Appeals — Court of Appeals — Jurisdiction

A division of the court of appeals considers whether it has jurisdiction to review an appeal from the dismissal of a campaign finance violation complaint by the Colorado Secretary of State, Elections Division. The division concludes that the court of appeals lacks jurisdiction because such a dismissal must be appealed to the district court first.

Court of Appeals No. 18CA2373
Office of the Secretary of State, Elections Division
Case No. ED201821

Michael Day,

Petitioner-Appellant,

v.

Chase for Colorado,

Respondent,

and

Colorado Secretary of State, Elections Division,

Respondent-Appellee.

APPEAL DISMISSED

Division IV
Opinion by JUDGE PAWAR
Furman and Welling, JJ., concur

Prior Opinion Announced April 23, 2020, WITHDRAWN

OPINION PREVIOUSLY ANNOUNCED AS “NOT PUBLISHED PURSUANT TO
C.A.R. 35(e)” ON April 23, 2020, IS NOW DESIGNATED FOR PUBLICATION

Announced May 28, 2020

Michael Day, Pro Se

Philip J. Weiser, Attorney General, Michael Kotlarczyk, Assistant Attorney
General, Emily Buckley, Assistant Attorney General, Joe Peters, Assistant
Attorney General, Denver, Colorado, for Respondent-Appellee

¶ 1 Petitioner, Michael Day, filed a complaint alleging a campaign finance violation with the Colorado Secretary of State, Elections Division. The Elections Division dismissed the complaint and Day appeals. The only question we resolve in this opinion is whether Day should have filed his appeal in district court or this court. We conclude that he was required to file his appeal in district court and therefore dismiss the appeal for lack of jurisdiction.

I. Background

¶ 2 To understand the issue in this appeal, it is first necessary to understand the procedural rules governing campaign finance actions in Colorado and how they changed in 2018 in the wake of the federal district court case, *Holland v. Williams*, No. 16-CV-00138-RM-MLC, 2018 WL 2938320 (D. Colo. June 12, 2018).

A. *Holland* and Rules Governing Campaign Finance Actions

¶ 3 The Colorado Administrative Procedure Act (APA) dictates which court has jurisdiction to review an appeal from an agency ruling. It provides that “any person adversely affected or aggrieved by any agency action” may seek appellate review in the district court. § 24-4-106(4), C.R.S. 2019. However, a party may seek a direct appeal to this court “[w]henever judicial review of any agency

action is directed to the court of appeals.” § 24-4-106(11)(a). These provisions were unaffected by *Holland*. Therefore, at all times relevant to this appeal, the first stop for appellate review of an agency action was the district court unless a specific rule provided for immediate review in the court of appeals.

¶ 4 In fact, before *Holland*, the Colorado Constitution contained a specific rule providing for direct appeal to the court of appeals from agency rulings on campaign finance actions. Article XXVIII, section 9(2)(a) of the Colorado Constitution allowed any citizen to file a complaint alleging a campaign finance violation and required that the complaint be referred to an administrative law judge (ALJ) for a hearing and decision. It also provided that the “decision of the administrative law judge shall be final and subject to review by the court of appeals, pursuant to section 24-4-106(11).” Colo. Const. art. 28, § 9(2)(a). Accordingly, before *Holland*, all complaints were to be referred to an ALJ and an ALJ’s ruling on a campaign finance action was directly appealable to the court of appeals.

¶ 5 *Holland* changed that. In *Holland*, the federal district court struck down section 9(2)(a) as facially unconstitutional. *Holland*, 2018 WL 2938320, at *13. The court held that allowing any citizen

to file a complaint alleging a campaign finance violation and requiring every complaint to be resolved by an ALJ after a hearing violated the First and Fourteenth Amendments. *Id.* at *9. This opinion was not appealed.

¶ 6 *Holland* left Colorado’s campaign finance laws without an enforcement mechanism. Therefore, days after *Holland* was issued, in June 2018, the secretary of state promulgated new, emergency rules to fill this void. The new rules shortened the statute of limitations to ninety days (previously 180 under section 9(2)(a)) and did away with the requirement that complaints are automatically referred to an ALJ. Dep’t of State Rules 18.2.2, 18.2.4, 8 Code Colo. Regs. 1505-6 (effective June 19-Oct. 11, 2018). Instead, the new rules provided that when a complaint is filed, the Elections Division reviews it and either (1) dismisses it; (2) provides the respondent an opportunity to cure the alleged violation; or (3) conducts additional review to determine whether to file a complaint with a hearing officer. *Id.* at Rule 18.2.4(b). Importantly for our purposes, the new rules also provided that if the Elections Division dismisses a complaint, “[t]he dismissal is a final agency action, and subject to review under section 24-4-106.” *Id.* at Rule 18.2.4(b)(1).

In other words, the new rules applied section 24-4-106's general rule that appellate review is in the district court unless direct appeal to the court of appeals is specifically authorized. And notably, unlike the old rules, the new rules did not specifically authorize appeal directly to the court of appeals.

B. Day's Complaint

¶ 7 Day filed his complaint alleging a campaign finance violation in October 2018, after *Holland* and also after the secretary of state promulgated the new rules. His complaint was therefore reviewed by the Elections Division, which dismissed it because it was filed outside the ninety-day statute of limitations.

¶ 8 Day appealed that ruling to this court, not the district court. The secretary of state, the respondent in this appeal,¹ moved to dismiss the appeal, arguing that this court lacks jurisdiction because Day was required to appeal the Elections Division's decision to district court. For the reasons set forth below, we agree with the secretary of state and dismiss the appeal.

II. We Lack Jurisdiction Over this Appeal

¹ Chase for Colorado was a respondent before the Elections Division but is not a party in this appeal.

¶ 9 The court of appeals has jurisdiction only to the extent that it has been granted by the General Assembly in statute. *See Musick v. Woznicki*, 136 P.3d 244, 249 (Colo. 2006). As discussed above, section 24-4-106 of the APA provides that appellate review of agency action is in the district court except in cases where it “is directed to the court of appeals.” § 24-4-106(11)(a). Accordingly, in order for us to have jurisdiction over Day’s appeal, some statute or rule must provide for direct review in the court of appeals.

¶ 10 No such authority exists in the post-*Holland* rules that were applicable when Day filed his complaint. As explained above, the new rules provide only that an Elections Division’s dismissal of a complaint is “subject to review under section 24-4-106.” Dep’t of State Rule 18.2.4(b)(1), 8 Code Colo. Regs. 1505-6 (effective June 19-Oct. 11, 2018). There is no provision providing for direct appeal to this court. Therefore, the APA’s default rule requiring appeal to the district court applies.

¶ 11 We recognize that because *Holland* was a federal district court opinion, we are not bound by it. *See Ahart v. Colo. Dep’t of Corr.*, 964 P.2d 517, 522 (Colo. 1998). Consequently, we could disagree with or ignore *Holland*, treat section 9(2)(a) as constitutional and

still enforceable, and analyze whether we have jurisdiction under its provisions. Day encourages us to do so, albeit for the first time in his reply brief. But even if we were to go down this road, it does not lead to a conclusion that we have jurisdiction.

¶ 12 Article XXVIII, section 9(2)(a) provides that “[t]he decision of *the administrative law judge* shall be final and subject to review by the court of appeals.” (Emphasis added.) Day’s appeal is not from a decision of an ALJ. It is from a decision of the Elections Division. Therefore, even if we were to ignore *Holland* and apply section 9(2)(a), we would still conclude that we lacked jurisdiction over Day’s appeal.

¶ 13 Day also argues that we should exercise jurisdiction over this appeal because the post-*Holland* rules are sufficiently vague that we should default to the pre-*Holland* rules. We disagree that the post-*Holland* rules are vague. They provide that an Elections Division’s dismissal is appealable pursuant to section 24-4-106 of the APA. And the APA is clear that appellate review is in the district court unless specifically directed to the court of appeals.

¶ 14 Moreover, the pre-*Holland* rules give us jurisdiction to review only a decision of an ALJ, not a decision of the Elections Division.

We therefore fail to see how any supposed vagueness in the post-*Holland* rules would allow us to exercise jurisdiction that did not exist pre-*Holland*.

¶ 15 We conclude that jurisdiction to review the Elections Division's dismissal of Day's complaint lies in the district court, not here. The appeal is therefore dismissed.

III. Conclusion

¶ 16 The appeal is dismissed without prejudice.

JUDGE FURMAN and JUDGE WELLING concur.