IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANDREW APRIKYAN,	)	NO. 66007-1-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
MARK EMMERT, PHYLLIS WISE, PAUL RAMSEY, and CHERYL CAMERON,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	FILED: October 17, 2011
	)	

Lau, J. — The Washington Administrative Procedure Act (APA) requires petitioner to serve a petition for judicial review on the agency, the office of the attorney general, and all parties of record within 30 days after service of the final order. RCW 34.05.542(2). Andrew Aprikyan failed to serve all parties of record. He argues that naming the individual University of Washington employees in their official capacities is equivalent to a suit against the University for service of process purposes, and therefore, renders individual service unnecessary. Because this argument contradicts the plain language of the APA's service requirements, we affirm the trial

court's dismissal of Aprikyan's petition for judicial review.

FACTS

The material facts are undisputed. The University of Washington conducted an internal investigation in accordance with its scientific misconduct policy and federal law to determine whether Research Assistant Professor Andrew Aprikyan committed scientific misconduct. School of Medicine Dean Paul Ramsey appointed an advisory committee of three scientists who reviewed the allegations and issued three reports. Aprikyan submitted a single response to the three reports. To assist his review of the committee's reports, Ramsey then appointed a reader group consisting of three scientists. The reader group provided their input and opinions to Ramsey regarding the advisory committee's reports. Ramsey then issued a decision finding that Aprikyan committed scientific misconduct and transmitted his decision to University Provost Phyllis Wise. Following this finding, Wise determined to terminate Aprikyan's employment. This procedure included review by a University faculty hearing panel and the University president. Under University policy, Wise and Ramsey named Aprikyan in a University employment termination proceeding. Around the same time, Aprikyan also filed an adjudication petition against Ramsey and University Vice Provost Cheryl Cameron requesting that a faculty panel review and reverse the University's findings.

The faculty hearing panel (the "Hearing Panel") considered the two petitions and determined not to support Aprikyan's termination. University President Mark Emmert reviewed the matter, agreed with Ramsey that Aprikyan committed scientific misconduct, and authorized Aprikyan's termination in a written decision dated March 4, 2010.

Emmert denied Aprikyan's reconsideration request by letter dated March 23, 2010, which Aprikyan received on March 26, 2010.

Aprikyan filed a petition for judicial review in King County Superior Court pursuant to the APA on April 16, 2010. RCW 34.05.542(2). That same day he dismissed and then refiled the petition to correct a clerical error. The refiled petition's caption did not identify the University as a respondent, but named Emmert, Wise, Ramsey, and Cameron as respondents. The body of the petition identified the University of Washington as the agency whose action was at issue.

On April 22, 2010, his attorney's legal assistant filed a declaration mistakenly stating that on April 19, 2010, she "personally served" copies of the petition and case schedule on "the President of the University of Washington" and on respondents Emmert, Wise, Ramsey, and Cameron. Emmert, Wise, Ramsey, and Cameron each filed a declaration on May 11, 2010, denying personal service by Aprikyan or his agent. These declarations do not state whether or when each respondent received the petition. The parties contest when the respondents received actual knowledge about the petition. Aprikyan later filed on May 13, 2010, the legal assistant's second declaration in which she explained her unsuccessful attempts at personal service on the respondents.

On July 7, 2010, Aprikyan filed the legal assistant's third declaration in which she provided more details about her service attempts. This declaration describes three trips to the University to attempt service. According to the legal assistant, during the first trip on Friday, April 16, she attempted to serve the original petition that Aprikyan

later dismissed and refiled.[1]

After dismissing the first petition, Aprikyan's attorney directed his legal assistant to return to the University later the same day to personally serve the refiled petition on the respondents and the attorney general's office. During the second trip, the legal assistant served a copy of the refiled petition on the attorney general's office, but not on the named respondents. Aprikyan's attorney then directed her to return the following Monday, April 19, and personally serve the respondents.

During this third trip, she attempted personal service on the individual respondents. She delivered the petition to a "staff member" in Ramsey's office, not to Ramsey personally. Similarly, she delivered the petition to a "receptionist" in Emmert's office, not to Emmert personally. She also delivered the petition to "Wise's assistant" and to a "receptionist" in Cameron's office but not to Wise or Cameron personally.

Aprikyan's attorney filed a declaration explaining his service of process decisions. He describes a telephone conversation with an assistant attorney general after filing the original petition and afterwards directing his legal assistant to personally serve the refiled petition. He rejected the APA's service by mail option, explaining, "Not confident that placing the documents in the U.S. Mail would mean that they would get to President Emmert, et al., I wanted to take what I determined to be appropriate steps to ensure that those persons would receive the documents."

[1] She delivered that petition, along with a motion for a temporary restraining order, to the attorney general's office, which prompted an assistant attorney general to call Aprikyan's attorney to discuss scheduling for the temporary restraining order proceedings. She also personally delivered a copy of the dismissed petition to Cameron and left copies for the other respondents with unnamed staff members.

Aprikyan's petition for judicial review was accompanied by a motion for a temporary restraining order directing the University to continue his employment. After the parties agreed to temporary relief, Aprikyan moved for a preliminary injunction on April 30, 2010. The respondents filed their opposition on May 11, 2010, arguing no personal service and failure to name the University as a party. Following oral argument on May 21, 2010, the court denied Aprikyan's motion for a preliminary injunction. He does not appeal that ruling.

On June 23, 2010, respondents moved the trial court to dismiss Aprikyan's petition because he failed to serve all parties of record as required by the APA and failed to name the University as a party. Following oral argument on August 13, 2010, the trial court granted respondents' motion on both grounds. Aprikyan appeals that order.

DISCUSSION

Standard of Review

We review the order dismissing Aprikyan's petition de novo. Lenca v. Employment Sec. Dep't, 148 Wn. App. 565, 575, 200 P.3d 281 (2009) (we review questions of law relating to the APA de novo).

Service on the Individual Respondents

The central issue in this appeal involves whether Aprikyan complied with the APA's service of process requirement to serve "all parties of record."[2] The record

[2] While Aprikyan named Emmert as a respondent in his petition for judicial review, the parties agree that the "parties of record" were Aprikyan, Wise, Ramsey, and Cameron. Resp't's Br. at 10; CP 2.

shows that Aprikyan neither served the petition by posting in the mail or by personal service under RCW 34.05.010(19).[3]

Borrowing from the non-APA context, Aprikyan primarily contends that naming the individual respondents in their "official capacities," is equivalent to a suit against the University itself. He therefore reasons that service only on the University satisfies the APA's service requirements and renders individual service irrelevant. Respondents counter that the APA expressly requires service on the University, the attorney general, and each respondent individually.

Aprikyan cites no controlling or relevant authority supporting his contention. The APA unambiguously required Aprikyan to serve separately the University, the attorney general, and all parties of record. The APA expressly distinguishes between the "agency" and the "parties of record" and requires individual service on each of them.

RCW 34.05.542(2) states, "A petition for judicial review of an order shall[4] 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." (Emphasis added.)[5]

---

[3] RCW 34.05.010(19) provides: "'Service,' except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company."

[4] The statute uses the term "shall," indicating service on the agency, the office of the attorney general, and all parties of record is mandatory.

[5] RCW 34.05.542 in its entirety states:
"(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

The superior court must dismiss the petition if the petitioner fails to serve any one of those parties in the time allowed. See Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 557, 958 P.2d 962 (1998); Muckleshoot Indian Tribe v. Dep't of Ecology, 112 Wn. App. 712, 728, 50 P.3d 668 (2002). The APA defines "agency" to include "institution[s] of higher education," so the "agency" requiring service in this case was the University. RCW 34.05.010(2). The APA defines the "parties of record" as the "person[s] to whom the agency action [was] specifically directed" or the "'person[s] named as [parties] to the agency proceeding or allowed to intervene or participate as [parties] in the agency proceeding.'" Muckleshoot, 112 Wn. App. at 724-25 (quoting RCW 34.05.010(12)). The parties agree that the "parties of record" were Aprikyan, Wise, Ramsey, and Cameron.

"(2) 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.

"(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

"(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

"(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

"(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record."

"'Service,' except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail." RCW 34.05.010(19). "Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency." RCW 34.05.542(4).

Aprikyan named the parties of record in his petition for judicial review—Aprikyan, Wise, Ramsey, and Cameron. And each was specifically named as a party in the administrative proceedings as discussed above. Because Wise, Ramsey, and Cameron were named parties of record in the agency proceedings below, the APA required Aprikyan to serve his petition on each of them. The APA requires that a petition separately identify "the agency action at issue" along with the "persons who were parties in any adjudicative proceedings that led to the agency action." RCW 34.05.546(4)-(5). Aprikyan's petition properly identified the agency action at issue as "the March 4, 2010, Final Decision of the University of Washington," and the "persons who were parties to the adjudicative proceedings" as Aprikyan, Wise, Ramsey, and Cameron. (Formatting omitted.)

Failing service on Wise, Ramsey, and Cameron in the manner required by the APA, Aprikyan now urges that any distinction between those parties of record and the agency is meaningless here because the parties of record were agency employees acting in their official capacities. The APA's text supports no such conclusion. The APA provisions that define "parties of record" may include agency employees. See, e.g.,

RCW 34.05.010(12);[6] RCW 34.05.542.

In this case, because agency employees opposed one another in adversarial proceedings below, the distinction between the agency and the parties of record is significant. University employees Wise, Ramsey, and Cameron were on the opposite side of a dispute with Aprikyan, another University employee. The University's internal process routed that dispute through a faculty hearing panel consisting of five other University employees. Ultimately, the University president reviewed the case and approved Aprikyan's termination. This dispute involved individuals with different views, duties, and interests in the scientific misconduct investigation at issue.

The APA entitled each respondent who participated as a party in the agency proceedings to personal notice of the petition for judicial review. RCW 34.05.010(19). The APA requires service on the agency and the adversarial parties of record below and nowhere suggests that the parties of record need not be individually served if they are also employees of the agency involved. Significantly, none of the "official capacity" cases cited by Aprikyan involves the APA and none addresses the proper review of agency proceedings under the APA's particular requirements. Here, Aprikyan never attempted to serve the respondents by mail, as the APA allows. Instead, he unsuccessfully attempted to personally serve Emmert, Wise, Ramsey, and Cameron.

Although no party disputes that Aprikyan's petition was delivered to President

[6] "(12) 'Party to agency proceedings,' or 'party' in a context so indicating, means:
(a) A person to whom the agency action is specifically directed; or
(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding." RCW 34.05.010(12).

Emmert's office on April 19, 2010, Aprikyan served none of the named respondents. Even if the University was properly served pursuant to RCW 34.05.542(4), none of the respondents was served at all. It is undisputed Aprikyan attempted to serve his petition on the individual respondents by leaving it with receptionists or other staff at their business offices. But the APA expressly authorizes only two methods of service—personal service or posting by mail.[7] In addition, any other interpretation would render meaningless the APA's requirement that petitioners serve the agency "'and the parties of record'" separately. See Cheek v. Employment Sec. Dep't, 107 Wn. App. 79, 83, 25 P.3d 481 (2001) (quoting RCW 34.05.542(2)).

Service on Attorney of Record

Aprikyan next argues that under RCW 28B.10.510,[8] the attorney general is necessarily the attorney of record for the University and the respondents. Therefore proper service on the attorney general satisfies the requirement to serve the respondents separately. Respondents counter that because the attorney general had not yet appeared in the action, he was not the respondents' attorney of record. Under the APA, "service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." RCW 34.05.542(6).

[7] By rule making, agencies may authorize service by electronic telefacsimile transmission, but copies must be simultaneously mailed or delivered by commercial parcel companies. RCW 34.05.010(19).

[8] This statute provides, "The attorney general of the state shall be the legal advisor to the presidents and the boards of regents and trustees of the institutions of higher education and he or she shall institute and prosecute or defend all suits in behalf of the same."

In Cheek, 107 Wn. App. 79, 25 P.3d 481 (2001), Division Three of this court held that the attorney general was not the attorney of record until she "file[d] a formal notice of appearance." Cheek, 107 Wn. App. at 84.[9] We reasoned that any other interpretation would render meaningless the APA's requirement that petitioners serve the agency "and the attorney general" separately. Cheek, 107 Wn. App. at 83. Similarly, here, the attorney general filed no notice of appearance on behalf of the respondents until after Aprikyan's deadline to serve the University and all parties of record had passed. Therefore, Aprikyan could not serve the University or the named respondents simply by serving the attorney general.

Substantial Compliance

Aprikyan next argues that this court should excuse his failure to serve each respondent personally because his agent handed copies of the petition to their staff member or receptionists and thereby "substantially complied" with the APA's requirements. Respondents counter that substantial compliance does not apply in the APA context, and regardless, Aprikyan did not substantially comply with the APA.

Aprikyan relies on Skinner v. Civil Service Comm'n of the City of Medina, 168 Wn.2d 845, 232 P.3d 558 (2010). In Skinner, the City of Medina Civil Service Commission affirmed police officer Roger Skinner's dismissal and later denied his motion for reconsideration. RCW 41.12.090 required service of a notice of appeal on

[9] Under the current version of the statute, under which Cheek was decided, service on an agency or party's attorney of record satisfies APA service requirements. Under the prior version of the statute, service on the attorney of record was insufficient. Skagit Surveyors, 135 Wn.2d at 555-57.

the commission within 30 days. "'The Commission's rules supplement the statute, providing that [p]apers required to be filed with the Commission shall be deemed filed upon actual receipt of the papers by the Commission staff at the Commission office.'" Skinner, 168 Wn.2d at 853 (quoting clerk's papers at 59). Finding no commission staff present at Medina City Hall, Skinner delivered three copies of the notice of appeal to the Medina city clerk. Our Supreme Court held that the trial court improperly dismissed the petition for improper service, reasoning that Skinner substantially complied with the service requirements by providing the notice of appeal in a manner reasonably calculated to give notice to the commission. Skinner, 168 Wn.2d at 855-56.

Under the circumstances here, we decline to address Aprikyan's substantial compliance contention because no compliance is not substantial compliance. Sprint Spectrum, LP v. Dep't of Revenue, 156 Wn. App. 949, 958-63, 235 P.3d 849 (2010) (no substantial compliance where taxpayer served Department of Revenue but not Board of Tax Appeals). But even if we assume without deciding that substantial compliance applies to the APA service requirements, we decline to apply it here when Aprikyan failed to use the statutory alternative to personal service—service by mail posting. We conclude Aprikyan failed to comply with the APA's provision allowing service by mail posting or personal service.

Waiver or Equitable Estoppel

Aprikyan next contends the respondents waived service, or are equitably estopped from contesting service, because an assistant attorney general called Aprikyan's attorney on April 16, 2010, to discuss the timing of Aprikyan's requested

temporary restraining order (TRO) hearing. Respondents counter that the conversation had no such effect and that they timely raised service as a defense.

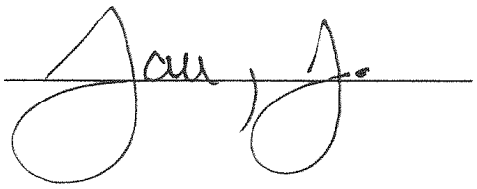
Equitable estoppel requires an act inconsistent with a later asserted defense and reasonable reliance upon that act by the other party. Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). But Aprikyan cites no case holding that a party waives an affirmative defense merely by discussing the scheduling of a TRO hearing. Furthermore, because Aprikyan's attorney directed his legal assistant to serve the refiled petition even after talking with the assistant attorney general, Aprikyan demonstrates no reliance. Accordingly, his equitable estoppel argument fails.

When the requirements for equitable estoppel have not been met, we may still consider whether a party waived a defense by raising it too late. Lybbert, 141 Wn.2d at 38-39. But respondents raised the defense in their first brief to the trial court, less than a month after Aprikyan filed his petition. By contrast, the waiver-related cases cited by Aprikyan involve long delays and significant litigation activities, including discovery, before a defense was asserted. Lybbert, 141 Wn.2d at 44 (waiving service defense by engaging in discovery for several months and delaying answering questions regarding service); Romjue v. Fairchild, 60 Wn. App. 278, 803 P.2d 57 (1991) (finding defendant waived service of process defense by waiting approximately four months, engaging in discovery, and failing to respond to letter from plaintiff's counsel regarding service). We conclude no waiver occurred here.[10]

[10] Finally, Aprikyan disputes the court's alternative ground for dismissal—his failure to name the University as a party in his petition. Given our disposition above, we need not address this argument.

CONCLUSION

Because Aprikyan failed to properly serve his APA petition on all parties of record, the trial court correctly dismissed his petition. Affirmed.



WE CONCUR: