

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID J. BROWN,

No. 29327-1-III

Appellant,

)

)

) **Division Three**

v.

)

)

**WASHINGTON STATE
UNIVERSITY,**

) **UNPUBLISHED OPINION**

)

)

Respondent.

)

)

Kulik, C.J. — David Brown appeals the superior court’s dismissal for lack of subject matter jurisdiction of his petition for review. He sought review of Washington State University’s (WSU) decision to suspend him from its master of business administration (MBA) program. Mr. Brown failed to file his petition for review within 30 days of WSU’s decision. Accordingly, we agree with the trial court that it lacked subject matter jurisdiction to hear the appeal, and affirm the dismissal.

FACTS

David Brown was enrolled in the MBA program at WSU. On April 12, 2010, the WSU conduct board found that Mr. Brown violated WSU’s standards of conduct for

students. The conduct board suspended Mr. Brown and barred him from the campus.

Mr. Brown appealed to the WSU appeal committee. On May 31, the appeal committee issued an order upholding the decision of the conduct board. The appeal committee mailed the order on June 1, 2010.

Mr. Brown sought judicial review of the appeal committee's decision. On July 1, Mr. Brown's attorney served a petition for review on the WSU division of the office of the attorney general. On that same day, Mr. Brown's attorney mailed the petition for review to the Whitman County Superior Court. The petition was filed at the court on July 6.

On July 23, WSU moved to dismiss Mr. Brown's petition for lack of subject matter jurisdiction based on Mr. Brown's failure to file a petition within the 30-day time limit set forth in RCW 34.05.542(2). Mr. Brown responded to the motion to dismiss and appeared at the hearing pro se. He was no longer represented by an attorney.

The superior court granted WSU's motion and dismissed Mr. Brown's petition for review. Mr. Brown then filed several motions challenging the dismissal, all of which were denied by the superior court. Mr. Brown now appeals to this court.

ANALYSIS

Construction of a statute is a question of law that is reviewed de novo on appeal.

Diehl v. W. Wash. Growth Mgmt. Hearings Bd., 153 Wn.2d 207, 212, 103 P.3d 193 (2004).

Subject Matter Jurisdiction. The Washington Administrative Procedure Act, chapter 34.05 RCW, establishes judicial review of an agency action. RCW 34.05.510.

To seek review of an administrative decision:

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.

RCW 34.05.542(2).

The superior court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party complies with the requirements of RCW 34.05.542(2). *City of Seattle v. Pub. Emp't Relations Comm'n (PERC)*, 116 Wn.2d 923, 926-27, 809 P.2d 1377 (1991) (referring to former RCW 34.04.130(2), recodified by RCW 34.05.570 (Laws of 1988, ch. 288, § 706)). Generally, when a petition for review is mailed, it is timely filed if it is received by the appellate court within the time permitted for filing. RAP 18.6(c). Substantial compliance is not considered in instances involving

No. 29327-1-III
Brown v. Wash. State Univ.

statutorily set time limits. *PERC*, 116 Wn.2d at 928-29.

The appeal committee mailed its decision on June 1, 2010. Service of an agency decision is complete when it is deposited in the United States mail. *Id.* at 927; *see also* RCW 34.05.010(19). Mr. Brown then had 30 days after service of the appeal committee's decision, until July 1, to file his petition for review with the superior court and serve WSU. His petition was filed on July 6, several days after the deadline. While his attorney may have mailed the petition to the superior court by the date due, the date of filing occurs when the petition is received. RAP 18.6(c). Substantial compliance under statutory timelines is not acceptable. *PERC*, 116 Wn.2d at 928-29. Mr. Brown did not comply with the requirements of RCW 34.05.542(2). For this reason, the superior court lacks jurisdiction.

The Whitman County Superior Court properly dismissed the petition for lack of jurisdiction.

Equitable Tolling. Appellate courts generally will not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

The application of the doctrine of equitable tolling first appears in Mr. Brown's appellant's brief. He did not raise the issue of equitable tolling in his response brief to

No. 29327-1-III
Brown v. Wash. State Univ.

WSU's motion to dismiss or in any of his motions challenging the superior court's order of dismissal. Likewise, at the motion hearing, Mr. Brown did not mention equitable tolling or cite to legal authority to support the application of this doctrine. The court should not entertain Mr. Brown's equitable tolling issue because he raises it for the first time on appeal.

Even if we considered this issue, equitable tolling does not apply. When a statutory time period elapses, equitable tolling permits a court to allow an action to proceed if justice requires it. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003) (quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). Equitable tolling does not apply to time limits that are jurisdictional. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 377, 223 P.3d 1172 (2009).

The 30-day time limit in RCW 34.05.542(2) is jurisdictional. *See PERC*, 116 Wn.2d at 926. Compliance with the statute allows the superior court to have subject matter jurisdiction over the controversy. *Id.* Equitable tolling does not apply to Mr. Brown's late filing of his petition for review.

On Friday, September 9, 2011, Mr. Brown filed a motion requesting relief under RAP 10.1(h) and RAP 12.1(b). Mr. Brown claims these two rules allow him to clarify the fraudulent information in the appeal record. He also contends that these rules allow

No. 29327-1-III
Brown v. Wash. State Univ.

this court to stay the current appeal and order the trial court to conduct a CR 60 motion hearing to address his allegations of fraud between his attorney and WSU.

The court will generally not address arguments raised for the first time in a supplemental brief and not made by the petitioner or respondent within the petition for review or the response to petition. *Cummins v. Lewis County*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006). Even if we considered Mr. Brown’s late-filed motions, they do not have merit. Therefore, while we accept Mr. Brown’s supplemental brief, we decline to address the issues therein.

We affirm the dismissal of Mr. Brown’s petition for review based on lack of subject matter jurisdiction. And we reject Mr. Brown’s assertion that equitable tolling applies to override the jurisdictional time limits of RCW 34.05.542(2).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

No. 29327-1-III
Brown v. Wash. State Univ.

Sweeney, J.

Korsmo, J.