

Case of the Month—October, 2011

Aprikyan v. Emmert, 2011 WL 4908038 (Wash. Ct. App. Div. I) (unpublished).

Key concepts: 1) Initiating judicial review of administrative decisions. 2) Service by mail, and service on the “attorney of record.”

Andrew Aprikyan was a research assistant professor at the University of Washington (“UW”). In 2003, he was accused of engaging in scientific misconduct (falsifying or fabricating research results). Almost seven years later, after the Dean of the UW School of Medicine and a faculty hearing panel reached conflicting conclusions about his guilt, then-UW President Mark Emmert fired him. Aprikyan sought to appeal Emmert’s decision to the court system, alleging that the UW had not followed its own rules and procedures in handling his case. No sooner did Aprikyan file his petition for judicial review, however, than the respondents (various University officials) alleged that the petition should be dismissed because they weren’t properly notified of the suit.

To the layperson, this might seem puzzling or even troubling. Since the University officials promptly objected to being sued, doesn’t that in itself prove that they knew about the suit? As a matter of law, however, the person starting a suit has a duty to inform those he is suing, and not just any sort of notice to the other side suffices to satisfy this duty. In particular, under the state Administrative Procedures Act (“APA”), anyone seeking judicial review of a final agency decision has to *serve* the petition for judicial review on the agency, all parties of record to the action, and the attorney general within 30 days of the agency decision. RCW 34.05.542. The APA defines service to mean “posting in the United States mail, properly addressed, postage prepaid, or personal service.” RCW 34.05.010(19). The APA also allows the agency or any respondent to be served by serving their “attorney of record.” RCW 34.05.542(6).

In *Aprikyan*, both the trial court and the court of appeals held that Aprikyan failed to do any one of these three things: 1) mail the petition to each of the respondents; 2) deliver the petition into the hands of each respondent or leave it at their respective residences with a person of “suitable age and discretion” who lives there (“personal service” as defined by RCW 4.28.080(15)), or 3) serve the respondents’ attorney of record. Having made this determination, the courts invoked the standard penalty: the lawsuit was dismissed. Unless Aprikyan succeeds in getting the state Supreme Court to review the matter, this is the definitive end of his search for relief from the University: under the APA, a petition for judicial review has to be filed within 30 days of the agency’s final decision, and Aprikyan can no longer meet this deadline. See RCW 34.05.542(2).

What does this harsh result teach? First and foremost, if you seek judicial review of an agency decision, be sure you properly serve the agency and all of the other respondents. There is nothing new in this message, which is undoubtedly why the court of appeals did not publish its opinion. However, looked at more closely, *Aprikyan* does hold some new lessons, or more accurately, poses some important questions that don’t have clear answers in settled law.

First of all, when serving a respondent by mail under the APA, where must the mail be addressed? To the respondent's residence, or to the respondent's place of work? The APA doesn't say. Neither does *Aprikyan*, though it implies that service by mail would have been easy to do (since the clear tenor of the opinion is that failure to "even" serve by mail helps justify dismissal). However, the main statute that addresses service by mail in the non-APA context, RCW 4.28.080(16), expressly excludes mailing to a place of employment. On the other hand, CR 4(d) authorizes service by mail in certain circumstances to "any . . . address determined by the court to be appropriate." In the APA context, at least when respondents are agency employees, there would be a strong argument for allowing service by mail to the known employment address, rather than to the likely unknown (and possibly concealed) residential address. Cautious counsel, however, should attempt service by mail at both residential and employment addresses, or seek guidance from the court—though this will be hard to get within the short 30-day deadline for service.

Second, when does an attorney become the "attorney of record" for the purpose of being subject to service on the client's account? The *Aprikyan* court relied on *Cheek v. Employment Sec. Dep't.*, 107 Wn. App. 79, 25 P.481 (2001) to support the proposition that an attorney does not become the attorney of record until he or she files a formal notice of appearance, presumably in the court case itself (the court noted that "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"). The *Aprikyan* court did not consider *Ricketts v. Washington State Board of Accountancy*, 111 Wn. App. 113, 43 P.3d 548 (2002), where Division 1 held that mailing a petition for judicial review to an attorney who had appeared for the agency during the administrative proceeding constituted service on the agency. To the extent *Cheek* only allows service on an attorney who has appeared in the court action itself, it appears to be in conflict with *Ricketts*. It also appears to conflict with the point that "parties of record" are defined by the administrative action, not (in the first instance) by the court case. See RCW 34.05.010(12), and *Muckleshoot Indian Tribe v. Washington Dept. of Ecology*, 112 Wn. App. 712, 724-25, 50 P.3d 668 (2002). If this is true of "parties of record," it should also be true of "attorneys of record." Based on the limited public file, it is impossible to say whether an argument based on *Ricketts* would have helped *Aprikyan*, but such an argument may well help others similarly situated—if attorneys have appeared for respondents at any stage of the administrative proceeding.