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ARIZONA CORPORATION COMMISSION

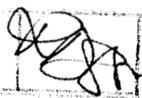
March 30, 2011

Via Certified Mail, Return Receipt Requested

Ms. Cynthia L. White
c/o Steve Rice
4081 E. Dublin St.
Gilbert, AZ 85295

Arizona Corporation Commission
DOCKETED

APR 12 2011

DOCKETED BY 

Re: *Cynthia Lea White v. Arizona Corporation Commission*
Maricopa County Superior Court Case No. LC2010-000611

Dear Ms. White:

Pursuant to the Court's order dated March 11, 2011, please be advised that since the Arizona Corporation Commission ("Commission") did not grant your application for rehearing filed on June 7, 2010, with respect to Commission Decision Nos. 70544 and 71695 ("Commission Decisions"), it was denied by operation of law on June 28, 2010. A copy of the Court's March 11, 2011, order is enclosed for your convenience.

You are further advised that the Commission's compliance with the Court's March 11, 2011, order should not be construed as a waiver of the Commission's right to raise the defense of lack of subject matter jurisdiction should you elect to seek judicial review of one or both of the Commission Decisions.

Regards,


Ernest G. Johnson
Executive Director
Arizona Corporation Commission

EGJ/jc

Enclosure: as stated

cc: Alan Baskin
Bade & Baskin PLC
80 East Rio Salado Parkway, Suite 511
Tempe, Arizona 85281

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000611-001 DT

03/11/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
T. Melius
Deputy

CYNTHIA LEA WHITE

ALAN S BASKIN

v.

ARIZONA CORPORATION COMMISSION
(001)

PHONG THANH HUYNH

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

The Arizona Corporation Commission (Defendant or Commission) asks this Court to dismiss Cynthia Lea White's (Plaintiff) cause of action because it claims Plaintiff has failed to file a Complaint in a timely manner. For the following reasons, this Court denies Defendant's Motion To Dismiss This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

I. FACTUAL BACKGROUND.

On May 17, 2010, Defendant issued its Opinion and Order, Decision No. 71695. On May 21, 2010, Defendant served a copy of that Opinion and Order on Plaintiff by sending a copy of it certified mail to Plaintiff's attorney, Scott Wakefield. On June 7, 2010, Plaintiff filed an application for rehearing. On June 28, 2010, because Defendant did not grant a rehearing, it was deemed denied by operation of law, specifically A.R.S. § 44-1974. On August 4, 2010, Plaintiff's attorney filed a Complaint with this Court.

II. ISSUE: DOES THIS COURT HAVE JURISDICTION IN THIS MATTER.

Defendant contends this Court does not have jurisdiction in this matter because Plaintiff did not file her Complaint within the required time. The applicable statute provides as follows:

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An action to review a final administrative decision shall be commenced by filing a complaint within 35 days from the date when a copy of the decision sought to be reviewed is served upon the party affected. The method of service of the decision shall be as provided by law governing procedure before the administrative agency, or by a rule of the agency made pursuant to law, but if no method is provided a decision shall be deemed to have been served when personally delivered or mailed by certified mail to the party affected at the party's last known residence or place of business. Service is complete on personal service or 5 days after the date that the final administrative decision is mailed to the party's last known address.

A.R.S. § 12-904(A). As noted by Defendant, a rehearing of a decision by the Commission is controlled by A.R.S. § 44-1974, which states:

The commission may institute or grant rehearings on application made within 20 calendar days after entry of an order or decision. Unless otherwise ordered, filing an application for rehearing does not stay the commission's decision or order. If the commission does not grant a rehearing within 20 calendar days, the application is considered to be denied. Rehearings are subject to the provisions of this article.

In the present matter, Plaintiff filed an application for rehearing on June 7, 2010. Because Defendant did not grant a rehearing by Monday, June 28, 2010, that application for rehearing was deemed denied by operation of law as of that date.

As noted above, a party must file a complaint "within 35 days from the date when a copy of the decision sought to be reviewed is served upon the party affected." A.R.S. § 12-904(A). That section provides for service as follows:

The method of service of the decision shall be as provided by law governing procedure before the administrative agency, or by a rule of the agency made pursuant to law, but if no method is provided a decision shall be deemed to have been served when personally delivered or mailed by certified mail to the party affected at the party's last known residence or place of business.

Defendant neither personally delivered a copy of that decision to Plaintiff nor sent a copy of it to her by certified mail, so there was no service under that part of the statute. Defendant notes that section provides that the "method of service of the decision shall be as provided by law governing procedure before the administrative agency," and contends service by the Commission is provided by operation of law by A.R.S. § 44-1974. In this Court's view, that section provides that *denial* of an application for rehearing is by operation of law, but that section does not provide that *service* is accomplished by operation of law. Defendant is essentially asking this Court to view A.R.S. § 44-1974 as reading as follows:

If the commission does not grant a rehearing within 20 calendar days, the application is considered to be denied *and served upon the party requesting a rehearing*.

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[Additional language added in bold italics.] This Court expresses no opinion whether it would be a good idea or a bad idea to have A.R.S. § 44-1974 read as shown above, but this Court is well aware of its limitations: It does not have the authority to add language to a statute as written by the legislature. If the Commission would like A.R.S. § 44-1974 read as shown above, the Commission will have to ask the Arizona Legislature to amend that statute accordingly.

For authority, Defendant cites *City of Tucson v. Arizona Corp. Comm'n*, 1 Ariz. App. 110, 399 P.2d 913 (1965). That case dealt with A.R.S. § 40-254. In the present matter, Defendant contends Plaintiff's Complaint is untimely under A.R.S. § 12-904(A). Because A.R.S. § 12-904(A) contains different language than A.R.S. § 40-254, this Court does not consider the above case controlling.

As such, this Court concludes as follows:

1. As of Monday, June 28, 2010, Plaintiff's application for rehearing was deemed denied by operation of law.
2. Because Defendant has neither personally delivered nor mailed by certified mail to Plaintiff a notice that her application for rehearing was denied by operation of law, Plaintiff has never been served with a copy of Defendant's decision.
3. Until such time as Defendant either personally delivers or mails by certified mail to Plaintiff a notice that her application for rehearing was denied by operation of law, this Court will be of the opinion that Plaintiff has never been served with a copy of Defendant's decision and thus her time to file a Complaint will not have started to run.
4. Considering Plaintiff to have been served by operation of law would be a violation of Plaintiff's due process rights.

IV. CONCLUSION.

Based on the foregoing, this Court concludes Plaintiff has never been served with a copy of Defendant's decision, thus her time to file a Complaint with this Court has not started to run.

IT IS THEREFORE ORDERED denying Defendant's Motion To Dismiss.

IT IS FURTHER ORDERED that, within 20 days of the date of this Order, the Commission shall either personally deliver to Plaintiff or mail to her by certified mail a notice that her application for rehearing was denied by operation of law.

IT IS FURTHER ORDERED remanding this matter to the Commission.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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