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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

Hon. Mary Yu
June 13, 2008 @ 9:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM T. SMITH,

Plaintiff,

v.

KING COUNTY PERSONNEL BOARD,

Defendant.

No. 07-2-34033-5 KNT

KING COUNTY PERSONNEL
BOARD MOTION FOR SUMMARY
JUDGMENT

I. RELIEF REQUESTED

Defendant King County Personnel Board (the "Board") files this motion for summary judgment dismissing this action based upon lack of personal and subject matter jurisdiction, for failure to exhaust administrative remedies, and on grounds that review is barred by res judicata.

II. STATEMENT OF FACTS

Plaintiff William Smith is an employee within the King County Department of Adult and Juvenile Detention (the Department). The King County Personnel Board is a five member

ORIGINAL

1 administrative body authorized by the King County Charter and King County Code to consider
2 appeals from certain types of County employment decisions. KC Charter §540; KCC 3.12.290.¹

3 Mr. Smith sought Personnel Board review of a written reprimand issued by Department
4 on April 2, 2007. Goff Dec. at Ex. 2. On May 18, 2007, the Board issued an order to show cause
5 why the appeal should not be dismissed for lack of jurisdiction. Id. at Ex. 3. The show cause
6 order noted that its jurisdiction was constrained by the County Charter and Code and that neither
7 appeared to authorize Board review of written reprimand decisions. Id. "It appears to the Board
8 that Mr. Smith's appeal from a written reprimand letter is outside the scope of matters over which
9 the Board has review authority." Id. Parties were advised that the matter would be dismissed if
10 no response to the show cause order was received by June 8, 2007. Id. No response was received
11 by the Board to its show cause order. Id. at Ex. 4. On July 18, 2007, the Board accordingly
12 issued an order dismissing the appeal. Id. No further judicial review was sought from the
13 Board's order of dismissal.

14 On August 3, 2007, Smith refiled an appeal with the Personnel Board seeking review of
15 the same written reprimand issued by the Department. Id. at Ex. 5. On that same day, the
16 Department sent a letter to the Board asking that this second appeal likewise be dismissed. Id. at
17 Ex. 6. "It is still DAJD's position that, in accordance with King County Charter Section 540, the
18 Personnel Board does not have jurisdiction over appeals concerning written reprimands." Id. No
19 response to the Department's motion to dismiss was received by the Board. Id. On October 9,
20 2007, the Board acknowledged receipt of the additional August 3rd submittals from the parties,
21 reaffirmed its earlier dismissal and advised parties that the matter was closed. Id. at Ex. 7.

22

¹ Copies of code and charter sections referenced in this memorandum are provided as Exhibit 1 to the Declaration of David B. Goff.

1 Mr. Smith thereupon filed this Superior Court action seeking to challenge the Board's
2 second rejection of his appeal. The "Notice of Appeal" filed with this Court does not specify the
3 mechanism by which such review is being sought. Sinsky Dec. at Ex. A. The Case Information
4 Cover Sheet filed by Mr. Smith incorrectly categorized his cases under the label of
5 "Administrative Law Review" rather than "Writ of Review". *Id.* at Ex. B. Accordingly, at the
6 time the appeal was filed in the King County Superior Court, Mr. Smith was apparently provided
7 with a case schedule that appears to set forth a review process governing appeals of state agency
8 decisions under RCW Chapter 34.05, the Administrative Procedures Act ("APA"). *Id.* at Ex. C.
9 As soon as it became aware of the case schedule, the Board accordingly moved to strike the
10 order. The court granted the Board's motion on April 21, 2008.

11 No application for a writ has been sought by Mr. Smith in this matter.

12 While Mr. Smith apparently mailed copies of his notice of appeal to the Department's
13 attorney and to the Personnel Board, service was never made upon the Clerk of the County
14 Council as required.² Matsuo Dec. at ¶ 4.

15 III. EVIDENCE RELIED UPON

16 This motion is based upon the:

- 17 (1) Declaration of Dave Goff with attached Exhibits,
- 18 (2) Declaration of Michael Sinsky with attached Exhibits:
- 19 (3) Declaration of Janet Masuo; and
- 20 (4) files and records herein.

21
22 ² No Case Schedule or document with a Superior Court case number was ever provided to the Board. The undersigned counsel for the Personnel Board was unaware of the fact that this action had been filed until April 4, 2007.

1 IV. LEGAL AUTHORITY

2 A. Appeal fails to comply with jurisdictional time limits for seeking review

3 Plaintiff has not sought review of the Board's decision in accordance with jurisdictionally
4 mandated timelines. In Washington State, administrative hearing decisions may be reviewed under
5 one of three potential appeal avenues: (1) a specific statute may provide its own mechanism for
6 appeal; (2) a party may obtain review by a statutory writ of certiorari if the agency is 'exercising
7 judicial functions' under RCW 7.16.040; or (3) a party may seek review pursuant to the court's
8 inherent constitutional power to review illegal or manifestly arbitrary and capricious action
9 violative of fundamental rights. Pierce County Sheriff v. Civil Service Commission, 98 Wn.2d
10 690, 693, 658 P.2d 648 (1983). In this case, there is no otherwise applicable statute creating a
11 special form of appeal for decisions of the King County Personnel Board. While Smith does not
12 specify the mechanism by which he seeks to appeal the Board's decision, the appropriate review
13 method would clearly have been by statutory writ of certiorari.

14 The statutory writ of review described in RCW Chapter 7.16 is available where, as here,
15 the challenged board decision is quasi-judicial. RCW 7.16.040 (statutory writ available to
16 review decisions of board that exercises judicial functions). Courts considering similar appeals
17 from employee board decisions have affirmed the availability of review by statutory writ of
18 certiorari. King County v. Carter, 21 Wn.App. 681, 687, 586 P.2d 904 (1978)(statutory writ
19 appropriate mechanism for reviewing King County Personnel Board order on employee
20 termination appeal). See also Vance v. Seattle, 18 Wn.App. 418, 423, 569 P.2d 1194
21 (1977)(civil service commission decision affirming employee discharge subject to review by
22 statutory writ); Washington Public Employees Ass'n v. Washington Personnel Resources Bd., 91

1 Wn.App. 640, 646, 959 P.2d 143, 146 (1998)(Personnel board was exercising a judicial function
2 reviewable by statutory writ when it heard the unfair labor practice complaint).³

3 This would not be an appropriate matter for constitutional writ review. A constitutional
4 writ of certiorari is not a matter of right, but is discretionary with the court. Saldin v. Snohomish
5 County, 134 Wn.2d 288, 304, 949 P.2d 370 (1998). As discussed more fully below, the
6 constitutional writ of review is rarely issued when, as here, an otherwise adequate remedy at law
7 was available from the final decision. See Mattson v. Kline, 47 Wn.2d 538, 540, 288 P.2d 483
8 (1955); Snohomish County v. Shorelines Hearings Board, 108 Wn.App. 781, 785, 32 P.3d 1034
9 (2001).

10 King County Code makes clear that any appeal of a Board decision is time-barred if not
11 commenced within fourteen days following issuance of the decision.

12 All decisions of the personnel board shall be final unless appealed
13 to a court of competent jurisdiction within fourteen calendar days.

14 KCC 3.12.290(B). The Board's initial decision dismissing Smith's appeal was issued on July 18,
15 2007. No review of that decision was ever sought. The Board's subsequent letter reaffirming
16 dismissal was issued on October 9, 2007. Plaintiff has never properly served a copy of its Superior
17

18 ³ Washington courts employ a four-part test to determine whether administrative action is quasi-judicial and thus
19 reviewed under RCW 7.16: (1) whether courts could have been charged with making the agency decision; (2)
20 whether the action is one historically performed by courts; (3) whether the action involves application of law to
21 facts; and (4) whether the action resembles ordinary business of courts as opposed to that of legislators or
22 administrators. Each of these elements is readily apparent here: (1 and 2) courts could be charged with and have
historically exercised review authority over disputes regarding the lawfulness of employer discipline, see e.g. Wolf
v. Columbia School District No. 400, 86 Wn.App. 772, 938 P.2d 357 (1997); Roe v. Quality Transportation
Services, 67 Wn.App. 604, 838 P.2d 128 (1992); (3) Board review of such actions that are properly before it plainly
involves the application of law to facts; and (4) the Board's specific dismissal action at issue in this case, reviewing
the type of appeal filed against the legal limitations on its exercise of jurisdiction, resembles the ordinary business of
courts.

1 Court "Notice of Appeal" upon the County. Appellant's request for review is therefore untimely and
2 should be dismissed for lack of both personal and subject matter jurisdiction.

3 Untimeliness in this case is apparent for three reasons:

4 **First**, plaintiff Smith failed to properly serve the County within ninety days after filing of
5 his "Notice of Appeal." As such, the action has yet to be commenced in accordance with RCW
6 section 4.16.170. That section provides that, when an applicant has filed within the applicable
7 time period, he has an additional 90 days to serve necessary parties. Griffith v. City of Bellevue,
8 130 Wn.2d 189, 194, 922 P.2d 83, 86 (1996)("We apply this rule to the filing of petitions for
9 writs of certiorari and supporting affidavits."). Service upon the County may only be made upon
10 the Clerk of the King County Council. See RCW 4.28.080; See also KCC 2.04.010 (for purposes
11 of RCW 4.28.080, service upon the County is to be made upon the clerk of the county council).
12 Here, plaintiff has never properly served the County by delivering copies of the appeal to the
13 County Council Clerk. Absent service within ninety days after filing, the matter did not
14 commence on the date it was originally filed, and plaintiff therefore failed to satisfy the fourteen
15 day jurisdictional time period for seeking review.

16 **Second**, plaintiff's request for review is untimely insofar as the jurisdictionally required
17 supporting affidavit has not been filed within the ninety day period for completing service of
18 process. RCW 7.16.050 provides that an application for a writ of certiorari, a "writ of review,"
19 "must be made on affidavit by the party beneficially interested...." A verification may be
20 substituted for an affidavit. RCW 9A.72.085; Gordon v. Seattle-First Nat'l Bank, 49 Wash.2d
21 728, 731, 306 P.2d 739 (1957). This statutory affidavit/verification requirement is jurisdictional.
22 Crosby v. County of Spokane, 137 Wn.2d 296, 301, 971 P.2d 32, 36 (1999). Plaintiff is unable

1 to cure this jurisdictional defect by filing such an affidavit at this late date. Griffith v. City of
2 Bellevue, 130 Wn.2d 189, 194, 922 P.2d 83, 86 (1996)(the filing of supporting affidavits in
3 action for writ of certiorari must occur within ninety days after filing of the writ).

4 **Third**, even if plaintiff had properly commenced a writ action on October 24, 2007, the
5 action would nonetheless have been untimely because the Board's decision that it lacked
6 jurisdiction to consider written reprimand actions was clearly and unequivocally issued by order
7 of dismissal dated July 18, 2007. Any action challenging that decision would necessarily have
8 had to have been brought within fourteen days following issuance of that order.⁴ KCC
9 3.12.290(B).

10 The untimeliness of plaintiff's appeal renders this request for review jurisdictionally
11 defective and necessitates dismissal of this action. When reviewing statutory writs, a court acts in
12 a limited jurisdictional capacity.

13 [A] writ of certiorari is a special proceeding in which the court
14 is acting in an appellate capacity. Under such circumstances, the
15 court has only such jurisdiction as is conferred by law. One of
16 the necessary elements to confer appellate jurisdiction upon a
17 court is the giving of a timely notice of appeal.... Compliance
18 with such time limit is essential for the court to acquire
19 jurisdiction.

17 Deschenes v. King County, 83 Wash.2d 714, 716, 521 P.2d 1181 (1974)(compliance with
18 County Code's ten-day time limitation for filing judicial appeal is jurisdictional). Cf. Vance v.
19 Seattle, 18 Wn.App. at 424 (dismissing civil service commission writ action where not filed

20 _____
21 ⁴ Plaintiff cannot properly resurrect already-passed deadlines for seeking judicial review by simply refile a Board
22 petition seeking the same relief that the Board already determined was beyond its jurisdiction to issue. See Kingery v.
Dep't of Labor & Indus., 80 Wn.App.704, 708, 910 P.2d 1325 (1996)(party barred from seeking judicial review of
survivor benefit claim arising out of same incident of previous unappealed denial); Hilltop Terrace Homeowners v.
Island County, 72 Wn.App. 91, 98 (1993)(judicial review of permit application barred by res judicata where application
did not present a substantial change from prior unappealed permit denial).

1 within analogous twenty-day period for seeking Superior Court review of decision by court of
2 limited jurisdiction). Where, as here, a court lacks jurisdiction over a writ proceeding, it “may
3 do nothing other than enter an order of dismissal.” Deschenes, 83 Wash.2d at 716.

4 Any argument that plaintiff should be allowed to obtain review by way of an
5 extraordinary constitutional writ would be devoid of merit. While courts have inherent
6 constitutional authority to entertain writs of review, the discretion to exercise such review is
7 rarely invoked under circumstances such as these, where an alternative remedy was available but
8 was not appropriately pursued. Such inherent review is rarely granted where a petitioner has
9 failed to take advantage of another avenue of review without an adequate excuse.
10 Bridle Trails Community Club v. City of Bellevue 45 Wn.App. 248, 254, 724 P.2d 1110,
11 1113 (1986).

12 The [constitutional] writ is an 'extraordinary remedy reserved for
13 extraordinary situations,' *King Cy. v. Board of Tax Appeals*, 28
14 Wash.App. 230, 237, 622 P.2d 898 (1981), and is rarely granted
15 where a direct appeal is available unless the appellant can show
16 good cause for not using that method. *Birch Bay Sales, Inc. v.*
17 *Whatcom Cy.*, 65 Wash.App.739, 45-46, 829 P.2d 1109 (1992).

18 San Juan Fidalgo Holding Co. v. Skagit County 87 Wn.App. 703, 714, 943 P.2d 341,
19 346 (1997) (no good cause for issuance of constitutional writ where statutory writ became
20 unavailable as a result of appellant's own delay).

21 The unavailability of ordinarily applicable statutory writ review in this case is simply the
22 result of plaintiff's failure to timely commence statutory writ review. There is no good cause in
this case for not having proceeded by statutory writ of certiorari. Plaintiff was aware of the
Board's decisions on July 18, 2007 and October 9, 2007. The fourteen day time period for

1 appealing Personnel Board decisions is clearly set forth in the County Code. KCC 3.12.290(B).
2 This is not one of the "rare" instances where issuance of the extraordinary constitutional writ
3 would be warranted. Plaintiff's request for review of the Board decision should accordingly be
4 dismissed.

5 **B. Plaintiff Failed to Exhaust Administrative Remedies.**

6 Plaintiff's effort to obtain judicial review is likewise barred for failure to exhaust
7 administrative remedies. The exhaustion of administrative remedies doctrine ensures: (1) that
8 proper deference is given to that body possessing expertise in areas outside the conventional
9 experience of judges, and (2) that the administrative process will not be interrupted prematurely,
10 so that the agency can develop the necessary factual background on which to reach its decision,
11 so that the agency will have the opportunity to exercise its expertise and to correct its own errors,
12 and so as not to encourage individuals to ignore administrative procedures by resorting to the
13 courts prematurely. Phillips v. King County, 87 Wn.App. 468, 479-80, 943 P.2d 306 (1997),
14 aff'd, 136 Wn.2d 946 (1998).

15 Here, plaintiff altogether ignored Board procedures leading to the dismissal of his
16 administrative appeals. Plaintiff filed no response either to the Board's May 18, 2007 show
17 cause order that resulted in the July 18, 2007 Order of Dismissal or to the County's August 3,
18 2007 request for dismissal of the subsequently refiled appeal which was dismissed on October 9,
19 2007. Plaintiff may not properly invoke judicial review of Board orders dismissing his case for
20 lack of jurisdiction without first raising arguments with the Board that it has authority to consider
21 appeals of the written reprimand decisions at issue. It is well settled that a party aggrieved by
22 governmental action must first exhaust all available administrative remedies before filing suit.

1 CLEAN v. Spokane, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997). When a party fails to seek
2 redress using available administrative procedures before filing suit, the matter should be
3 dismissed.

4 **C. Plaintiff's Request for Review of Board Decision Barred by Res Judicata**

5 Plaintiff's effort to appeal the Personnel Board's decision to dismiss its administrative
6 appeal for lack of jurisdiction is likewise barred by the doctrine of res judicata. Res judicata
7 prevents claims that were or should have been decided among the parties in prior proceedings.
8 Norris v. Norris, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). A claim is subject to res judicata
9 effect if the subsequent proceeding involves the same subject matter, cause of action, parties and
10 quality of persons. See Raine v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).

11 Each of these res judicata factors is readily apparent in this case. As noted above, on
12 July 18, 2007, the Board issued an order dismissing plaintiff's administrative appeal of the
13 Department of Adult and Juvenile Detention written reprimand on grounds that it lacked
14 jurisdiction to consider such a challenge. No further judicial review was sought from the Board's
15 order of dismissal. On August 3, 2007, Smith refiled an appeal, again seeking Personnel Board
16 review of the same written reprimand issued by the Department. The subject matter of the claim
17 involved in the second administrative appeal and the parties involved in the second appeal were
18 identical in virtually all respects. The Board's jurisdictional authority had not changed since the
19 time it issued its prior dismissal. Again, the Board dismissed the appeal.

20 The Board's decision that it lacked jurisdiction over such a claim was issued on July 18,
21 2007 and became final and non-reviewable after the deadline for appealing that decision to court
22 passed. The doctrine of res judicata accordingly bars plaintiff from later seeking judicial review

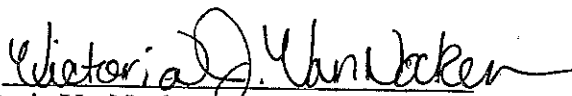
1 of the Board's decision that simply reaffirmed its earlier unappealed ruling. See Kingery v. Dept'
2 of Labor & Indus., 80 Wn.App.704, 708, 910 P.2d 1325 (1996)(party barred from seeking judicial
3 review of survivor benefit claim arising out of same incident of previous unappealed denial); Hilltop
4 Terrace Homeowners v. Island County, 72 Wn.App. 91, 98 (1993)(judicial review of permit
5 application barred by res judicata where application did not present a substantial change from prior
6 unappealed permit denial). . Plaintiff's effort to now obtain review of the Board's decision should
7 therefore be dismissed.

8 V. CONCLUSION

9 For each of the reasons set forth above, the King County Personnel Board respectfully
10 requests that this mater be dismissed.

11 DATED this 7th day of May, 2008.

12
13 DANIEL T. SATTERBERG,
King County Prosecuting Attorney

14
15 By: 
Victoria VanNocken, WSBA # 26733
16 Deputy Prosecuting Attorney
Attorneys for King County Personnel Board