

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-808

Filed: 5 May 2015

Guilford County, No. 14 CVS 2901

ERIN ISENBERG, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF  
EMPLOYMENT SECURITY, Respondent.

Appeal by petitioner from order entered 28 April 2014 by Judge A. Robinson  
Hassell in Guilford County Superior Court. Heard in the Court of Appeals  
18 November 2014.

*Hopler & Wilms, LLP, by Adam J. Hopler, for petitioner-appellant.*

*N.C. Department of Commerce, Division of Employment Security, by Chief  
Counsel Thomas H. Hodges and Sharon A. Johnston, for respondent-appellee.*

McCULLOUGH, Judge.

Erin Isenberg (“petitioner”) appeals from an order dismissing her petition for  
judicial review of a decision of the North Carolina Department of Commerce, Division  
of Employment Security (“respondent” or “Division”). Upon review, we affirm.

I. Background

On 21 January 2014, petitioner filed a petition for judicial review (the  
“petition”) in Guilford County Superior Court seeking review of a 2 January 2014  
decision by respondent that petitioner was disqualified from receiving unemployment

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insurance benefits. Respondent responded to the petition on 12 February 2014 by filing a motion to dismiss on the ground that petitioner failed to serve the petition upon all parties of record in the Division proceedings as required by N.C. Gen. Stat. § 96-15(h). Attached to respondent's motion was an affidavit of the Director of Business and Finance of petitioner's former employer, Growing Years Burlington, indicating that petitioner's former employer had not been served with a copy of the petition as of the date of the affidavit, 11 February 2014.

On 10 March 2014, petitioner filed an affidavit of service dated 5 March 2014. The affidavit of service, along with the attachments, show that petitioner mailed a copy of the petition to the former employer via certified mail on 31 January 2014. The U.S. Postal Service attempted delivery on 3 February 2014 and left notice because there was no authorized recipient available. Thereafter, the mailing was available for pickup from 12 February 2014 to 20 February 2014. The mailing was returned to petitioner unclaimed on 27 February 2014. During the time the mail was held by the U.S. Postal Service, petitioner communicated with respondent by email. In their communications, respondent indicated that it had been in contact with petitioner's former employer about the mailing but petitioner's former employer never received it.

In addition to the affidavit of service, petitioner submitted a brief in which he opposed respondent's motion to dismiss the petition.

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Respondent's motion to dismiss came on for hearing in Guilford County Superior Court on 9 April 2014 before the Honorable A. Robinson Hassell. By order filed 28 April 2014, the superior court granted respondent's motion and dismissed the petition. In doing so, the superior court concluded it did not obtain jurisdiction to review the petition because petitioner failed to comply with the statutory requirements of N.C. Gen. Stat. § 96-15(h) in that petitioner failed to serve the petition on petitioner's former employer within the time allowed. Petitioner now appeals.

II. Discussion

On appeal, petitioner raises two issues concerning the superior court's interpretation of N.C. Gen. Stat. § 96-15(h). That statute, in full, provides the following concerning judicial review of a decision of the Division:

Any decision of the Division, in the absence of judicial review as herein provided, or in the absence of an interested party filing a request for reconsideration, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved by the decision has exhausted his remedies before the Division as provided in this Chapter and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Division and what relief the petitioner seeks. *Within 10 days after the petition is filed with the court, the petitioner shall serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Division and upon all parties of*

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*record to the Division proceedings.* Names and addresses of the parties shall be furnished to the petitioner by the Division upon request. The Division shall be deemed to be a party to any judicial action involving any of its decisions and may be represented in the judicial action by any qualified attorney who has been designated by it for that purpose. Any questions regarding the requirements of this subsection concerning the service or filing of a petition shall be determined by the superior court. Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in [N.C. Gen. Stat. §] 1A-1, Rule 24.

N.C. Gen. Stat. § 96-15(h) (2013) (emphasis added).

In the review proceedings below, the superior court interpreted the service requirement in the N.C. Gen. Stat. § 96-15(h) to require that copies of the petition “must be *delivered* to the Division and all parties of record to the Division’s proceedings within ten (10) days after the petition is filed.” (Emphasis added). Now in petitioner’s first issue on appeal, petitioner claims the superior court’s interpretation is error. Specifically, petitioner contends actual delivery is not required for service, but instead service under N.C. Gen. Stat. § 96-15(h) is complete upon deposit of the petition into the mail.

The crucial inquiry in deciding this issue is whether Rule 4 or Rule 5 of the N.C. Rules of Civil Procedure applies to service of the petition under N.C. Gen. Stat.

§ 96-15(h).<sup>1</sup> “Issues of statutory construction are questions of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Rule 4 governs the manner of service to exercise personal jurisdiction and provides that service of process may be made upon a natural person, agencies of the State, and business entities “[b]y delivering a copy of the summons and of the complaint . . .” or “[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested . . . [.]” among other methods. N.C. Gen. Stat. § 1A-1, Rule 4(j) (2013). As both parties acknowledge, service under Rule 4 is complete upon actual delivery.

As a complement to Rule 4, Rule 5 governs the service of pleadings and other papers. It provides that “[w]ith respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party's attorney of record . . . . If the party has no attorney of record, service shall be made upon the party.” N.C. Gen. Stat. § 1A-1, Rule 5(b) (2013). Service upon the party's attorney of record or upon the party may be made in a manner provided in Rule 4 or by delivering or mailing a copy of the pleading or other paper to the party's attorney of record or the party. *Id.* Under Rule 5, “[s]ervice by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and

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<sup>1</sup> All references to rules in this opinion are to the N.C. Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1.

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custody of the [U.S.] Postal Service.” *Id.* “A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4.” N.C. Gen. Stat. § 1A-1, Rule 5(b1) (2013).

In this case, petitioner asserts “[s]ervice of a petition for judicial review should be looked at as service under [Rule 5] as opposed to Rule 4.”

In support of this position, petitioner points to the following language in N.C. Gen. Stat. § 96-15(h): “Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after *receipt* of the copy of the petition.” N.C. Gen. Stat. § 96-15(h) (emphasis added). Petitioner contends that “[i]f the legislature had equated service with actual delivery then one would presume that the legislature would have used the word ‘service’ instead of ‘receipt’ to start the period of time for the [e]mployer to request participation.” Petitioner further argues that if actual delivery is required for service under N.C. Gen. Stat. § 96-15(h), the statute provides an unreasonably short period of time, “[w]ithin 10 days after the petition is filed with the court,” to accomplish service when compared to the 60 day period allowed for service in Rule 4. *See* N.C. Gen. Stat. § 1A-1, Rule 4(c).

Upon review, we disagree. While we acknowledge the short time period allowed for service of the petition under N.C. Gen. Stat. § 96-15(h) provides little room for mistakes in service, we are bound by the language of the statute, which we hold

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supports the superior court's determination that actual delivery, as required in Rule 4, is required for service of the petition under N.C. Gen. Stat. § 96-15(h).

Similar to service by mail under various subsections of Rule 4(j), N.C. Gen. Stat. § 96-15(h) provides service may be accomplished by "certified mail, return receipt requested[.]" When a statute requires "certified mail, return receipt requested," it is clear to this Court that the emphasis is on actual delivery. *See Nissan Div. of Nissan Motor Corp. in USA v. Nissan*, 111 N.C. App. 748, 755, 434 S.E.2d 224, 228 (1993) ("When a statute requires registered mail, . . . the emphasis is on delivery of a written document."), *rev'd sub nom. on other grounds, Nissan Div. of Nissan Motor Corp. in U.S. v. Fred Anderson Nissan*, 337 N.C. 424, 445 S.E.2d 600 (1994). Rule 5(b), on the other hand, places no emphasis on actual delivery and merely requires pleadings and other papers to be mailed to the party's last known address. Instead of proof of actual delivery by return receipt, Rule 5(b1) requires a certificate of service to accompany all pleadings or other papers required to be served.

Where the language in N.C. Gen. Stat. § 96-15(h) closely mirrors the language in Rule 4(j), we hold actual delivery is required to accomplish service of the petition. This holding guarantees that all parties to the Division proceedings have notice that a petition for judicial review of a final decision of the Division has been filed in superior court.

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Additionally, N.C. Gen. Stat. § 96-15(h) does not distinguish between the service of a petition for judicial review upon the Division and service upon all parties of record to the Division proceedings. Therefore, we assume the service requirements for the Division and all parties of record to the Division proceedings are the same. N.C. Gen. Stat. § 96-4 provides that “[s]ervice of process upon the Division in any proceeding instituted before an administrative agency or court of this State shall be pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 4(j)(4)[.]” N.C. Gen. Stat. § 96-4(y) (2013). Thus, we hold N.C. Gen. Stat. § 96-15(h) requires actual delivery to achieve service on petitioner’s former employer. The superior court’s interpretation was not error.

On appeal, petitioner also argues in the alternative that even if service under N.C. Gen. Stat. § 96-15(h) requires actual delivery, service of the petition upon petitioner’s former employer was not a jurisdictional defect necessitating dismissal. We disagree.

The courts have long recognized that

[t]here is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court.

*A fortiori*, no appeal lies from an order or decision of an administrative agency of the State or from the judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. If the right exists, it is brought into being, and is a right granted, by legislative enactment.

There can be no appeal from the decision of an



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administrative agency except pursuant to specific statutory provision therefor.

Obviously then, the appeal must conform to the statute granting the right and regulating the procedure.

The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.

*In re State ex rel. Emp't Sec. Comm'n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (quotation marks and citations omitted). Nothing in the many amendments to N.C. Gen. Stat. § 96-15(h) to date have changed the mandatory nature of the service requirements. Thus, we hold the service requirements are jurisdictional and the superior court did not err in dismissing the petition where petitioner's former employer, a party of record to the Division proceedings, was not properly served.

III. Conclusion

For the reasons discussed above, we affirm the superior court's dismissal of the petition.

AFFIRMED.

Judges CALABRIA and STROUD concur.