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CASE NUMBER: 2016-CV-000150

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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT OF KANSAS

STEPHANIE MOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2016-CV-000150
	)	
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT	)	
	)	
and	)	
	)	
SUSAN MOSIER, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,	)	
	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS

COMES NOW the Respondents, Kansas Department of Health and Environment (KDHE), and Susan Mosier, Secretary of the KDHE, by and through counsel, Darian Dernovish and Eugene Lueger, and file this Motion to Dismiss. As per Shawnee County District Court Local Rule 3.202(a), a memorandum in support of the motion is filed herewith.

The Respondents request dismissal based on the following:

(1) Petitioner failed to strictly comply with the pleading requirements of K.S.A. 77-614(b) of the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, and as a result the Court does not have subject matter jurisdiction;

(2) Petitioner's amendment to the Petition for Judicial Review was not filed within the 30-day time limit to request review as mandated by the KJRA;

(3) The applicable Statute of Limitations, K.S.A. 60-513(a)(4), requires dismissal because the Petitioner failed to file an appeal within two years of November 20, 2013;

(4) The relief requested by Petitioner in the Petition for Judicial Review – to amend an original birth certificate – is not permitted by K.S.A. 65-2422c; and

(5) The relief requested by Petitioner contravenes K.A.R. 28-17-20, which was codified on June 24, 2016.

RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF FACTS

1. The original birth certificate for Petitioner indicated "male" as Petitioner's sex at the time of birth, December 31, 1957. (Pet. ¶10).

2. As a result of Petitioner undergoing sex reassignment surgery in Thailand in 2012 Petitioner filed a request to amend Petitioner's birth certificate on November 18, 2013. (Certification of Record, pgs. 1-3).

3. On November 20, 2013, Respondents issued a final agency action and order denying Petitioner's request to amend the birth certificate. (Certification of Record, pg. 4).

4. Petitioner did not timely appeal the Respondents' decision of November 20, 2013.

5. On December 14, 2015, Petitioner filed a second request to amend Petitioner's birth

certificate, again based on sex reassignment surgery. Petitioner also requested identification of the person to receive service of process which had been omitted from the final agency action and order of November 20, 2013. (Certification of Record, pgs. 5-33).

6. In a letter dated January 22, 2016, Respondent, Susan Mosier, Secretary of the KDHE, notified Petitioner of the previously issued final agency action and order of November 20, 2013, in response to Petitioner's request. The letter from the KDHE indicated the person to receive service of process. (Certification of Record, pg. 34).

7. On February 19, 2016, Petitioner filed a Petition for Judicial Review under the KJRA. The specific request for relief contained in the Petition is to "approve the amendment to the gender marker on Petitioner's birth certificate". (Pet. ¶ 57).

8. The Petition indicated that Petitioner was appealing the letter from Respondents dated January 22, 2016. (Pet. ¶5).

9. The January 22, 2016 letter to Petitioner was not a final agency action and order and therefore not subject to appeal under KJRA.

10. Respondents filed a Motion to Dismiss on April 15, 2016.

11. The Court did not allow argument in the case and denied the motion and granted the motion in part, issuing a ruling in a Memorandum Decision and Order dated August 1, 2016.

12. In its Memorandum Decision and Order, the Court ruled that the November 20, 2013 decision was the final agency action and final order that gave rise to this action, not the letter dated January 22, 2016.

13. The Court further ruled that the failure of the Respondents to notify the Petitioner of the person to receive service of process in the November 20, 2013 final agency action and final order tolled the 30-day time period for filing a Petition for Judicial Review allowing the Petition of February 19, 2016.

14. Petitioner's February 19, 2016 Petition failed to identify the correct agency action in direct violation of the strict compliance requirements of the KJRA.

15. Petitioner was permitted by the Court to amend the Petition for Judicial Review. The amended version was filed on August 17, 2016.

16. The Court did not have jurisdiction to allow the amended Petition to be filed beyond February 24, 2016.

17. Respondents allege that the appeal should not be tolled and anything filed by Petitioner beyond thirty days is not allowed under the KJRA.

18. Respondents assert that outside of the KJRA, the statute of limitations is two years on this type of action pursuant to K.S.A. 60-513(a)(4).

19. Respondents state the relief sought by Petitioner, to amend an original birth certificate, is not permitted by K.S.A. 65-2422c.

20. Respondents state that the relief sought by Petitioner is not permitted by K.A.R. 28-17-20, which was codified prior to the Amended Filing of the Petition.

ARGUMENT AND AUTHORITIES

Respondents request the Court dismiss all of the claims raised in the Petition for Judicial Review because either the court lacks subject matter jurisdiction to hear this matter or the allegations contained in the Petition fail to state a claim.

Motion to Dismiss Standard

"On a motion to dismiss for failure to state a claim upon which relief can be granted, the question is whether in the light most favorable to plaintiff and with every doubt resolved in plaintiff's favor, the petition states a valid claim for relief." *Ritchie Paving, Inc. v. City of Deerfield, Kansas*, 275 Kan. 631, 631 Syl. ¶ 1, 67 P.3d 843, 844 (2003). *See also Smith v. State*, 264 Kan. 348, 353, 955 P.2d 1293, 1297 (1998) (same for motion to dismiss for lack of subject matter jurisdiction). The court must accept the plaintiff's well-pleaded facts and any inferences that

reasonably follow. *See Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140, 143 (2001). "However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself." *Id.*

1. ***Petitioner failed to strictly comply with the pleading requirements of K.S.A. 77-614(b) by failing to identify the correct agency action and as a result the Petition for Judicial Review must be dismissed for lack of subject matter jurisdiction.***

Petitioner filed a request to amend Petitioner's birth certificate on November 18, 2013. Respondents issued a denial of the request on November 20, 2013. The Petitioner waited until December 14, 2015 to file another request, including requesting the name of the person to receive service of process. In response, Secretary Susan Mosier issued the letter dated January 22, 2016, notifying Petitioner that the November 20, 2013 letter was the final decision in this matter. The letter did provide notice of the person to receive service of process. Petitioner then filed a Petition for Judicial Review on February 19, 2016 appealing the Secretary's decision of January 22, 2016. The letter dated January 22, 2016, was not a denial of Petitioner's request to amend a birth certificate and therefore, is not an agency action subject to appeal as previously determined by the Court in its Memorandum Decision and Order. The January 22, 2016 letter merely indicates that a previous agency action was issued to Petitioner and that the final agency action and order is contained in the letter dated November 20, 2013.

An "agency action" as defined in K.S.A. 77-602(b) includes "(1) the whole or part of a rule or regulation or an order." An "order" under K.S.A. 77-602(e) is "an agency action of particular applicability that determines the rights, duties, privileges, immunities or other legal interests of

one or more specific persons." Since the letter of November 20, 2013 determined the legal interests of Petitioner, the letter is an "agency action" and an "order".

Respondents intended that the November 20, 2013 order be final in that it was not preliminary with regard to subsequent agency action. A "final agency action" is defined in K.S.A. 77-607(b)(1) as "the whole or part of any agency action other than nonfinal agency action." "Nonfinal agency action" is "the whole or part of an agency determination ... that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency." K.S.A. 77-607(b)(2). Therefore, the denial issued on November 20, 2013 was the final agency action. Petitioner did not appeal this order.

Review of an administrative agency action is governed by the KJRA. The KJRA provides specific pleading requirements for a petition for judicial review, including K.S.A. 77-614, which states: "(b) A petition for judicial review shall set forth: ... (3) identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action." Petitioner failed to comply with the requirements of K.S.A. 77-614(b) when Petitioner incorrectly identified the January 22, 2016 letter as the agency action subject to appeal, when in fact the January 22, 2016 letter was not an agency action and thus not appealable under the KJRA. The November 20, 2013 letter from Respondent was the final agency action and order, and, therefore was the only action subject to appeal under the KJRA.

"[F]ailure to comply with the pleading requirements set forth in K.S.A. 77-614(b) precludes a litigant's statutorily granted right of appeal." *Pittsburg State University v. Kansas Board of Regents*, 30 Kan.App.2d 37, Syl. ¶7 (2001). "Application of a strict compliance standard to petitions for judicial review of agency actions is in keeping with the overall intent of the

legislature in enacting the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA) and results in apprising both the court and the agency of the position raised." *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, Syl. ¶2 (2009). *See also Ashley v. Kansas Dept. of Revenue*, 38 Kan.App.2d 421, Syl. ¶5 (2007); *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, Syl. ¶8 (2006).

By failing to correctly identify the agency action at issue, Petitioner did not comply with the strict compliance standard applicable to petitions for judicial review of agency actions and cannot be allowed to later amend the petition to identify a different agency action. Conseqeuently, the Court does not have subject matter jurisdiction in this case and the motion to dismiss should be granted.

2. ***An amendment of the Petition for Judicial Review beyond the KJRA mandated 30-day time limit to request does not cure the lack of subject matter jurisdiction.***

The KJRA mandates strict compliance with its pleading requirements. Under K.S.A. 77-614(b)(3) a petition for judicial review must set forth identification of the agency action at issue. Moreover, K.S.A. 77-613(b) requires that "a petition for judicial review of a final order shall be filed within 30 days". Petitioner failed to strictly comply with the requirements of the KJRA when Petitioner filed an Amended Petition for Judicial Review on August 17, 2016, outside the 30-day time period for filing an appeal.

Assuming that the time for filing a petition was tolled as previously determined by the Court because the Respondents failed to strictly comply with the requirements of K.S.A. 77-613(e), then Petitioner was required to file a Petition for Judicial Review, identifying the agency action which Petitioner was appealing, within 30 days of January 22, 2016. Therefore, including

three mailing days, the Petitioner was required to file a petition for judicial review appealing the November 20, 2013 decision on or before February 24, 2016 (3 days added for mailing).

In the Court's Memorandum Decision and Order the Court recognized that Petitioner failed to identify the correct agency action subject to review. In an attempt to allow the Petitioner to remedy their failure to comply with the requirements of K.S.A. 77-614(b) the Court granted the Petitioner an opportunity to amend the petition. Petitioner filed an Amended Petition for Judicial Review on August 17, 2016, identifying the November 20, 2013 decision as the order being appealed. However, when a petitioner fails to comply with the pleading requirements in the original petition an amendment to a defective petition for judicial review is contrary to the strict compliance standard for actions under the KJRA. *See Kuenstler v. Kansas Dept. of Revenue*, 40 Kan.App.2d 1036 (2008).

In *Kuenstler*, the petitioner failed to strictly comply with the pleading requirements set forth in K.S.A. 77-614(b). In an attempt to correct the defects of his petition *Kuenstler* cited the Code of Civil Procedure as the means to allow an amendment. The Court of Appeals in *Kuenstler* ruled: "[A] petition in compliance with K.S.A. 77-614 must be filed within the statutory time period to give the trial court subject matter jurisdiction. We further agree that the relation back provisions under the Code of Civil Procedure cannot operate to cure the trial court's lack of subject matter jurisdiction in an administrative action." *Id* at 1047. Consequently, *Kuenstler's* amendment filed outside the time period for filing the original petition was not allowed.

In the present case, which is remarkably similar to *Kuenstler*, Petitioner's amendment to the Petition for Judicial Review is outside the time period for filing the original petition. Petitioner's original Petition for Judicial Review was filed on February 19, 2016. Petitioner filed the Amended Petition for Judicial Review on August 17, 2016, outside the 30-day time period for

filing an appeal. Pursuant to *Kuenstler*, when a petition for judicial review is defective because it does not comply with the strict compliance standard for actions brought pursuant to the KJRA, an amendment to the petition does not cure the requirement for filing a petition for judicial review within the 30-day filing period.

By failing to file a petition identifying the correct agency action at issue within thirty days, Petitioner did not comply with the strict compliance standard applicable to petitions for judicial review of agency actions and cannot be allowed to later amend the petition to identify a different agency action. As a result, the Court does not have subject matter jurisdiction in this case and the motion to dismiss should be granted.

3. Petitioner's claims are barred by the statute of limitations pursuant to K.S.A. 60-513.

Pursuant to K.S.A. 60-513(a)(4) the statute of limitations for an action for injury to the rights of another, not arising on contract, is limited to two years. The various actions that fall under K.S.A. 60-513(a)(4) include actions claiming violations of due process and equal rights. *See Elam v. Williams*, 753 F.Supp. 1530 (D.Kan.1990); *Amro v. Boeing Co.*, 951 F.Supp. 1533 (D.Kan.1997); *Smith v. United Technologies, Essex Group, Inc.*, 240 Kan. 562 (1987). K.S.A. 60-513(a)(4) is also applicable to tort and civil rights claims. *See Lindenman v. Umscheid*, 255 Kan. 610 (1994). In the present action, Petitioner claims an injury was sustained, specifically pleading that Petitioner's privacy and liberty rights were violated and Respondents are guilty of sex discrimination. These claims are covered by K.S.A. 60-513(a)(4).

The Court ruled in its Memorandum Decision and Order that the November 20, 2013 decision tolled the Petitioner's time to appeal. While the Court identified *Heiland v. Dunnick*, 270 Kan. 663 (2001) and *Reifschneider v. State of Kansas*, 266 Kan. 338 (1998) as cases supporting

tolling the 30-day time period to appeal an action under the KJRA, these cases do not indicate that the statute of limitations was tolled. If Petitioner's argument that the time period for appealing was tolled indefinitely were carried to its logical conclusion, a person receiving an order that fails to identify the person to receive service of process could sit on their rights without taking an affirmative action to seek relief. For this uncertainty alone, statutes of limitation were enacted to prevent a person from sitting on their rights. "Statutes of limitation are statutes of repose, precluding presentation of stale claims and encouraging diligence on the part of those whose rights have been infringed." *Welch v. City of Kansas City*, 204 Kan. 765, Syl. ¶8 (1970).

"In general, a cause of action accrues, so as to start the running of the statute of limitations, as soon as the right to maintain a legal action arises. The true test to determine when an action accrues is that point in time at which the plaintiff could first have filed and prosecuted the action to a successful conclusion." *Admire Bank & Trust v. City of Emporia,* 250 Kan. 688, 698, 829 P.2d 578 (1992). The agency action in this case, the denial of the request to amend Petitioner's birth certificate, was issued on November 20, 2013. This is the point in time at which the Petitioner could have filed an action claiming a violation of constitutional rights or any other claim arising out the denial of Petitioner's request to amend Petitioner's birth certificate.

Because the Respondents' denial of Petitioner's request to amend Petitioner's birth certificate was issued on November 20, 2013, and that is the only agency action which gave rise to an appeal, that is the point in time at which Petitioner could first have filed and prosecuted the action. Petitioner filed the Petition for Judicial Review in this case on February 19, 2016. This is over two years after the agency action was issued. Because the Petition in this matter was not filed until February 19, 2016, well over the two year period provided by the statute of limitations, the Petitioner's claims are barred and the motion to dismiss should be granted.

4. ***The relief requested by Petitioner in the Petition - amend the original birth certificate - is not permitted by State law.***

In the prayer for relief Petitioner requests the Court to approve the amendment to the birth certificate. However, an amendment to the birth certificate is not permitted under the statute referenced by Petitioner.

Petitioner cites K.S.A. 65-2422c as the basis for the request. K.S.A. 65-2422c allows for minor corrections to certificates or records, but provides that "[a]ny certificate so corrected shall be marked "amended", and shall have such further marking as shall be prescribed by the secretary". Petitioner is requesting an amendment to the original birth certificate as opposed to having an "amended" certificate issued. While this appears to be a fine distinction, the statute only provides for an "amended" certificate. Therefore, the Petitioner's request is beyond the authority granted to the Respondents pursuant to K.S.A. 65-2422c.

5. ***The relief requested by Petitioner in the Petition - amend the gender marker on the Petitioner's birth certificate - is not permitted by State law.***

K.A.R. 28-17-20 was amended, effective June 24, 2016. The regulation, as amended, removed the provision allowing for the correction of a birth certificate as a result of a gender reassignment surgery. Since the Petitioner did not file the Amended Petition for Judicial Review until August 17, 2016, and an amendment to the birth certificate is no longer permitted by law, the Petition must be dismissed.

For the reasons set forth in Respondents' Motion and Memorandum, Respondents request that this action be dismissed and such other and further relief as the Court deems just and proper.

Respectfully submitted:

/s/ Darian Dernovish
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2017, I electronically filed the foregoing with the Clerk of the Court and emailed the same to the following:

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