Go to Table of Contents

SUPREME COURT OF ARIZONA

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Arizona Supreme Court No. CV-16-0306-PR Court of Appeals Division One No. 1 CA-CV 15-0455 Maricopa County Superior Court No. LC2015-000172-001

DEFENDANT/APPELLEE'S SUPPLEMENTAL BRIEF

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Click on headings below to go to corresponding page

TABLE OF CONTENTS

Page

Click on headings below to go to corresponding page

Go to Table of Contents

TABLE OF AUTHORITIES

Page

Cases

Statutes

Go to Table of Contents

Rules

Go to Table of Contents

INTRODUCTION

The Judicial Review of Administrative Decisions Act ("JRADA") provides that, "[u]nless review is sought of an administrative decision within the time and in the manner provided . . . the parties to the proceeding . . . shall be barred from obtaining judicial review." A.R.S. § 12-902(B). "It is well settled that the time for filing an appeal, whether by appeal or by complaint for judicial review following the conclusion of the administrative process, is jurisdictional." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 413 ¶ 25 (2006). In this case, Appellant Legacy Foundation Action Fund ("LFAF"), failed to timely seek judicial review of a final decision of the Citizens Clean Elections Commission, and the lower courts dismissed LFAF's case.

The question for this Court is whether a party who fails to seek review "within the time" required may nevertheless avoid dismissal of the untimely appeal and be permitted to seek judicial review to challenge an administrative agency's jurisdiction.

The answer is no. The right of judicial review is created by statute, and the statutory provisions authorizing judicial review here do not carve out an extension of time to appeal jurisdictional issues. Separate from the

total bar on untimely appeals, § 12-902(B) also limits the scope of judicial review to "questioning the jurisdiction of the administrative agency" when a party has defaulted at the administrative level—when the party lets an "administrative decision become[] final because of failure to file any document in the nature of an objection, protest, petition for hearing or application for administrative review." A.R.S. § 12-902(B). LFAF and dicta from two otherwise unrelated court of appeals decisions, *Dandoy v. Phoenix*, 133 Ariz. 334 (App. 1982) and *Arkules v. Board of Adjustment*, 151 Ariz. 438 (App. 1986), misread this sentence from § 12-902(B) as allowing a party to challenge a final administrative decision on jurisdictional grounds at any time, no matter how long the party waits to seek judicial review. That reading of § 12-902(B) is unambiguously incorrect, and the Court should disapprove of the unnecessary language suggesting otherwise in *Arkules* and *Dandoy*.

Moreover, LFAF's preferred rule would leave final administrative decisions open to question indefinitely, regardless of how long a party sits on its rights. This result would frustrate the purpose of § 12-902, which is to provide both for meaningful judicial review of administrative decisions and for finality of administrative decisions. The Court should affirm.

Go to Table of Contents

PERTINENT BACKGROUND

I. The voter-approved Clean Elections Act charges the Commission with enforcement of the Act, and makes the Commission's final enforcement decisions subject to judicial review.

In 1998, Arizona voters approved the Citizens Clean Elections Act (the "Act"). *See* A.R.S. § 16-940. The Act created the Commission which is charged with enforcing the Act. A.R.S. § 16-956(A)(7). Among other things, the Commission is authorized to enforce the Act through the imposition of penalties for a failure to comply with reporting and disclosure requirements for campaign-related spending and advertising. *See* A.R.S. § 16-942. The enforcement process can begin with a complaint submitted to the Commission, as it did here.

The Act and the Commission's rules set out a multi-step process for the resolution of a complaint alleging violations of the Act. *See* Ariz. Admin. Code §§ R2-20-203 to –208 (CCEC rules for processing complaints). The end-product of the process is a "final administrative decision" that is

subject to judicial review as provided in JRADA.[1] *See* A.R.S. § 16-957(B) (providing that "violator has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in [JRADA]").

II. The Commission receives a complaint alleging that LFAF violated the Act and commences an enforcement proceeding that ultimately results in the March 27, 2015 final administrative decision.

In 2014, the Commission received a complaint alleging that LFAF failed to comply with the Act's requirement that "any person who makes independent expenditures"—spending used to advocate the election or defeat of a candidate—shall file certain reports of those expenditures.[2] The Commission therefore commenced an enforcement proceeding to consider the allegations.[3]

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[1] *See* Ariz. Admin. Code § R2-20-227 (describing procedure for when a decision is "certified as final"); Ariz. Admin. Code § R2-20-228 (noting that "a party may appeal a final administrative decision" after it "exhausts its administrative remedies by going through the . . . steps" in Ariz. Admin. Code §§ R2-20-203 to -208).

[2] IR-42.

[3] IR-44.

After finding reason to believe that LFAF committed the violations alleged,[4] the Commission issued a Compliance Order requiring LFAF to comply with the requirements of the Act within 14 days.[5] LFAF objected to the compliance order.[6] Because LFAF remained out of compliance, the Commission found probable cause to believe that LFAF violated the Act and issued an order on November 28, 2014 concluding that LFAF had violated the Act and assessing civil penalties "in accordance with § 16-942" (the "November 28 Order"). [7] The November 28 Order provided that LFAF could "request an administrative hearing to contest [the] Order" within 30 days.[8] LFAF did so, and a hearing was conducted by an Administrative Law Judge ("ALJ").[9]

Under the Commission's rules, the last step to create a final administrative decision—i.e., a decision that "terminates the proceeding

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[4] IR-52.

[5] IR-53; *see* A.R.S. § 16-957(A) (after finding "reason to believe" a violation occurred, the commission "shall serve . . . an order . . . requiring compliance within fourteen days").

[6] IR-54; 55.

[7] IR-62.

[8] *Id.*; *see also* Ariz. Admin. Code § R2-20-224.

[9] IR-63; 69.

before the [ ] agency," A.R.S. § 12-902(A)(1)—is for the Commission to review the ALJ's decision and "accept, reject, or modify the decision." Ariz. Admin. Code § R2-20-227. "If the Commission accepts, rejects or modifies the decision, the Commission's decision will be certified as final." Ariz. Admin. Code § R2-20-227(B). This final step occurred on March 27, 2015, when the Commission accepted part and rejected part of the ALJ's decision (the "March 27 Order").[10] The March 27 Order incorporates the findings in the November 28 Order and affirms the assessment of civil penalties based on "the Commission's authority to impose civil penalties . . . as prescribed by . . . A.R.S. § 16-942(B)."[11] The March 27 Order is therefore both an order assessing a penalty and the Commission's final administrative decision.

III. The Superior Court dismisses LFAF's complaint seeking judicial review of the March 27 Order as untimely and the Court of Appeals affirms.

LFAF sought review of the March 27 Order under JRADA by filing a complaint for judicial review in the superior court on April 14, eighteen

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[10] *See* IR-70; Petitioner's Appendix to Petition for Review ("APP VOL #") at APP VOL 2 00008.

[11] *Id*.

days after issuance of the March 27 Order.[12] The superior court dismissed the action, however, because the Act states that a party "has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in" JRADA. A.R.S. § 16-957(B).[13]

LFAF appealed the dismissal of its complaint, and the Court of Appeals affirmed. The court held that LFAF's argument that its complaint was timely filed was "foreclosed by *Smith*," and affirmed that the 14-day deadline in § 16-957(B) applies to appeals from Commission orders (Mem. Decision ("Dec.") ¶ 8). The court also rejected LFAF's argument that § 12-902(B) allows a party to challenge an agency's jurisdiction at any time, holding that the "language of § 12-902(B) does not allow an appeal of an administrative decision to be heard after the allotted time for appeal has passed." (Dec. ¶ 12.) LFAF then filed its Petition and this Court granted review.

ARGUMENT

I. LFAF's complaint for judicial review is barred under § 12-902(B) because it was untimely filed after the fourteen-day deadline in

[12] IR-1.

[13] IR-76; APP VOL 2 00030.

§ 16-957(B), a jurisdictional deadline to appeal the Commission's final decision.

A. The scope of judicial review is defined by statute, and the statutory deadline for judicial review of a final administrative decision is jurisdictional under § 12-902(B).

"In Arizona it is settled that a right to appeal exists only when that right is specifically given by statute." *Pima Cty. v. State Dep't of Revenue, Div. of Prop. & Special Taxes*, 114 Ariz. 275, 277 (1977). This Court has held that "appeals can be taken only in the time and manner provided by law." *Lount v. Strouss*, 63 Ariz. 323, 325-26 (1945).

The same is true of appeals of administrative decisions, which are governed by JRADA, A.R.S. §§ 12-901 to -914. The Court has "said of this statute that the right of appeal exists only by force of statute, and this right is limited by the terms of the statute." *Ariz. Comm'n of Agric. & Horticulture v. Jones*, 91 Ariz. 183, 187 (1962) (internal quotation marks and citation omitted).

One of the most significant statutory limitations on the right of administrative appeal is that a party must seek judicial review within a certain amount of time. Section 12-902(B) provides that, "[u]nless review is sought of an administrative decision within the time and in the manner

provided in this article, the parties to the proceeding . . . ***shall be barred*** from obtaining judicial review of the decision" (emphasis added).

Because late appeals are "barred," the appeal deadline is jurisdictional. "It is well settled that the time for filing an appeal, whether by appeal or by complaint for judicial review following the conclusion of the administrative process, is jurisdictional." *Smith*, 212 Ariz. at 413 ¶ 25 (citing *Jones*, 91 Ariz. at 187). A jurisdictional deadline is one that cannot be waived or excused "because the failure to timely appeal deprives the court of jurisdiction to review the administrative decision." *Id.* (internal quotation marks, alterations, and citation omitted). *See Jones*, 91 Ariz. at 187 (holding that superior court lacked jurisdiction to consider appeal of administrative decision because the decision "was determined finally and conclusively as against collateral attack by the failure to appeal within" the statutory deadline in JRADA).

Arizona is hardly alone in imposing a jurisdictional deadline on the ability to appeal administrative decisions. *See Noland Health Servs., Inc. v. State Health Planning & Dev. Agency*, 44 So. 3d 1074, 1081 (Ala. 2010) (holding that a "timely filing" of an appeal from an administrative decision is "jurisdictional"); *Rodriguez v. Sheriff's Merit Comm'n of Kane Cty.*, 843

N.E.2d 379, 382–83 (Ill. 2006) (noting that the "parties to a proceeding . . . shall be barred from obtaining judicial review . . . unless review is sought 'within the time and in the manner'" provided by law and holding that "[i]f the statutorily prescribed procedures are not strictly followed, 'no jurisdiction is conferred on the circuit court'"); *Kame v. Emp't Sec. Dep't*, 769 P.2d 66, 68 (Nev. 1989) ("When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review.").

B. The jurisdictional deadline applicable here is the fourteen-day appeal deadline found in § 16-957(B).

In general, JRADA requires a party to commence "[a]n action to review a final administrative decision . . . within thirty-five days." A.R.S. § 12-904. JRADA, however, "applies to and governs [e]very action to judicially review a final decision of an administrative agency except . . . if the act creating or conferring power on an agency . . . prescribes a definite procedure for the review." A.R.S. § 12-902(A)(1). Here, "the Clean Elections Act itself contains a definite term for appeals: A.R.S. § 16-957(B) requires that appeals be taken no later than 'fourteen days from the date of

issuance of the order assessing the penalty.'" *Smith*, 212 Ariz. at 413 ¶ 29 (quoting A.R.S. § 16-957(B)). Like JRADA's generally applicable 35-day deadline, the fourteen-day deadline in § 16-957(B) "is jurisdictional; any appeal not filed within the stated period is barred." *Id.* (citing A.R.S. § 12-902(B)).

C. LFAF's administrative appeal is barred under § 12-902(B) because it was not filed within fourteen days.

Here, the Commission issued its final decision assessing a penalty on March 27, 2015. LFAF was therefore required to seek judicial review of the March 27 Order within fourteen days of its issuance. A.R.S. § 16-957(B); *Smith*, 212 Ariz. at 413 ¶ 29 (appeal from Commission order must "be taken no later than fourteen days from the date of issuance" and "any appeal not filed within the stated period is barred").

LFAF filed its appeal eighteen days after the issuance of the March 27 Order.[14] Consequently, as in *Smith*, LFAF is "barred from obtaining judicial review," A.R.S. § 12-902(B), and the superior court is without jurisdiction to consider LFAF's complaint for judicial review. § 16-957(B); *Smith*, 212 Ariz. at 413 ¶ 25.

[14] IR-1.

II. The existence of purported jurisdictional issues on appeal does not create appellate jurisdiction.

In its Petition for Review, LFAF does not contest that the fourteen-day deadline in § 16-957(B) applies, that LFAF failed to meet the deadline, or that § 12-902(B) bars judicial review of non-jurisdictional issues. Instead, LFAF argues that § 12-902(B) exempts jurisdictional challenges from its time-bar and asks the Court to issue a rule that a party to an administrative proceeding may appeal at any time—even years later—to challenge an agency's jurisdiction. This argument is not supported by the statutory text and was correctly rejected by the Court of Appeals. A.R.S. § 12-902(B); Dec. ¶ 10.

A. The plain and unambiguous language in § 12-902(B) does not carve out an exception permitting late appeals for jurisdictional issues.

Section 12-902(B) has two sentences. Each sentence limits the right of appeal in a different way:

> [1] ***Unless review is sought*** of an administrative decision ***within the time*** and in the manner provided in this article, ***the parties*** to the proceeding before the administrative agency ***shall be barred*** from obtaining judicial review.
>
> [2] ***If*** under the terms of the law governing procedure before an agency an ***administrative decision becomes final because of failure to file*** any document in the nature of an objection, protest, petition for hearing or application for administrative

> review ***within the time allowed*** by the law, the decision is not subject to judicial review under the provisions of this article except for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

A.R.S. § 12-902(B) (emphasis added). The first sentence applies to all final administrative decisions and bars review when a party to the administrative proceeding fails to timely seek judicial review as "provided in" JRADA. That is, the first sentence states what is true of most appeal deadlines: "It is well settled that the time for filing an appeal . . . is jurisdictional." *Smith*, 212 Ariz. at 413 ¶ 25.

The second sentence applies not to late appeals to the courts (the first sentence covers that ground) but instead to tardy or missed filings at the administrative level—filings that are late "under the terms of the law governing procedure before an agency," A.R.S. § 12-902(B). In other words, if a party defaults at the administrative level and wishes to challenge the resulting adverse final administrative decision, § 12-902(B)'s second sentence limits the party's right of judicial review solely to issues "questioning the jurisdiction" of the agency.

Nothing in the language of the second sentence, however, modifies the total bar on late appeals in the first sentence or otherwise permits

parties to file an untimely appeal. As the Court of Appeals reasoned in this case, the second sentence "does not allow an appeal of an administrative decision to be heard after the allotted time for appeal has passed. Instead, it restricts a party who has suffered an administrative default or who has not exhausted administrative remedies from challenging the merits of the agency's decision." Dec. ¶ 12.

The Commission's March 27 Order did not become final "because of the failure to file any document." Nor did LFAF fail to exhaust its administrative remedies. Accordingly, the second sentence of § 12-902(B) has no applicability to this case.

B. LFAF's arguments that jurisdictional challenges are exempted from § 12-902(B)'s bar depend on incorrect dicta from *Arkules* and *Dandoy* and are meritless.

LFAF contends that § 12-902(B) allows its late appeal to survive to the extent LFAF raises issues "questioning the jurisdiction" of the Commission. LFAF's petition for review does not offer any text-based interpretation for why that is so, and given the unambiguous language, it could not. That should end the matter. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 8 (2007) (holding "the best and most reliable index of a

statute's meaning is its language" and that "when the language is clear and unequivocal, it is determinative of the statute's construction").

Ignoring § 12-902(B)'s text, LFAF instead relies on two cases that purport to interpret § 12-902(B) and include language seemingly favorable to LFAF's position—*Dandoy* and *Arkules*. But *Arkules* and *Dandoy* do not help LFAF. These cases are factually and procedurally distinguishable—they do not hold that a party to an administrative proceeding seeking judicial review can appeal after the applicable time has expired—and the description these cases give to § 12-902(B) is simply incorrect.

First, *Arkules* involved a special action brought by a non-party challenging the decision of a municipal board of adjustment, not a party's appeal under JRADA. 151 Ariz. at 439. There, a resident had petitioned the board for and received a variance from a regulation governing the color of his home. *Id.* The plaintiffs, who were not parties to the proceeding before the board, later filed a special action challenging the variance. *Id.* The court held that the plaintiffs were not bound by a 30-day statute of limitations set forth in A.R.S. § 9-462.06(J). *Id.* at 440. Before reaching that conclusion, the court cited § 12-902(B), mischaracterizing it as providing that "an appeal from an administrative agency may be heard even though

untimely to question the agency's" jurisdiction. *Id.* That is simply not what § 12-902(B) says, and the opinion offers no textual analysis supporting its interpretation. Moreover, the court's passing reference to § 12-902(B) was irrelevant to the case, because § 12-902(B) applies only to "***the parties to the proceeding*** before the administrative agency," not non-parties who may have some separate grounds and authority to seek review.

Next, *Dandoy* involved a challenge by the City of Phoenix to an injunction entered against it based on its admitted violation of a cease-and-desist order entered by a state agency. 133 Ariz. at 335-36. The City requested an administrative hearing, but before concluding the hearing, the parties agreed to a consent order. *Dandoy*, 133 Ariz. at 336. "Some seven months later," the agency—not the City—filed suit to enjoin violations of the consent order and the superior court granted the injunction. *Id.* On appeal, the City argued that the underlying cease-and-desist order was void and could not provide a basis for an injunction. *Id.* Before reaching the City's argument, the court purported to analyze § 12-902(B) stating that it provides "an exception to [the] statutorily declared finality . . . for the purpose of questioning the jurisdiction of the administrative agency." Like

the misreading in *Arkules*, that characterization of § 12-902(B) cannot be squared with the statute's unambiguous text. The only "exception" in § 12-902(B) is that a party to an administrative proceeding may timely appeal jurisdictional issues to a court, even if the party let the administrative decision become final at the agency level by failing to timely challenge the decision during the administrative process.

And, as in *Arkules*, the court need not have cited to § 12-902(B) because the City's appeal was not an appeal of a final administrative decision under JRADA. In any event, the court went onto hold that "the City's attempt to circumvent finality . . . by an attack on . . . jurisdiction" was not "sound." *Id.* at 337.

Both *Arkules* and *Dandoy* are factually and procedurally distinguishable—neither was an appeal of a final administrative decision under JRADA. But importantly, the plain language of § 12-902(B), as discussed above, does not support the flawed interpretation of § 12-902(B) found in *Dandoy* and *Arkules*.

C. LFAF's proposed interpretation of § 12-902(B) would subvert the interests of finality that the statute is designed to serve.

The interpretation of § 12-902(B) that LFAF advances does harm to the principles of finality embodied in § 12-902(B).

LFAF's rule would open administrative decisions to unending uncertainty as to whether a "final decision" was ever truly "final." This Court long ago rejected that approach, holding that § 12-902(B) meant that the failure to timely appeal settles a decision "finally and conclusively as against collateral attack." *Jones*, 91 Ariz. at 187. "Were such an attack permissible, there would be no end to the mischief created" by the lack of finality. *Id.*

Under LFAF's proposed interpretation of § 12-902(B), finality and "certainty in legal relations" would be considerably less certain because a party would be able to file appeals at any time, so long as it couched its issues as being "jurisdictional." LFAF has identified no limit on this purported jurisdictional appeal right. Indeed, during oral argument before the Court of Appeals, LFAF's counsel argued that a party to an administrative proceeding has no deadline whatsoever to file an appeal

challenging the jurisdiction of an agency.[15] Under this interpretation, "there would be no end to the mischief created." The Legislature rejected LFAF's position with § 12-902(B) and so should this Court.

D. The availability of possible relief under Rule 60 does not confer appellate jurisdiction.

LFAF's Petition for Review argues (at 10-12) that its late appeal should be permitted because of a court's authority to void its own judgment under Rule 60. Of course, that factual scenario is not this case and, for good reason, LFAF never raised this issue before its Petition for Review. But even if Rule 60 was relevant, Rule 60 would not help LFAF. Rule 60(b)(4) permits a court to relieve a party from a final judgment if "the judgment is void." Such relief, however, "is not a substitute for a timely appeal" and is "generally . . . reserved . . . only for the exceptional case in which the court that rendered the judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (applying federal Rule 60).

But even in the rare circumstances when relief under Rule 60 is possible, that possibility does not confer appellate jurisdiction and would

[15] *See* https://www.youtube.com/watch?v=uSiDx2f4SUI&feature=youtu.be at 4:35.

not save a late appeal from dismissal. The hypothetical ability of a court to void its own judgment under Rule 60 does not create an exception to the longstanding rule that an appeal deadline from the final decision of an administrative agency is jurisdictional. *See Smith*, 212 Ariz. at 413. Nothing in Rule 60 expands a court's appellate jurisdiction over the supposedly void judgment and the cases cited by LFAF do not say anything different. *See Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994) (holding that trial court did not err in refusing to vacate erroneous but not void judgment); *Nat'l Inv. Co. v. Estate of Bronner*, 146 Ariz. 138, 140 (App. 1985) (holding that trial court did not abuse discretion in setting aside its own default judgment); *In re Milliman's Estate*, 101 Ariz. 54, 58 (1966) (holding that "court which makes a void order may" set aside its own order).

CONCLUSION

LFAF did not file a complaint seeking judicial review of the March 27 Order within fourteen days of its issuance. LFAF's appeal is therefore barred. *See* § 12-902(B). This Court should affirm the decisions below and hold that § 12-902(B) contains no exception allowing a party to file an untimely appeal.

Go to Table of Contents

RESPECTFULLY SUBMITTED this 12th day of May, 2017.

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