

1 **BEFORE THE PERSONNEL RESOURCES BOARD**

2 **STATE OF WASHINGTON**

3 LOWELL BUSHEY, )  
4 Appellant, )  
5 v. )  
6 WASHINGTON STATE UNIVERSITY, )  
7 Respondent. )

PRB Case No. R-RULE-10-002

**ORDER OF DISMISSAL**

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9 This matter came before the Personnel Resources Board, LAURA ANDERSON, Vice Chair; and  
10 DJ MARK, Member, for dismissal pursuant to WAC 357-52-215 and WAC 357-52-220.

11 WAC 357-52-215 provides, in relevant part:

12 The board may dismiss an appeal on its own motion when:

13 . . .

14 (3) An appeal is not filed on time . . . .

15 By letter dated January 28, 2010 and received February 1, 2010, Lowell Bushey filed an appeal of  
16 the December 29, 2009 director's review determination denying his request for remedial action.

17 The appeal was received thirty-four (34) days after service of the director's determination and  
18 appeared to be untimely.

19 Pursuant to WAC 357-52-045, by letter dated February 1, 2010, Board staff directed the parties to  
20 submit affidavits and/or written argument addressing the timeliness of the appeal. Affidavits and/or  
21 written argument were to be submitted within twenty-one (21) calendar days of the date of the letter.  
22

23 On February 19, 2010, Mr. Bushey filed written argument. Mr. Bushey argued that:

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- the director's determination was post-marked December 30, 2010,
  - he mailed his appeal by overnight delivery on January 28, 2010 and it should have been delivered on January 29, 2010, and
- 25

- he exercised due diligence to pursue his appeal and the fact that Federal Express failed to deliver his appeal until February 1, 2010 was beyond his control.

Washington State University did not file written argument addressing the issue of timeliness.

RCW 41.06.170 provides, in relevant part: “. . . any employee who is adversely affected by a violation of the state civil service law, chapter 41.06 RCW, or rules adopted under it, shall have the right to appeal, either individually or through his or her authorized representative, not later than thirty days after the effective date of such action . . . .”

WAC 357-52-015 provides, in relevant part: “[i]n order to be considered timely, an appeal must be received in writing at the office of the board within thirty calendar days after: . . . Service of the director’s determination . . . .”

WAC 357-04-105 provides, in relevant part, that service upon parties “will be regarded as completed . . . upon deposit in the United States mail . . . .” Director’s review determinations are deposited in the mail on the same date as the date on the determination. In this case, the date on the determination is December 29, 2009.

The RCW and the rules require that an appeal must be received by the Board within thirty days of service of the director’s determination. In this case, service of the director’s determination was completed on December 29, 2009. But, the appeal was not filed until February 1, 2010. The appeal was received thirty-four (34) days after service of the director’s determination and thirty-three (33) days after the date on which the director’s determination was postmarked. Therefore, under either scenario, the appeal appeared untimely.

Neither the RCW nor the civil service rules allow the Board to waive the jurisdictional requirements for filing appeals. The RCW and the rules require that an appeal must be received by the Board within thirty (30) days of the effective date of the action appealed.

1 The Board has addressed similar situations on numerous occasions. Most recently, in Daniels v.  
2 Department of Corrections, PRB Case No. R-DEMO-09-007 (2009), the Board stated that “[i]t is  
3 unfortunate that Mr. Daniels was given misleading information by United States postal staff  
4 regarding the delivery time for mail from Lacey, Washington, to the Board’s office in Olympia.  
5 However, there is a history of cases in which this Board and the Personnel Appeals Board  
6 (predecessor to this Board) have held that an appeal is untimely even when the affected employee  
7 had been unintentionally misled by an agency or given erroneous information about a process. See  
8 for example, Lapp v. Washington State Patrol, PAB No. V94-079 (1995) and Yialelis v. Dept. of  
Transportation, PRB No. R-ALLO-08-016 (2008).”

9  
10 In Daniels, the Board further stated that, “[w]hile the Board understands that Mr. Daniels relied on  
11 information given to him by postal staff, the Board may not waive the jurisdictional timelines found  
12 in statute.”

13 On February 25, 2010, Board staff served the parties with a Notice of Potential Dismissal. The  
14 notice stated that the appeal would be dismissed unless, within fifteen calendar days following the  
15 date of service of the notice, the Board received a written request showing good cause why the  
16 appeal should not be dismissed. In this case, the fifteenth day following February 25, 2010 is Friday,  
17 March 12, 2010.

18 Mr. Bushey filed a response by fax at 5:38 pm on March 12, 2010. The fax contained two pages  
19 plus a cover sheet and appeared to be incomplete. Further, the fax response was filed untimely.

20 WAC 357-52-225(2) provides, in relevant part:

21 **Filing by telephone facsimile.**

22 (a) Written documents filed with the board by telephone facsimile are considered  
23 received when a legible copy of the document is reproduced on the board's telephone  
24 facsimile equipment in the board's office. If transmission begins after customary  
25 office hours, which are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding  
26 legal holidays, the document will be deemed filed on the next business day.

(b) Any document filed with the board by telephone facsimile should be preceded

1 by a cover page identifying the addressee; the party making the transmission,  
2 including the address, telephone and telephone facsimile number of such party; the  
3 appeal to which the document relates; the date of transmission; and the total number  
4 of pages included in the transmission.

5 (c) The party attempting to file papers by telephone facsimile bears the risk that  
6 the papers will not be timely received or legibly printed, regardless of the cause. If  
7 the telephone facsimile is not legible, it will be considered as if it had never been  
8 sent.

9 Because Mr. Bushey's fax was received after 5 p.m. on March 12, it is deemed filed the next  
10 business day which is March 15, 2010. As a result, Mr. Bushey's response is untimely.

11 Washington State University did not file response to the Notice of Potential Dismissal.

12 In this case, the director's determination was served December 29, 2010 and the appeal was  
13 received February 1, 2010. The appeal was received thirty-four (34) days after service of the  
14 director's determination. The appeal is untimely.

15 The Board having reviewed the file and records herein and being fully advised in the premises, now  
16 enters the following:

17 **ORDER**

18 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal request of Lowell Bushey v.  
19 Washington State University, PRB Case No. R-RULE-10-002, is dismissed.

20 DATED AND MAILED this \_\_\_\_ day of \_\_\_\_\_, 2010.

21 WASHINGTON PERSONNEL RESOURCES BOARD

22 \_\_\_\_\_  
23 LAURA J. ANDERSON, Vice Chair

24 \_\_\_\_\_  
25 DJ MARK, Member