BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

LYNN KINNEY, Appellant, vs. SUPERINTENDENT OF PUBLIC INSTRUCTION, Respondent.	)	Case No. RULE-05-0003 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

1.1 **Consideration of Motion.** This matter came before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, BUSSE NUTLEY, Vice-Chair, and GERALD L. MORGEN, Member, on consideration of Respondent's Motion to Dismiss. This matter was considered on written documents without oral argument.

1.2 **Representation.** Michael Hanbey, Attorney at Law, represented Appellant Lynn Kinney. Stewart Johnston, Assistant Attorney General, represented Respondent Superintendent of Public Instruction.

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including:

- [Respondent's] Motion to Dismiss Appeal for Untimeliness, with attachments, filed July 7, 2005.

- [Appellant's] Response to Motion to Dismiss Appeal, filed July 27, 2005.
- [Respondent's] Reply Memorandum in Support of Motion to Dismiss, with attachments, filed July 28, 2005.

II. FACTS

2.1 Appellant, a Secretary Senior for the Office of the Superintendent of Public Instruction (OSPI), received and signed her annual Employee Development and Performance Plan (EDPP) on March 8, 2005.

2.2 On April 26, 2005, Appellant filed an appeal alleging the OSPI violated WAC 356-30-300.

2.3 On July 7, 2005, Respondent filed a Motion to Dismiss. Respondent argued that Appellant's appeal was untimely and should be dismissed because Appellant did not file her rule violation appeal until over 30 days after she signed and dated her EDPP. Respondent further argued that the Board does not have jurisdiction to hear an untimely appeal.

2.4 On July 27, 2005, Appellant filed a response. Appellant argued that her appeal was timely because she utilized the grievance policy in an attempt to modify portions of the EDPP to which she objected. Appellant argued that because her grievance was rejected by the agency on April 13, that date was the last day when a final action was undertaken by the agency, and therefore, her April 26 filing to the Personnel Appeals Board was within the 30-day time period allotted for appeals of rule violations.

2.5 On July 28, Respondent filed a reply memorandum. Respondent asserted that the Board's 30-day jurisdictional requirement runs from the date the alleged rule violation occurred even though an employee first filed an internal grievance with the agency. Respondent argued that Board

precedent supports the Board has jurisdiction only if, pursuant to WAC 358-20-404(1)(d), the Appellant files an appeal of an alleged rule violation within 30 days. Respondent argued that the Board should grant the Motion to Dismiss on the basis that Appellant failed to file a timely appeal.

III. DISCUSSION

3.1 The Board may decide an appeal by motion if the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. See Hall v. University of Washington, PAB No. 3863-V2 (1995).

3.2 In order to preclude summary judgment, the non-moving party must set forth specific facts by affidavit or otherwise show a genuine dispute of material fact. A material fact is one upon which the outcome of the litigation depends. Hudeman v. Foley, 73 Wn.2d 880, 886, 441 P.2d 532 (1968).

3.3 There are no issues of material fact that must be resolved to decide Respondent's Motion to Dismiss. The issue is whether Appellant's appeal was filed within 30 days of the date when she could reasonably have been expected to have knowledge of the action giving rise to her appeal. We are able to make this determination based on the uncontroverted facts presented here.

3.4 RCW 41.06.170 provides, in relevant part:

> (2) Any employee who is . . . adversely affected by a violation of the state civil service law . . . shall have the right to appeal to the personnel appeals board

> created by RCW 41.64.010 not later than thirty days after the effective date of such action. . . .

3.5 WAC 358-20-040(1) provides, in relevant part:

> (1) An appeal must be received in writing at the principal office of the personnel appeals board within 30 days after: . . . (e) the employee could reasonably be expected to have knowledge of the action giving rise to a law or rule violation claim under WAC 358-20-020 or the stated effective date of the action, whichever is later.

3.6 Having reviewed the file and arguments presented, it is clear that this appeal was filed more than 30 days after Appellant had knowledge of the alleged rule violation. This situation is similar to that discussed in Lapp v. Washington State Patrol, PAB No. V94-079 (1995), where the Board determined that an appeal was untimely even though the affected employee had been erroneously informed by the agency that she had to first exhaust the agency's internal grievance procedure before filing an appeal of a rule violation with the Board.

3.7 In this case, Appellant clearly had knowledge of the action giving rise to her appeal by no later than March 8, 2005, when she signed the EDPP at issue here. Appellant filed her appeal on April 26, 2005, more than 30 days after the date that she had knowledge of the "action giving rise to a law or rule violation claim." Therefore, the appeal is untimely and Respondent's motion to dismiss should be granted.

Having reviewed the file and record in this matter and being fully advised in the premises, the Board enters the following:

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted, and the appeal of Lynn Kinney is dismissed.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member