

FILED
MAR 25 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 293271

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DAVID J. BROWN,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

Danielle A. Hess
Assistant Attorney General
WSBA #22307
P.O. Box 641031
Pullman, WA 99164-1031
(509) 335-2636

FILED

MAR 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 293271

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DAVID J. BROWN,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

Danielle A. Hess
Assistant Attorney General
WSBA #22307
P.O. Box 641031
Pullman, WA 99164-1031
(509) 335-2636

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES1

III. STATEMENT OF THE CASE1

IV. ARGUMENT3

 A. Standard Of Review.....3

 B. The Requirements For Judicial Review Are Strictly
 Construed And Were Not Met In This Case.....3

 C. Equitable Tolling Was Not Raised Before The Superior
 Court And Does Not Apply In This Case6

V. CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Carlstad v. McLean</i> , 150 Wn.2d 583, 591, 80 P.2d 587 (2003).....	7
<i>Cheek v. Empl. Sec. Dep't</i> , 107 Wn. App. 79, 25 P.3d 481 (2001).....	5
<i>City of Bellevue v. Benyaminov</i> , 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), <i>review denied</i> , 165 Wn.2d 1020, 203 P.3d 378 (2009).....	7
<i>City of Pasco v. Pub. Empl. Relations Comm'n</i> , 119 Wn.2d 504, 507, 833 P.2d 381 (1992).....	3
<i>City of Seattle v. Pub. Empl. Relations Comm'n</i> , 116 Wn.2d 923, 927, 809 P.2d 1377 (1991).....	passim
<i>Clymer v. Empl. Sec. Dep't</i> , 82 Wn. App. 25, 917 P.2d 1091 (1996)	5, 6
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 118 Wn. App. 212, 219, 75 P.3d 975 (2003).....	4
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 153 Wn.2d 207, 212, 103 P.3d 193 (2004).....	3, 4
<i>In re: Hoisington</i> , 99 Wn. App. 423, 431, 993 P.2d 296 (2000)	7
<i>Millay v. Cam</i> , 135 Wn.2d 193, 206, 955 P.2d 791 (1998).....	7
<i>State v. Dearbone</i> , 125 Wn.2d 173, 180, 883 P.2d 303 (1994).....	6
<i>State v. Duvall</i> , 86 Wn. App. 871, 874, 940 P.2d 671 (1997)	7
<i>State v. Kirkman</i> , 159 Wn.2d 918, 926, 155 P.3d 125 (2007).....	6
<i>State v. McFarland</i> , 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).....	6
<i>State v. Tolias</i> , 135 Wn.2d 133, 140, 954 P.2d 907 (1998).....	6

Statutes

RCW 34.04.130(2), *recodified by* RCW 34.05.570 (Laws of 1988,
ch. 288, § 706) 3

RCW 34.05 1

RCW 34.05.010(19)..... 6

RCW 34.05.510 4

RCW 34.05.542(2)..... passim

Rules

RAP 2.5(a) 6

I. INTRODUCTION

The Washington Administrative Procedure Act, RCW 34.05, (WAPA) was intended to provide clear and consistent procedures for agency action. A party wishing to challenge agency action by filing a petition for judicial review must comply with the WAPA's strict time limits for service and filing. Here, Mr. Brown did not comply with these time limits. Therefore, the superior court properly dismissed his petition for review.

II. STATEMENT OF THE ISSUES

1. When a petition for judicial review is not timely filed, does the superior court lack subject matter jurisdiction under the WAPA?
2. Does the doctrine of equitable estoppel apply when the petitioner's attorney mistakenly fails to timely file a petition for review?

III. STATEMENT OF THE CASE

Mr. Brown was a student in Washington State University's (WSU or University) Master of Business Administration (M.B.A.) program. On April 12, 2010, the University Conduct Board (Conduct Board) found that Mr. Brown had violated WSU's Standards of Conduct for Students. The Conduct Board suspended Mr. Brown and trespassed him from campus. CP 27-31.

Mr. Brown appealed to the University Appeal Committee (Appeal Committee). On May 31, 2010, the Appeal Committee issued an order upholding the decision of the Conduct Board. CP 25-26. The order was mailed to Mr. Brown on June 1, 2010. CP 23, 26.

Mr. Brown subsequently petitioned for judicial review of WSU's order. Mr. Brown's attorney served the petition on the WSU Division of the Office of the Attorney General on July 1, 2010. CP 12. However, he did not file the petition with the Whitman County Superior Court until July 6, 2010. CP 2.

Because Mr. Brown's petition was filed after the 30-day time limit set forth in RCW 34.05.542(2), WSU moved to dismiss Mr. Brown's petition based on lack of subject matter jurisdiction.¹ CP 19-26. Mr. Brown responded to the motion and appeared at the hearing *pro se*. CP 506.

The superior court granted WSU's motion and dismissed Mr. Brown's petition for review. CP 586. Mr. Brown then filed several motions challenging the dismissal, which the superior court denied. CP 584-85. Mr. Brown now appeals to this Court.

¹ RCW 34.05.542(2) provides:

A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

IV. ARGUMENT

A. Standard Of Review

Construction of a statute is a question of law that is reviewed by the Court of Appeals *de novo*. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 212, 103 P.3d 193 (2004) (citing *City of Pasco v. Pub. Empl. Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)).

B. The Requirements For Judicial Review Are Strictly Construed And Were Not Met In This Case

RCW 34.05.542(2) provides:

A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

A petition for judicial review of an administrative decision invokes the limited appellate jurisdiction of the superior court. The superior court does not acquire subject matter jurisdiction over the matter until the petitioner files the petition and serves it on all parties. “Both of these steps must be accomplished within ‘30 days after the service of the final decision of the agency.’” *City of Seattle v. Pub. Empl. Relations Comm'n*, 116 Wn.2d 923, 927, 809 P.2d 1377 (1991) (citing former RCW 34.04.130(2), *recodified by* RCW 34.05.570 (Laws of 1988, ch. 288, § 706)).

The party filing for judicial review has the burden of showing compliance with the filing and service requirements in the WAPA. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 118 Wn. App. 212, 219, 75 P.3d 975 (2003), *reversed on other grounds*, 153 Wn.2d 207, 103 P.3d 193 (2004). Furthermore, the WAPA is the exclusive method of obtaining judicial review of an agency order; the Rules of Civil Procedure do not apply, except where specifically authorized by the WAPA. *Diehl*, 153 Wn.2d at 215-16; *see also* RCW 34.05.510 (“Relationship between this chapter and other judicial review authority.”)

In *City of Seattle*, the City sought judicial review of a decision of the Public Employment Relations Commission (PERC). PERC had mailed its decision to the parties on July 26, 1989. The City timely filed its petition for judicial review on August 25, 1989. However, the City did not serve the other parties with the petition until August 28, 1989, 33 days after PERC had mailed its decision. *City of Seattle*, 116 Wn.2d at 926. The court of appeals upheld the superior court’s dismissal of the City’s petition for lack of subject matter jurisdiction. Specifically, the court held that PERC’s decision was served at the time of mailing (July 26, 1989) and that the City’s August 28, 1989, service of its petition on the other parties was therefore beyond the 30-day statutory time limit. *Id.* at 927.

The court also rejected the City's argument that it had substantially complied with the statute, stating:

[A statutory time limit] is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit. We therefore hold that failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.

Id. at 928-29. See also *Cheek v. Empl. Sec. Dep't*, 107 Wn. App. 79, 25 P.3d 481 (2001) (dismissal affirmed where petitioner failed to serve other party within 30 days).

In *Clymer v. Empl. Sec. Dep't*, 82 Wn. App. 25, 917 P.2d 1091 (1996), the petitioner's attorney left a petition for review with the process server. However, the process server did not file it on time. The petitioner argued that he had substantially complied with the statutory filing requirement because he had timely served the petition on the other parties. The court rejected this argument, stating:

A failure to comply with the filing requirement of RCW 34.05.542(2), resulting from a messenger's failure or refusal to accept a Petition for Review for filing, does not constitute substantial compliance. Nor does *servicing* the Petition on other parties constitute substantial compliance with the *filing* requirement.

Id. at 29. The court also rejected the petitioner's argument that his failure to timely file the petition should be excused for good cause, stating, "The APA contains no exception for 'good cause,' and the [*State v.*] *Dearbone* court held that an 'attorney's inadvertence alone is not good cause.'"

Id. at 30 (quoting *State v. Dearbone*, 125 Wn.2d 173, 180, 883 P.2d 303 (1994)).

In this case, WSU's final decision was the decision of the University Appeal Committee, which was mailed to Mr. Brown on June 1, 2010. CP 23, 26. Service of an agency decision is complete when it is deposited in the U.S. mail. *City of Seattle*, 116 Wn.2d at 927; *see also* RCW 34.05.010(19) ("Service by mail is complete upon deposit in the United States mail."). Mr. Brown therefore had thirty (30) days from June 1, 2010, or until July 1, 2010, to serve and file his petition for review. However, he did not file his petition for review until July 6, 2010. CP 2. Because Mr. Brown did not meet the requirements of RCW 34.05.542(2), he did not properly invoke the subject matter jurisdiction of the superior court. The court therefore properly dismissed his petition.

C. Equitable Tolling Was Not Raised Before The Superior Court And Does Not Apply In This Case

Appellate courts generally will not hear an issue raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a); *State v. Toliias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)). Here, Mr. Brown did not raise the issue of equitable tolling before the superior court, either in his response to WSU's motion to

dismiss or in any of his motions challenging the superior court's order of dismissal. The Court should not agree to hear this argument because it was raised for the first time on appeal.

Even if the Court decided to consider the issue, equitable tolling does not apply in this case. Equitable tolling permits a court to toll the statute of limitations when justice requires it. *Carlstad v. McLean*, 150 Wn.2d 583, 591, 80 P.2d 587 (2003) (citing *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). However, the doctrine of equitable tolling does not apply to time limits that are jurisdictional in nature. *In re: Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000).

“The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). The party asserting equitable tolling has the burden of proof. *City of Bellevue v. Benyaminov*, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), *review denied*, 165 Wn.2d 1020, 203 P.3d 378 (2009).

In this case, the Court should not apply the doctrine of equitable tolling. First, the time limit in RCW 34.05.542(2) is jurisdictional in nature. Compliance with the statute is necessary for the superior court to have subject matter jurisdiction over the matter. *See City of Seattle*, 116 Wn.2d at 926 (superior court does not obtain appellate jurisdiction

unless filing and service requirements are met). Mr. Brown does not cite any case law supporting his claim that equitable tolling can or should be applied to extend the subject matter jurisdiction of the superior court by allowing late filing of a petition for judicial review.

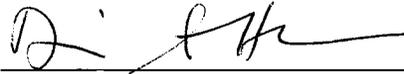
Second, there is no evidence that Mr. Brown's failure to file his petition for review on time resulted from bad faith or deception on the part of WSU. The failure to file the petition on time appears to have been the result of a mistake by Mr. Brown's attorney. Thus, even if the Court concluded that Mr. Brown did not waive the issue of equitable tolling, it should conclude that equitable tolling does not apply to this case.

V. CONCLUSION

The WAPA's thirty-day time limit for filing a petition for review of an agency decision is strictly construed and was not complied with in this case. In addition, there is no basis for applying the doctrine of equitable tolling in this case. Under these circumstances, the superior court properly dismissed Mr. Brown's petition because the court lacked subject matter jurisdiction. WSU therefore respectfully requests that this Court affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 24th day of March, 2011.

ROBERT M. MCKENNA
Attorney General



DANIELLE A. HESS, WSBA #22307
Assistant Attorney General
Attorneys for Respondent
Washington State University

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on this 24th day of March, 2011, I mailed the foregoing Brief of Respondent to:

Court:

Renee S. Townsley
Clerk/Administrator
Court of Appeals
500 North Cedar Street
Spokane, WA 99201

Mailed, postage prepaid
(original and one copy)

Appellant:

David J. Brown
18221 NE 21st
Redmond, WA 98052

Mailed, postage prepaid
(copy)



Danielle A. Hess, WSBA #22307
Assistant Attorney General