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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30043-9

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

ANDREA L. BECK,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Petitioner Andrea Beck failed to timely serve the Department of Employment Security (“Department”) with her petition for judicial review of the Department’s decision denying her unemployment benefits. Because of this failure, the superior court granted the Department’s motion to dismiss Ms. Beck’s petition. In order to invoke the superior court’s jurisdiction, Ms. Beck was required under the Washington Administrative Procedure Act (“APA”) both to timely file her petition with the superior court and to timely serve it on the Department. Since she did not timely serve the Department with her petition, the superior court lacked jurisdiction over the administrative appeal and properly dismissed it.

Courts require strict compliance with the APA’s requirements to serve all parties to administrative proceedings under appeal and the agency that issued the order, and to do so in a timely fashion. Indeed, courts have rejected Ms. Beck’s argument that substantial compliance with the time and service requirements of the APA is sufficient to invoke a superior court’s jurisdiction over an administrative appeal. The Court should therefore affirm the superior court’s order dismissing her petition for judicial review due to her failure to meet the statutory requirements to invoke the court’s jurisdiction.

II. COUNTERSTATEMENT OF THE ISSUE

Whether the superior court correctly dismissed Ms. Beck's petition for review since she failed to strictly comply with the APA's service requirements and therefore failed to invoke the court's jurisdiction?

III. COUNTERSTATEMENT OF THE CASE

Ms. Beck applied for unemployment benefits; however, the Department issued a determination notice disqualifying her from benefits because she was discharged from her employment with Providence Health Services/St. Mary's Hospital for misconduct. Clerk's Papers ("CP") 89-92. Ms. Beck timely filed an appeal of the determination notice and an administrative hearing was held before Administrative Law Judge ("ALJ") David Turplesmith of the State Office of Administrative Hearings ("OAH"). CP 32-82, 86-88.

The ALJ issued an Initial Order which reversed the Department's initial determination and instead concluded Ms. Beck was eligible for unemployment benefits. CP 106-13. The employer timely submitted to the Commissioner of the Department a petition for review of the ALJ's Initial Order. CP 115-21.

On August 20, 2010, the Commissioner issued a decision that modified the ALJ's initial order and disqualified Ms. Beck from

unemployment benefits due to disqualifying misconduct.¹ CP 131-34. Page three of the Commissioner's decision explains a party's right to judicial appeal and provides explicit directions on how to file a superior court judicial appeal:

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department

¹ The final agency determination is rendered by a review judge from the Commissioner's Review Office. For the sake of simplicity, the review judge is referred to throughout Respondent's Brief as the Commissioner because the Commissioner of Employment Security has delegated his authority to make a final agency decision in these matters to the Commissioner's Review Office. *See* WAC 192-04-020(5).

should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(2) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

CP 134 (emphasis appears in original).

The Commissioner's Review Office mailed the Commissioner's Decision to Ms. Beck and her attorney on August 20, 2010.² CP 131-32. In order to perfect her appeal, Ms. Beck was instructed she must file her petition and serve it on the Department within 30 days from the day she received it. CP 134; *see* RCW 34.05.542. Ms. Beck timely filed her petition with the Walla Walla Superior Court on September 17, 2010. CP 3-9. On September 23, 2010, the Washington State Attorney General's Office received a copy of the Petition for Review. CP 156-64. On September 24, 2010, the Employment Security Department Commissioner's Office was served, by hand delivery, a copy of the Petitioner for Review. CP 149-55; 165-67. The Department timely made

² The Certificate of Service is located at the top-left side of the first page of the Decision of Commissioner. CP 132.

a motion to dismiss for lack of jurisdiction which was granted by the superior court.³ CP 138-44, 207-11.

IV. STANDARD OF REVIEW

The question of whether service must be timely to invoke superior court jurisdiction in a petition for judicial review of an agency order is a question of law. Questions of law are subject to de novo review. RCW 34.05.570(3)(d); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

V. ARGUMENT

A. The Court of Appeals should affirm the Superior Court's dismissal order because Ms. Beck failed to serve the Department within 30 days of service of the Decision of Commissioner as required by the APA.

The superior court was correct when it dismissed Ms. Beck's administrative appeal for lack of jurisdiction, because she failed to serve the Department within 30 days after she was served with the Commissioner's decision as required by the APA.

Judicial appeals from final Department decisions are brought under RCW 34.05, the Administrative Procedure Act (APA). RCW 34.05.510; RCW 50.32.120. Under the APA, a party seeking review must meet the filing and service requirements of RCW 34.05.542(2) in order to invoke

³ Ms. Beck asserts that the Department's motion to dismiss was a "dilatory action"; however, Ms. Beck does not provide any legal support for such a position. See Petitioner's Brief at 7-8.

the appellate jurisdiction of the superior court in a judicial appeal of a final agency decision. *City of Seattle v. Pub. Empl. Relations Comm'n (PERC)*, 116 Wn.2d 923, 926-27, 809 P.2d 1377 (1991); *Muckleshoot Indian Tribe v. Dep't of Ecology*, 113 Wn. App. 712, 728, 50 P.3d 668 (2002); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555-57, 958 P.2d 962 (1998). RCW 34.05.542(2) provides that 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.**”⁴ (emphasis added). Further, RCW 34.05.542(3) makes clear that a “petition for judicial review of agency action . . . is not timely unless filed with the court and served on the agency⁵, the office of the attorney general⁶, and all other parties of record within thirty days after the agency action” (emphasis added).

Here, Ms. Beck concedes that she failed to timely serve the Department with her petition for review under RCW 34.05.542(2). *See*

⁴ “Service” is defined by the APA as follows: “posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.” RCW 34.05.010(19).

⁵ RCW 34.05.542(4) provides how to properly serve a petition on the agency, other parties and the AGO. It states: “Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United State mail, as evidenced by the postmark.” RCW 34.05.542(4).

⁶ “Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.” RCW 34.05.542(5).

Brief of Appellant at 4-5. The Commissioner's Review Office mailed Ms. Beck and her attorney a copy of the Commissioner's Decision on August 20, 2010. By statute, the date of mailing is the date of service. RCW 34.05.010(19). From the date the Commissioner served the decision, Ms. Beck had 30 days, until September 20, 2010, to serve the Department. *See* RCW 34.05.542. On September 23, 2010, the Attorney General's Office received the petition for review by mail. On September 24, 2010, the Department received the petition for review by in-hand delivery. Only then did Ms. Beck accomplish service under RCW 34.05.542(2). Ms. Beck concedes that more than 30 days had expired between when she was served the final agency decision and when service was made upon the Department on September 24, 2010. *See* Brief of Appellant at 4-5. Thus, the Superior Court was correct in dismissing the appeal for failure to timely serve the Department as required by the RCW 34.05.524(2) to invoke the superior court's appellate jurisdiction.

B. Strict compliance with the time and service requirements of the APA is required to invoke the superior court's appellate jurisdiction over an administrative appeal; substantial compliance does not suffice.

It is well settled law in Washington State that in order for a petitioner to invoke a superior court's appellate jurisdiction in an administrative appeal, the APA requires strict compliance with statutory

service requirements, including timely service on the agency that issued the order by actual delivery. *PERC*, 116 Wn.2d at 926-27; *Skagit Surveyors*, 135 Wn.2d at 555-57; *Muckleshoot Indian Tribe*, 113 Wn. App. at 728; *Cheek v. Employment Sec. Dep't*, 107 Wn. App. 79, 83, 25 P.3d 481 (2001). In fact, courts have specifically rejected the argument that a petitioner can substantially comply with the timely service requirement of RCW 34.05.542(2). *PERC*, 116 Wn.2d at 926-27. Ms. Beck errs in asserting the substantial compliance rule applies to APA's service requirements.

Sitting in its appellate capacity, the superior court has limited statutory jurisdiction over administrative appeals, and a petitioner must meet all of the APA's statutory procedural requirements before he or she properly invokes jurisdiction. *Cheek*, 107 Wn. App. at 83; *Clymer v. Employment Sec. Dep't*, 82 Wn. App. 25, 27, 917 P.2d 1091 (1996). RCW 34.05.542(2), which clearly identifies the APA's time and service requirements for judicial appeal of administrative final decisions, is not ambiguous. *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 953, 963, 235 P.3d 849 (2010). Because the APA unambiguously provides the time and manner for filing and service of superior court petitions for review, the service requirements contained in the Civil Rules and Rules of Appellate Procedure do not apply. See RCW 34.05.510-

.598; *PERC*, 116 Wn.2d at 926-27. On the other hand, non-compliance with APA filing and service requirements fails to invoke the jurisdiction of the superior court and the result must be dismissal. *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995) *superseded by statute on other grounds*, RCW 34.05.542; *PERC*, 116 Wn.2d at 926.

The APA service and time requirements have been analyzed under the strict compliance rule. *PERC*, 116 Wn.2d at 928-29; *Union Bay Pres. Coal.*, 127 Wn.2d at 617-20. “Substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court.” *Skagit Surveyors*, 135 Wn.2d at 555; *see Cheek*, 107 Wn. App. at 85. Further, in applying the strict compliance rule, the court cannot excuse a petitioner’s failure to comply with the APA service requirements even where the other party cannot show prejudice by the failure. *Id.*; *see Banner Realty, Inc. v. Dep’t of Revenue*, 48 Wn. App. 274, 277-78, 738 P.2d 279 (1987).

In *PERC*, the Supreme Court held explicitly that the APA time limits can only be strictly complied with, and in doing so, ruled that prior case law that assumed that the substantial compliance rule applied to APA appeals was erroneous. *PERC*, 116 Wn.2d at 928-29. The court analyzed the substantial compliance doctrine and then concluded:

It is impossible to substantially comply with a statutory time limit in the same way. It 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.

In *PERC*, the City filed its petition for judicial review under the APA on the 30th day after service of the final order but neglected to serve some of the parties of record until 33 days after service of the final order. *Id.* at 925-26. The Supreme Court held that, despite timely filing the petition with the court, because the City failed to timely serve parties of record within the 30-day judicial time limit, per the APA requirements, the City failed to invoke the superior court's appellate jurisdiction and the case was properly dismissed. *Id.* at 928-29 (citing to former RCW 34.04.130(2) which is similar to current RCW 34.05.542(2) requiring filing and service on all parties within 30 days).

Similarly, here Ms. Beck timely filed her petition for judicial review in superior court, but she failed to serve the Department until 35 days after she had been served with the Commissioner's decision. CP at 149. Under *PERC*, she did not comply with the service requirements of the APA, and therefore failed to invoke the appellate jurisdiction of the

superior court. The superior court properly dismissed her petition for lack of jurisdiction. *See PERC*, 166 Wn.2d at 928-29.

In *Cheek*, following the Department's final decision finding petitioner ineligible for unemployment benefits, petitioner timely filed a superior court petition for review but served the petition on the Attorney General's Office four days beyond the 30-day time limit and never served the Department with her petition. *Cheek*, 107 Wn. App. at 81-82. In addition to finding that service upon the Attorney General's Office did not equate to service upon the Department under RCW 34.05.542(2), the Court rejected petitioner's argument that timely service on the Department was met through substantial compliance with the APA requirements. *Id.* at 84-85. The Court held that petitioner failed to comply with the service requirements of RCW 34.05.542 and "substantial compliance with the service requirements of the APA does not invoke appellate jurisdiction." *Id.* at 85.

Similarly, here Ms. Beck timely filed her petition for judicial review in superior court, but she failed to serve the Department within the judicial time limit. Pursuant to *Cheek*, Ms. Beck's failure to comply with the service requirements of the APA results in the superior court lacking appellate jurisdiction over the appeal; therefore, it properly dismissed.

In *Union Bay*, the court required strict compliance with the APA's service requirements in affirming the lower court's dismissal of the judicial appeal. *Union Bay Pres. Coal.*, 127 Wn.2d at 619-21. There following service of the final administrative decision, the petitioner timely filed its superior court petition and timely served a copy of the petition on the parties' attorney but did not serve the parties directly. *Id.* at 617. Analyzing former RCW 34.05.542⁷ which did not provide that service upon a party's attorney equated to service upon such party, the court stated that the unequivocal definition of "party" in the APA combined with the legislative history prevents the application of the doctrine of substantial compliance. *Id.* at 620. The court reasoned that its "ruling arises directly from the words of the APA and, for this reason, decisions applying the doctrine of substantial compliance to other statutes are not persuasive." *Id.*; see *Skagit Surveyors*, 135 Wn.2d at 555. In *Continental Sports Corp. v. Dep't. of Labor & Indus.*, 128 Wn.2d 594, 604, 910 P.2d 1284 (1996), a non-APA case, the Supreme Court applied the doctrine of substantial compliance and in doing so distinguished *Union Bay* by stating:

⁷ Current RCW 34.05.542(6) supersedes *Union Bay*'s holding in part and provides that for purpose of this section "service upon the attorney of record of any agency or party or record constitutes service upon the agency or party of record."

To hold in *Union Bay* that service on an attorney for a party amounted to substantial compliance with the requirements that service be made on a party of record would have effectively trumped the Legislature's clear expression of its intent that service be made only on the parties of record.

Continental Sports Corp., 128 Wn.2d at 604.

Here, the Superior Court correctly applied the strict compliance rule when dismissing Ms Beck's administrative appeal for lack of jurisdiction where she failed to comply with the unambiguous time and service requirements of the APA. Under strict compliance, there is no requirement that the Department must show it was prejudiced by the non-compliance nor is there an exception to strict compliance when a petitioner asserts he or she was negligent in failing to timely serve.⁸

Ms. Beck cites to *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997) (Durham, J., concurring), for the proposition that statutory procedural requirements should be discarded. This case is not controlling here because Ms. Beck cites to a concurrence opinion, not the court's holding, and the case is distinguishable as it was not decided under the APA requirements. First, it is noteworthy that Ms.

⁸ Mr. Beck suggests that she should be excused from the statutory service requirements because her attorney experienced a communication error in providing documents to a courier. See Brief of Appellant at 4-5. Ms. Beck provides no authority to support that such a mistake would excuse strict compliance with the APA service requirements. An attorney is required to institute internal office procedures sufficient to assure legal documents are properly handled and delivered and failure to do so does not excuse late filing of an appeal. *Beckman v. DSHS*, 102 Wn. App. 687, 11 P.3d 313 (2000).

Beck cites to a concurrence opinion, not the majority holding, and this opinion has not been adopted by any court and therefore it not law. *Okanogan Wilderness League, Inc.*, 133 Wn.2d at 787-92. Second, the case is distinguishable from the present matter because it involved an appeal of a decision by the Pollution Control Hearings Board to change a municipality's water rights brought under RCW 43.21B.190⁹. *Id.* at 775-76. The case was not governed by the APA. *Id.* Upon appeal, the municipality brought a motion to dismiss because it was not served with the petition for review as required by the APA and *Union Bay*. *Id.* at 775. In finding that *Union Bay* was not applicable, the court stated “[d]ue to a conflict between [APA] RCW 34.05.542(2) and former RCW 43.21B.190, we find in this case that service was made pursuant to former RCW 43.21B.190.” *Id.* Thus, *OWL* does not address the service requirements under the APA and is therefore not applicable to Ms. Beck's appeal.

RCW 34.05.542(2) explicitly provides that a petition for judicial review must be served on the agency within thirty days after service of the final order. Ms. Beck's speculation about the legislative purpose of the statutory service requirements does not change this fact. The language of the statute is clear, and courts must construe a statute according to its plain

⁹ RCW 43.21B.190 was repealed by Laws 2010, Ch.210, § 41, eff. July 1, 2010. See RCW 43.21B.180 (provides that judicial appeals of decisions of the Pollution Control Hearings Board are brought under the authority of APA.)

language to give effect to the legislative intent. *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). In considering a statute, a court must assume that the legislature means exactly what it says, and must give words their plain and ordinary meaning. *Stone v. Sw. Suburban Sewer Dist.*, 116 Wn. App. 434, 438, 65 P.3d 1230 (2003). Statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Kinnan v. Jordan*, 131 Wn. App. 738, 751, 129 P.3d 807 (2006). A statute is ambiguous if its language is susceptible to more than one meaning. *City of Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 669-70, 818 P.2d 1076 (1991).

RCW 34.05.542(2) provides no ambiguity as to what is required in order to invoke the superior court's limited appellate jurisdiction over administrative judicial appeals. Because Ms. Beck failed to comply with this strict APA service requirement, the superior court correctly found that it lacked jurisdiction and dismissed. As noted in *PERC*, either a party complies with an APA time requirement or it does not. Washington law dictates that strict compliance with the APA's time and service requirements must be met to invoke the court's jurisdiction; substantial compliance will not suffice.

The legislature has clearly imposed a definite deadline for filing and serving judicial appeals of final administrative decisions. RCW

34.05.542. By doing so, it has recognized that administrative agencies are entitled to a degree of finality in managing their significant caseloads. To apply the substantial compliance doctrine in this context would circumvent the unambiguous time requirements and impose a flexible time requirement over the legislature's clear rules. Therefore, the superior court properly held that Ms. Beck failed to strictly comply with the APA and, as a result, the court lacked jurisdiction.

C. The cases cited by Ms. Beck, *Sprint Spectrum* and *Banner Realty*, do not support the application of the substantial compliance doctrine in analyzing whether the time and service requirements of the APA were met to establish jurisdiction.

Ms. Beck argues that *Sprint Spectrum* and *Banner Realty* support the proposition that substantial compliance with APA's time and service requirements will suffice to invoke a superior court's limited appellate jurisdiction. She is incorrect. These cases do not stand for that proposition, and the facts here are not analogous to these cases. Further, as discussed above, *PERC*, *Cheek*, *Union Bay* and *Skagit Surveyors* all require strict compliance with APA time and service requirements. *Sprint Spectrum* and *Banner Realty* are not in opposition to these holdings and certainly do not overrule them.

In *Sprint Spectrum*, the court of appeals affirmed the lower court's dismissal for lack of jurisdiction over the APA judicial appeal where the

petitioner never served the agency, the Board of Tax Appeals, with the petition for review, as required per RCW 34.05.542. *Sprint Spectrum*, 156 Wn. App. at 952, 963. The issue in *Sprint Spectrum* was whether the petitioner's failure to serve the agency, entirely, with a copy of the petition for judicial review supported the trial court's order dismissing that petition. *Id.* at 954. Upon appeal, the petitioner argued that RCW 34.05.542's requirement to serve a copy of the petition for review on the "agency" and "parties of record" was ambiguous, so the court should liberally construe the statute and hold that service of the petition on the Board of Tax Appeals is not required to establish jurisdiction. *Id.* at 954-56. The court of appeals rejected this argument holding that requirements of the APA, specifically RCW 34.05.542, are not ambiguous and the lower court properly dismissed for petitioner's failure to serve the Board. *Id.*

The *Sprint Spectrum* ruling relied upon *Banner Realty* for the holding "that noncompliance with the time requirements for service of a copy of the petition for judicial review on the board of Tax Appeals supported dismissal of the petition." *Sprint Spectrum*, 156 Wn. App. at 961; citing *Banner*, 48 Wn. App. at 276. Any discussion of substantial compliance in *Sprint Spectrum* is dicta considering "Sprint does not argue that it substantially complied with the requirement to serve the Board."

Sprint Spectrum, 156 Wn. App. at 958. The holding in *Sprint Spectrum* does not support the use of the doctrine of substantial compliance in APA appeals. Rather, it supports the general proposition that the APA service requirements are clear and not subject to liberal statutory construction. Thus, non-compliance with the requirements results in dismissal. *Id.* at 963.

In *Banner Realty*, the case cited by *Sprint Spectrum*, the court of appeals affirmed the lower court's dismissal for lack of jurisdiction where petitioner failed to serve the agency, the Board of Tax Appeals, until almost two months after the superior court dismissed the appeal. *Banner Realty*, 48 Wn. App. at 278. The court does not directly address the issue of whether the doctrine of substantial compliance is applicable to APA service requirements; rather it holds "Banner had neither strictly nor substantially complied with the service requirements of RCW 34.04.130(2)." *Id.* Moreover, in *PERC* the Supreme Court specifically rejected any suggestion in *Banner Realty* that it is possible to substantially comply with the APA's timely service requirements. *PERC*, 116 Wn.2d at 927-29.

Thus, Ms. Beck's reliance upon the legal authority of *Sprint Spectrum* and *Banner Realty* for the position that substantial compliance

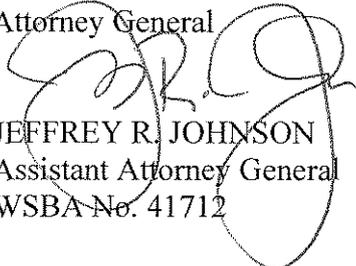
with APA service requirements invokes superior court appellate jurisdiction over administrative appeals is misplaced.

VI. CONCLUSION

The Department respectfully requests that the Court affirm the lower court's dismissal for lack of jurisdiction. Petitioner Andrea Beck did not serve the Department with a copy of her petition for review until 35 days after she was served with the Commissioner's decision. She thus failed to invoke the superior court's appellate jurisdiction because she did not strictly comply with RCW 34.05.542(2).

RESPECTFULLY SUBMITTED this 8TH day of November, 2011.

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