

March 27, 2009

TO: Bert Loomis

FROM: Teresa Parsons, SPHR  
Director's Review Program Supervisor

SUBJECT: Albert (Bert) Loomis v. Department of Fish & Wildlife (WDFW)  
Director's Review Request RULE-09-001

**Nature of Alleged Violation**

On February 9, 2009, the Department of Personnel received your request for a Director's review. In your request, you alleged WDFW violated RCW 41.06.150 and 41.06.010; WAC 357-16-125; 357-16-130; and 357-16-190 with regard to Penny Warren's appointment to a Property and Acquisition Specialist 6 (PAS 6) with the working title of Westside Lands Supervisor (Exhibit 1). Specifically, your alleged violations pertain to the following:

- RCW 41.06.010 establishes a system of personnel administration for the state that governs, in part, the appointment, promotion, transfer, layoff, recruitment, and retention of civil service employees.
- RCW 41.06.150 provides that the Director of the Department of Personnel shall adopt rules consistent with the purposes and provisions of Chapter 41.06 RCW.
- Chapter 357-16 WAC provides rules regarding recruitment, assessment, and certification.
- The action prompting your alleged law and rule violations is the appointment of Penny Warren to a Property & Acquisition Specialist 6 position.
- Chapter 357-19 WAC provides rules regarding appointment and reemployment.

### Timeliness

Ms. Warren's appointment to the PAS 6 position was effective January 7, 2009. By letter dated February 17, 2009, I asked you and WDFW to address the timeliness of your request (Exhibit 19). In your response dated March 3, 2009, you disagreed that your request was untimely (Exhibit 20). Specifically, you indicated that in January 2009, your attorney, Ed Younglove, made several attempts to obtain information from WDFW about Ms. Warren's appointment and that you did not receive the information requested until January 28, 2009. As a result, you stated that on January 28, 2009, you concluded that civil services laws and rules had been violated.

In an email response dated March 10, 2009, Art Irving, WDFW, provided the following timeline of decisions and communications regarding Ms. Warren's appointment (Exhibits 23 & 24):

- **December 23, 2008** – Ms. Warren was returned to her former exempt position of Human Resources Director, effective August 1, 2008. This resulted from a December 1, 2008 Director's determination, based on your previous request for a Director's review of similar alleged rule violations by WDFW.
- **December 31, 2008** – Ms. Warren was returned from her exempt appointment to the Washington Management Service (WMS), effective January 1, 2009.
- **January 2, 2009** – Ms. Warren requested a voluntary demotion to a vacant PAS 6 position in the Lands Division of the Wildlife Program by submitting a letter to Wildlife Program Assistant Director Dave Brittell.
- **January 5, 2009** – In an email to Ms. Warren, Mr. Brittell accepted her request for a voluntary demotion to the PAS 6 position, making her voluntary demotion effective January 6, 2009.
- **January 6, 2009** – Sarah Nelson in the WDFW HR Office formally notified Ms. Warren of her voluntary demotion appointment to the PAS 6 position, effective January 7, 2009. A corrected appointment letter indicated the proper appointment date, effective January 7, 2009.
- **January 28, 2009** – By email attachment from Gil Hodgson, AAG for WDFW, Mr. Younglove, as your attorney of record, was provided copies of the above correspondence. Additional documentation was provided to Mr. Younglove in a second email dated January 29, 2009.

WAC 357-49-010(4) establishes the criteria for requesting a Director's review of an alleged rule violation, which states, in part, the following:

. . . an employee who has been adversely affected by a violation of the civil service laws or rules may request a director's review within thirty calendar days of the date the employee could reasonably be expected to have knowledge of the action giving rise to a law or rule violation claim or the stated effective date, whichever is later. . . .

In Mishra v. University of Washington, PRB No. R-RULE-07-002 (2007), the Personnel Resources Board (PRB) addressed the issue of reasonable knowledge, citing Barrington, et al. v. Eastern Washington University, 41 Wn. App. 259 (1985). While the facts in Mishra differ from your case, Mr. Mishra acknowledged his awareness of the action prompting his allegations in an email written approximately two months prior to his request for a Director's review. Mr. Mishra asserted that while attempting to get a written response regarding the action, he ultimately concluded the action taken was in violation with laws and rules. After reaching such a conclusion, Mr. Mishra filed his request, which was untimely. The PRB concluded Mr. Mishra's assertion he was waiting for a written response was not persuasive in determining when he had knowledge giving rise to his request for review. Further, the Board found that regardless of whether he was seeking additional information, he must comply with the jurisdictional requirements of the RCW and WAC.

In determining when you could reasonably be expected to have knowledge of the action giving rise to a law or rule violation claim, I considered all of the documents you submitted with your Director's review request and your response regarding the timeliness of your request, as well as WDFW's response. Because your allegations stem from Ms. Warren's appointment to the PAS 6 position, it is her appointment to the position that is the action giving rise to your claim. When Ms. Warren was appointed to the PAS 6 position as Westside Lands Supervisor, she became your supervisor, as evidenced by an email you provided from Real Estate Services Manager Dan Budd. Mr. Budd's email to you and Ms. Warren's other direct reports on January 6, 2009 at 5:01 p.m. states, in part, "[e]ffective January 7, 2009 your supervisor is Penny Warren" (Exhibit 10). While you may not have received information about the facts surrounding Ms. Warren's appointment until January 28, 2009, you were aware of Ms. Warren's appointment on January 7, 2009.

Similar to Mishra, you were seeking additional information to determine whether Ms. Warren's appointment had been made in accordance with the rules. In Mishra, however, the evidence supported Mr. Mishra reasonably understood the circumstances giving rise to his claims approximately two months prior to his request. In your case, it is reasonable you had knowledge of the action giving rise to your claims WDFW violated laws and rules related to recruitment, assessment, and

certification, as outlined in Chapter 357-16 WAC, since you knew the position had been filled by Ms. Warren on January 7, 2009. However, with respect to alleged violations regarding her appointment, as outlined in Chapter 357-19 WAC, the evidence supports your assertion that you were waiting for more information. On January 28, 2009, you became aware of the facts surrounding Ms. Warren's appointment, as evidenced by the emails provided to your attorney of record (Exhibit 21). As a result, I conclude your request for a Director's review was, in part, timely as it related to Ms. Warren's appointment under Chapter 357-19 WAC.

### **Director's Determination and Rationale**

As an attachment to your request for a Director's review, you provided extensive documentation regarding Ms. Warren's January 7, 2009 appointment to the PAS 6 position. The documentation includes information about her return from an exempt position to a Washington Management Service (WMS) position within classified service, followed by her voluntary demotion to the PAS 6 position.

WAC 357-04-030 addresses the return of an exempt employee to classified service as follows:

As required by RCW [41.06.070](#)(3), any employee having permanent status in a classified position who accepts an appointment in an exempt position has the right to return to classified service in accordance with WAC [357-19-195](#), [357-19-200](#), and [357-19-205](#). As long as the employee was not terminated from the exempt position for gross misconduct or malfeasance, the employee has the right to return to the highest class of position in which he/she previously held permanent status or to a position of similar nature and salary.

WAC 357-58-450 provides the following: "When an exempt employee has the right to return under WAC [357-04-030](#) to a WMS position the return will be accomplished as provided in WAC [357-19-195](#) and [357-19-200](#)."

Ms. Warren was returned to position #710163641, WMS Band 3, in the Human Resources Office, the highest class of position she previously held. However, the position was unfunded (Exhibit 4). In accordance with WDFW's WMS layoff plan, Ms. Warren requested a voluntary demotion to the vacant PAS 6 position, #70069269 (Exhibit 7). WAC 357-58-215 states that "[a] permanent employee may voluntarily demote from a WMS position to a WGS position at a lower pay level than his/her current position." WDFW management in the Human Resources Office and the Wildlife Program determined Ms. Warren met the competencies, skills, and abilities for the PAS 6 position.

After reviewing the supporting documents, I conclude WDFW appointed Ms. Warren to the PAS 6 position in accordance with the civil service laws and rules. Therefore,

you have not proven that WDFW violated any civil service laws or rules regarding the appointment.

**Appeal Rights**

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination.

The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

If no further action is taken, the Director's determination becomes final.

c: Art Irving, WDFW  
Connie Goff, DOP

Enclosure: List of Exhibits

**Albert Loomis v. Fish and Wildlife**

**RULE-09-001**

List of Exhibits

- Exhibit 1 Request for Director's Review, received via fax and mail on February 9, 2009.
- Exhibit 2 Position description for Property & Acquisition Specialist 6.
- Exhibit 3 Letter from Cynthia Lerch to Penny Warren dated December 23, 2008
- Exhibit 4 regarding exempt position.  
Letter from Joe Stohr to Penny Warren dated December 31, 2008 regarding WMS position.
- Exhibit 5 HR Action form: 8/1/2008 – 12/31/2008.
- Exhibit 6 Computer page showing Voluntary Demotion 1/7/09.
- Exhibit 7 Letter to Dave Brittell from Penny Warren dated January 2, 2009 requesting voluntary demotion.
- Exhibit 8 Email from Dan Budd dated 1/5/2009 regarding supervision.
- Exhibit 9 Email from Dave Brittell to Penny Warren dated January 5, 2009 accepting voluntary demotion.
- Exhibit 10 Email from Dan Budd to Brian Mitchell, Albert Loomis, Kye Iris indicating Penny Warren was their supervisor.
- Exhibit 11 Correction letter to Penny Warren from Sarah Nelson dated January January 6, 2009, indicating effective date of appointment.
- Exhibit 12 HR action form: 1/1/09 - 1/6/09
- Exhibit 13 HR action form: 1/7/2009
- Exhibit 14 Email from Connie Goff to Margaret Gordon dated January 9, 2009 regarding question about voluntary demotion.
- Exhibit 15 Request for Public Record from James A. Perkins, Larson Berg & Perkins PLLC, dated 2/6/2009.
- Exhibit 16 Out of office email reply from DOP MI Information to Bert Loomis dated February 6, 2009, 6:01 p.m.
- Exhibit 17 Email dated February 6, 2009, 5:58 p.m. from Bert Loomis, addressed to Eva Santos, Director, requesting a Director's review.
- Exhibit 18 Fax Transmission verification report 2/7/2009 at 08:59
- Exhibit 19 February 17, 2009 letter from Teresa Parsons to Albert Loomis and Cynthia Lerch, addressing timeliness of Mr. Loomis's request.
- Exhibit 20 Mr. Loomis's response to timeliness, dated March 3, 2009.
- Exhibit 21 Email correspondence between Ed Younglove, Attorney, and Gil Hodgson, AAG, regarding request for information
- Exhibit 22 Postal delivery receipt.
- Exhibit 23 Email from Art Irving to Karen Wilcox addressing timeline of Penny

Exhibit 24      Warren's appointment.  
                    Timeline of Actions regarding Appointment of Penny Warren.