70354-4

70354-4

NO. 70354-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

YEVGENY SEMENENKO and NATALYA SEMENENKO,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

APPELLANTS' REPLY BRIEF

Judith Lurie, WSBA #26097
Deborah Perluss, WSBA #8719
NORTHWEST JUSTICE PROJECT
PO Box 3324
300 Okanogan Ave, Suite 3A
Wenatchee, Washington 98801
Tel. (509) 664-5101
Email: judithl@nwjustice.org
debip@nwjustice.org

ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. REPLY TO COUNTER STATEMENT OF CASE 2

III. ARGUMENT 3

A. The Delayed Findings at Issue Are Void. 3

1. The 90 Day Statutory Limit is Clear and Unambiguous. 3

2. *State v. Rice* Does Not Control the Outcome in This Case. 7

3. Construing the Statutory Time Limit as Mandatory Does Not Impair the Legislative Purpose. 10

B. There is Good Cause to Reinstate the Request for Administrative Hearing. 13

1. The "Good Cause" Exception Applies in this Case. 14

2. The Semenenkos have Good Cause for Their Late Request for Review. 16

C. Equitable Estoppel Requires the State to Honor the Late Request for Review and Provide an Administrative Hearing. 19

1. Equitable Estoppel Applies to Statements Made to the Semenenkos' Daughter Acting on Their Behalf. 19

2. Equitable Estoppel Does Not Require that a Statement Relied Upon Must be Made by a Speaking Agent. 20

TABLE OF CONTENTS

Page

3. Denying the Semenenkos a Hearing on the Merits of the Finding is Unjust. 21

D. The Department Cannot Demonstrate that Its Actions are Substantially Justified 22

IV. CONCLUSION 25

V. APPENDIX 26

TABLE OF AUTHORITIES

Page

Cases

City of Des Moines v. Personal Property Identified as $81,231 in U.S. Currency,
87 Wn. App. 689, 696, 943 P.2d 669 (1997).....16

Danzer v. Dep't. of Labor & Indus.,
104 Wn. App 307, 318, 16 P.3d 35 (2000).....22

Griggs v. Averbeck Realty, Inc.,
92 Wn.2d 576, 581, 599 P.2d 1289 (1979).....16

In re Luscier,
84 Wn.2d 135, 136, 524 P.2d 906 (1974).....6

In re Welfare of Myricks
85 Wn.2d 252, 533 P.2d 841 (1975).....6

Johnson v. Cash Store,
116 Wn. App. 833, 841, 68 P.3d 1099 (2003).....17

Kabbae v. Dep't. of Soc. and Health Serv.,
144 Wn. App. 432, 440, 192 P.3d 903 (2008).....8, 12

Marcum v. Dep't. of Soc. and Health Servs.,
172 Wn. App. 546, 560, 290 P.3d 1045 (2012).....23

Millay v. Cam,
135 Wn.2d 193, 206, 955 P.2d 791 (1998).....22

Norton v. Brown,
99 Wn. App. 118, 121, 992 P.2d 1019 (1999).....17

Raven v. Dep't. of Soc. & Health Servs.,
177 Wn.2d 804, 832, 306 P.3d 920 (2013).....24

Ryan v. State of Washington, DSHS,
171 Wn. App. 454, 464, 287 P.3d 629 14

TABLE OF AUTHORITIES

Page

Sacotte Const., Inc. v. National Fire & Marine Ins. Co.,
143 Wn. App. 410, 418, 177 P.3d 1147
(2008).....17

Secretary of Labor v. Baretto Granite Corp.,
830 F.2d 396, 399 (1st Cir. 1987).....22

Silverstreak v. Dep't. of Labor & Indus.,
159 Wn.2d 868, 888, 154 P.3d 891 (2007).....19

State ex. re. Petroleum Transp. Co., et. al. v. Washington Public Service Commission,
35 Wn.2d 858, 862, 216 P.2d 177 (1950).....8

State v. Rice,
174 Wn.2d 884, 279 P.2d 849 (2012).....7, 8, 9, 12, 13

Washington State Coalition for the Homeless v. Dep't. of Social and Health Serv.,
133 Wn.2d 894, 904, 949 P.2d 1291 (1997).....4

Statutes

Indiana Ann. Code.
31-33-26-14; 31-33-26-15 12

RCW 13.34.040 10

RCW 24.44.030(11).....11

RCW 26.44 .....4, 14

RCW 26.44.010 6

RCW 26.44.020(1).....6

RCW 26.44.030 3

RCW 26.44.030(11).....3, 12

RCW 26.44.030(12)(a) 3

TABLE OF AUTHORITIES

Page

RCW 26.44.100(1).....6

RCW 26.44.105 10

RCW 26.44.125(3).....14

RCW 26.44.180 4

RCW 34.05.570(3)(b), (c) and (h) 10

RCW 34.05.570(3), (4).....9

RCW 34.05.570(4)(a), (b) 10

RCW 43.43.830 and .832 11

RCW 43.43.832(4).....11

RCW 43.43.832(5) and (6) 11

RCW 9.94a.640 12

RCW 9A.16.100 6

Vermont Ann. Stat. Tit.
33 VSA 4916c; 4916d 12

Other Authorities

WAC 388-02.....14, 15

WAC 388-02-0005 14

WAC 388-02-0020 .....13, 14, 15, 16, 21, 22, 24

WAC 388-02-0020(2).....13

WAC 388-02-0080 15

WAC 388-02-0200 14

WAC 388-02-0215(l),(m).....24

TABLE OF AUTHORITIES

Page

WAC 388-06-0240 12

WAC 388-06-0700, 0710 11

WAC 388-08-0190 12

WAC 388-15-021 5

WAC 388-15-021(7) 4

WAC 388-15-089 14

WAC 388-15-109 14

Rules

CR 56 2

CR 60 ..... 13, 16

I. INTRODUCTION

The Appellants, Yevgeny and Natalya Semenenko, are loving parents who, as the Department rightly acknowledges, have been absolutely devastated by having been wrongly accused of abusing their then seventeen (17) year-old daughter. The Department provides no rationale for why it failed to comply with the ninety (90) day statutory time limit for completing its required investigation of reported child abuse – because there is none. Ironically, while the Department seeks to hold the Semenenkos to a statutory time frame for appeal, they fail to hold themselves to the mandatory time frame in which they are required to complete their investigations and issue their findings in the first place. The Department contends the Semenenkos are stuck with the resulting stigma and bar to any opportunity that requires a DSHS background check.

Even though the Semenenkos did not timely request a hearing, they meet the "good cause" standards for a late request under regulations that govern DSHS administrative hearings. Good cause exists by virtue of equitable estoppel that operates to equitably toll the time to appeal.

The Semenenkos' experience during the past four years has been more than what the Department deems "devastating" or "frustrating". Respondent's Brief ("RB") 1, 13. For the Semenenkos, the past four years have been a living nightmare. This Court should end the nightmare and

rule that the findings are void and order that they be immediately removed from the DSHS database. At minimum, the Court should rule the Semenenkos have a right to a hearing to clear their names.

II. REPLY TO COUNTER STATEMENT OF CASE

The Department's "Counter Statement of the Case" grossly mischaracterizes the facts of this case and thus merits reply. First, the issues in this case were not resolved by summary judgment. There has been no hearing on the merits or finding that there are no disputed material issues of fact as would be required for summary judgment. CR 56. Indeed, the Semenenkos dispute every material fact related to the abuse finding.

Second, the Semenenkos did not "choose" to use physical force on their daughter. RB 2. They sought to prevent her from injecting drugs while she was being checked into inpatient treatment for her drug addiction. CP 61. While an altercation may have been captured on videotape, the Semenenkos have never had a chance to challenge what it might appear to represent.[1] Nor has the Department ever substantiated its interpretation through witness testimony. By consistently denying the Semenenkos a hearing, (CP 90-91,106-07), the Department has avoided the need to do more than simply assert that the Semenenkos are child abusers rather than loving parents who saved their daughter's life.

[1] The record suggests that the videotape was of poor quality, grainy, indistinct and suffering from frame lapses. CP 61.

Third, the Department insinuates the Semenenkos' assertion that they were misled by a Department representative is sheer fantasy. RB 3. The Semenenkos' evidence is uncontroverted, and, thus not mere allegation or supposed misrepresentation. CP 1, 109. Moreover, the fact that their Child Protective Services (CPS) case was closed was fully substantiated by a letter dated December 3, 2009 signed by Abigail G. Cabang of the same Division of Children and Family Services that later issued the disputed finding of abuse. CP 88.

III. ARGUMENT

A. The Delayed Findings at Issue Are Void.

1. The 90 Day Statutory Limit is Clear and Unambiguous.

The findings of abuse against the Semenenkos were issued well past the statutory deadline the Legislature imposed on the Department to complete their investigations of abuse/neglect reports and notify parents or others of the outcome. The statute is mandatory in both its expressed language and purpose. RCW 26.44.030(11)[2] states in clear and unambiguous terms:

> For reports of alleged abuse or neglect that are accepted for investigation by the department, the investigation *shall be* conducted within time frames established by the department in rule. *In no case shall the investigation extend longer than ninety days from the date the report is received,* unless the investigation

[2] Amendments to RCW 26.44.030 took effect on December 1, 2013. Citations are prior to the 2013 amendments. As currently amended, the 90 day limit on investigations appears at RCW 26.44.030(12)(a).

> is being conducted under a written protocol pursuant to RCW 26.44.180 and a law enforcement agency or prosecuting attorney has determined that a longer investigation period is necessary. *At the completion of the investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded.*
>
> Emphasis added.

The Department would like the Court to believe that the above statutory language is open to interpretation and postures that *"[i]n no case shall the investigation extend longer than ninety days from the date the report is received..."* is merely precatory. Even if this language were open to interpretation, which it is not,[3] the Department itself has, as the statute directs, established time frames that are identical to the statute.

WAC 388-15-021(7) mandates that *"[i]n no case shall the investigation extend beyond ninety days* unless the investigation is being conducted under local protocol, established pursuant to chapter 26.44 RCW and a law enforcement agency or prosecuting attorney has determined that a longer investigation period is necessary."[4] Emphasis added. In fact, the regulation mandates 90 days as the outer time limit for the agency to complete the investigation, recognizing that the ideal limit is forty-five (45) days. WAC 388-15-021(7).

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[3] A clear and unambiguous statute is not open to judicial interpretation, but its meaning must be derived from the language of the statute alone. *See, Washington State Coalition for the Homeless v. Dep't. of Social and Health Serv.,* 133 Wn.2d 894, 904, 949 P.2d 1291 (1997).

[4] The Department has never claimed that the stated exception applies to this case.

Even deferring to the agency's interpretation leads to the same result. WAC 388-15-021 contains seven sub-sections outlining how CPS responds to reports of alleged child abuse or neglect and clearly differentiates between those actions that are mandatory and those that are merely permissive. The Department has established that CPS:

> (1) *must* assess all reports ... of child abuse or neglect...; (2) *must* provide an in-person response to alleged victims and *must* attempt an in-person response to the alleged perpetrator...(3) *may* refer reports assessed at low or moderately low risk to an alternative response system; (4) *may* interview a child, outside the presence of the parent...; (5) [u]nless the child objects, ... [CPS] *must* make reasonable efforts to have a third party present at the interview...; (6) *may* photograph the alleged child victim to document the physical condition of the child...; and (7) *attempt to* complete investigations within forty-five days...[in] *no case shall* the investigation extend beyond ninety days."
>
> WAC 388-15-021, emphasis added.

The Department's own regulation recognizes the difference between those obligations that are merely directory and those that are mandatory by variously using "may" and "attempt to" to identify those actions in which CPS has discretion, and "must" and "in no case shall" for those actions which must be complied with for the CPS determination to be lawful.

The reason for the distinction is that the Department understands a substantiated report of child abuse or neglect has serious consequences for

the entire family and can lead to heart-wrenching state intrusions into constitutionally protected family relationships. *See, In re Welfare of Myricks,* 85 Wn.2d 252, 533 P.2d 841 (1975) (holding right of parent to the companionship of a child is fundamental and more precious than the right to life itself, *citations omitted); In re Luscier,* 84 Wn.2d 135, 136, 524 P.2d 906 (1974) ("the integrity of the family unit has been zealously guarded by the courts...[as] an innate concomitant of the protected status accorded the family as a societal institution.")

Indeed, while the protection of children is primary, the Department has, and should have, a mandatory duty to quickly resolve reports of abuse and to act quickly to protect children by timely, affirmative efforts when that is warranted; and to also timely dismiss reports that cannot be substantiated with evidence that meets the definition of abuse.[5] It is not just the Legislature's aspirational goal that the Department make reasonable efforts to protect an abused child. Rather, the Legislature mandates that the agency respond timely for the protection of both the child and the alleged perpetrator, an even greater consideration when that person is the alleged victim's parent. RCW 26.44.010, 26.44.100(1).

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[5] RCW 26.44.020(1) defines "abuse or neglect" as "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100 or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section."

2. *State v. Rice* Does Not Control the Outcome in This Case.

State v. Rice, 174 Wn.2d 884, 279 P.2d 849 (2012) does not control the outcome of this case and arises in such a different context as to be wholly distinguishable. *State v. Rice* concerned the constitutionality of a statute that arguably compels an elected Prosecuting Attorney to charge special aggravating circumstances for crimes involving kidnapping of a minor. The defendant appealed her conviction and sentence based on the aggravating circumstances that the kidnapping was predatory and with sexual motivation, claiming that the charging statute was an unconstitutional deprivation of prosecutorial discretion and therefore a violation of separation of powers.

The *Rice* Court held that while the charging statutes were written in mandatory terms, they were not unconstitutional because they are to be applied in the context of a Prosecuting Attorney's constitutionally based discretionary authority to make charging decisions -- an authority which has been expressly acknowledged by the Legislature. *Id.* at 899. In order to read the statutes as consistent with the constitution and the clear intent of other statutory provisions, the Court held that in this rare instance the statutes expressed in terms of "shall" are intended to express a policy preference and not a mandate.

The rationale and unusual circumstances of the *Rice* case are simply not applicable here. First, unlike the alleged statutory impairment of constitutional authority at issue in *Rice*, the mandatory time limit is directed to an administrative agency. An administrative agency, unlike a Prosecuting Attorney, is a creature of statute and its powers are strictly defined by the Legislature. *Kabbae v. Dep't. of Soc. and Health Serv.,* 144 Wn. App. 432, 440, 192 P.3d 903 (2008) ("...because administrative agencies are 'creatures of the legislature without inherent or common-law powers,' an agency only has those powers that are conferred either expressly or by necessary implication.") *Cf. State ex. re. Petroleum Transp. Co., et. al. v. Washington Public Service Commission,* 35 Wn.2d 858, 862, 216 P.2d 177 (1950) ("The department is a creature of statute and must obey the mandate of the legislature in word and spirit.") In interpreting the statutory mandate in *State ex. rel. Petroleum Transp. Co.,* in regard to the Commission's issuance of a trucking permit, the Court held that "[n]o permit or extension thereof shall be granted...." to mean exactly what it says and that "no" and "shall" meant that no exception is allowed for. In this case, the statutory mandate "*in no case shall*" similarly allows for no exception.

Because DSHS is a creature of statute, its power and authority is circumscribed by legislative authority and a mandatory unambiguous

statute is not subject to the type of interpretation that was necessary in *Rice.* While the statute at issue in *Rice* was expressed in mandatory terms, the context in which it applied rendered it ambiguous. Judicial interpretation was necessary to avoid a constitutional conflict that would invalidate the statute and to further avoid an interpretation inconsistent with Legislative intent as expressed in other statutes.

The argument that like in *Rice*, there is no consequence to the Department's violation of the 90 day statutory mandate at issue here is also without merit. In *Rice* the Court found that a Prosecuting Attorney's failure to comply with the statute is of no consequence because it would not void a lawfully obtained conviction of the lesser charged offense. Also, because it is not in any defendant's interest to challenge the failure to include the aggravated charges, there is no real mechanism to enforce non-compliance. In any event, in *Rice* the Prosecuting Attorney *complied* with the statutory directive.

In contrast, here the Department's failure to comply with the mandatory 90 day time limit renders the administrative agency action void, unenforceable against the parties against whom the void finding is rendered, and subject to judicial authority to invalidate and vacate the finding. See RCW 34.05.570(3), (4), which authorizes a court to grant relief, *inter alia,* from agency action that is outside the statutory authority

of the agency; when the agency has failed to comply with prescribed procedure; the action is inconsistent with a rule of the agency; or, when a person's rights are violated by the agency's failure to perform a duty that is required by law. RCW 34.05.570(3)(b), (c) and (h); RCW 34.05.570(4)(a), (b). Hence, the violation here is not without consequence, legal effect or remedy.

3. Construing the Statutory Time Limit as Mandatory Does Not Impair the Legislative Purpose.

Finally, the Department's argument that construing the 90 day statutory time limit for investigation of child abuse reports as mandatory would impair the overarching legislative purpose of protecting children also has little merit. Again, the Legislature's intent in requiring that in "*no case shall the investigation extend longer than ninety days...*" is to protect both parents (and other alleged perpetrators) and children. The consequence of non-compliance does not "extinguish" abuse or neglect allegations after 90 days. The Department can utilize other powers to protect children, including referring families for voluntary services, keeping the report on record in the event of repeat allegations, or in serious cases filing a dependency proceeding for which there appears to be no similar statutory time limit. RCW 26.44.105, RCW 13.34.040.

Moreover, the issuance of an administrative finding against a parent in an intact family has little protective value and even less when done several months (or years)[6] after the alleged incident of abuse or neglect. As to an intact family, once a final administrative finding is issued the parent(s) are tagged as child abusers and they are automatically denied access to employment and volunteer opportunities in which they may have unsupervised contact with children or vulnerable adults. See RCW 43.43.830 and .832; WAC 388-06-0700, 0710.[7]

Like the Semenenkos, a parent with an administrative finding of abuse is likely to be denied or terminated from covered employment, denied access to health care and other benefits through employment, denied opportunities to read to one's children at school, go on field trips, or otherwise participate in school-based parental involvement programs with their children. This occurs regardless of the circumstances that lead to the finding, including such circumstances arising from minor mistakes in judgment, a loving parent's effort to save a drug addicted child's life, or failure to timely respond to the finding letter. And, unlike the case with

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[6] Accepting the Department's argument that RCW 24.44.030(11) is not mandatory would mean there is absolutely no time limit on the Department's authority and "devastating" abuse or neglect findings could be issued years after an alleged report.

[7] The circumstances in which a person with a negative finding of abuse or neglect is denied employment and important volunteer opportunities under RCW 43.43.832(4) are extremely broad and include: (a), (b) employment with the state; (c) facility licensing; (d) contracts for services; (e) home care employment by individuals, and under RCW 43.43.832(5) and (6) with respect to any educational facility.

criminal convictions, which may be expunged or reviewed in light of an applicant's character and fitness after the passage of time (RCW 9.94a.640, WAC 388-08-0190), there is no process available in Washington by which a person with an administrative finding of abuse/neglect can have the finding expunged and their name removed from the Background Check database. [8]

Furthermore, the administrative finding does not otherwise result in provision of protective child welfare services or court intervention to monitor the child's care or ensure the provision of services. In short, the impact on a parent and their children is not in any way protective, but is in fact, as the Department so aptly declared, "devastating," even more so when the finding is delayed well past the statutory deadline.

The rules of statutory construction compel a determination that RCW 26.44.030(11) sets a mandatory 90 day deadline. As stated in *Kabbe,* 144 Wn. App. at 908, "[u]nless a contrary legislative intent is clear, the use of the word "shall" is a mandatory directive." *Rice* also holds that use of "shall" in a statute is presumed mandatory. 174 Wn.2d at

[8] There is no right to appeal the Department's denial of authorization for unsupervised contact with a child or vulnerable adult. WAC 388-06-0240. Other states have removed the specter of the lifelong impact of an administrative abuse finding. *See, e.g.* Vermont Ann. Stat. Tit. 33 VSA 4916c; 4916d providing that after seven years, a person placed on the registry for a finding of child abuse or neglect may request expungement; Wisconsin allows a person to clear his/her name from the registry for employment and licensing purposes. http://www.dhs.wisconsin.gov/caregiver/pdffiles/chap5-rehabreview.pdf; and Indiana Ann. Code. 31-33-26-14; 31-33-26-15, which provides for automatic expungement after the child victim reaches the age of 24.

896. No legislative intent exists to overcome this presumption. This Court should not ratify the Department's unexplained and unjustified violation of the mandatory time limit. Instead, the Court should render the required consequence: Declare the findings void and order the Semenenkos be removed from the Background Check database.

B. There is Good Cause to Reinstate the Request for Administrative Hearing.

This case concerns a final determination of child abuse, with devastating impacts, entered by default. When the Semenenkos failed to seek review within 20 days of receiving the Department's letters notifying them that the alleged abuse was found to be substantiated, the findings became final, and at each level of appeal thereafter they were denied a hearing not only on whether or not the finding had merit, but also on whether they had cause to file a late request for review. The Department contends the dismissals of their review and hearing requests were "inevitable" because the 20-day period for requesting review is absolute notwithstanding the "good cause" exception in WAC 388-02-0020.[9] RB 6-10. This contention lacks merit.

[9] WAC 388-02-0020(2) expressly provides in relevant part: "Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline."

1. The "Good Cause" Exception Applies in this Case.

The Department argues that WAC 388-02-0020 does not provide the Semenenkos any relief because RCW 26.44.125(3) and WAC 388-15-089 do not set forth *within themselves* a provision that would allow a late hearing request for good cause. RB 7-10. WAC 388-02-0200 was not, however, simply "plucked" from the hearing rules and "presumed" to apply in this case. RB 7.

In fact, the Department has already conceded that WAC 388-02-0020 applies to late hearing requests made by an alleged perpetrator of abuse. *See Ryan v. State of Washington, DSHS*, 171 Wn. App. 454, 464, 287 P.3d 629 (in which the Department agrees that pursuant to WAC 388-02-0020, an ALJ can excuse a late request for hearing made by an alleged perpetrator of abuse of a vulnerable adult.) WAC Chapter 388-02 was promulgated to "describe[ ] the general procedures that apply to the resolution of disputes between [the individual] and the various programs within [DSHS]." WAC 388-02-0005. The scope of this chapter is broad. It applies to the "resolution of disputes" with DSHS and nowhere states that it excludes disputes over findings issued under RCW 26.44. Nor does RCW 26.44 anywhere state that the normal hearing procedures set out in Department regulations do not apply to findings under that chapter. Indeed, WAC 388-15-109, which sets out rules that control administrative

hearings held regarding CPS findings, expressly references and includes WAC Chapter 388-02.

Nowhere in the regulations is it stated or implied that WAC 388-02-0020 is limited to resolution of disputes between the Department and those who have already timely filed for a hearing.[10] WAC 388-02-0020 applies to provide relief in all disputes with DSHS that are subject to administrative hearings from the impact of "failing to appear, to act, or to respond to an action" by DSHS. WAC 388-02-0080 describes "disputes with DSHS" as disagreements with "a DSHS decision or action". Because the Semenenkos have a "dispute" with DSHS concerning a "decision or action" by the agency, WAC 388-02-0020 applies to the administrative findings of abuse in this case.

WAC Chapter 388-02 contains the set of regulations that govern all DSHS hearings. The Department's argument that WAC 388-02-0020 cannot apply to an individual who has failed to timely respond to a DSHS action cannot stand to reason. There is no purpose to a rule allowing an exception for those who have failed to respond to an action, if the rule did not apply to those who have failed to respond to an action.

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[10] Ironically, the Departments cites a section of WAC 388-02 to support its position, while also suggesting that other sections of WAC 388-02 are inapplicable.

2. The Semenenkos have Good Cause for Their Late Request for Review.

The Department argues that even if WAC 388-02-0020 applies, the Semenenkos do not have good cause. RB 9. However, it ignores the express requirement that administrative law judges (and courts on judicial review) look to CR 60 as the guideline for when good cause exists. *Id.*

Under CR 60, legal consequences imposed by default are disfavored because justice demands that cases be decided on their merits. *Griggs v. Averbeck Realty, Inc.,* 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Defaults are only proper where the party has been essentially unresponsive, (*City of Des Moines v. Personal Property Identified as $81,231 in U.S. Currency*, 87 Wn. App. 689, 696, 943 P.2d 669 (1997)), not where he or she has been misled by the opposing party as was the case here. When considering whether to vacate a default, courts consider:

> whether the default party has shown (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default judgment was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside. But the court will spend little time inquiring into the reasons for the failure to appear and answer if the moving party demonstrates "'a strong or virtually conclusive defense,' "

Sacotte Const., Inc. v. National Fire & Marine Ins. Co., 143 Wn. App. 410, 418, 177 P.3d 1147 (2008) (quoting *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003)).

Equitable principles control whether a default should be vacated. "'[T]he overriding reason should be whether or not justice is being done ... What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" *Norton v. Brown*, 99 Wn. App. 118, 121, 992 P.2d 1019 (1999) (quoting *Griggs*, 92 Wn.2d at 582, *citations omitted).*

The facts in this case are uncontroverted. The Semenenkos' failure to request review of the finding was caused by the Department's misinformation, and not by any unresponsiveness on their part. The Semenenkos engaged with the Department through voluntarily receiving services after the initial report of alleged abuse (CP 88), and after they received the child abuse finding, they immediately called the Department to inquire about the conflicting and confusing letters received from the agency. CP 9, 34-35. A Department official instructed them that the finding letter was a mistake, their case had been closed, and there was therefore no need to file a written appeal. CP 35. The Semenenkos discovered they had been misinformed by the Department after Mrs. Semenenko's employer terminated her employment because a routine

background check showed that a finding of abuse was entered by the Department. CP 9. They then acted with due diligence and requested a hearing. CP 105.

Because the Semenenkos have demonstrated "a strong or virtually conclusive defense", i.e., that the finding was issued without statutory authority and is therefore void, the Court should "spend little time inquiring into the reasons for the failure [of the Semenenkos] to appear and answer." *Sacotte Const.* at 418, quoting *Johnson v. Cash Store*. The Semenenkos have also presented a very strong and compelling defense on the merits: The alleged abuse occurred at approximately 2 a.m. while the Semenenkos were checking their daughter into a drug treatment facility and were trying to save her from the threat of an imminent drug overdose and "sudden death". CP 13-15, 61-63. Their daughter, the alleged victim, vigorously defends her parents. CP 33. If the default were set aside, the Department would suffer no substantial hardship. All the evidence of alleged abuse is contained in a single video; thus, the Department's ability to put on its case is not prejudiced. Given the gravity of the consequences of an administrative finding of abuse, for justice to be done in this case, if the court does not vacate the finding outright, it should remand for the abuse allegations to be determined on their merits.

C. Equitable Estoppel Requires the State to Honor the Late Request for Review and Provide an Administrative Hearing.

The "good cause" for the late hearing request is based on the principle of equitable estoppel. The Department contends s that the Semenenkos have not satisfied the elements of estoppel, arguing that the misrepresentation was made to an intermediary third party and the "unnamed" DSHS official was not a speaking agent of DSHS. RB 10-14.

1. Equitable Estoppel Applies to Statements Made to the Semenenkos' Daughter Acting on Their Behalf.

The DSHS statement upon which the Semenenkos relied was made to their daughter (also the alleged victim of abuse). CP 9, 15-16. The Department does not provide any authority to support its position that a party asserting equitable estoppel must have directly heard the statement upon which he or she relied, and none exists. In fact, in *Silverstreak v. Dep't. of Labor & Indus.*, 159 Wn.2d 868, 888, 154 P.3d 891 (2007), the only case cited by the Department, the Court held that an *in*direct statement made by the state agency through a third party, was sufficient to effect equitable estoppel against the state. There is no evidence that controverts the fact that the Semenenkos' daughter Letitciya made the call to DSHS on their behalf shortly after receiving the finding letter and spoke to a DSHS social worker. CP 9, 15-16, 35. The record indicates that Mr. and Mrs. Semenenkos' English language skills were limited (CP 13, 23-

24), and because they "didn't understand the language in the [finding] letter" their daughter made the call on their behalf. CP 9, 32. Letitciya states that the social worker told "us" not to worry about it. CP 35.[11] The Semenenkos reasonably relied on this representation as it was completely consistent with the letter they received on December 3, 2009, informing them that their CPS case was closed. CP 88. There is no basis for claiming the Semenenkos fabricated the DSHS statements.

2. Equitable Estoppel Does Not Require that a Statement Relied Upon Must be Made by a Speaking Agent.

The Department further provides no authority for its assertion that in order to support a claim for equitable estoppel, the statement relied upon must have been a "binding statement" made by a "speaking agent," RB 11. It cites only to the *Silverstreak* case, which does not address this issue. The Semenenkos did not call a "random" DSHS worker. RB 11. In fact, Letitciya called the phone number that appeared at the bottom of the finding letter. CP 35. That person is identified as a "CPS Supervisor".

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[11] The record contains the following undisputed facts: The Declaration of the Petitioners describes receiving the finding letter and immediately calling the DSHS phone number on the letter: "The person on the phone told our daughter that nothing needed to be done about the letter because the case was closed." CP 15. Letitciya described the same thing, declaring: I was with my parents in April, 2010 when they received yet another letter from [DSHS]...I immediately called the number at the bottom of the letter. A woman answered...I referred her to the first DSHS letter closing the case... the DSHS worker assured me that if the case was closed, there must be some mistake regarding the second letter and not to worry about it. CP 35. See also the letter from the Semenenkos to Judge Fleck explaining that DSHS told them they didn't "need to do anything, because the case is closed." CP 9.

CP 94, 98. The CPS Supervisor did not refer the Semenenkos to another DSHS employee or qualify her answers. The Semenenkos' reliance on the Supervisor's statements was justified.[12]

3. Denying the Semenenkos a Hearing on the Merits of the Finding is Unjust.

The entry of a final determination by default that the Semenenkos committed child abuse has caused a serious and lasting injustice. The Semenenkos lost the opportunity to defend themselves against a charge of child abuse because of the Department's misinformation and the unlawful delay in completing its investigation, which contributed to the confusing and conflicting messages. If afforded the opportunity, the Semenenkos would present ample evidence that the single, indistinct video does not depict child abuse, but instead, shows a brief snapshot of the Semenenkos' frantic efforts to save their severely drug-addicted daughter's life.

The principle of equitable estoppel is invoked to establish that the Semenenkos have good cause under WAC 388-02-0020 for their late request for review. Framed slightly differently, due to the misinformation received from the Department, the time frame for requesting review was "equitably tolled." The doctrine of equitable tolling allows an action to proceed under "appropriate circumstances" even though the statutory time

[12] Also in response to the Department's contention, it is readily apparent the Semenenkos did not cause their own injury, but their failure to request review directly resulted from the incorrect DSHS instruction.

limit has passed. *Danzer v. Dep't. of Labor & Indus.*, 104 Wn. App 307, 318, 16 P.3d 35 (2000), citing *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Appropriate circumstances include "false or misleading assurances" by an agency. *Id., Cf. Secretary of Labor v. Baretto Granite Corp.*, 830 F.2d 396, 399 (1st Cir. 1987) (equitable tolling appropriate when delay in filing caused by agency deception or failure to follow proper procedures).

The Semenenkos' delay was caused by the Department's misrepresentation of the need to seek review, compounded by the failure to follow proper procedure (i.e., 90 day limit). The Court may choose among a variety of routes to arrive at a just result in this case because the Semenenkos have established they are entitled to a hearing on the merits of the abuse finding under WAC 388-02-0020, CR 60, equitable estoppel, and/or equitable tolling.

D. The Department Cannot Demonstrate that Its Actions are Substantially Justified.

The Semenenkos are entitled to reasonable attorney fees as the Department's unlawful issuance of the findings against them is not substantially justified. Regardless of whether the Court voids the finding, as it should, or remands the matter for a hearing on the merits based on good cause and equitable tolling, the Semenenkos are the prevailing

parties in either event. First, they will have prevailed on their ultimate goal, which is to vacate the findings and have their names removed from the Background Check database. Second, they will have prevailed on the merits of their right to a hearing, the denial of which is the very reason they sought judicial review in the first instance.

EAJA is not limited to cases in which only substantive rights are vindicated. It also applies to any case in which the petitioner for judicial review prevails on procedural rights, including their right to due process. *Marcum v. Dep't. of Soc. and Health Servs.,* 172 Wn. App. 546, 560, 290 P.3d 1045 (2012) involved remand of the appellant's case for a new hearing on the merits of the neglect finding based on the Department's misapplication of the regulatory definition of "neglect". Unlike here, the court's decision did not directly address or resolve a substantive or procedural right or the merits of the case on judicial review. It only clarified the standards that should be applied to a determination of the merits on remand.

In contrast, this case is wholly concerned with redressing the substantive and procedural rights of the Appellants. The Department has not demonstrated that its actions were substantially justified in this case. The delay in issuing the abuse findings beyond the statutory deadline was not based in law or fact. Further, the administrative decisions that denied

the Semenenkos a hearing failed to address the good cause provisions of WAC 388-02-0020, notwithstanding the ALJ and Review Judge's authority to do so. WAC 388-02-0215(l),(m).

The Department's inability to understand the illegality of failing to complete its abuse investigation and issue its findings within 90 days does not meet the standard of reasonableness (*Raven v. Dep't. of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013)), even were it the case that no one had ever raised it. However, the Department simply cannot claim that such a decision is "unprecedented and unexpected" (RB 23). In fact, just such a decision was rendered by the Thurston County Superior Court in one recent case, and the Department conceded the point in another case. *See* Findings of Fact and Conclusions of Law entered in the matters of *Gloria McKnight v. Dep't. of Soc. and Health Servs.*, Thurston County Superior Court No. 12-2-02606-5, and *Suzanna Cadena v. Dep't. of Soc. and Health Servs.*, Thurston County Superior Court No. 13-2-01025-6, copies of which are attached, respectively, as Appendices 1 and 2.[13] The Court should award Appellants their attorney fees in an amount to be submitted in accordance with RAP 18.1.

[13] To be clear, the McKnight Decision and Order and the Cadena Stipulated Order are not submitted as authority for the substantive legal arguments on which they are based, but to demonstrate that contrary to the Department's argument, a decision that an administrative finding of abuse is without any lawful authority and thus void, is neither unprecedented, unexpected, or otherwise unreasonable in any way, and that the Department has no cause

IV. CONCLUSION

For all of the foregoing reasons and the reasons set out in the Appellant's Corrected Opening Brief, the Court should order that the findings of abuse issued against Mr. and Mrs. Semenenko are void. If the Court somehow determines that the statutory deadline is merely precatory, then the Court should remand the matter for a full hearing on the merits.

Respectfully submitted this 12th day of December, 2013,

NORTHWEST JUSTICE PROJECT

Deborah Perluss for

Judith Lurie, WSBA #26097
Deborah Perluss, WSBA #8719
Attorneys for Yevgeny and Natalya Semenenko, Appellants

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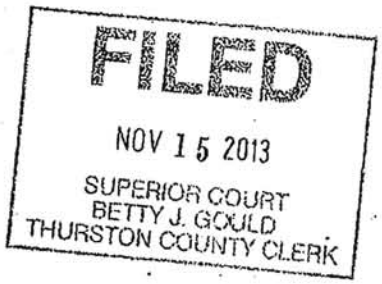
to believe that mandatory statutory language is merely an expression of legislative preference versus mandate.

V. APPENDIX

App. 1	Findings of Fact and Conclusions of Law entered in the matter of *Gloria McKnight v Dep't of Soc. And Health Servs.,* Thurston County Superior Court No. 12-2-02606-5.
App. 2	Stipulated Findings of Fact and Conclusions of Law entered in the matter of *Suzanna Cadena v. Dep't of Soc. And Health Servs*., Thurston County Superior Court No. 13-2-01025-6.

APPENDIX 1

☐ EXPEDITE
☒ Presentment set for:
Date: November 15, 2013
Time: 9:00 a.m.
Judge/Calendar: Hon. Chris Wickham



SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

GLORIA M. McKNIGHT,

Petitioner,

vs.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

NO. 12-2-02606-5

FINDINGS, CONCLUSIONS, AND ORDER

These findings and conclusions are based on the record and oral argument held on October 25, 2013, at which Petitioner, Gloria McKnight appeared with her attorney, Meagan MacKenzie, of Northwest Justice Project, and Respondent, Department of Social and Health Services (DSHS) appeared through its attorney, Karen Dinan, of the Attorney General's Office.

FINDINGS OF FACT

1. Respondent DSHS received a report on January 5, 2004 that Ms. McKnight may have abused her minor child.

Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501
Phone: (360) 753-3610 Fax: (360) 753-0174

2. On January 26, 2004, Petitioner signed a voluntary agreement to engage in therapy. The terms of the agreement stated it would end or be evaluated after 90 days. Petitioner was not asked to sign another agreement or to extend the existing agreement at the end of the 90 days.

3. On May 19, 2004, DSHS completed its investigation as "founded" for physical abuse by Petitioner. DSHS mailed the Notice of Finding, dated May 19, 2004, on June 10, 2004 to Petitioner at her last known address by certified mail, return receipt requested.

4. On June 6, 2004, Petitioner and her children left Washington to return to South Carolina.

5. On June 14 and 16, 2004, DSHS received phone calls from Petitioner's therapist that Petitioner may have moved. The CPS investigator called Petitioner's phone number on June 16, 2004 and spoke with a man who said he was Petitioner's ex-boyfriend. The investigator asked if petitioner was there, and the man said no, that they were moving to the east coast and he did not know what state. The investigator asked for Petitioner's phone number, and the man said that she did not have one.

6. At some point the DSHS investigator reviewed Petitioner's file and did not see any records or information related to other family members, friends, or collaterals who many have had additional information as to her whereabouts.

7. On July 1, 2004, the notice DSHS sent Petitioner was returned to DSHS as "unclaimed." DSHS made no further attempts to ascertain Petitioner's location.

8. Petitioner did not receive the Notice of Substantiated Finding of Abuse. Her first indication that something was wrong was in September 2011 when she lost her job because of a negative finding on her background check. Only after filing a request for an administrative hearing did she see the May 19, 2004 notice of finding of abuse.

Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501
Phone: (360) 753-3610 Fax: (360) 753-0174

9. State law requires that the Children's Administration (of which CPS is part) maintain records for licensed or approved providers and for persons who apply and are subsequently denied licensure or approval for service. RCW 13.34.130; RCW 13.50.010; RCW 26.33.330; RCW 26.44.030. CA maintains these records in two formats: automated format in the State of Washington's State Automated Child Welfare Information System, called "FamLink," and paper records linked to cases in the FamLink system. A finding of child abuse or neglect is part of the FamLink record. Background checks, including FamLink information, are required for a variety of employment and other activities, including any work or volunteer position with the possibility of unsupervised contact with children or vulnerable adults. A finding of abuse mandates refusal or termination of many jobs. *See, e.g.*, RCW 43.43.842(1), WAC 388-71-0540(5).

10. A DSHS finding of abuse affects a significant right of an individual. It has significant consequences on an individual's ability to get employment involving children and vulnerable adults and take part in volunteer opportunities which involve children and vulnerable adults.

11. DSHS moved to dismiss Petitioner's hearing request as untimely. After a hearing on May 4, 2012, an Administrative Law Judge entered an order on May 15, 2012 granting DSHS's motion to dismiss on the basis that Petitioner did not timely file her request for a hearing. The DSHS Board of Appeals upheld this order on November 20, 2012. Petitioner timely filed a Petition for Review and Declaratory Judgment with this court.

CONCLUSIONS OF LAW

1. The current versions of RCW 26.44.030(11)(a) and WAC 388-15-021(7) require DSHS to conduct investigations within 45 days and "[i]n no case shall the investigation extend beyond 90 days from the date the report is received . . . ."

Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501
Phone: (360) 753-3610 Fax: (360) 753-0174

2. When this investigation took place in 2004, these laws did not specify timelines for investigations. However, WAC 388-15-021(7) required DSHS to establish timelines for the completion of investigations in procedure.

3. DSHS procedure in 2004 provided that investigations were to be completed no later than 90 days from the date of the referral. *See* The Practice Guide to Risk Assessment (DSHS Children's Administration), pages 41 and 103.

4. DSHS failed to complete its investigation and issue its finding within the required timeline. Because DSHS received the referral on January 5, 2004, the 90-day deadline to complete the investigation and make a finding expired on or about April 6, 2004. DSHS did not complete its investigation until May 19, 2004, and mailed the notice of finding on June 10, 2004.

5. As a result of this failure, Ms. McKnight did not receive notice of the finding and was prejudiced.

6. Because the Department did not enter a finding within the 90-day period, the finding entered after that date is void and should be vacated.

ORDER

Based on the foregoing facts and conclusions, this court REMANDS the matter to DSHS to vacate the finding of abuse against Petitioner Gloria McKnight and awards attorneys' fees in an amount to be determined by agreement of counsel or at a hearing they will note no later than January, 2014 and as supported by an Affidavit and Cost Bill to be filed with that order.

Signed this 15th day of November, 2013.

CHRIS WICKHAM

Judge H. Christopher Wickham

Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501
Phone: (360) 753-3610 Fax: (360) 753-0174

Presented by:

Meagan J. MacKenzie, WSBA #21876
Attorney for Petitioner

Agreed for entry:

/s/
Karen M. Dinan, WSBA #20863
Assistant Attorney General for Respondent

Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501
Phone: (360) 753-3610 Fax: (360) 753-0174

APPENDIX 2

MC PUBLIC #2

3

SUPERIOR COURT
THURSTON COUNTY, WA

2013 NOV 15 AM 9:46

BETTY J. GOULD, CLERK

☒ Hearing set for:

Date: November 15, 2013
Time: 9:00 a.m.

Judge: Hon. James Dixon

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

SUZANNA CADENA, ***Petitioner,*** **vs.** **STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,** **Respondent.**	**NO.13-2-01025-6** **STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

These findings and conclusions are based on agreement between the Petitioner, Suzanna Cadena, and the Respondent, Department of Social and Health Services (the Department).

I. FINDINGS OF FACT

1. The Department received a report on August 2, 2010, that Ms. Cadena may have neglected her minor children.

2. On June 2, 2011, the Department completed its investigation as "founded" for neglect by Ms. Cadena. The Department mailed the Notice of Finding to Ms. Cadena at her last known address by certified mail, return receipt requested.

Northwest Justice Project
1702 W. Broadway
Spokane, WA 99201
Phone: (509) 324-9128
Fax: (509) 324-0065

MC PUBLIC #2

3. State law requires that the Children's Administration (of which the Department is part) maintain records for licensed or approved providers and for persons who apply and are subsequently denied licensure or approval for service. RCW 13.34.130; RCW 13.50.010; RCW 26.33.330; RCW 26.44.030. The Department maintains these records in two formats: automated format in the State of Washington's State Automated Child Welfare Information System, called "FamLink," and paper records linked to cases in the FamLink system. A finding of child abuse or neglect is part of the FamLink record. Background checks including FamLink information are required for a variety of employment and other activities, including any work or volunteer position with the possibility of unsupervised contact with children or vulnerable adults. A finding of abuse mandates refusal or termination of many jobs. *See, e.g.*, RCW 43.43.842(1), WAC 388-71-0540(5).

4. A Department finding of neglect affects a significant right of an individual. It has significant consequences on an individual's ability to get employment involving children and vulnerable adults and take part in volunteer opportunities which involve children and vulnerable adults.

5. In March 2012, Ms. Cadena filed a request for hearing to challenge the finding after a background check that pulls information from the FamLink system revealed the finding and resulted in the loss of employment.

6. The Department moved to dismiss for lack of jurisdiction, and the Office of Administrative Hearings (OAH) granted the motion. Ms. Cadena appealed to the Board of Appeals (BOA). BOA affirmed OAH's decision. Ms. Cadena timely filed this petition for judicial review.

7. COURT FINDS THAT COST OF LIVING INCREASE AS WELL AS LACK OF QUALIFIED ATTORNEYS PARTICULARLY GIVEN MS. CADENA'S INDIGENT STATUS RESULTS IN AN INCREASE TO THE STATUTORY MINIMUM IN RCW 4.84.340(3) TO $200 PER HOUR.

Northwest Justice Project
1702 W. Broadway
Spokane, WA 99201
Phone: (509) 324-9128
Fax: (509) 324-0065

II. CONCLUSIONS OF LAW

1. RCW 26.44.030(11)(a) and WAC 388-15-021(7) require DSHS to conduct investigations within 45 days and "[i]n no case shall the investigation extend beyond 90 days from the date the report is received . . . ."

2. The Department failed to complete its investigation and issue its finding within the required timeline. The referral was received on August 2, 2010, and the 90-day deadline to complete the investigation and make a finding expired on or about November 2, 2010. The Department did not complete its investigation until June 2, 2011, and mailed the notice of finding on that date.

3. Because the Department did not enter a finding within the 90-day period, the finding entered after that date is void and should be vacated.

4. ~~COURT FINDS THAT COST OF GOING TO CREDMOOR AS WELL AS LACK OF GAR~~

III. ORDER

ATTORNEYS FEE SET AT $200 PER HOUR.

Based on the foregoing facts and conclusions, this court remands the matter to the Department to vacate the finding of neglect against Petitioner Suzanna Cadena, and awards attorney's fees and costs to Ms. Cadena ~~as requested in the Declaration and Cost Bill filed in this case.~~ IN THE AMOUNT OF $6165.77.

Signed this 15th day of November, 2013.

JUDGE JAMES DIXON

Presented by:

JACQUELYN HIGH-EDWARD
WSBA #37065
Attorney for Petitioner

Agreed, notice of presentation waived:

MEAGAN MILLER
WSBA #41780
Assistant Attorney General

Northwest Justice Project
1702 W. Broadway
Spokane, WA 99201
Phone: (509) 324-9128
Fax: (509) 324-0065