Supreme Court No.

Court of Appeals No. 49063-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

Dayanara Castillo,

Appellant/Petitioner,

v.

State of Washington, Department of Social and Health Services,

Respondent.

PETITION FOR REVIEW

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I. Identity of Petitioner

Petitioner Dayanara Castillo appealed an administrative finding by the Department of Social and Health Services (DSHS or the Department) that she committed child abuse. The Court of Appeals upheld an administrative order that dismissed her appeal, thus denying her a hearing on the merits of the finding.

II. Court of Appeals Decision

The Court of Appeals issued its unpublished opinion on August 29, 2017. Appendix at 1-10 (Decision). The Court denied Ms. Castillo's Motion for Reconsideration on October 12, 2017. Appendix at 11 (Order Denying Motion for Reconsideration).

III. Issues Presented for Review

1. Whether the Court of Appeals erred in ruling that Ms. Castillo must show a future inability to procure employment in her chosen field to establish that she has a protected liberty interest and her procedural due process rights were violated.

2. Whether the Court of Appeals erred in ruling that Ms. Castillo did not have good cause for her untimely petition for Board of Appeals review and whether that late filing has legal effect.

IV. Statement of the Case

In June 2013, Ms. Castillo lived with her husband, Charles Kleeberger, in Shoreline, Washington. Declaration of Dayanara Castillo, Administrative Record (AR) 57, ¶ 5. Ms. Castillo's two children, aged 10 months and 17 years at the time, lived with her. *Id.* at 56, ¶ 3.

That month, police searched Ms. Castillo's home based on an allegation that Ms. Castillo's husband or a person residing in the home possessed stolen firearms. In August 2013, the Department alleged that Ms. Castillo had neglected her two children. The Department made this allegation based upon a written police report from the June 2013 search. AR 63. The report stated that the family lived in a home where firearms were present and where another person lived as a tenant in the basement who had a prior criminal and Child Protective Services (CPS) history. AR 62. Ms. Castillo strenuously denied she mistreated or neglected her children or that the children had access to firearms. AR 71-72, 56-57.

On September 5, 2013, the Department's CPS sent a letter to Ms. Castillo that concluded she had neglected her children. AR 62. The letter was sent by certified mail with return receipt requested. AR 57, ¶ 5. It was addressed only to Ms. Castillo. AR 57, ¶ 5. Ms. Castillo's husband signed for the letter on Monday, September 9, 2013 at 5:02 p.m. AR 69. Ms. Castillo's husband did not tell her about the letter until the next morning,

September 10. AR 57, ¶ 6. Ms. Castillo then read the letter, which had not been opened yet. This was the first time she learned that CPS had made a "founded" finding against her. AR 57, ¶ 6.

The letter stated that to review the finding:

> CA [Children's Administration] must receive your written request for a review within 30 calendar days from the date *you* receive this letter. **If CA does not receive the request within 30 calendar days of the date *you* receive this letter, you will have no further right to challenge the CPS findings.** AR 57, ¶ 7 (Emphasis added).

Ms. Castillo concluded this meant that she had 30 days from the date *she* received the letter to request CPS supervisory review. AR 57. Acting pro se, she mailed her request for review on October 9, 2013, within 30 days from the date that *she* received the letter. AR 57 at ¶ 9. In her request, she specifically, and in great detail, denied the allegations against her. AR 70-72. She stated that the subject of the search was, in fact, the person they had allowed to stay in their home, and not her partner, as indicated by CPS. AR 71-72. She stated that she had no knowledge of any firearms in the home. AR 71-72. There is no evidence in the record that criminal charges or conviction of any person followed the police search.

CPS received her request for review on October 10, 2013, 30 days from the date that Ms. Castillo actually received the finding letter, but 31 days from the date her husband signed for it. AR 73.

On October 16, 2013, the Department notified Ms. Castillo that the finding would not be changed because she did not timely request review. AR 73. The Department's letter stated the reviewer "did not have legal authority" to review her finding because it was "received on 10/10/13 which is past the allowed time frame of 30 calendar days." AR 73.

Ms. Castillo requested an administrative hearing to contest the agency action. AR 82. The Department filed a motion to dismiss her hearing request for "lack of jurisdiction." AR 60-61. Ms. Castillo opposed the motion, and an administrative law judge (ALJ) heard the matter on June 3, 2014. AR 40-54. In her opposition to the motion, Ms. Castillo stated that she would be harmed by the finding because she wouldn't be able to work with children or volunteer at her child's school. AR at 58-59.

On December 31, 2014, the ALJ ruled that Ms. Castillo did not have a right to a hearing because her request for supervisory review was received one day late. AR 33-36.

Ms. Castillo's representative sought review of the ALJ's decision by the DSHS Board of Appeals (BOA). Declaration of David Girard, AR 23-24, ¶ 6. On April 28, 2015, the BOA affirmed the ALJ's dismissal of Ms. Castillo's request for review because her October 9, 2013 letter seeking review was one day late. CP 15-27. The BOA also determined that Ms.

Castillo's then-representative did not have good cause for his day-late filing. CP 15-27.

Ms. Castillo timely petitioned for judicial review in the Thurston County Superior Court on May 20, 2015. CP 4-14. On May 20, 2016, the court affirmed the agency decision. CP 32-34. Ms. Castillo timely filed her Notice of Appeal on June 14, 2016. CP 35-36.

V. Argument for Why Review Should Be Accepted

Dayanara Castillo is suffering from the devastating consequences of being labeled a child abuser. She is now permanently barred from working in any field with unsupervised contact with a child or vulnerable adult. *See* WAC 388-113-0030. The consequences of the agency finding are harsher than many criminal convictions. For example, a criminal conviction for simple or fourth degree assault, second or third degree theft, or forgery does not automatically disqualify an applicant from employment with access to vulnerable adults. RCW 43.43.842(2). Further, while criminal convictions can be sealed, vacated or expunged, DSHS findings cannot. RCW 9.94A.640; RCW 9.95.240; RCW 9.96.060; RCW 13.50.50. Ms. Castillo has consistently denied she committed abuse, and she has never had a hearing on the merits to show she is innocent.

Long-term care and child care—two major fields restricted by these findings—are broad fields of employment opportunity for low-income

workers. The Court of Appeals decision allows DSHS to permanently ban a person from these fields, without appropriate due process protections to ensure the legitimacy of that ban. Because DSHS maintains that it cannot correct a late appeal request—even if a person was hospitalized and unaware of the finding—its system of due process presents an unacceptable risk of error.

The Court should grant review under RAP 13.4(b)(3) and (4) because, under the Court of Appeals ruling, DSHS has no effective limit on its authority or requirement to take appropriate steps to remedy any possible incorrect abuse findings. A statutory deadline within which Ms. Castillo should have asked for internal agency review (RCW 26.44.125(2)) is so inherently rigid that missing it is a jurisdictional bar to a hearing, regardless of cause. There are inherent due process concerns in a system that is unable to fix such an error. This raises substantial issues of public interest and a significant question of law under both the U.S. and Washington State constitutions.

A. The Court of Appeals decision incorrectly requires Ms. Castillo to demonstrate harm in addition to the loss of a right under state law

The Court of Appeals' August 29, 2017 ruling disposed of Ms. Castillo's due process claim on the grounds that the record lacked adequate evidence to demonstrate she had a protected liberty interest. Decision 8-10.

However, if the Department lacks authority to review a late request under RCW 26.44.125, then the Department's process is unconstitutional as applied to Ms. Castillo, and this raises a significant question of law under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. The Department's process creates a substantial risk that a person will be erroneously deprived of her significant protected interests.

Under controlling Ninth Circuit case law, to show a protected interest, Ms. Castillo need demonstrate no more than the creation of a stigma by the state, and that the stigma extinguishes a right under state law. *Paul v. Davis*, 424 U.S. 693, 711 (1976). There is no federal legal requirement that a person demonstrate the loss of a job, license, or other immediate hardship related to her present occupation, as contemplated by the Court of Appeals. Decision 9-10. To do so would unfairly require a person to speculate into the future as to what her employment may be decades later. It is sufficient to demonstrate that the state's action forecloses employment possibilities or other areas of activity because of the stigma the action itself creates.

If a system cannot allow itself to correct an error like this, that system has an inherent risk of erroneous deprivation. The deprivations at issue are central to the ability of low-income people to house and feed

themselves and their families. Because every person with a founded finding has a protected interest at stake, the Court of Appeals' holding should be reversed, and this Court should instruct DSHS to provide due process to every person with a founded finding.

1. Under *Paul v. Davis* and controlling Ninth Circuit case law, Ms. Castillo has a protected interest

Prior to the imposition of the CPS finding against her, Ms. Castillo had a right under state law to be employed in the care of children or vulnerable adults. Pursuant to RCW 74.39A.056, RCW 43.215.215, and WAC 170-06-0070, the founded finding on her background permanently extinguishes that right to seek employment in long-term care and child care. Ms. Castillo needed only to demonstrate that some "right or status previously recognized by state law [was] extinguished" by the stigma. Decision 9-10.

In addition to the employment disqualifications suffered by Ms. Castillo, the record demonstrates that other opportunities were limited as well. Ms. Castillo provided written evidence that she did not want to be barred from working with children, and that she would be unable to volunteer or chaperone for her children's school. AR 58-59.

While a completely confidential child abuse allegation cannot implicate a protected interest, one that has the potential for dissemination

does create a protected interest. In Washington, a person on the state's abuse and neglect database will have that finding disclosed to any employer or potential employer where the employment involves unsupervised access to children or vulnerable adults. RCW 43.43.832. Similarly, a background check would also be conducted before Ms. Castillo could volunteer or chaperone at her children's school. *See* RCW 43.43.834 (authorizing background inquiry into child abuse findings for volunteers).

As noted by the Court of Appeals, this Court has held that there is a protected liberty interest when future possibilities are extinguished. In *Giles v. DSHS,* the court found that an employee did not have a protected liberty interest affected when the state fired him. *Giles v. Dep't of Soc. & Health Servs. (DSHS)*, 90 Wn.2d 457, 583 P.2d 1213 (1978). But a liberty interest could be infringed "if the government imposes a stigma or other disability that forecloses the employee's freedom to take advantage of other employment opportunities." *Id.* at 461. The court did not require that the person had actually applied for those opportunities. The fact that they were foreclosed was adequate.

Similarly, in *Ritter v. Board of Commissioners*, the court found no protected liberty interest because there had been only diminished employment opportunities as opposed to opportunities that had been

foreclosed. 96 Wn.2d 503, 508, 637 P.2d 940 (1981). The analysis in these cases turned on whether employment opportunities were diminished or foreclosed.

The U.S. Supreme Court has found a protected interest where far more trivial consequences are involved. For example, in *Paul v. Davis*, the Court noted that it was sufficient to guarantee a protected interest if a person's right to purchase alcohol under state law was affected by a government stigma, such as a "wanted" poster. 424 U.S. at 708 (citing *Wisconsin v. Constantineau,* 400 U.S. 433 (1971)).

To require a person to demonstrate evidence of present intent to seek future employment imposes a much higher burden than the Ninth Circuit and *Paul v. Davis* require. If a party demonstrates the curtailment of a right under state law to employment in a certain field, which Ms. Castillo has, then the Constitution compels that due process be provided.

For example, the Ninth Circuit, in *Humphries v. Los Angeles County*, confirmed and applied the analysis that a person must only demonstrate the loss of opportunity under state law. 554 F.3d 1170, 1191-92 (2009). In that case, the state maintained a child abuse database that employers were required to search, and that if listed, barred a person from some employment. *Id.* For the *Humphries* court, this alone implicated a protected liberty interest. *Id.* In examining the legal scheme by which child

abuse and neglect findings occur in California, the court pointed out that employment possibilities need not be completely extinguished. *Id.* at 1188-91. If a person's ability to seek employment was "altered" in some way, rather than completely foreclosed, then a protected interest would be implicated. *Id.* at 1188. Finally, for the plaintiffs in *Humphries*, as in Ms. Castillo's case, the inability to volunteer at their local community center implicated a protected interest. *Id.*

Similarly, in *Valmonte v. Bain*, the Second Circuit found a liberty interest where a person did not lose a present job interest, but the stigma of informing employers of a child abuse finding foreclosed the possibility of a future job interest. 18 F.3d 992 (1994). Like Ms. Castillo, the plaintiff in *Valmonte* would have been unable to pursue future employment interests. The court there found that the dissemination of the finding to potential employers, as well as the loss of future, speculative job prospects, implicated a liberty interest. *Id.* at 1000-01.

The Court of Appeals' decision in this case conflicts with *Humphries*, a precedential interpretation of federal law, and *Valmonte*. The key point in both cases is a concrete legal barrier to employment or other opportunities imposed by the state's action. Here, that barrier is found in RCW 74.39A.056, RCW 43.215.215, and WAC 170-06-0070, as well as the fact that Ms. Castillo will not be able to volunteer at her children's

school. As noted above, Ms. Castillo demonstrated in the record that she would be unable to work with children or volunteer with her children's school. No evidence from the state disputes this fact. Pursuant to RCW 74.39A.056 and WAC 170-06-0070, Ms. Castillo will forever be barred from employment in long-term care or child care.

The public employment context provides another example of why the Court of Appeals reached the wrong conclusion in Ms. Castillo's case. A termination by a government entity that forecloses the employee's ability to seek additional work, whether or not she demonstrated the intent to seek such work, also implicates a protected interest. A "public employer can violate an employee's rights by terminating the employee, if in so doing, the employer makes a charge 'that might seriously damage [the terminated employee's] standing and associations in his community' or 'impose[s] on [a terminated employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other opportunities.'" *Tibbetts v. Kulongoski,* 567 F.3d 529, 536 (9th Cir. 2009) (alterations in original) (quoting *Bd. of Regents v. Roth,* 408 U.S. 564, 573, 92 S. Ct. 2701 (1972)).

The Sixth Circuit Court of Appeals used the same reasoning in finding that a minor child would be harmed by a permanent finding of child abuse or neglect made against him, because of the possibility that it could

harm future employment possibilities. In *Wright v. O'Day*, a case involving a minor child who ended up on a child abuse registry, the child prevailed, in part, by demonstrating that the speculative nature of his future employment did not mean that he was not harmed by the allegation in the present. 706 F.3d 769, 773-74 (6th Cir. 2013). The court noted the conundrum he faced: if he cannot demonstrate that his employment is affected now, he will not be able to challenge the finding when it does affect his employment because the time to appeal would have passed. *Id.* at 774.

2. The Court of Appeals' decision incorrectly extinguishes Ms. Castillo's due process rights

Ms. Castillo does have a protected liberty interest, and she should be given the opportunity to have her CPS finding reviewed. However, the Court of Appeals stated that RCW 26.44.010 does not give the Department authority to review any abuse or neglect finding after 30 days. Decision 7. This is incorrect under *Humphries*. A bar to review of state action with as extreme consequences as are present in this case is exactly what the Ninth Circuit found unconstitutional in *Humphries*.

In this case, Ms. Castillo was not able to challenge the CPS finding against her because the Department determined her request for internal review was one day late. The Court of Appeals' ruling creates both a

jurisdictional bar to review and denies the agency any discretion to review and correct its own actions once 30 days for seeking internal review have passed. Having absolutely no mechanism in place to correct the error, either through judicial review or on the agency's own authority, creates an untenable denial of due process.

The Court should grant review of this case to address the significant question of law and the substantial issues of public interest raised by the Court of Appeals' decision.

B. The administrative remedy of "good cause" for not complying with a deadline to request agency review provides relief from default in this case

This Court should review the Court of Appeals' ruling that "good cause" under WAC 388-02-0020 does not apply to the request for review sent to the Board of Appeals (BOA).

WAC 388-02 governs all administrative hearings involving DSHS agency action and supplements the Administrative Procedure Act (APA). WAC 388-02-0005. In the vast majority of DSHS administrative hearings, aggrieved parties are appearing *pro se*. Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. Rev. L. & Soc. Change 131, 133 (2008). Thus, the Court of Appeals' decision raises a serious issue of substantial public interest that should be determined by the Supreme Court.

WAC 388-02-0020 provides that a party who failed to appear, act, or respond to an agency action may be excused for "good cause". The regulation mandates that Civil Rule (CR) 60 be used as a guideline. WAC 388-02-0020 serves the same equitable purpose as CR 60(b): to relieve litigants of adverse legal consequences by default under certain circumstances. Just as CR 60(b) provides relief from failure to meet response timelines in civil actions established by statute or court rule, so too does WAC 388-02-0020 with regard to agency action under the APA. *See, e.g., White v Holm,* 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

In this case, the Court of Appeals ruled that the BOA's findings that Ms. Castillo's petition for BOA review was untimely and that she did not meet the good cause exception are supported by substantial evidence. Decision at 6-7. In doing so, the Court stated that it was unreasonable to rely on timely delivery of standard mail after a holiday weekend, in part, because Ms. Castillo's then-counsel conceded that he could have also faxed the petition using the same filing method he had relied on throughout the case. *Id.*

Ms. Castillo can demonstrate good cause and should be relieved from a quasi-criminal finding of child abuse made without a hearing on the

merits.[1] The Court of Appeals' ruling erroneously denies Ms. Castillo the right to review of the CPS finding on overly technical and arbitrary reasoning that has no basis in the purpose of RCW 26.44.125: the protection of vulnerable persons and the provision of due process to the accused.

Ms. Castillo's alleged day-late filing for internal agency review is the sole reason she was deprived of her right to a hearing. Any further procedural defect in the hearing process is without legal effect given the initial error that occurred when the Department failed to internally review the finding. The Department argued that the Office of Administrative Hearings lacked jurisdiction to grant Ms. Castillo a hearing, and it follows that the BOA similarly would have lacked jurisdiction to consider the appeal. The original legal error rendered the entire process void *ab initio*, and the late BOA filing does not defeat the initial jurisdictional error that deprived Ms. Castillo of her right to a hearing in the first place.

The Court of Appeals stated that the failure to ask for internal review within 30 days of receiving the notice creates an absolute bar to any process for disputing an administrative finding that one has committed child abuse. Decision 7, fn. 3. In essence, the Court of Appeals stated that failure to

[1] If RCW 26.44.125(2) is an absolute bar to an administrative hearing, then a significant issue exists as to whether the internal agency review requirement is an unconstitutional barrier to due process. If so, then application of the bar to preclude the right to a hearing is unconstitutional and should be invalidated.

timely seek internal agency review under RCW 26.44.125 is a jurisdictional bar to obtaining an adjudicative proceeding under the APA. However, in determining whether a filing deadline is jurisdictional, a court must examine the legislative intent. *Nickum v. City of Bainbridge Island,* 153 Wn. App. 366, 376, 223 P.3d 1172 (2009)(citing *In re Pers. Restraint of Hoisington,* 99 Wn. App. 423, 431, 993 P.2d 296 (2000), which found that no reference to jurisdiction in filing statute indicates legislative intent that deadline is not jurisdictional).

The United States Supreme Court has tried to bring "some discipline to the use of the term 'jurisdiction'...", adopting a "bright line" test to ascertain the intent of certain agency deadlines in legislation. *Sebelius v. Auburn Regional Medical Ctr.*, 133 S. Ct 817, 824, 184 L. Ed. 2d 627 (2013) (the Court inquires whether Congress has "clearly stated" that the rule is jurisdictional; absent a clear statement, courts should treat the restriction as non-jurisdictional).

In *Henderson v. Shinseki*, the Court distinguished between Congressional intent to establish a jurisdictional time bar or a "processing rule" in holding that a 120-day statutory Veterans Claims Court filing deadline is subject to waiver. 131 S. Ct. 1197, 1204-05, 179 L. Ed. 2d 159 (2011). Noting that the administrative veterans claim review process is informal and non-adversarial, the Supreme Court held that, even though the

120-day limit was expressed in mandatory terms, the statutory scheme did not demonstrate Congress' intent that the limit is jurisdictional. *Id.* at 1206.

In other cases, the U.S. Supreme Court has ruled that applying a technical reading to an administrative filing deadline would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 396-97, 102 S. Ct. 1127 (1982) (finding that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling; citation omitted); *United States v. Kwai Fun Wong*, 575 U.S.__, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

Similarly, the internal review requirement here should be construed as non-jurisdictional. In *Kwai Fun Wong*, the Court considered time limits in the Federal Tort Claims Act, in which a claim shall be forever barred if presented late to the agency. 135 S. Ct. at 1629. The Court reasoned that even this language carried no "talismanic jurisdictional significance" because it was an ordinary way to set a statutory deadline. *Id.* at 1634, 1638. The Court held that this deadline is not jurisdictional unless Congress provides "a clear statement" to that effect. *Id.* at 1632. The Court stated that most time bars, even if mandatory and emphatic, are non-jurisdictional. *Id* at 1627. Indeed, the language considered non-jurisdictional in *Kwai Fun*

Wong—"forever barred"—is more emphatic than the "may not further challenge" language of RCW 26.44.125 in terms of jurisdictional significance.

Like the veterans and torts claim processes, the internal review here is an informal, non-adversarial, supervisorial review of a determination that abuse has occurred. *See* WAC 388-15-093(describing the internal review process and information considered). Accused persons typically seek review unassisted by lawyers. The legislature framed the internal review process as a "*right* to seek review" and permissive: "an alleged perpetrator ...*may* request that the department review the finding...." RCW 26.44.125(2)(emphasis added). The statutory requirements of the finding notice do not include information that the review is jurisdictional. The notice must only state that there is "a right to submit a written response...which...shall be filed in the department records." RCW 26.44.125(2)(c).

The internal review may or may not change the finding, but it is not a substitute for due process and in no way meets the due process requirements of *Goldberg v. Kelly.* 397 U.S. 254, 266, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *see also Jacquins v. Dept. of Social and Health Serv.*, 69 Wn. App. 21, 26, 847 P.2d 513 (1993) (due process requires a full and fair opportunity for a hearing on the merits). While the statutory language

precludes the opportunity for an adjudicative hearing for failure to seek internal review, construing the statute as jurisdictional does not comport with the legislative policy reaffirming "that all citizens, including parents shall be afforded due process." RCW 26.44.100(1).

Thus, the Court of Appeals' ruling raises an issue of substantial public interest and this Court should grant review.

C. Should the Court accept review and Ms. Castillo prevail, she seeks reasonable attorney fees under RCW 4.84.350

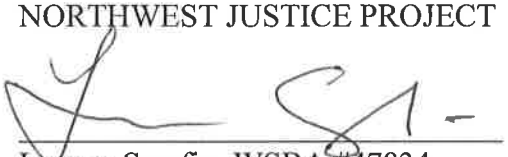
Ms. Castillo has sought relief through every avenue of review available. Under the law, she should prevail, and the Court should find that DSHS' actions were not substantially justified under RCW 4.84.350.

VI. Conclusion

Since the Court of Appeals' decision raises issues of substantial public interest and a significant question of law under both the U.S. and Washington State constitutions, the Court should grant review under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 8th day of November, 2017.

NORTHWEST JUSTICE PROJECT



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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, I caused the foregoing to be served via email and first-class mail to:

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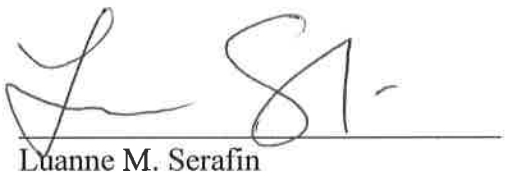
I declare under penalty of perjury that the foregoing is true and correct.



Luanne M. Serafin

Appendix

Filed
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAYANARA CASTILLO, Petitioner/Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	No. 49063-3-II UNPUBLISHED OPINION

SUTTON, J. — Dayanara Castillo appeals the Department of Social and Health Services' (Department) founded finding of neglect. The Department received Castillo's request for agency review past the 30-day statutory deadline and denied her request for a review, asserting that it did not have legal authority to act on the request. Castillo then filed a petition for review to the Board of Appeals (BOA), but that petition was also filed late. Castillo argues that (1) her request for agency review was timely, (2) even if untimely, the Department had the legal authority to review her request, (3) the administrative law judge (ALJ) erred in dismissing her request for review and failed to consider her request for a good cause exception, (4) the BOA's findings of fact, that her petition for review to the BOA was untimely and good cause did not exist, are not supported by substantial evidence and do not support the BOA's conclusion of law, and (5) her procedural due process rights were violated.

We hold that the BOA's findings, that Castillo's petition to the BOA was untimely and no good cause exception existed, are supported by substantial evidence, and they support the BOA's

conclusion of law to dismiss her petition. We also hold that the record is insufficient to determine whether Castillo has a future inability to procure employment in a chosen field and her procedural due process claim fails. Thus, we affirm.

FACTS

I. CHILD NEGLECT FINDING NOTIFICATION AND ADMINISTRATIVE APPEAL

The Department issued a letter notice, informing Castillo of a "founded finding"[1] of child neglect involving Castillo's children. The letter was sent to Castillo's residence via certified mail, return receipt requested. Castillo's husband received and signed for the letter on September 9, 2013. The next morning, September 10, Castillo's husband handed the unopened envelope to Castillo. Castillo read the Department's notice[2] that same day. The notice stated that Castillo had the right to send the Department a written response about the founded finding and that the response would be put in the Department's file on Castillo. The notice also explained how the Department used founded findings, including for subsequent law enforcement investigations or proceedings and to determine licensing or employment qualifications to work with children and vulnerable adults.

On October 9, Castillo mailed a request for agency review to the Department. The Department received Castillo's request for review on October 10. On October 17, the Department

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[1] "Finding" means "the final decision made by a [Child Protective Services] social worker after an investigation regarding alleged child abuse or neglect." WAC 388-15-005. "Founded" means the CPS social worker has determined following an investigation that it is more likely than not that child abuse or neglect occurred based on the available information. WAC 388-15-005.

[2] The notice informed Castillo that she could request agency review of the finding and included instructions for filing a written request.

delivered a notice to Castillo informing her that the founded finding would not be changed because Castillo's request for review was not timely. The notice stated, in relevant part:

> Your inquiry requesting a review of these findings was received on 10/10/13 which is past the allowed time frame of **30 calendar days**.
>
> Unfortunately, your request for a review does not meet the required time frame. Therefore, I do not have the legal authority to fulfill your request to review the finding.

Administrative Record (AR) at 73. The notice was delivered to Castillo's residence via certified mail, return receipt requested.

On February 4, 2014, Castillo requested an administrative hearing before an ALJ to contest the founded finding. The Department filed a motion to dismiss, and after considering the motion on December 31, the ALJ mailed an initial order of dismissal, ruling that Castillo did not have a right to a hearing because her request to the Department was untimely. The ALJ's order of dismissal stated:

> [Castillo] asserts through a signed declaration that she believed that she "received" the notice on September 10, 2013, when [her husband] handed her the envelope, and that October 10, 2013, was the 30-day deadline for requesting review of the finding. This belief, even if credible, was not reasonable under the circumstances. As such, [Castillo] has not shown that the Department's notice was insufficient under RCW 26.44.100(2)(d) insofar as it failed to clarify when the 30-day deadline began. Additionally, there is no good cause exception for a late appeal under Chapter 26.44 RCW or Chapter 388-02 WAC. (*Compare* WAC 388-02-0305(1)).
>
> . . . .
>
> Because the request for review was not received by [October 9], [Castillo] does not have a right to a hearing under RCW 26.44.125(3) and WAC 388-02-0085(1). Therefore, the Department's motion to dismiss is granted and the appeal is dismissed under WAC 388-02-0085(6).

AR at 35. The initial order also provided the following notice:

> **NOTICE TO PARTIES:** THIS ORDER BECOMES FINAL ON THE DATE OF MAILING UNLESS WITHIN 21 DAYS OF MAILING OF THIS ORDER A PETITION FOR REVIEW IS RECEIVED BY THE [DEPARTMENT] BOARD OF APPEALS, [MAILING ADDRESS]. A PETITION FORM AND INSTRUCTIONS ARE ENCLOSED.

AR at 36. The deadline to appeal was repeated in bold font at the bottom of the petition form, just above the mailing address. And the notification included the BOA's address for personal service, telephone and fax numbers. The mailing date of December 31, 2014, was stamped at the top of the first page of the initial order and at the top of the petition form.

II. Petition for Review of Initial ALJ Order to the BOA

Castillo, through counsel and using the petition form provided with the initial order, filed a petition for review of the ALJ's initial order to the BOA. The BOA received the petition on January 22, 2015. In her petition, Castillo stated, "I ask for review of the initial decision because . . . it contains errors of fact [and] law and should be reversed." Castillo made no other arguments.

The BOA asked Castillo to provide good cause why her petition to the BOA was filed late. Castillo timely filed her explanation by fax. Castillo's counsel explained that, in his experience, it takes one to two business days for mail to travel between Seattle and Olympia. Castillo's counsel further explained that he mailed the petition on Friday morning, January 16, from a downtown Seattle post office, which would have allowed six days for it to arrive by the deadline on January 21. The postmark on the envelope used to mail the petition was Saturday, January 17. Monday, January 19, was a federal holiday, with no mail delivery. Castillo's counsel stated that he was aware that he could have delivered the petition by fax, as he had done in the past, but did not believe that time was an issue in this instance so he mailed the petition using standard delivery mail.

The BOA ruled that Castillo's petition was untimely, she did not meet the good cause exception for missing the appeal deadline to the BOA under WAC 388-02-0580(3)(b); it was unreasonable to rely on timely delivery by mail given the mailing date and the intervening federal holiday; and the one page petition should have been faxed to the BOA as counsel had done with prior filings. The BOA order stated, "The late filing was not the result of excusable neglect and a bona fide mistake." Clerk's Papers (CP) at 18. The BOA then dismissed her petition.

Castillo timely filed her petition for judicial review of the agency action to the superior court. The superior court affirmed the BOA's order of dismissal. Castillo appeals.

ANALYSIS

I. STANDARD OF REVIEW

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of agency actions. *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 465, 287 P.3d 629 (2012). Under the APA, the party challenging agency action has the burden of demonstrating the action is invalid and must show substantial prejudice. RCW 34.05.570(1)(a), (d).

"When reviewing an agency decision, we apply the standards of chapter 34.05 RCW directly to the agency's record without regard to the superior court decision." *Goldsmith v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 573, 584, 280 P.3d 1173 (2012). "Although we review legal issues de novo, we give substantial weight to the agency's interpretation of the law it administers, particularly where the issue falls within the agency's expertise." *Goldsmith*, 169 Wn. App. at 584. And "[t]o the extent [an agency] interprets the regulations as defining the right to administrative review, its view is not entitled to deference." *Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 416, 120 P.3d 130 (2005).

We review questions of statutory construction de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Jametsky*, 179 Wn.2d at 762. To determine legislative intent, we first look to the plain language of the statute. *Jametsky*, 179 Wn.2d at 762. If the plain meaning of a statute is unambiguous, we must apply that plain meaning as an expression of legislative intent. *Jametsky*, 179 W2d at 762. We do not rewrite unambiguous statutory language under the guise of interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

II. PETITION FOR REVIEW TO THE BOA

Castillo argues that substantial evidence does not support the BOA's findings that her petition for review to the BOA was untimely and that good cause does not exist. We disagree.

An untimely petition may be heard by the BOA if the petitioner can show good cause. WAC 388-02-0580(3)(b). "Good cause is a substantial reason for legal justification for failing to appear, to act, or respond to an action." WAC 388-02-0020(1). A good cause finding is a factual finding that we review for substantial evidence. RCW 34.05-.570(3)(e). Substantial evidence means evidence that "is sufficient to persuade a rational, fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). We review any legal conclusions that flow from the findings de novo. *Cantu*, 168 Wn. App. at 21.

Here, Castillo filed a petition to the BOA on January 22, one day late. The BOA asked Castillo to explain why she was late in order to establish good cause. She claimed excusable neglect and mistake. But Castillo's counsel conceded that he could have faxed the one page petition using the same filing method that he had relied on throughout the case, but decided instead to mail the petition on a holiday weekend using standard mail delivery. The BOA's founding that

Castillo did not meet the good cause exception under WAC 388-02-0580(3)(b) because it was unreasonable to rely on timely delivery of standard mail after a holiday weekend, is supported by substantial evidence. The BOA's findings of fact support the BOA's conclusion of law that Castillo failed to provide a reasonable explanation for why her petition to the BOA was untimely. Thus, the BOA did not err in dismissing Castillo's petition for review.[3]

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[3] Although the issue of whether Castillo's appeal to the BOA was timely is dispositive, we acknowledge her other arguments. Castillo also argues that (1) the Department erred in denying her request for review because it was timely filed within 30 days of the date she actually received the Department's notice on September 10, (2) even if her request was untimely, the Department has the legal authority to review a founded finding "at any time" under RCW 26.44.010 to correct any errors in its records, and (3) the Department incorrectly concluded it lacked the legal authority to review her request. We disagree.

RCW 26.44.125 governs an alleged perpetrator's right to challenge a founded finding of child neglect. RCW 26.44.125(2) states, "Within thirty calendar days after the *department has notified* the alleged perpetrator [of a founded finding] under RCW 26.44.100 . . . he or she may request that the department review the finding." (Emphasis added). If the alleged perpetrator fails to timely submit his or her request for review:

> the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding, unless he or she can show that the department did not comply with the notice requirements of RCW 26.44.100.

RCW 26.44.125(3).

Here, the Department notified Castillo of the Department's founded finding on September 9, 2013, the date that the certified mail was delivered to her house and signed by her husband. Thus, Castillo's request for review filed on October 10 was untimely under the plain language of RCW 26.44.125(2). Because Castillo's petition was untimely, the Department correctly determined that it lacked the legal authority to review her untimely petition under RCW 26.44.125(3), and Castillo did not have the right to further review. Although RCW 26.44.010 requires the Department to maintain and disseminate reports of child abuse and neglect, RCW 26.44.010 does not provide the Department the legal authority to review founded findings "at any time" as Castillo claims.

III. PROCEDURAL DUE PROCESS

Castillo argues that she has a protected liberty interest in her future inability to procure employment in a particular field. She argues that without an opportunity for review, her procedural due process rights were violated. We disagree.

We review constitutional challenges de novo. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). The Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Procedural due process protection is conferred under the Fourteenth Amendment. *Amunrud*, 158 Wn.2d at 216.

When the State seeks to deprive a person of a protected interest, procedural due process requires that the person receive notice of the deprivation and an opportunity to be heard to guard against an erroneous deprivation of that interest. *Amunrud*, 158 Wn.2d at 216 (citing *Mathews v. Eldridge,* 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Only when a protected interest is implicated do we proceed to evaluate the procedural process claim. *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 508, 637 P.2d 940 (1981). We consider the following factors to determine what procedural due protections are required: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved. *Matthews*, 424 U.S. at 335. Procedural due process applies to the opportunity to request a formal hearing. *Amunrud*, 158 Wn.2d at 218.

Here, Castillo fails to show that she has a protected liberty interest that the Department interfered with by denying her request for agency review of the founded finding. She argues that

the Department's "finding deprives her of a liberty interest" and that she "has a significant interest in not being branded as a negligent parent in agency records, and in not having her role as a parent and her future employment possibilities severely limited by the finding." Br. of Appellant at 30; Reply Br. at 11. Castillo claims that without the opportunity for a hearing on the founded finding, she "is subject to a stigma and employment bar for the rest of her life" because the finding will show up on a criminal background check for employment or volunteer opportunities involving children or vulnerable adults. Br. of Appellant at 33.

Castillo argues "that a protected liberty interest can be demonstrated by the extinguishment of future possibilities," citing *Giles v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 457, 583 P.2d 1213 (1978). Reply Br. at 13. In that case, Giles was terminated from civil service employment and argued that his dismissal deprived him of a liberty interest. *Giles*, 90 Wn.2d at 461. The *Giles* court held that in the absence of a dismissal which affects an employee's reputation, "the 'liberty' interest can be infringed if the government imposes a stigma or other disability that forecloses the employee's freedom to take advantage of other employment opportunities." *Giles*, 90 Wn.2d at 461. Subsequently, in *Ritter*, the court held

> that a constitutionally protected "liberty" interest based on foreclosure of employment opportunities was not implicated where a discharged state employee's license was not revoked and "he was not prohibited from working in his *chosen field*."

Ritter, 96 Wn.2d at 510 (emphasis added) (quoting *Giles*, 90 Wn.2d at 461).

Here, there is no evidence in the record that establishes that Castillo works in an occupation where a founded finding of child neglect affects her employment opportunities, or that working as a caregiver is her chosen field. Therefore, we hold that Castillo fails to show that the Department's founded finding deprives her of a protected liberty interest. Thus, her procedural due process claim fails.[4]

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, A.C.J.

MAXA, A.C.J.

Lee, J.

LEE, J.

[4] Castillo asserts that she is entitled to attorney fees and costs as a qualified party who prevails in a judicial review of an agency action under RAP 18.1(a) and RCW 4.84.350(1). Because Castillo does not prevail, we deny her request for an award of attorney fees and costs.

Filed
Washington State
Court of Appeals
Division Two

October 12, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAYANARA CASTILLO, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Respondent.	No. 49063-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's August 29, 2017 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. MAXA, LEE, SUTTON

FOR THE COURT:

Sutton, J.
JUDGE

RCW 26.44.125

Alleged perpetrators—Right to review and amendment of finding—Hearing.

(1) A person who is named as an alleged perpetrator after October 1, 1998, in a founded report of child abuse or neglect has the right to seek review and amendment of the finding as provided in this section.

(2) Within thirty calendar days after the department has notified the alleged perpetrator under RCW **26.44.100** that the person is named as an alleged perpetrator in a founded report of child abuse or neglect, he or she may request that the department review the finding. The request must be made in writing. The written notice provided by the department must contain at least the following information in plain language:

(a) Information about the department's investigative finding as it relates to the alleged perpetrator;

(b) Sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded reports;

(c) That the alleged perpetrator has the right to submit to child protective services a written response regarding the child protective services finding which, if received, shall be filed in the department's records;

(d) That information in the department's records, including information about this founded report, may be considered in a later investigation or proceeding related to a different allegation of child abuse or neglect or child custody;

(e) That founded allegations of child abuse or neglect may be used by the department in determining:

(i) If a perpetrator is qualified to be licensed or approved to care for children or vulnerable adults; or

(ii) If a perpetrator is qualified to be employed by the department in a position having unsupervised access to children or vulnerable adults;

(f) That the alleged perpetrator has a right to challenge a founded allegation of child abuse or neglect.

(3) If a request for review is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding, unless he or she can show that the department did not comply with the notice requirements of RCW **26.44.100**.

(4) Upon receipt of a written request for review, the department shall review and, if appropriate, may amend the finding. Management level staff within the children's administration designated by the secretary shall be responsible for the review. The review must be completed within thirty days after receiving the written request for review. The review must be conducted in accordance with procedures the department establishes by rule. Upon completion of the review, the department shall notify the alleged perpetrator in writing of the agency's determination. The notification must be sent by certified mail, return receipt requested, to the person's last known address.

(5) If, following agency review, the report remains founded, the person named as the alleged perpetrator in the report may request an adjudicative hearing to contest the finding. The adjudicative proceeding is governed by chapter **34.05** RCW and this section. The request for an adjudicative proceeding must be filed within thirty calendar days after receiving notice of the agency review determination. If a request for an adjudicative proceeding is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the

finding.

(6) Reviews and hearings conducted under this section are confidential and shall not be open to the public. Information about reports, reviews, and hearings may be disclosed only in accordance with federal and state laws pertaining to child welfare records and child protective services reports.

(7) The department may adopt rules to implement this section.

[2012 c 259 § 11; 1998 c 314 § 9.]

NOTES:

Effective date—1998 c 314 § 9: "Section 9 of this act takes effect October 1, 1998." **[1998 c 314 § 45.]**

WAC 388-02-0020

What does good cause mean?

(1) 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.

(2) Good cause may include, but is not limited to, the following examples.

(a) You ignored a notice because you were in the hospital or were otherwise prevented from responding; or

(b) You could not respond to the notice because it was written in a language that you did not understand.

[Statutory Authority: RCW **34.05.020**. WSR 00-18-059, § 388-02-0020, filed 9/1/00, effective 10/2/00.]

November 08, 2017 - 9:58 AM

Filing Petition for Review

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