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SUPREME COURT
STATE OF WASHINGTON

NO. 75567-6-1

DALJIT S. DHALIWAL,

Petitioner

vs.

**STATE OF WASHINGTON
DEPARTMENT OF SOCIAL & HEALTH SERVICES,**

Respondent.

PETITION FOR REVIEW

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ATTACHMENT TO EMAIL



ORIGINAL

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**IDENTITY OF PETITIONER
AND CITATION TO COURT OF APPEALS DECISION**

Daljit S. Dhaliwal seeks review of Court of Appeals Division I decision dated February 26, 2018 denying his appeal of a Superior Court ruling preventing him from presenting newly-available, exonerating evidence, which would overrule a “founded” finding by an administrative agency that he hit his daughter.

ISSUES PRESENTED FOR REVIEW

Petitioner asks this Court to consider significant issues of law under both the US Constitution and the Constitution of the State of Washington.

Additionally, this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner, Daljit S. Dhaliwal, is denied a license to practice his profession of caregiver, based upon an

administrative finding that he hit his daughter. There is no physical evidence that this occurred. Mr. Dhaliwal has come forward with newly discovered evidence that exonerates him from this allegation, yet the agency refuses to consider the evidence and reexamine its finding.

Washington's Administrative Procedure Act prescribes that new evidence relating to the validity of an agency action, not discoverable at the time, and which serves the interests of justice, is grounds for remand to the agency for further fact finding. *See* RCW 34.05.562(2)(b).

RCW 34.05.562(2)(c), further contemplates remand to the agency when the agency improperly omits or excludes evidence from the record.

Did Court of Appeals fail to apply the correct legal standard in finding that the agency had no duty to consider or evaluate newly-available, exculpatory evidence?

STATEMENT OF THE CASE

In November 2011 Mr. Dhaliwal's daughter accused him of hitting her with a closed fist. (C.P. Sub # 6 page 80) There is no evidence of any injury in the record. Mr. Dhaliwal's daughter was placed in DSHS custody.

Mr. Dhaliwal was charged with 4th degree assault. The charge was dismissed. (C.P. Sub # 7 page 137)

In January 2012 Mr. Dhaliwal's daughter told DSHS that he attempted to contact her in violation of DSHS rules. (C.P. # 6 page 74)

In December 2011 and January 2012, DSHS informed Mr. Dhaliwal by mail that "it was more likely than not" that he had committed child abuse against his daughter on two

occasions. Mr. Dhaliwal received the letters. (C.P. Sub # 6 page 94)

Mr. Dhaliwal did not respond in writing to the December 2011 and January 2012 letters. On January 10, 2012, Mr. Dhaliwal's daughter Sukhpreet wrote to DSHS accusing the agency of mistreating her parents and requesting to go home. (C.P. Sub # 6 page 54)

During February to April 2012, Mr. Dhaliwal and his family received counseling under the direction and auspices of DSHS, and the agency agreed to allow Sukhpreet to return home. (C.P. Sub # 6 pages 47-48¹)

¹ The Clerk's Papers citation here is to a quote from a confidential DSHS record that was not made a part of the administrative record by the agency, and is therefore not included in the Clerk's Papers. The original confidential record would be available to the agency on remand, along with approximately 100 additional pages of DSHS confidential records, to allow the agency to weigh the veracity of Sukhpreet's adult testimony against the statements she made as a sixteen-year-old.

Confidential agency records show that, although Sukhpreet is currently well adjusted, strong, and functioning as a new mother now, she had experienced a fragile and delicate mental state while growing up, including attempts at suicide. Mr. Dhaliwal and the entire family have helped Sukhpreet through her difficult period of adolescence.

On August 8, 2013, Mr. Dhaliwal sought information from DSHS.

On August 16, 2013, per DSHS instructions he requested review of the “founded” reports stating that he had abused Sukhpreet.

On October 4, 2013, Ivana Rozekova, Area Administrator for King County DSHS, informed him in writing that any request for review must be submitted within “20 calendar days” of the DSHS notice and that he had missed that deadline. (C.P. Sub # 6 page 99)

Nonetheless, despite his missing the deadline, Ms. Rozekova elected to reopen the case and conduct a review of the matter. She then informed him that the findings would not be changed. (C.P. Sub # 6 page 99)

In December 2013, Mr. Dhaliwal learned that his license as a caregiver for the elderly would be revoked because of “a pending charge” with DSHS Children Administration. (C.P. Sub # 7 pages 134-135)

On May 7, 2014, Mr. Dhaliwal asked the DSHS to allow him to dispute the “founded findings.” He requested a hearing. (C.P. Sub # 6 page 72)

A Pre-Hearing Conference was held on October 24, 2014. (C.P. Sub # 6 page 66) DSHS was ordered to file a Motion to Dismiss on or before November 25, 2014. (C.P. Sub # 6 page 65)

DSHS did not file a Motion to Dismiss, but was granted until March 6, 2015 to do so. (C.P. Sub # 6 page 61)

DSHS did not file a Motion to Dismiss prior to a Pre-Hearing Conference held on June 9, 2015, at which time the agency was provided with a copy of Sukhpreet's newly-available written recantation. (C.P. Sub # 6 pages 57 & 55)

On June 30, 2015, the Office of Administrative Hearings issued an Order of Dismissal. The Order did not address the issue of the newly-discovered evidence. (C.P. Sub # 6 pages 31-34)

On July 20, 2015, Mr. Dhaliwal submitted a Petition for Review to the DSHS Board of Appeals, specifically asserting that "new, previously unavailable evidence was made available" (C.P. Sub # 6 page 27) DSHS did not file a response.

On July 31, 2015, the DSHS Board of Appeals affirmed the Office of Administrative Hearings Order of Dismissal without addressing, or mentioning, the factual or legal issues raised by the new evidence. (C.P. Sub # 1 pages 16-23)

On August 28, 2015, Mr. Dhaliwal petitioned the Superior Court for the State of Washington for review of the DSHS Board of Appeals Order. (C.P. Sub # 1 pages 2-5)

On April 22, 2016, a hearing was held in Superior Court during which Mr. Dhaliwal's daughter's testimony and her declaration were offered.

No testimony or evidence was received by the Superior Court regarding the newly discovered evidence, during the April 22, 2016 hearing. The Court ordered that the parties brief the specific issue of recanted evidence in administrative proceedings. (C.P. Sub # 11 pages 188-189) Both parties submitted briefs.

On July 1, 2016, the Superior Court affirmed the DSHS Board of Appeals Order. (C.P. Sub # 19 pages 224-225)

Mr. Dhaliwal sought review of the Superior Court's affirmation of the DSHS Board of Appeals Order, on August 1, 2016.

SUMMARY OF THE ARGUMENT

Mr. Dhaliwal has individual liberty and property interests in the right to his good name and the right to pursue his chosen occupation. These rights merit both substantive and procedural due process protection. *See Board of Regents v. Roth*, 408 U.S. 564, 572-574 (1972).

By refusing to consider new, previously unavailable evidence, or rule on the factual and/or legal relevance of the evidence, as contemplated in RCW 34.05.562, DSHS has acted arbitrarily and capriciously, and in discord with the law.

The interests of justice would be served by remanding this matter to the agency with instruction to consider Mr. Dhaliwal's daughter's current testimony.

ARGUMENT

Standard of Review

The standards for review of agency orders under the APA are set forth in RCW 34.05.570.

DSHS findings of fact are reviewed under the substantial evidence standard. *See* RCW 34.05.570(3)(e). This standard is highly deferential to the administrative fact finder. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 553, 14 P.3d 133 (2000). The same deference should be afforded to DSHS factual findings as an appellate court would afford a Superior Court's findings. *Snohomish County v. Hinds*, 61 Wash.App. 371, 378–79, 810 P.2d 84 (1991).

An appellate court engages in de novo review of the agency's legal conclusions. *In re Farina*, 94 Wash.App. 441, 450, 972 P.2d 531 (1999).

Under the APA, new evidence that becomes available and relates to the validity of the agency action at the time that action was taken, should be cause to remand the matter to the agency when the party could not reasonably have discovered the evidence prior to the agency action and the interests of justice would be served. can only be raised on appeal if they fall expressly within the statutory exceptions of RCW 34.05.562(2)(b). *See Washington State Dept. of Health Unlicensed Practice Program v. Yow*, 147 Wn.App. 807 (2008); Reviewable questions of judgment or discretion, whether in formal or informal administrative proceedings, are generally reviewed under the arbitrary or capricious standard. The US Supreme Court has held that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *See*

Camp v. Pitts, 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973).

Arbitrary and capricious action is established by willful and unreasoning action, without consideration and in disregard of facts and circumstances. *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wash.2d 690, 695, 658 P.2d 648 (1983) (quoting *State v. Rowe*, 93 Wash.2d 277, 284, 609 P.2d 1348 (1980)). It is not established where there is room for two opinions, even though one may believe that an erroneous conclusion has been reached. *Id.*

Clearly, erroneous action is established when an appellate court reviews the whole record and finds that although there is evidence to support the decision, the appellate court is left with the definite and firm conviction that a mistake has been committed. *Franklin County Sheriff's Office v. Sellers*, 97 Wash.2d 317, 324, 646 P.2d 113 (1982)

(quoting *Ancheta v. Daly*, 77 Wash.2d 255, 259–60, 461 P.2d 531 (1969)).

The DSHS' Refusal to Consider the Possible Relevance of Previously Unavailable Evidence is Arbitrary and Capricious

Washington's APA specifically provides that new, previously-unavailable evidence can – and should – be considered by an agency. The specific section of the Act reads as follows (emphasis added):

RCW 34.05.562

New evidence taken by court or agency.

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

- (b) Unlawfulness of procedure or of decision-making process; or
 - (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.
- (2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:
- (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
 - (b) **The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;**
 - (c) **The agency improperly excluded or omitted evidence from the record; or**
 - (d) A relevant provision of law changed after the agency action and the court determines

that the new provision may control the outcome.

In its reply brief before the Superior Court DSHS has argued that RCW 34.05.562(2)(b) is inapplicable to the facts at hand because Sukhpreet's current statement does not relate to the validity of the agency action that took place four years before, when she was sixteen. (C.R. Sub # 8 page 167)

However, Sukhpreet's current statements directly address the validity of the agency action at the time it was taken. It's clear that her statements deal with nothing *other* than the validity of the 2011 and 2012 agency actions. (C.R. sub # 7 page 151)

Her father could not have known, at the time of the DSHS decision, that she would eventually want to recant her allegations, and it seems unimaginable to argue that a full consideration by DSHS of its record in this matter – including Sukhpreet's current statements exonerating her

parents and admitting her teenage fabrications – is not in the interest of justice.

We ask the Court to further consider that the record shows that DSHS ignored the possible relevance of Sukhpreet Dhaliwal's current testimony regarding her actions when she was sixteen. The agency refused to even acknowledge the issue, or make a ruling on whether, or for what reason, it was rejecting the new evidence in either of the two agency orders in the record.

In acting as if the issue of new evidence did not exist, DSHS has declined to provide the Court with a basis to begin its review.

Did the agency reject the evidence as a finding of fact or as a matter of law?

Neither the Plaintiff nor the Court can know the agency's reasoning in refusing to acknowledge Mr. Dhaliwal's request to submit new evidence pursuant to RCW

34.05.562(2)(b).

The agency's exclusion of this new evidence and its refusal to even address the evidence in its orders, further gives rise to a request to remand this matter pursuant to RCW 34.05.562(2)(c), which contemplates remand as a remedy for improperly omitting or excluding evidence from the record.

CONCLUSION AND RELIEF SOUGHT

Petitioner respectfully requests the Court remand this case to the agency for inclusion of Sukhpreet Dhaliwal's current written statements and testimony into the administrative record and reconsideration of the two determinations of abuse, based upon the full record.

RESPECTFULLY SUBMITTED this 28th day of March 2018.

William Frick

/s/ _____

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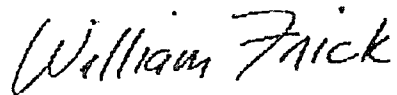
CERTIFICATE OF SERVICE

I, William Frick, the undersigned, declare: I served the original/true copy of the attached *Petition for Review*, by email, addressed as follows:

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DATED this 28th day of March 2018.



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Appendix

Court of Appeals Decision
dated February 26, 2018

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DALJIT S. DHALIWAL,)	
)	No. 75567-6-1
Appellant,)	
)	
v.)	
)	DIVISION ONE
STATE OF WASHINGTON)	
DEPARTMENT OF SOCIAL & HEALTH)	UNPUBLISHED OPINION
SERVICES,)	
)	
Respondent.)	FILED: February 26, 2018
)	

APPELWICK, J. — Dhaliwal failed to timely request review of an adverse agency finding. Years later, he produced evidence that he claims proves that the finding was erroneous. An ALJ, the DSHS Board of Appeals, and the superior court, all dismissed for failure to timely request review. We affirm.

FACTS

Child Protective Services received a report that Dhaliwal had hit his daughter on November 29, 2011. The daughter was taken into protective custody. On December 20, 2011, Dhaliwal received notice of a founded finding from the Department of Social and Health Services (DSHS) that he had engaged in abuse or neglect of a minor in his care arising out of the incident. It was written in his native language, and stated that he had 30 days to request review of the findings.

Child Protective Services received a report of a second incident that occurred on December 12, 2011. On January 5, 2012, Dhaliwal received notice

of another founded finding from DSHS that he had engaged in of abuse or neglect of a minor in his care arising out of this second incident. It was written in his native language, and stated that he had 30 days to request review of the findings.

Dhaliwal did not request review until August 16, 2013, 18 months after the second finding. At that time, he asked DSHS to review the findings. DSHS responded that his request for review was untimely.

On May 7, 2014, Dhaliwal submitted to the Office of Administrative Hearings (OAH) a request for an administrative hearing regarding the founded findings. In his prehearing brief to the OAH, Dhaliwal included his daughter's handwritten note, dated April 21, 2015, in which she rescinded her allegations that led to the founded findings.

On June 30, 2015, the OAH Administrative Law Judge (ALJ) dismissed the request, because Dhaliwal did not timely request review of the initial two founded findings. The DSHS Board of Appeals affirmed the OAH ALJ for the same reason: Dhaliwal did not seek review within thirty days of the original founded findings. Dhaliwal petitioned for review in superior court. The Superior Court affirmed. Dhaliwal appeals.

DISCUSSION

Dhaliwal argues that his daughter's recantation of her accusations amounts to newly discovered evidence that should allow him to seek review, even though he did not initially seek timely review.

Adjudicative proceedings regarding DSHS findings of child abuse or neglect are governed by RCW 26.44.125(5), and the Administrative Procedure Act (APA),

ch. 34.05 RCW. When reviewing an agency decision, this court applies the standards of the APA directly to the agency's record, without regard to the superior court decision. State v. Snyder, 194 Wn. App. 292, 296-97, 376 P.3d 466 (2016), review denied, 187 Wn.2d 1017, 389 P.3d 604 (2017). This court reviews the Board of Appeals' legal determinations de novo.¹ Id. at 297.

Two statutes are relevant. First, former RCW 26.44.125(2) (1998)² stated,

Within twenty calendar days after receiving written notice from the department under RCW 26.44.100 that a 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. 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.

(Emphasis added.) Second, RCW 34.05.562(2), of the APA, allows for a remand to the agency if new evidence becomes available:

The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers

¹ Under the APA, Dhaliwal must demonstrate the invalidity of the agency's actions on one of nine grounds. See Snyder, 194 Wn. App. at 297. Here, he argues that the agency's action was arbitrary and capricious, which is one of those nine grounds. RCW 34.05.570). An arbitrary or capricious action is a willful and unreasonable action made without consideration and without regard for the facts and circumstances. State Dep't of Soc. & Health Servs. v. Nix, 162 Wn. App. 902, 913-14, 256 P.3d 1259 (2011). But, this is an argument on the merits of the action. As discussed below, we do not reach the merits due to Dhaliwal's failure to timely request review.

² In 2012, the legislature amended RCW 26.44.125(2) to allow for an appeal within 30 days, rather than 20 days. LAWS OF 2012, ch. 259 § 11. This revision was effective June 1, 2012. However, it appears that the notices sent to Dhaliwal stated that he had 30 days to request review, even though the statute at the time only gave him 20 days. This distinction is immaterial, because Dhaliwal did not request review within 20 or 30 days.

necessary and that the agency take such further action on the basis thereof as the court directs, if:

.....

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency.

Dhaliwal does not argue that he filed for review within the 20 day period. Instead, he relies on RCW 34.05.562(2)(b) in arguing that his case should have been remanded to the agency due to his daughter's recantation.

We disagree. We first note that the language in former RCW 26.44.125(2) is particularly strong. A party "shall have no right to agency review or to an adjudicative hearing or judicial review of the finding" if the party does not file a timely request for review. Id. (emphasis added). This language is unequivocal. Failure to request review results in the party having no right to review. The order was final.

Second, the APA contains a separate notice of appeal time requirement that is similarly restrictive. That statute states that "[f]ailure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding." RCW 34.05.440(1). As evidenced by both chapter 26.44 RCW, and the APA, the legislature intended to apply strict requirements for appeals of agency decisions. A party loses his or her right to review if he or she does not timely request review.

The language in RCW 34.05.562(2) that states that the court "may" remand upon the discovery of new evidence never came into play here. It applies only when a timely petition for review has been filed and the resulting order is subsequently appealed to the superior court. Due to Dhaliwal's initial failure to request review, the orders became final. The statute does not allow the court to reopen final orders in unappealed proceedings.

We affirm.

WE CONCUR:

Seach, J.

Appelwick, J.

Spencer, J.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, March 28, 2018 2:00 PM
To: 'Christine Phillips'
Cc: William Frick
Subject: RE: Daljit S. Dhaliwal v. State of WA Dept. of Social & Health Services

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The filing fee for a Petition for Review is \$200.00 made payable to the Washington State Supreme Court, P.O. Box 40929, Olympia, WA 98504-0929. Please include the Court of Appeals case number with your remittance.

Supreme Court Clerk's Office

From: Christine Phillips [mailto:Christine@crossborders.us]
Sent: Wednesday, March 28, 2018 1:48 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: William Frick <william@fricklawfirm.info>
Subject: Daljit S. Dhaliwal v. State of WA Dept. of Social & Health Services

Hi Jocelyn,

Attached is a Petition for Review and Appendix for Petition for Review. Please file with the Court today. We will put the filing fee check in the mail to you today.

Can you e-mail me the amount for the filing fee, as I cannot find on the website - not sure if this is \$200 or \$250?

Thank you, Jocelyn; we appreciate your help. I have calls into Virginia Neal to help us with resetting the password for future use.

Christine

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