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Court of Appeals No. 70354-4-1

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SUPREME COURT OF THE STATE OF WASHINGTON

Yevgeny Semenenko and Natalya Semenenko,

Petitioners

v.

Department of Social and Health Services,

Respondent.

MEMORANDUM OF *AMICI CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND COLUMBIA LEGAL SERVICES IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF *AMICI*

Amici adopt and incorporate their statement of interest contained in their accompanying motion.

II. STATEMENT OF THE CASE

Amici adopt and incorporate the statement of the case from the Semenenkos' petition for review.

III. ARGUMENT

A. Review Should Be Accepted Because the Court of Appeals Opinion, Even Though Unpublished, is of "Substantial Public Interest" and Could Negatively Impact Hundreds or Thousands of Public Assistance Applicants and Recipients Who Seek a Hearing Challenging Agency Denials of "Brutal Needs"[1] Benefits and Families Challenging Wrongful Findings of Abuse.

This Supreme Court should accept review because the Court of Appeals decision at issue, holding that the "good cause" and WAC 388-02-0020 remedy is available only where a statute grants substantive authority permitting the Department of Social and Health Services (DSHS) to waive a deadline (Opinion p. 11), has substantial public impact and constitutional implications far beyond RCW 26.44 administrative

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[1] *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (describing food, clothing, shelter, income, and health care as "brutal needs" and finding that the constitutional right to procedural due process includes the right to an administrative hearing when access to such resources is denied). The Goldberg court wrote that:

> ... termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. . . . His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

abuse findings.

1. **Over the next several years, potentially hundreds or thousands of appellants seeking due process hearings who have good cause for late filing may be denied that basic right if the Court of Appeals decision stands.**

The Court of Appeals correctly observes that the phrase "good cause" does not appear in RCW 26.44.125. This phrase does not appear in other important DSHS and Health Care Authority (HCA) statutes authorizing aggrieved parties to request administrative appeals to contest agency decisions either.

DSHS conducts administrative hearings involving eligibility for and termination of "brutal needs" benefits and services. These include short-term emergency cash, food, developmental disabilities, child care, and assistance through other programs. "Other assistance programs" includes services related to WorkFirst support to move parents from welfare to work, as well as services provided through DSHS Divisions, including Adoption Services, Aging, Home and Community Services, Mental Health, and Vocational Rehabilitation. If crucially needed benefits or services are denied or terminated in error, RCW 74.08.080 authorizes appeals.

The HCA is Washington's administrative agency responsible for all Medical Assistance (Medicaid) programs, the State Children's Health Insurance (S-CHIP) program, and Medical Care Services (MCS) programs

("Medical Services Programs"). Medical Services Programs provide access to physician services, inpatient and outpatient surgical care, durable medical equipment, laboratory services, and several levels of nursing home or long term in-home care. Recipients denied health care services necessary for life may contest incorrect HCA decisions at administrative hearings authorized by RCW 74.09.741.

DSHS and HCA appeal statutes, like RCW 26.44.125, do not contain explicit "good cause" provisions. The relevant portion of DSHS's appeal statute, RCW 74.08.080(2)(a), reads:

> The applicant or recipient must file the application for an adjudicative proceeding with the secretary within ninety days after receiving notice of the aggrieving decision.

HCA's appeal statute, RCW 74.09.741(4), reads:

> An applicant or recipient may file an application for an adjudicative proceeding with either the authority or the department and must do so within ninety calendar days after receiving notice of the aggrieving decision.

Both command that the application for an adjudicatory proceeding "*must*" be filed within the deadline. Neither contains authority permitting DSHS or HCA to waive or extend the deadline for good cause shown.[2]

Low-income appellants file thousands of requests for hearing

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[2] RCW 74.09.741 actually does contain a good cause provision, but not one relevant here. Hearing requests that invoke both HCA and DSHS jurisdiction may be severed to conserve resources "without another party's consent" for "good cause" where the appellant's rights would not prejudiced. RCW 74.09.741(5)(a).

challenging DSHS decisions and HCA medical coverage denials every year. If the unpublished opinion's reasoning is applied by these agencies to refuse to consider any good cause reason for a late filing of an administrative hearing request, hundreds or thousands of low-income appellants over the next several years seeking a chance to have their grievances heard could be summarily denied this basic due process right.

This absolute denial of any good cause reason for filing a late hearing request would be especially brutal for low-income public benefits appellants because this group as a whole is particularly likely to have a good reason for filing late. The findings of the Washington State Supreme Court's groundbreaking 2003 study on the civil legal needs of low-income and vulnerable people in Washington show that this population experiences increased civil legal issues related to domestic violence, economic insecurity, loss of housing, and have less knowledge of available legal resources, and less access to the internet.[3] The study demonstrates that people on or applying for public assistance have many obstacles to timely filing for hearings that provide good cause for missing a deadline – an increased level of illnesses, disabilities, non-English speaking households, fear relating to the consequences of pressing for legal rights, homelessness, and lack of easy access to mail, internet, phone,

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[3] 2003 Washington State Civil Needs Study, http://www.courts.wa.gov/newsinfo/content/taskforce/civillegalneeds.pdf.

and transportation.[4] Foreclosing any ability to show how these obstacles could provide a good cause reason for late filing of a hearing request to challenge denial of the very benefits that help alleviate these conditions would result in substantial adverse public impact that should be addressed by this court.

2. Even though the Court of Appeals opinion is unpublished, DSHS and HCA can consult the opinion and determine that they can bar *all* public assistance appeals filed beyond the statutory appeal time frame regardless of the good cause reason for the delay.

Although the *Semenenko* opinion may not be cited in court proceedings and has no precedential value (RAP 14.1; RCW 2.06.040), the unpublished opinion could well have a huge impact on agency policy and administrative adjudications.

DSHS and HCA can, except where the notice was *knowingly* mailed to an incorrect address, *see Ryan v. Dept. of Soc. & Health Servs.*, 171 Wn. App. 454, 287 P.3d 629 (2012) (a case characterized by DSHS as having "muddied" the RCW 26.44.125 waters), apply the *Semenenko* decision to absolutely bar all public benefit appeals filed beyond the statutory time frame no matter what the reason for the delay.

No court rule prevents DSHS or HCA from using the rationale of

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[4] Good cause must be determined on a case-by-case basis applying the individual facts and situation to the standard. *See Griggs v. Averbeck Realty*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). In Thompson v. Goetz, the court recognized that physical, mental, and emotional incapacities suffered by parties are appropriate good cause grounds for vacating default judgments. *Thompson v. Goetz*, 455 N.W.2d 580 (N.D. 1990).

unpublished opinions in adjudicative proceedings:

> (1) ALJs and review judges must first apply the department rules adopted in the Washington Administrative Code.
>
> (2) If no department rule applies, the ALJ or review judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and court decisions.

WAC 388-02-0220. The agencies can distribute the *Semenenko* opinion to its administrative law judges and Board of Appeals judges, who can then hold that good cause is never available to excuse a late hearing request in any RCW 74.08.080, RCW 74.09.741, or RCW 26.44.125 appeal.

Agencies can incorporate the *Semenenko* decision into worker and administrative hearing coordinator training.[5] They can integrate it into internal manuals and instructions. These agencies can revise WAC 388-02-0020 to omit "good cause" unless it is expressly contained in the appeal statute. People who seek to protect life-sustaining benefits or parents who seek to protect the family unit will be denied a hearing if the request is filed one day late due to illness or other good cause.

In conclusion, both DSHS and HCA can implement *Semenenko* internally. An agency's ability to implement any court decision internally means even an unpublished decision may have a substantial impact on the

[5] Administrative Hearing Coordinators is the job title of experienced DSHS employees or supervisors who represent DSHS at benefit and other hearings.

individuals the agency serves.[6] DSHS and HCA actions impact so many low-income persons, including public benefits applicants and recipients, and parents subject to findings of abuse, that *Semenenko* could have a huge impact if not corrected. The "good cause" remedy for missing a deadline could be denied to hundreds or thousands.

B. Review Should Be Accepted Because RCW 26.44.030(12) Prohibits DSHS from Exceeding a 90-Day Investigation and Notice Period; Providing a Longer Timeframe Has a Substantial Negative Impact on Children and Families.

The legislature has specifically found that both parents and children involved in CPS investigations have due process rights and has affirmed that the priority of protecting children includes protecting the family unit from unnecessary disruption. RCW 26.44.100(1). The legislature mandated, in RCW 26.44.030(12)(a), that CPS investigations shall be completed within 90 days from the date the report is received.

Agency policy implementing RCW 26.44.100(1) requires that CPS Investigative Assessments must be completed within 60 days of CPS receiving a report of alleged abuse or neglect. Children's Administration

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[6] Public assistance appellants almost never use judicial branch courts to resolve disputes, and so the inability to get an administrative hearing to contest a benefits loss is particularly onerous. In Washington State in fiscal year 2006, only 29 of the 1765 final administrative hearing decisions affirming the welfare agency's denial of public assistance benefits were appealed to the state court system. This constitutes less than 2% of appealable cases. See Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. Rev. L. & Soc. Change 131, 143 n. 60 (2008).

Practices and Procedures Guide, Section 2540[7]. A supervisor must review all open CPS cases to determine if the 60-day rule requirement has been met and may only extend the investigation for an additional 30 days in accordance with the mandatory 90-day state law deadline. Children's Administration Practices and Procedures Guide, Section 2610(C & (E)). CPS's own policies do not allow investigations to exceed 90 days. See WAC 388-15-021(7).

The timely completion of investigations and notice is crucial to child safety and effective case planning, and to ensure due process for subjects of the investigation (often parents) who may be anxious to resolve allegations of maltreatment. Office of the Family and Children's Ombudsman (OFCO) 2012 Annual Report, p. 76.[8] The failure to complete an investigation and issue findings in a timely manner and serve notice can leave children at risk of continued maltreatment. *Id.* at 77. Due process rights for parents are triggered at the completion of the investigation and receipt of notice of the finding, an important due process protection given the fact that a "founded" finding of abuse or neglect remains on the subject's record and permanently prevents him/her from employment in certain fields. *Id.* at 78.

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[7] Children's Administration Practices and Procedures Guide, Section 2540 http://www.dshs.wa.gov/ca/pubs/mnl_pnpg/chapter2_2500.asp.

[8] OFCO 2012 Annual Report, http://ofco.wa.gov/documents/ofco_2012_annual.pdf.

The OFCO 2012 Annual Report states that "for the past three years the Ombudsman has identified a chronic pattern of the department's failure to complete CPS investigations in a timely manner ..." and that in the "... past year, over a quarter of all CPS investigations remained open more than 90 days." *Id.* at 80. The consequence is endangering children, improper due process denial or delay to parents, and disrupting the family unit. Holding DSHS to the mandatory 90-day time limit furthers the legislative policy to protect children, parents, and the family. Failing to do so empowers DSHS to ignore the mandate and institutionalize delay in its determination and notice process.

DSHS admits that the determination of whether or not a CPS finding of neglect or abuse is void when CPS fails to complete an investigation and serve notice within 90 days can affect numerous children and adults. DSHS Answer to Petition for Discretionary Review, p. 12 ("While this issue could affect numerous children and adults, it does not warrant review."). Rather, CPS's failure to timely complete investigations endangers children, negatively impacts children's and parent's rights and damages the family unit.

Review of this issue is appropriate as the issue is of substantial public interest.

IV. CONCLUSION

For these reasons, the petition for review should be granted.

RESPECTFULLY SUBMITTED this 26th day of December, 2014.

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

s/ Lisa Brodoff

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Seattle University School of Law
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s/ Eileen Schock

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DECLARATION OF SERVICE

I, Z. Ivy Rosa, a paralegal at Columbia Legal Services, declare under penalty of perjury under the laws of the State of Washington that on the date below I served a copy of the foregoing MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND COLUMBIA LEGAL SERVICES IN SUPPORT OF PETITION FOR REVIEW, by emailing the same with consent to email service, upon the following counsel of record:

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DATED at Wenatchee, Washington, this 26th day of December, 2014.

Z. Ivy Rosa

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Dear Clerk of the Supreme Court,

Please find attached amended memorandum excluding an appendix as instructed in the December 22, 2014 letter from Commissioner Narda Pierce.

Regards,

Received
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DEC 26 2014

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