70354-4 70354-4

NO. 70354-4-I

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

YEVGENY SEMENENKO and NATALYA SEMENENKO,

Appellants

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANTS' CORRECTED OPENING BRIEF

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I. INTRODUCTION

This appeal concerns the Department of Social and Health Services' (the "Department") determination that the appellants Yevgeny and Natalya Semenenko (the "Semenenkos") abused their seventeen year-old daughter resulting in the issuance of a formal "finding" that they committed child abuse. The "finding" stemmed from a report of alleged abuse from a single incident that occurred at approximately 2 a.m. on November 10, 2009 while the Semenenkos were attempting to admit their severely drug addicted teenage daughter into a drug treatment center.

On April 5, 2010, 146 days after the Department received the report of alleged abuse, the Department sent each of the Semenenkos a letter informing them that the Department investigated the report, and determined that the allegations were "founded" (hereinafter referred to as the "Child Abuse Determination" or "Determination").

Months later, in November, 2010, Ms. Semenenko was fired from her job as a caregiver after her employer ran a periodic background check and discovered her name on a centralized registry of abusers maintained by the Department. As a result, the Semenenkos not only lost all of the earnings previously provided by Ms. Semenenko's caregiver job, but also the healthcare insurance that had previously covered the family of five. Ms. Semenenko will no longer be able to work as a caregiver, and both

Mr. and Ms. Semenenko have been permanently stigmatized as child abusers.

After being fired, the Semenenkos sought administrative review of the April 5th Child Abuse Determination, but were denied a hearing because more than 20 days had elapsed from the time they received their respective Child Abuse Determination letters, and the time they sought review.

The Semenenkos argue in this appeal that: (a) the Department's Child Abuse Determination was void because it was issued more than 90 days after the Department received the report of alleged child abuse; (b) the Department is equitably estopped from enforcing the 20-day limit on seeking review because the Semenenkos justifiably relied on the assurances of the Department employee who told them that their case had been closed and it was therefore not necessary to file an appeal; (c) the Semenenkos had "good cause" to file their request for review more than 20 days after receiving the April 5th Child Abuse Determination; and (d) the King County Superior Court erred by dismissing the Semenenkos' appeal without reviewing the administrative record.

II. ASSIGNMENTS OF ERROR

The trial court erred when it entered an order of dismissal on April 16, 2013, finding that it lacked subject matter jurisdiction because the

Semenenkos had failed to request an internal review of a founded report of child abuse within 30 [sic] days after being notified of the Child Abuse Determination.[1]

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was the Department's Child Abuse Determination void because it was made more than 90 days after the Department received the report of alleged abuse? Yes.

B. Is the Department equitably estopped from enforcing the 20-day limit on filing a request for internal review? Yes.

C. Did the Semenenkos have "good cause" to file their appeal more than 20 days after receiving the Child Abuse Determination letter? Yes.

D. Did the King County Superior Court err by dismissing the Semenenkos' appeal without reviewing the administrative record? Yes.

IV. STATEMENTS OF THE CASE

A. Procedural Background

On April 5, 2010 the Department issued two identical letters to Yevgeny and Natalya Semenenko notifying each of them that the Department received a report alleging they had engaged in abuse or neglect of a child on November 10, 2009, and informing the Semenenkos that "CPS investigated this report...and has found that the alleged abuse or

[1] At the time the Semenenkos' Determination letters were issued, persons who the Department found to be alleged perpetrators of child abuse or neglect could request internal review of the determination within 20 days, and an administrative hearing within 30 days after completion of the administrative review. In 2012 the legislature changed the time period in which to request the internal review to 30 days.

neglect occurred." (CP 18, 92.) On March 25, 2011, Mr. and Ms. Semenenko requested review of the CPS Determination. (CP 19, 106-107.)

The Department denied the Semenenkos' request for review of the Child Abuse Determination based on their failure to have appealed within 20 days of receiving written notice from the Department. (CP 19, 106-107.) The Semenenkos then filed a request for an administrative hearing to challenge the Determinations. (CP 19, 78.) On October 5, 2011, the Administrative Law Judge granted the Department's Motion to Dismiss based on the Semenenkos' failure to request a review within 20 days of receiving the notices. (CP 20, 77-81.) That decision was affirmed by the Department's Board of Appeals on May 10, 2012 (CP 20, 66-70), and again by the King County Superior Court on April 16, 2013, each time on the same grounds: the failure of the Semenenkos' to have sought administrative review within 20 days of receipt of the notice. (CP 39.) This appeal was timely filed on May 14, 2013. (CP 38.)

B. Factual Background

The Semenenkos

Yevgeny and Natalya Semenenko immigrated from Estonia and the Ukraine, respectively, to the United States in 1989. English is their second language. They speak English conversationally, but have

difficulty understanding sophisticated concepts and legal language in English. (CP 14, 24.) They have three daughters. Letitciya is their youngest.

The alleged incident of abuse

On April 5, 2010 the Department's division of Child Protective Services (CPS) issued a letter to each of the Semenenkos informing them that they had investigated the report of alleged child abuse, and determined that the report was "founded." (CP 4, 92.) The determination was made based on a video taken on November 10, 2009, at approximately 2 a.m. (CP 61.) The events are described at CP 61-62. The Semenenkos had been struggling since 2004 to help their severely drug addicted daughter, Letitciya. They had reached out to drug rehabilitation clinics, churches, hospitals, the police and their daughter's school in search of help. (CP 61, 63.) Letitciya was chemically dependent on a number of drugs, and her parents had been trying "everything to save her life." (CP 75, 86.)

Finally, with the help of a counselor, their daughter agreed to enter a drug rehabilitation program. For 13 hours before being admitted, however, she went on a binge. Without her parents' permission she took the family car, stole jewelry and money which she used to buy drugs, and put large amounts of drugs into her system. Her parents transported her to

the rehabilitation facility. On the way, Letitciya asked to stop multiple times, allegedly for bathroom breaks. But instead, she used the opportunity to put more drugs into her system. (CP 61.)

When the Semenenkos and their daughter arrived at the rehabilitation center between 2:00 and 3:00 a.m. to admit their daughter, she already had a significant amount of drugs in her system. She went into the bathroom and locked the door. The Semenenkos asked her repeatedly to come out and sign the admission paperwork. She refused. After approximately one hour, Letitciya opened the bathroom door. The Semenenkos saw illegal intravenous drugs on the bathroom counter, and "fear[ing] for her life" the Semenenkos tried to intervene. (CP 61.) They were afraid she "was going to overdose on drugs and die right there in the detox center." (CP 15.) They asked the clerk at the rehabilitation center to call 911 or help in some way, but got no reaction. (CP 24.) Together Mr. and Ms. Semenenko removed their daughter from the bathroom, and Mr. Semenenko cleared the drugs from the bathroom counter. Letitciya tried to re-enter the bathroom, but her parents blocked her. Their daughter was heavily drugged by this point, and fell to the ground. Letitciya was under the influence of such a large quantity of drugs at this point, that she could not even find the door to exit the facility. (CP 61-62.) The Department received a report of alleged abuse on or around November 10, 2009.

The Department's follow-up to the report of alleged abuse: Case Closed.

In response to the report of alleged abuse, the Department sent a social worker to the Semenenkos' home. The social worker visited the home on two or more occasions and the Semenenkos had multiple conversations with the Department about the report of alleged abuse. (CP 33-34.) At the conclusion, the CPS worker told the Semenenkos that they shouldn't worry, that the case was being closed, and that all issues had been resolved. (CP 34.) This was confirmed when, less than a month after the report of alleged abuse, the Semenenkos received a letter from the Department dated December 3, 2009 confirming that their case had been closed. The letter recommended that the family continue to attempt to admit their daughter to an in-patient treatment facility, and that they attend support groups and classes regarding drug addiction. (CP 88.)

There was no indication of any kind in the case closure notice that the Semenenkos had been determined to have abused their daughter, that they needed to receive counseling or treatment as child abusers, or that there was another case still pending in the Department which was investigating the incident. (CP 88.)

The Department's Determination of Child Abuse was made 146 days after receiving the report of alleged abuse

Four months after being told that their case had been closed, that there was nothing to worry about, and that everything had been resolved; after having zero contact with the Department since receiving the December 3, 2009 case closure notice; and 146 days after the report of alleged abuse was made (CP 92, 96), the Semenenkos received a notice from the Department that confused them.

The notices (one sent to Mr. Semenenko and the other to Ms. Semenenko) were dated April 5, 2010. (CP 92-99.) They are each four pages in length, and said:

> a. the Department received a report of alleged abuse or neglect on November 10, 2009, investigated the report, and determined that the abuse or neglect occurred;
>
> b. the investigation showed that the allegations were "founded." "Founded" means it was more likely than not that the abuse or neglect occurred and you were responsible for it;
>
> c. the Department keeps information about "founded CPS reports" in its computer system, but this information "is confidential and cannot be released to the public."

d. the information can be released if authorized by law or court order and may be released for purposes of determining if you can be licensed or employed to provide care for children or vulnerable adults.

Letitciya was with the Semenenkos when they received the April 5, 2010 notices. All three of them were confused and upset. (CP 9, 15, 34.) They had received a letter four months earlier telling them their case had been closed, and, essentially, to keep up the good work (they had already been trying to get their child admitted into a treatment center, and had already been seeking out services wherever they could.) The daughter spoke better English than her parents, so in the presence of her parents, she called the Department and spoke with a CPS employee there. The daughter explained the situation, told the CPS worker that her parents never abused her, and asked what to do and how to correct the error. (CP 9, 34.)

The Department employee told the daughter that since the case was closed, the April 5, 2010 letter must be a mistake, and not to worry about it. (CP 9, 15, 34.) The Department employee, "didn't give [the Semenenkos] any other advice. She didn't advise [them] to respond, to call anyone else or to verify whether the letter was indeed a mistake. She just told [the Semenenkos] not to worry about it." (CP 34.)

In reliance on this advice, the Semenenkos did not seek review of the Child Abuse Determination. (CP 18.)

The loss of Ms. Semenenko's job and the family's health insurance as a result of the Child Abuse Determination.

Despite the confusing statement contained in the Department's April 5, 2010 letter, the fact that the Semenenkos had been found to have engaged in child abuse was not kept confidential. To the contrary, over 300,000 times per year the Department shares information about individuals found to have engaged in child abuse or neglect by processing requests for background checks.[2] The Department has a "Background Check Central Unit" ("BCCU") that manages a central database to search and track department-wide background check information, including negative actions issued by CPS.[3] Any authorized entity may request a background check, including service providers, licensees, contractors, or other public or private agencies that have permission. This includes private businesses and organizations providing services to children, developmentally disabled persons, or vulnerable adults. WAC 388-06-0700, 0710; RCW 43.43.832.

As a result of the Semenenkos' failure to seek review of the Child Abuse Determination, it became final by default, and the Department

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[2] *See* App. A, "Background Check Central Unit," DSHS website at http://dshs.wa.gov/bccu/ *See also* WAC 388-06-0700 *et seq.*
[3] *Id.*

placed the Semenenkos' names on the registry of child abusers. Ms. Semenenko worked at "ResCare" as a caregiver for elderly people. (CP 15.) When Ms. Semenenko's employer ran a routine background check roughly a year after the incident at the rehab center, the employer discovered Ms. Semenenko's name on this registry. (CP 11.) As a result, in November, 2010 Ms. Semenenko was fired, which resulted not only in loss of income, but also the loss of health insurance for their family of five. (CP 62.) The Semenenkos are also now stigmatized as child abusers.

The King County Superior Court's dismissal of the Semenenkos' appeal in the absence of the administrative record

Upon filing of the Semenenkos' Petition for Judicial Review of the agency decision in King County Superior Court, the Department's Board of Appeals notified the parties that a certified copy of the original adjudicative proceeding (the "AR"), was sent to the King County Superior Court for filing. The AR never, however, became part of the King County Superior Court record. The King County Superior Court Clerk's Office has never been able to locate the original AR, and reports that they never received it. (Stipulation of Counsel, CP 51.) There is no evidence of record that the trial court considered the AR in rendering the decision now on appeal before this Court. The Semenenkos and their attorney in Superior Court were not aware that the trial judge did not have the record

before him when he made the decision to dismiss the case. The Assistant Attorney General representing the Department was also unaware of the absence of the AR, as she repeatedly cited to the AR in her brief. (CP 18-22.) The judge never mentioned that he did not have the AR before him at the time of the hearing on the Department's Motion to Dismiss. (RP, pp. 8-20.)

V. ARGUMENT

A. Standard of Review

Judicial review of administrative agency orders are governed by the Administrative Procedure Act (APA). *Hardee v. State of Washington, Dep't of Soc. & Health Serv.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011). The APA provides nine grounds for challenging an agency decision, including:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
> ...

RCW 34.05.570(3). The party challenging the validity of agency action has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). This court stands in the same position as the trial court when reviewing an administrative agency decision. *Hardee*, 172 Wn.2d at 6.

The issues raised in this appeal involve whether the agency decision is void as a matter of law under the application of a clear and unambiguous statutory time limit, the application of the doctrine of equitable estoppel to the agency's denial of administrative review, and the failure of the trial court to rely on the administrative record as a whole. Each of these issues raise questions of law or mixed questions of law and fact, all of which are subject to the "error of law" standard of *de novo* review under the APA. *City of Seattle v. Public Employment Relations Comm.*, 160 Wn. App. 382, 388, 249 P.3d 650 (2011).

B. The Child Abuse Determinations issued to the Semenenkos are void as a matter of law because the Department issued them more than 90 days after receiving the report of alleged abuse.

As of April 5, 2011, the Department had no authority whatsoever to issue the Child Abuse Determinations concerning the Semenenkos. The legislature granted the Department authority to investigate reports of alleged abuse and neglect, and to determine whether those allegations are founded or unfounded. RCW 26.44.010, RCW 26.44.030. The legislature put limits on the Department's authority, however, and mandated that the Department complete its investigations of reports of alleged abuse within 90 days. RCW 26.44.030 governs the Department's conduct of investigations, and provides:

> For reports of alleged abuse or neglect that are accepted for investigation by the department, the investigation shall be conducted within time frames established by the department in rule. **In no case shall the investigation extend longer than ninety days from the date the report is received,** unless the investigation is being conducted under a written protocol pursuant to RCW 26.44.180 and a law enforcement agency or prosecuting attorney has determined that a longer investigation period is necessary**. At the completion of the investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded.**

RCW 26.44.030(11)(a) (emphasis added.) In turn, the Department promulgated a rule that expresses the intent to complete investigations of child abuse within 45 days. Like the statute, the Department's rule states that, "in no case shall the investigation extend beyond 90 days..." WAC 388-15-021(7). CPS has a duty to notify the alleged child abuser in writing of any "finding made by CPS in any investigation of suspected child abuse and/or neglect." WAC 388-15-065. CPS satisfies this duty by mailing the CPS finding notice to the alleged perpetrator. WAC 388-15-069.

While the statute and regulation both allow one exception under which the Department may extend its investigation beyond 90 days, the facts of the Semenenko investigation do not fall within the exception.[4]

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[4] Investigations may only extend beyond 90 days if they (1) involve allegations of child sexual abuse; and (2) they are being conducted pursuant to a local written protocol; and (3) if law enforcement or the prosecuting attorney has determined that a longer investigation period is necessary. RCW

The time limit in which the Department must render a finding or close the case (as unfounded) is consistent with the statute's explicit emphasis on the protection of the due process rights of parents in the course of investigations of child abuse:

> [P]arents and children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that all citizens, including parents, shall be afforded due process, that protection of children remains the priority of the legislature, and that this protection includes protecting the family unit from unnecessary disruption.

RCW 26.44.100(1).

The 90 day limit is also consistent with the overall legislative purpose of Title 26.44.

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; ... Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions.

RCW 26.44.010.

The limitation on investigations regarding abuse and neglect is consistent too with the constitutional rights of parents. One of the "oldest of the fundamental liberty rights" recognized by the United States

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26.44.030(11)(a). None of the three mandatory elements to the exception are present here.

Supreme Court is a parent's right to the care, control, and custody of their children. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2045, 147 L.Ed.2d 49 (2000). When fundamental rights are at stake, a statutory time limit for specific state action must be strictly construed against the state. *State v. Morris*, 74 Wn. App. 293, 300, 873 P.2d 561 (1994) (holding that the state's failure to request a continuance within the statutory time frame properly results in a dismissal of criminal charges.) The Department has the burden of proving in the first instance that the finding it issued fell within the statutory time frame for issuing the finding. *Id.*

Hence, the statutory 90 day time limit between when the Department receives a report of alleged abuse and when it renders a determination that alleged abuse is founded or unfounded must be strictly construed and applied to ensure that parents are not unfairly accused, their privacy is not inappropriately invaded, and that their parental rights are safeguarded against "arbitrary, malicious or erroneous information or actions." RCW 26.44.010. Parents should not be faced with uncertainty of an indefinite duration as to the status of their family relationships or potential for interference by the state.

In this case, fundamental parental rights are at stake when the Department alleges abuse against a parent. Moreover, it is arbitrary and capricious for the Department to make a finding that not only creates a

stigma, but that impairs the ability of a person to work, a consequence that only comes to the person's attention several months to years after an alleged abuse incident. By right and statute, the state must carry out its authority to investigate timely and with due regard for the nature of the parent-child relationship. As a result, the issuance of a decision within the 90 day period is a *prima facie* condition to a lawful finding of abuse.

In this case, the Department did not conclude its investigation of alleged abuse by the Semenenkos until 146 days after it received the report alleging abuse -- 56 days after the statutory time period expired. The report of alleged abuse by the Semenenkos occurred on or about November 10, 2009. (CP 4, 92, 96.) The notices informing the Semenenkos of the Department's determination the alleged abuse was "founded" issued on April 5, 2010. (CP 4, 92, 96.)

The Department had only those investigative powers expressly conferred upon it by RCW 26.44.030(11)(a), namely, to, within 90 days, conduct an investigation of the report of alleged abuse by the Semenenkos. The Department acted outside its statutory authority when, beyond the 90 day period, it made a determination and issued notice to the Semenenkos that the alleged abuse was founded.

Because the Department failed to complete its investigation within the statutory 90 day period, the Child Abuse Determination is void as a

matter of law. "Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." *State v. Munson,* 23 Wn. App. 522, 597 P.2d 440 (1979). Agency actions made outside statutory authority are ultra vires, and void as a matter of law. *McGuire v. State*, 58 Wn. App. 195, 198, 791 P.2d 929 (1990). "Ultra vires acts are those done 'wholly without legal authorization or in direct violation of existing statutes....' " *Metropolitan Park Dist. v. Dep't. of Natural Resources*, 85 Wn.2d 821, 825, 539 P.2d 854 (1975) (quoting *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968)). Administrative actions exceeding authority delegated by law are void. *Id. See also, Lemire v. State, Dept. of Ecology, Pollution Control Hearings Bd.*, --- Wn.2d ---, --- P.3d ---, 2013 WL 4128853 (Washington Supreme Court, Aug. 15, 2013).

Under the APA, the court *must* grant relief from administrative orders issued outside the agency's statutory authority.

> (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
> ...
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

RCW 34.05.570.

Pursuant to CR 60(b) the court may relieve a party from a final judgment, order or proceeding for the following reasons:

> (5) The judgment is void;
> ...
> (11) Any other reason justifying relief from the operation of the judgment.

CR 60(b)(5) and (11).

The Semenenkos' case originated with a decision by the Department that the Semenenkos had engaged in child abuse. That decision was void *ab initio* because it exceeded the Department' statutory authority. Therefore, both the administrative Child Abuse Determination against the Semenenkos and the King County Superior Court's decision essentially affirming the Determination by default are void as a matter of law and must be vacated. The Court should further order that the Child Abuse Determination be removed from the Semenenkos' records, and that their names be removed from the central registry of abusers.

C. The Department is equitably estopped from enforcing the 20-day limit on filing a request for review.

The doctrine of equitable estoppel prevents a party from making a later claim where (1) one party has made an admission, statement, or act inconsistent with the later claim, (2) another party reasonably relies on the

admission, statement, or act, and (3) the relying party would be injured if the first party is allowed to contradict or repudiate the admission, statement, or act. *Brevick v. City of Seattle,* 139 Wn. App 373, 378-379, 160 P.3d 648 (2007); *Kramarevcky v. Dep't. of Soc. & Health Serv.,* 122 Wn.2d 738, 863 P.2d 235 (1993).

The Department made a statement that was inconsistent with a later claim. After the Semenenkos received the April 5, 2010 Child Abuse Determination and were confused by it, they called the Department. The Department specifically told them that the April 5, 2010 letter was a mistake, and that they should therefore ignore it. Now the Department is claiming the Semenenkos should not have ignored the notice and that because they failed to seek review within 20 days, the Determination is final and cannot be reviewed or reversed.

It was reasonable for the Semenenkos to rely on the Department's representation that the notice was a mistake and should be ignored. Four months earlier they were told by the Department's social worker that everything was resolved; they received a written notice from the Department that their case was closed; and, after they received the April 5, 2010 Child Abuse Determination, they were told by a Department employee that the Determination letter must be a mistake, and to ignore it. Furthermore, because English is the Semenenkos' second language, it is

even more understandable that they would defer to the instructions of the Department's employee who told them that the Child Abuse Determination letter was a mistake, since it was difficult for the Semenenkos to even understand the contents of the notice, let alone the harsh consequences of the Determination.

Even for someone whose first language is English, the determination letter is confusing. It says that the finding is confidential and cannot be released to the public. But it also says that it may be used in determining if one can be licensed or employed to provide care for children or vulnerable adults. Though Ms. Semenenko was employed as a care provider as of April 5, 2010, she had not experienced any adverse employment determination.

The Semenenkos already have suffered and will continue to suffer significant harm as a result of their justified reliance on the Department's statement that the April 5, 2010 notice was a mistake. Ms. Semenenko lost her job, the family lost their healthcare coverage, and Ms. Semenenko has lost her ability to work as a caregiver in the future. Likewise, this avenue of employment is also not one Mr. Semenenko can pursue in the future. The Semenenkos will also be prohibited from working or volunteering in any position where they may have access to children or vulnerable adults. Finally, both Mr. and Ms. Semenenko have been

wrongly stigmatized as child abusers, all because they tried to stop their daughter from overdosing on drugs.

D. The Semenenkos had good cause to file their request for review more than 20 days after receiving the notice of founded finding.

If the Court does not vacate the Child Abuse Determinations against the Semenenkos because they are void as a matter of law, the Court should remand the case for an administrative hearing on the merits of the determination that the Semenenkos committed child abuse. The trial court dismissed the Semenenkos' petition for judicial review thereby sustaining the agency's decision to deny them an administrative hearing to challenge the Determinations because their requests for review were untimely. This decision was based on misapplication of RCW 26.44.125, and failure to apply WAC 388-02-0020, which provides for good cause for a late hearing request.

Under RCW 26.44.125(3), a request for an internal agency review of a CPS "finding" of abuse is a precondition to requesting an adjudicative proceeding to challenge the agency decision. That provision states:

> 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.**

(Emphasis added.) RCW 26.44.100(2) expressly provides that "[w]henever the department completes an investigation of child abuse or neglect report under chapter 26.44 RCW, the department shall notify the subject of the report of the department's investigative findings." The Semenenkos have already demonstrated that the Department failed to comply with the notice requirements of RCW 26.44.100 by failing to timely "notify [them] of the department's investigative findings." Hence, the Semenenkos are statutorily exempt from the requirement that they request internal review of the finding.[5]

Assuming *arguendo* that the Semenenkos are subject to the "internal review" requirement of RCW 26.44.125(3), under the statutory scheme at issue, the internal review is an extension of the adjudicative hearing process under the APA.

Washington Administrative Code 388-02 *et seq.* sets out the procedures for resolving disputes with the Department and supplements the applicable rules under the APA. WAC 388-02-0005. It specifically provides that a party who failed to appear, act or respond to an agency

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[5] While a person subject to a departmental finding of child abuse or neglect might legitimately challenge, as a denial of due process, the legality of requiring an internal review process as a condition for seeking any judicial review of adverse agency action (*see* the APA provisions RCW 34.05.413(2) (agency shall commence an adjudicative proceeding "when required by law or constitutional right") and 34.05.510, *et. seq.* (judicial review of agency action)), the court need not reach that issue in this case.

action, may be excused for "good cause." Good cause is defined at WAC 388-02-0020:

> (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.

The WAC does not limit "good cause" to only the two examples listed, but instead mandates that the provisions of CR 60 be used as a guideline. Under Superior Court Civil Rule 60(b), a court may relieve a party from a final order where "[t]he judgment is void" and for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(5); CR 60(b)(11).

As set forth above, the Child Abuse Determinations made against the Semenenkos were void and, hence, the decision of the King County Superior Court upholding the finding is also void. Therefore, under CR 60(b)(5), the Semenenkos should be relieved of the King County Superior Court Order of Dismissal which sustained the Department's finding of abuse and the subsequent decisions that denied the Semenenkos any

means of challenging the decision through the administrative hearing process.

Through the "guidance" of CR 60, the Semenenkos should also be relieved from the Child Abuse Determination under a CR 60(b)(11) analysis, as it is manifestly unjust to sustain the finding when the Semenenkos have not been provided any due process whatsoever on the underlying merits of the Department's determination.

The Semenenkos meet the basic elements generally necessary to prevail under a CR 60 motion to vacate. The Semenenkos (1) have a prima facie defense to the Department's Determination; (2) they failed to timely seek review because they were misled in the need to do so; (3) there was irregularity in the determination process and the untimely notice added to their confusion; (4) they acted with due diligence after discovering the Child Abuse Determination had been made final through default; and (5) the Department will not experience substantial hardship if the court vacates the founded finding. See *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581(1968); *Sacotte Const., Inc. v. National Fire & Marine Ins. Co,* 143 Wn. App. 410, 417, 177 P.3d 1147 (2008).

The Semenenkos have a prima facie defense to the Department's Child Abuse Determination. First, the Semenenkos have a procedural defense: the Determination was void because it was made more than 90

days after the report of alleged abuse. Second, the Semenenkos deny they engaged in abuse of their daughter. They were instead trying to save their daughter's life when they forcibly removed her from the bathroom at the drug rehab facility.

The Semenenkos did not timely seek review because they justifiably relied on the Department's statement that the April 5, 2010 Determination letter was issued in error, that their case had been closed, and that therefore there was no need to seek review of the Determination. The Semenenkos acted with due diligence after discovering the Determination had become final through default. Ms. Semenenko did not discover the effect of the Child Abuse Determination until she was notified by her employer that her name appeared on a registry of child abusers. After the Semenenkos discovered this, they began the process of seeking review of the Determination.

The Department will not experience substantial hardship if the Court vacates the Determination. The Department will not be prejudiced by having to go back and prove the merits of the Determination made in 2010. They state that the claimed altercation with the daughter was captured on videotape. If so, the evidence would not be hard to proffer.

Finally, in applying the CR 60(b) analysis to this case, the Court should note that the agency action from which the Semenenkos seek relief

was in essence, a default judgment, having been entered after the Semenenkos failed to seek review within 20 days of the founded finding. Default judgments are frowned upon by Washington courts. *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). Instead our courts favor resolving cases on their merits. *Id.* Washington courts "'liberally set aside default judgments pursuant to ... CR 60 and for equitable reasons in the interests of fairness and justice.'" *Sacotte Const., Inc.* at 414-415, 177 P.3d 1147 (2008) quoting *Morin* , 160 Wn.2d at 161. A decision not to set aside a default judgment is more likely to be reversed than a court's decision to set aside a default judgment. *Morris v. Palouse River & Coulee City R.R., Inc.,* 149 Wn. App 366, 370, 203 P.3d 1069 (2009). Default judgments are proper only when the adversary process has been halted because of an essentially unresponsive party. *City of Des Moines v. Pers. Prop. Identified as $81,231 in U.S. Currency*, 87 Wn. App. 689, 696, 943 P.2d 669 (1997).

Here the Semenenkos were responsive, and the default should be set aside in the interest of fairness and justice. CR 60(b)(11). They called the Department the very day they received the Determination letter. Their attempts to introduce evidence that they were entitled to a hearing based on equitable estoppel were not heard. The ALJ stated that he had "no equitable power" and that he was prevented from reviewing a request for

review that was submitted more than 20 days after the Determination letter was issued. (CP 80.) The Review Judge at the Board of Appeals similarly strictly applied the WAC requiring alleged perpetrators to seek review of a finding of abuse within 20 days. (CP 69-70.) The King County Superior Court Judge would have had the ability to make an equitable decision, but (in violation of the Administrative Procedure Act, as set forth below) he did not even have before him the administrative record, and was therefore prevented from doing so.

E. The King County Superior Court erred by dismissing the Semenenkos' appeal without reviewing the administrative record.

Judicial review of agency decisions is governed by the Administrative Procedure Act. RCW 34.05 *et seq*. Within thirty days after a petition for judicial review is filed, the agency must transmit to the court the original or a certified copy of the agency record for judicial review. RCW 34.05.566(1). A court shall grant relief from an agency decision if it determines that the agency engaged in an unlawful procedure or has failed to follow a prescribed procedure, or if the order is not supported by "evidence that is substantial when viewed **in light of the whole record before the court, which includes the agency record for judicial review**." RCW 34.05.570(3)(c) and (e) (emphasis added.)

Judicial review of an administrative decision in a contested case is not selective, but must be conducted on the entire record, not by isolating evidence. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 324, 646 P.2d 113, cert. denied, 459 U.S. 1106, 103 S. Ct. 730, 74 L.Ed.2d 954 (1982). The appellate court sits in the same position as the King County Superior Court, and must apply the Administrative Procedure Act standards to the administrative record that was before the administrative agency. *Herbert v. Washington State Pub. Disclosure Com'n*, 136 Wn. App. 249, 254, 148 P.3d 1102 (2006). In an appeal of an administrative decision, the court of appeals reviews the administrative record directly rather than reviewing the superior court record. *Lemire v. State, Dept. of Ecology, Pollution Control Hearings Bd.*, --- Wn.2d ---, --- P.3d ---, 2013 WL 4128853 (Washington Supreme Court, Aug. 15, 2013).

In this case, though the Board of Appeals informed the parties that the AR was transmitted to the King County Superior Court, through some clerical mistake or inadvertence, the AR was never filed in King County Superior Court or was never filed in this case. As a result, the order to dismiss entered by King County Superior Court was entered without considering the "whole record before the court," which is required under the Administrative Procedure Act, RCW 34.05.570(3)(e).

While the order of dismissal was entered based on the uncontested fact that the Semenenkos had failed to appeal the Child Abuse Determination within 20 days of receipt of the Determination letter, the Semenenkos had also argued that the court should allow their appeal based on equitable estoppel and other legal claims. (CP 23-35; RP 8-20.) Because the Superior Court judge did not have the AR, in violation of the Administrative Procedure Act, he failed to consider the Semenenkos' equitable estoppel argument "in light of the whole record before the court, which includes the agency record for judicial review." RCW 34.05.570(3)(e). Moreover, the court could not have considered other relevant and applicable legal arguments that were suggested on the face of the administrative record, including that the good cause requirements of WAC 388-02-0020 applied and/or that the finding itself was unlawful and void from the outset, rendering the failure to "appeal" within the administrative timeframe inapplicable to a determination that the finding itself is unlawful and must be reversed.

For these reasons and based on CR 60(b)(11), the Court should order that the King County Superior Court's order of dismissal be vacated.

F. The Semenenkos are entitled to reasonable attorneys' fees under RCW 4.84.350 (EAJA).

The Equal Access to Justice Act, RCW 4.84.350, mandates that a court shall award a qualified party who prevails in a judicial review of an agency action, fees and other expenses including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. The agency has the burden of proving that the exception applies. Assuming the Semenenkos prevail in this appeal, they will have "obtained relief on a significant issue that achieves some benefit that the qualified party sought." RCW 4.84.350(1). They will have succeeded in getting the Determination of Child Abuse against them vacated as a matter of law. Alternatively, they will succeed in obtaining a hearing on the merits of the Determination. In either case, they will have achieved some or all of the benefit they seek. The Semenenkos are entitled to their costs and attorneys' fees in an amount to be submitted in a Cost Bill pursuant to RAP 18.1.

VI. CONCLUSION

The Semenenkos respectfully request that the Court vacate the King County Superior Court's order of dismissal, and that it declare void the Department's Child Abuse Determination against Mr. and Ms. Semenenko. The Semenenkos further request that the Court order the Department to remove the Semenenkos' names from any and all registries

over which they exercise control, that contain the names of people who have been found to have engaged in child abuse or neglect.

Alternatively, should the Court find that the trial court failed to consider the administrative record in violation of the APA, the Semenenkos respectfully ask that the matter be remanded to the King County Superior Court for review in light of the complete record.

Alternatively, should the court find good cause for the Semenenkos' untimely request for review, they respectfully ask that the matter be remanded to the Office of Administrative Hearings for an appropriate adjudicative proceeding on the underlying merits of the alleged abuse.

RESPECTFULLY SUBMITTED this 24th day of October, 2013.

NORTHWEST JUSTICE PROJECT

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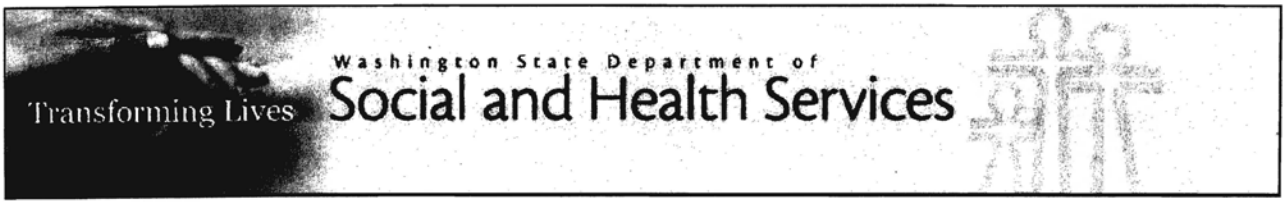
Attorney for Appellants

VII. APPENDIX

App. 1	"Background Check Central Unit," DSHS website at http://dshs.wa.gov/bccu/



Background Check Central Unit

Our staff process over 300,000 background checks annually, including approximately 100,000 fingerprint based checks. Background checks conducted through the Background Check Central Unit include a search of the Washington State Patrol and Washington State Courts criminal history data systems as well as the Department of Health and Department of Social and Health Services negative actions.
BCCU conducts background checks for agencies providing services to vulnerable adults, juveniles, and children such as:

- Nursing homes, assisted living facilities, and adult family homes
- Adult in-home care providers
- Child care centers, in-home child care providers
- Residential programs for children and youth
- Services for people with developmental disabilities
- DSHS contracted services

Learn more about Background Check Central Unit by reading our History and Overview (word).

The BCCU Guidebook is no longer available. For questions about program requirements, call your program representative, licenser, contractor or social worker. For questions about the Background Check Central Unit operations, email BCCUInquiry@dshs.wa.gov or Phone 360-902-0299.

Washington State Patrol RAP Sheet Information.

Frequently Asked Questions - Washington Court Search Results.

You can receive helpful updates by joining the BCCU ListServ. This email method provides information on various background check processes (current policy issues, helpful hints to assure proper form completion, system downtimes, turnaround times for processing background checks, etc.). If you are from outside DSHS and would like to receive this information, please email your request to BCCU Inquiry.

APPENDIX 1

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

YEVGENY SEMENENKO and NATALYA SEMENENKO, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	NO. 70354-4-1 ERRATA Appellants' Opening Brief (Corrected)

Appellants, Yevgeny and Natalya Semenenko, through counsel, file herewith APPELLANTS' CORRECTED OPENING BRIEF to correct:

1) Citations to the record to properly identify the page numbers of the Clerks Papers designation of the administrative record to which the citations relate;

2) Certain typographical errors to properly refer to "equitably estopped" in place of "collaterally estopped" on pages 2 and 3, and in Argument Heading C; and

3) The statutory references on pages 14,17 to properly refer to RCW 26.44.030(11)(a) instead of RCW 26.44.125(11)(a) and page 22 to refer to RCW 26.44.125 instead of RCW 26.55.125.

The Errata is necessary due to the extensive delay in the Superior Court's filing of the official Administrative Record. Appellants make no change in the substance of the Brief.

Respectfully submitted,

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