NO. 90871-I

SUPREME COURT OF THE STATE OF WASHINGTON

YEVGENY SEMENENKO AND NATALYA SEMENENKO,	)	
PETITIONERS,	)	
V.	)	MOTION TO REJECT ANSWER
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
RESPONDENT.	)	

I. IDENTITY OF MOVING PARTY

Petitioners, Yevgeny and Natalia Semenenko, ask for the relief designated in Part 2.

II. STATEMENT OF THE RELIEF SOUGHT

Petitioners ask the Court to reject DSHS' Answer to the Petition for Discretionary Review as untimely filed. Alternatively, Petitioners ask that they be allowed the opportunity to briefly clarify misstatements contained in the Answer, which may impact the Court's consideration of their Petition for Review.

III. FACTS RELEVANT TO MOTION

The Semenenkos timely filed and served their Petition for Review of the Court of Appeals decision in this case on October 3, 2014. The Department of Social and Health Services (the Department or DSHS), filed its Answer to the Petition on November 4, 2014 and served counsel for the Semenenkos by email only that same day. The Answer misrepresents the record of the case and the legal position of the Petitioners. It also proffers new facts not raised below and cites a case not previously referenced by the parties or the Court of Appeals.

IV. GROUNDS FOR RELIEF AND ARGUMENT

a. The Department filed its Answer more than 30 days after the date of service of the Petition - outside the deadline set out in RAP 13.4(d).

RAP 13.4(d) authorizes a party to file an answer to a petition for review within thirty (30) days after service on the party of the petition. The Department filed its Answer more than 30 days after the deadline contained in RAP 13.4(d) and, thus, the Answer is untimely. Ironically, a key issue raised in this case is whether the Department can deny a hearing to the Semenenkos based on their failure to seek review of administrative findings of abuse under RCW 26.44.125 within a 20-day statutory deadline. Twice now the Department has missed critical deadlines for carrying out authorized actions related to this case: (1) The Department

failed to comply with the statutory mandate of RCW 26.44.030(12) to complete its investigations and notify alleged perpetrators within 90 days of receiving a report of the alleged abuse; and, (2) the Department failed to file an Answer to the Petition for Review within 30 days as required by RAP 13.4(d).

While one cannot excuse the former, the latter can arguably be excused by the Court, but should not be. The Department cannot have it both ways. It should not be allowed to hold the individual Appellants to the devastating results of an abuse finding based on an "untimely" application for *internal* agency review of the finding, while at the same time violate clear time limits imposed by statutes and court rules. This alone is a basis for rejecting the Department's Answer to the Petition.

b. The Department's Answer misstates the Petitioners' legal position and asserts new facts not supported by the record.

If the Court permits the Answer to be filed and considered as part of its decision on whether to grant review, the Semenenkos point out two significant misstatements in the Answer:

First, the Department erroneously asserts that both parties "agree that the statute unambiguously grants DSHS legal authority to issue findings." Answer, p. 14. This is untrue and was clearly indicated to the contrary in the Petition for Review. See Petition for Review, p. 10, fn. 13.

The Semenenkos reiterate that throughout the course of this appeal, their position has always been that DSHS *lacks* legal authority under RCW 26.44.030(12)(a) to issue an administrative finding once the 90-day mandatory statutory deadline has passed. The statute is clear and unambiguous on this point and not open to interpretation.

Second, as to the application of "good cause" for filing a late request for an administrative review of the finding under WAC 388-02-0020, for the first time the Department proffers that the availability of WAC 388-02-0020 is impacted by the Semenenkos' delay between the time they discovered the imposition and permanent impact of the finding on their ability to work and when they sought the internal review. However, there is no administrative record or related findings of fact with respect to reasons for such delay and any inference to be drawn is merely speculative. This Court should not make findings of fact in the first instance absent an administrative record. RCW 34.05.558; *Raven v. Department of Social and Health Services*, 77 Wn.2d 804, 816, 306 P.3d 920 (2013) (findings of fact reviewable only for substantial evidence).

Moreover, given that good cause under WAC 388-02-0020 is to be guided by standards applicable under CR 60(b), the Department has neither claimed nor shown any prejudice caused by the Semenenkos' delayed request for review.

For the first time in the course of this case, the Department cites to *Kingery v. Dep't. of Labor & Indus.,* 132 Wn.2d 162, 176, 937 P.2d 565 (1997) in support of its position that the "good cause" regulation does not provide the Semenenkos relief from the delayed request for review. Without significant discussion, suffice it to say that *Kingery* is factually and legally distinguishable insofar as the delay in time between the original agency decision and request for review was eight years, well beyond the CR 60(b) time frame and the original order was not arguably void. *Id* at 170, citing *Marley v. Dep't. of Labor & Indust.,* 125 Wn.2d 533, 539, 886 P.2d 189 (1994) ("*Marley* stands for the broad proposition that where an aggrieved party has not appealed a final Department order deciding an industrial claim within the 60-day time period of RCW 51.52.050 and .060, that party is precluded from rearguing the same claim *unless the order was void when entered.* Emphasis added.). In this case, the Semenenkos maintain that the finding was void when entered as it was issued well past the mandatory deadline applicable to the Department.

Finally, while not raising a new issue subject to review, it is notable that the Department's argument that the Petition raises no issues of

substantial public interest contradicts its position set out in its Motion to Publish the Court of Appeals decision for which review is sought.[1]

V. CONCLUSION

For all of the foregoing reasons, the Court should grant the motion to reject the Answer or in the alternative consider the points set forth herein in deciding whether to grant the Petition for Review.

Respectfully submitted this 5th day of November, 2014.

NORTHWEST JUSTICE PROJECT

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[1] See Department's Motion to Publish at p. 5: "As noted by counsel for appellants in briefing, some superior courts in the past have concluded that a finding after more than 90 days is void ab initio. Such decisions means that DSHS findings...are subject to different standards in different counties.... Clarity of child abuse/neglect law is important and necessary, justifying publication under RAP 12.3(d).

SUPREME COURT
OF THE STATE OF WASHINGTON

Yevgeny Semenenko and Natalya Semenenko, Petitioners, v. Department of Social and Health Services, Respondent.	**Supreme Court No. 90871-I** **CERTIFICATE OF SERVICE**

I certify that on the 5th day of November, 2014, I caused a true and correct copy of the Motion to Reject Answer to be served on the following, via electronic mailing and via ABC Legal Services directed to:

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Dated: November 5, 2014

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