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62808-9

NO. 62808-9-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MONTY RICHARDSON,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Appellant, Monty Richardson, provided sole care for his infant daughter KMR for approximately 30-45 minutes on August 29, 2005 while he was under the influence of crack cocaine. In addition, he smoked crack cocaine that day in the baby's presence. The Department of Social and Health Services determined that Mr. Richardson's behavior constituted negligent treatment or maltreatment of his daughter and made a founded finding of child neglect against him. This finding has been affirmed through four levels of review: the DSHS internal review, the administrative hearing, review by the DSHS Board of Appeals, and review by the superior court.

Mr. Richardson has failed to advance any argument or theory that would give this court a legal basis to overturn the Review Decision and Final Order issued by the DSHS Board of Appeals on March 19, 2007 or the Decision on Reconsideration issued April 20, 2007. There is no basis for remanding the case, nor would a remand serve any purpose because Mr. Richardson admitted that he cared for his daughter while under the influence of crack cocaine. Mr. Richardson's failure to call his wife to testify at the administrative hearing does not justify a remand, as he had full opportunity to have her testify. In addition, his wife's proffered

testimony does not meet the standard for new evidence under the Administrative Procedure Act. Finally, the letter and declaration from Mr. Richardson's sister and niece written two years later, which he offered at superior court, do not meet the standard for new evidence under the APA.

The finding of neglect against Mr. Richardson is supported by substantial evidence. Accordingly, the DSHS Review Decision and Final Order and the Decision on Reconsideration must be affirmed.

II. ISSUES

- A. Should the Appellant's proffered "new evidence" be excluded because it was available to him at the time of the administrative hearing?
- B. Should the Appellant's request for a remand be denied, because he admitted that he provided sole care for his infant daughter while under the influence of crack cocaine and because he chose not to present testimony from his wife, who in any event was not an eyewitness to the events in question?
- C. Is the founded finding of child neglect against the Appellant supported by substantial evidence?

III. COUNTERSTATEMENT OF THE CASE

Appellant Monty Richardson is the father of KMR, who was born on February 8, 2005. CP 91, 127, 194. Janet Blessing (a.k.a. Janet Blessing Richardson) is the wife of Mr. Richardson and the mother of KMR. CP 59, 77, 91, 127, 194.

On August 29, 2005, Mr. Richardson came home under the influence of crack cocaine. CP 216-18, 225, 227, 262-63. He cared for 6 month old KMR by himself for approximately 30-45 minutes while he was under the influence of crack cocaine. CP 92-95, 128-30, 254, 256; *see* CP 230-33, 235-36, 240-44, 268. He then returned the baby to his sister, Deana Terrone, who resided in the same household. CP 94, 129-30. Mr. Richardson admitted that smoking crack cocaine affected his judgment and motor skills. CP 230-31; *cf.* CP 213, 251. With regard to coming home high on August 29, 2005, Mr. Richardson testified that “[i]t’s stupid, wrong, and it was very, very scary to [KMR]. I mean to even to hold her for 15 minutes, it was so bad.” RP 268.

Also on August 29, 2005, Mr. Richardson smoked crack cocaine at his home while the baby was in the same room. CP 92-94, 128, 152, 212, 218; *see also* CP 257-58. Ms. Terrone was concerned about the baby’s welfare due to Mr. Richardson’s drug use. CP 94-95, 130. Ms. Terrone

discussed this with her daughter, Shylla, and her daughter then made a CPS referral. CP 92, 128, 219, 251-523; *see* CP 242, 245. Janet Blessing was not at home during the events of August 29, 2005. *See* CP 85; RP 11, 18.

Suzy¹ Vigesaa is a Child Protective Services (CPS) investigator for the Department of Social and Health Services (DSHS or Department). CP 209. Ms. Vigesaa investigated the CPS referral and determined that the allegation of negligent treatment or maltreatment of KMR was founded as to Mr. Richardson. CP 223; *see* CP 224. CPS sent Mr. Richardson a letter on September 1, 2005, informing him that this allegation of child abuse or neglect was founded. CP 151-56. Mr. Richardson requested that the Department review this finding. CP 158. The Department conducted a review and determined that no change would be made to the finding. CP 164-65.

Mr. Richardson then requested an administrative hearing, CP 162, and one was held before ALJ Leslie Wagner on November 16, 2006. CP 126. Mr. Richardson's wife, Janet Blessing, was present at the Office of Administrative Hearings at the start of the hearing, but because she was a witness, she was excused to wait outside. CP 194-96. Ms. Vigesaa, Mr.

¹ The Review Decision and Final Order, as well as the Initial Order, spell Ms. Vigesaa's first name as Susie. However, the correct spelling is Suzy, which is short for Suzette. *See* CP 193.

Richardson, and Ms. Terrone testified as witnesses. CP 126, 193. Mr. Richardson did not call Ms. Blessing to testify, although the Administrative Law Judge asked him twice if he had any other witnesses to present.² CP 266, 269. On January 5, 2007, ALJ Wagner issued an Initial Order affirming the founded finding of negligent treatment or maltreatment against Mr. Richardson, who then appealed to the DSHS Board of Appeals. CP 126-35.

On March 19, 2007, Review Judge Christine Stalnaker issued a Review Decision and Final Order for the DSHS Board of Appeals, affirming the Initial Order. CP 77-100. Mr. Richardson sought reconsideration of that decision, CP 68-73, which was denied by Review Judge Stalnaker on April 20, 2007. CP 59-66.

Mr. Richardson then timely filed a Petition for Judicial Review in King County Superior Court. CP 1-9. Along with the briefing he filed in superior court, Mr. Richardson submitted a letter from his sister, Deana Terrone, dated December 27, 2007, and a declaration from Ms. Terrone's daughter, Shyla Winterhollow,³ dated December 25, 2007. CP 183, 186-89; RP 17. A hearing was held before King County Superior Court Judge

² Mr. Richardson's witness list for the administrative hearing included Deana Turrone, Shylla Towne, and Janet Blessing Richardson. CP 168.

³ Although this document is entitled Declaration of Shyla Winterhollow, the declarant's last name is spelled Winterholler in two places within the document.

Gregory Canova on December 5, 2008.⁴ Judge Canova determined that Ms. Terrone's letter and Ms. Winterhollow's declaration did not meet the strict requirements for admissibility as new evidence, because Mr. Richardson was aware of this information at the time of the administrative hearing. RP 17; *see* note 2 *supra*. Therefore, Judge Canova declined to consider those two documents. RP 17-18. At the end of the hearing, Judge Canova entered an order, denying Mr. Richardson's petition for judicial review, affirming the Review Decision and Final Order dated March 19, 2007, and affirming the Review Judge's order denying reconsideration dated April 20, 2007. CP 320, 329-30; RP 18-19. Mr. Richardson then timely filed a Notice of Appeal to the Court of Appeals. CP 319, 321.

IV. ARGUMENT

A. General Principles Governing Judicial Review

Unless provided otherwise in the Administrative Procedure Act (APA) or some other statute, RCW 34.05.570(1) provides that the following four principles govern review of all forms of agency action:

⁴ Janet Blessing had previously appeared before Judge Canova on another matter, as Judge Canova noted at the hearing in the instant case on December 5, 2008. RP 11. Mr. Richardson did not allege that this amounted to a conflict at the hearing on December 5, 2008, nor did he file an Affidavit of Prejudice pursuant to RCW 4.12.050.

- (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
- (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
- (c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
- (d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

RCW 34.05.570(1)(a)-(d).

RCW 34.05.574 expressly sets forth the types of relief a court can award:

In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

RCW 34.05.574(1).

B. Judicial Review Of Agency Orders In Adjudicative Proceedings

When reviewing an agency action, the Court of Appeals sits “in the same position as the superior court, applying the standards of the APA directly to the record before the agency.”

Costanich v. Dep't of Soc. & Health Servs., 138 Wn. App. 547, 554, 156 P.3d 232 (2007), *rev'd on other grounds*, 164 Wn. 2d 925, 194 P.3d 988 (2008), *citing Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 414, 120 P.3d 130 (2005).

Judicial review of an agency decision is not a trial *de novo*, but rather it is limited to review of the record of proceedings made before the agency. RCW 34.05.558. Judicial review is also limited to final administrative orders. *See Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *Refai v. Central Wash. Univ.*, 49 Wn. App. 1, 6, 742 P.2d 137 (1987), *review denied*, 110 Wn.2d 1006 (1988).

The court, in its review, must give deference to the party who prevailed in the administrative proceeding and must accept “the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Sunderland Family Treatment Serv. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

The standards of review of agency orders in adjudicative proceedings are set forth in RCW 34.05.570(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:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (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;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency, or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

In reviewing a question of law, the court determines whether the agency has erroneously interpreted or applied the law under the "error of law" standard. See *Shoreline Community College v. Employment Sec. Dep't*, 120 Wn.2d 394, 401, 842 P.2d 938 (1992). Under the error of law standard, the court reviews the agency's legal conclusions *de novo*, giving substantial weight to the agency's interpretation of the statute it administers. *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). The party asserting the error bears the burden of demonstrating that the agency erroneously interpreted or applied the law. RCW 34.05.570(1)(a); *King County*, 142 Wn.2d at 553; see *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002).

Findings of fact are subject to review under the "substantial evidence" standard. RCW 34.05.570(3)(e); *Terry v. Employment Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). The findings which are reviewed by the court are those of the final agency decision-maker and not those of the administrative law judge who entered the initial order. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 404-06, 858 P.2d 494 (1993); *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352, review denied, 127 Wn.2d 1020 (1995).

In other words, the court is to review the whole record and if there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld. This is so even if the reviewing court would make a different finding from its reading of the record. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 675-76 and n. 9, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997). Unchallenged findings of fact are treated as verities on appeal. *Tapper*, 122 Wn.2d at 407.

The arbitrary and capricious test is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Arbitrary and capricious has been defined as action which is willful and unreasoning in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly upon due consideration, even though one may believe the conclusion reached was erroneous. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *Pierce Cy. Sheriff*, 98 Wn.2d at 695. Under this test, a court will not set aside a discretionary decision of an agency absent a clear showing of abuse. *ARCO Prods. Co. v. Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

Harshness is not the test for arbitrary and capricious action. *Heinmiller*, 127 Wn.2d at 609 (court upheld agency's indefinite suspension of therapist's license upon a finding of unprofessional conduct); *In re Discipline of Brown*, 94 Wn. App. 7, 16-17, 972 P.2d 101, review denied, 138 Wn.2d 1010 (1999) (agency sanction that is challenged as harsh will be upheld if the sanction was imposed after party had an adequate opportunity to be heard). To be overturned, a discretionary agency decision must be manifestly unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510, 837 P.2d 647 (1992), *aff'd*, 122 Wn.2d 801, 863 P.2d 64 (1993).

C. No New Evidence Should Be Considered By The Court Of Appeals.

During the process of judicial review, the court may only receive new evidence under very limited circumstances. Namely, the new evidence must relate to the validity of the agency action at the time the action was taken, and the new evidence must be 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.

RCW 34.05.562(1). *See Keenan v. Employment Sec. Dep't*, 81 Wn. App. 391, 395-96, 914 P.2d 1191 (1996).

The court may also remand a matter to the agency before final disposition of a petition for review if 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;

RCW 34.05.562(2)(b).

Mr. Richardson submitted a Declaration of Shyla Winterhollow (his niece) dated December 25, 2007 and a letter from his sister Deana Terrone dated December 27, 2007 to the superior court. CP 183, 186-89. These documents were attached as addenda to his Trial Brief/Overview which was filed in the superior court on December 31, 2007. CP 173-82, 184-85. These documents were properly excluded by Superior Court Judge Canova, because they were created well after the administrative hearing was completed and they do not meet the requirements for admissibility under RCW 34.05.562(1). Moreover, these documents do not constitute new evidence under RCW 34.05.562(2)(b), because Mr.

Richardson was aware of this information and these witnesses at the time of the administrative hearing. In fact, Ms. Terrone testified at the hearing, and his niece Shylla was listed on Mr. Richardson's witness list. *See* CP 168, 197. In an administrative appeal under the APA, the decision to admit or refuse newly offered evidence is largely within the superior court's discretion and will not be reversed on appeal without a showing of manifest abuse of discretion. *Okamoto v. Employment Sec. Dep't*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001), *review denied*, 145 Wn.2d 1022 (2002). Mr. Richardson has not made any showing that Judge Canova manifestly abused his discretion by excluding these two documents. Thus, these additional documents must not be considered by the Court of Appeals, and they do not support a remand to the Office of Administrative Hearings.

D. This Case Should Not Be Remanded to the Office of Administrative Hearings.

The Appellant invites this court to remand the case to the Office of Administrative Hearings. Br. of App. at 24. However, remand would serve no purpose, because Mr. Richardson admitted one of the two alternative bases for the founded finding of neglect. Specifically, he admitted that he came home high on August 29, 2005; that he cared for KMR by himself for a period of time while he was under the influence of

crack cocaine; and that crack cocaine affected his judgment. CP 228-32, 266, 268.

The Administrative Law Judge found that “[e]ven if Appellant had not smoked crack in KMR’s presence (which the ALJ has found he did), his actions in exercising care, custody, and control of KMR while high constitute negligent treatment and maltreatment.” CP 133. The ALJ found and the Review Judge affirmed that:

Appellant’s actions in being under the influence of crack cocaine *and/or* smoking crack cocaine while exercising care, custody, and control of KMR, on August 29, 2005, show a serious disregard by Appellant for the consequences to KMR of such magnitude as to present a clear and present danger to KMR’s health, welfare and safety.

CP 130-31; CP 95 (emphasis added). This finding is made in the alternative, which means that either the act of caring for the child while under the influence of crack cocaine or the act of smoking crack cocaine in the child’s presence were independently sufficient to support the finding of negligent treatment or maltreatment.

Furthermore, RCW 26.44.020 defines “abuse or neglect” to mean:

sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

Former RCW 26.44.020(12) (effective 10/1/08, this section has been recodified at RCW 26.44.020(1)).

RCW 26.44.020 goes on to define “negligent treatment or maltreatment” to mean:

an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. *When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight.*

Former RCW 26.44.020(15) (emphasis added; effective 10/1/08, this section has been recodified at RCW 26.44.020(13)). Mr. Richardson’s substance abuse was not merely a contributing factor; it was the determining factor that he committed negligent treatment or maltreatment of his infant daughter KMR. Evidence of his substance abuse “shall be given great weight.” Former RCW 26.44.020(15).

At the administrative hearing, Mr. Richardson admitted that he cared for the child while he was under the influence of crack cocaine. This fact independently supports the finding of neglect, regardless of whether he smoked crack cocaine in the same room as the baby. Thus, a

remand to the Office of Administrative Hearing could not result in a change to the finding of neglect.

1. There is substantial evidence to support the founded finding of negligent treatment or maltreatment.

The administrative record includes the testimony of CPS investigator Suzy Vigesaa, Monty Richardson, and Mr. Richardson's sister, Deana Terrone. The record clearly contains substantial evidence to support the findings of the Review Judge that Monty Richardson committed negligent treatment or maltreatment of KMR when he provided sole care for his infant daughter for a period of time on August 29, 2005 when he was under the influence of crack cocaine. Furthermore, the record contains substantial evidence to support the Review Judge's finding that Mr. Richardson committed negligent treatment or maltreatment of KMR when he smoked crack cocaine in her presence on August 29, 2005.

2. Issues of witness credibility are for the trier of fact.

The Review Judge adopted the findings of the Administrative Law Judge. This included the following findings with regard to issues of witness credibility:

1. The evidence presented by the parties conflicted on certain material points. The findings made herein are based upon a careful consideration of the record of the case, including the demeanor and motivations of the parties, the reasonableness of the testimony, and the totality of the evidence presented. Findings made consistent with the

evidence offered by a party indicate that the ALJ found that evidence persuasive over conflicting or contradictory evidence offered by the other party.

...

14. Ms. Vigesaa's testimony was credible. . . .

...

17. It is more likely than not that on August 29, 2005, the Appellant came home high under the influence of drugs and that he also smoked crack cocaine in his home in the presence of this daughter, KMR, while she was in his sole care, custody, and control. KMR was in the Appellant's sole care and control for an extended period of time (a minimum of 30 to 45 minutes) while he was under the influence of drugs and using drugs. The Appellant's assertions to the contrary are not persuasive. The Appellant has acknowledged and yet attempted to down play the seriousness of his actions on August 29, 2005. He gave some clearly false testimony. For example, the Appellant testified that KMR, not yet seven months old, came running over to him when he returned from work on August 29, 2005, indicating either a lack of veracity as to his actions that day or an impairment so serious that day that he does not have a clear and accurate recollection of what actually occurred (the ALJ taking judicial notice of the fact that a child not yet seven months old would not have the physical capacity to run over to a parent⁰ [sic]. His memories or assertions of what occurred that day are not found persuasive given his acknowledge[d] impairment from crack cocaine. Ms. Terrone attempted at hearing to downplay the earlier assertions she had made to Ms. Vigesaa against her brother (perhaps because she loves [sic] her brother and after the incident at issue he received treatment which has been helpful to his sobriety –see Finding of Fact 18 below), but clearly she believed that he used and was using crack cocaine to such an extent that KMR's welfare was at risk; on the date of the alleged

incident, she had specific concerns about his usage of cocaine in front of KMR.⁵

CP 91, 93, 94-95, 126, 129, 130.

The State Supreme Court has clearly stated that determinations of credibility are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Accordingly, the appellate court must “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Id.* at 874-75.

3. Appellant’s failure to call his wife to testify at the administrative hearing does not constitute error.

Mr. Richardson alleges that this matter should be remanded, because there is “new” evidence to be considered and because his wife, Janet Blessing, did not testify. *See, e.g.*, CP 1-5; Br. of App. at 5-7, 14, 19. However, Mr. Richardson acknowledged in his Petition for Review that there isn’t any “new” evidence:

Father needs to be allowed “new” actually old but not previously heard/allowed evidence to be appropriately presented in order to serve justice. This would include document able/verifiable corrections of erroneous testimonies and erroneous mis-recordings, as well as to

⁵ The quoted text from Finding of Fact 17 is from the Review Decision and Final Order. It is virtually identical to Finding of Fact 17 in the Initial Order, except that the Review Judge made a few typographical errors as noted and a few grammatical changes, none of which affect the substance of the finding.

allow testimony of key witness to overall evidence/background, wife/Janet.

CP 4.

Ms. Blessing accompanied Mr. Richardson to the administrative hearing on November 16, 2006. However, because she was going to be a witness, she was excluded from the hearing room during other witnesses' testimony. CP 194-96. The CPS investigator Suzy Vigessaa, Mr. Richardson, and Deana Terrone, Mr. Richardson's sister, testified at the administrative hearing.

After Ms. Terrone's testimony, the Administrative Law Judge asked if there were any more witnesses. CP 266. The Department rested, so the ALJ asked, "Mr. Richardson, do you have anyone else? Any other witnesses?" CP 266. Mr. Richardson said no. CP 266. A little while later, the ALJ asked, "Is there any testimony that has not been given by anyone, by either side, that needs to be given? Any question that needs to be asked of another party that hasn't been asked?" Both the Department's attorney and Mr. Richardson responded, "No." CP 269. Mr. Richardson had full opportunity to present the testimony of his wife, Janet Blessing, at the administrative hearing, yet he chose not to call her.

Mr. Richardson asserts that he was misled or tricked by the ALJ into not calling his wife as a witness. He claims that he thought he could

not call his wife to testify as a witness because she was not an eyewitness to the events of August 29, 2005. Br. of App. at 32-33. However, the record does not bear this out in any way. First of all, Mr. Richardson submitted a witness list for the administrative hearing that included his wife, his sister, and his niece, CP 168, 197, so he himself had identified his wife as a witness.

Secondly, Mr. Richardson was present and participated in the dialogue between the ALJ and the Department representative regarding why Ms. Blessing should be excused to wait outside so that her testimony would not be influenced by anyone else's. CP 194-96.⁶ Mr. Richardson was fully aware that Ms. Blessing was merely being excused to come back in an hour.

Third, the ALJ took the time to review Mr. Richardson's witness list with him orally at the beginning of the hearing. Mr. Richardson and ALJ Wagner discussed that his list of possible witnesses included his sister Deana, his niece Shylla, Janet Blessing Richardson, and Robert Lyden. CP 197.

⁶ The verbatim report of proceedings mistakenly says "Mr. Robinson" instead of Mr. Richardson when he is speaking on pages CP 195 and 196. Likewise, it says "Ms. Robinson" instead of Ms. Blessing Richardson when Mr. Richardson's wife is speaking. CP 196. However, a careful reading of the record demonstrates that there were no persons named Robinson present and that the Richardsons were the persons participating. See CP 190-96.

Fourth, Mr. Richardson heard the CPS investigator Suzy Vigesaa's testimony and he also cross-examined her. CP 209-27. Mr. Richardson knew that Ms. Vigesaa had not been present for the events of August 29, 2005, but yet she was allowed to testify.

Finally, during the course of the hearing, the ALJ asked Mr. Richardson on two separate occasions if he had any other testimony to present. CP 266, 269. She asked him these questions in several different and general ways. She asked if he had "anyone else," "[a]ny other witnesses," "any testimony that has not been given by anyone," or "[a]ny question that needs to be asked of another party that hasn't been asked?" CP 266, 269. In no way did ALJ Wagner restrict Mr. Richardson to calling only those individuals who had been physically present and had observed the events of August 29, 2005.

Thus, there is no evidence to suggest that Mr. Richardson was misled or tricked into not calling his wife to testify in the administrative hearing. There was no error on the part of the Administrative Law Judge, and there was no improper procedure on the part of the Department. Mr. Richardson may now regret his failure to call his wife as a witness at the administrative hearing, but his own failing does not constitute a legal basis for this court to remand the case to the Office of Administrative Hearings. The legal requirements that are necessary for a remand are not met. *See*

RCW 34.05.562(2)(b); RCW 34.05.574(1). Moreover, Mr. Richardson's failure to call his wife as a witness does not establish any of the grounds that are necessary in order for this court to grant relief from the Department's final order. *See* RCW 34.05.570(3).

Furthermore, Ms. Blessing was not present at the family home on August 29, 2005, when Mr. Richardson arrived home under the influence of crack cocaine and provided sole care for his baby KMR for approximately 30-45 minutes. CP 85. Deana Terrone testified that Janet Blessing had gone to work and she (Ms. Terrone) was babysitting KMR. Mr. Richardson had breaks during the day from his work and he was to come home and have time with KMR and then give her back to Ms. Terrone. *See* CP 252. This was when the incident occurred with Mr. Richardson caring for KMR while under the influence of crack cocaine. Thus, Ms. Blessing was not an eyewitness to the events that occurred at Mr. Richardson's home on August 29, 2005 when he cared for KMR while under the influence of drugs or when he smoked crack cocaine in the baby's presence. *See* Br. of App. at 25. Ms. Blessing wishes to testify so that she can interpret the behavior and explain the statements of Mr. Richardson and Ms. Terrone. In short, Ms. Blessing wants to provide "damage control." Br. of App. at 11-12. However, the ALJ already heard directly from Mr. Richardson and Ms. Terrone. Ms. Blessing's

potential comments were known to Mr. Richardson at the time of the administrative hearing. Accordingly, they do not constitute new evidence, nor do they justify a remand to the Office of Administrative Hearings pursuant to RCW 34.05.562.

The Review Judge found that Mr. Richardson smoked crack in the presence of his daughter KMR. CP 94-95. In addition, the Review Judge found and Mr. Richardson admitted that he provided sole care for KMR for a period of time on August 29, 2005, while he was under the influence of crack cocaine. CP 93-94, 228-33, 268. The Review Judge determined that Mr. Richardson's act of caring for KMR while under the influence of crack cocaine by itself constituted negligent treatment or maltreatment. CP 95. Smoking crack in KMR's presence was additionally negligent and constituted maltreatment. CP 95; *see* CP 133.

For the above stated reasons, Mr. Richardson's request to have this case remanded for further hearing must be denied. Mr. Richardson had the opportunity to present his witnesses and he did not call his wife to testify; his wife's prospective testimony does not constitute new evidence; and the founded finding is supported by substantial evidence, including Mr. Richardson's own admissions. Because the Review Judge found that Mr. Richardson's act of providing sole care for KMR while under the influence of crack cocaine independently constituted negligent treatment

or maltreatment (separate from the finding that he smoked crack cocaine in the baby's presence), remanding this case to the ALJ would not change the outcome.

E. This Case Cannot Be Remanded to Child Protective Services.

Appellant requests that this court remand the case back to Child Protective Services. Br. of App. at 31. The thrust of Appellant's argument is that he does not believe that CPS conducted a "full and fair investigation." Br. of App. at 33. In particular, Appellant alleges that the CPS investigator, Suzy Vigesaa, spoke extensively with Appellant's sister, Deana Terrone, but only spoke briefly with Appellant's wife, Janet Blessing. Br. of App. at 16-17.

As noted above, Ms. Blessing was not present during the events in question on August 29, 2005, because she was at work. Mr. Richardson's sister, Deana Terrone, was at home babysitting KMR when Mr. Richardson returned home under the influence of crack cocaine and provided sole care for KMR for 30-45 minutes. Moreover, Ms. Blessing was not at home when Mr. Richardson smoked crack cocaine in the same room as the baby on August 29, 2005.

Appellant has cited no authority that would allow this court to remand the case back to CPS for further investigation. The Review Judge

addressed this lack of authority when she entered the following conclusion of law:

[T]he quality of the decision-making CPS engaged in to determine that the Appellant neglected his daughter is not relevant to the outcome of this case. WAC 388-02-0215(1) states, 'The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing.' This means that the ALJ will consider all of the evidence and argument presented at the hearing and reach his/her own factual determination as to what happened and his/her own conclusion as to whether child neglect has occurred. The ALJ will make a new (de novo) decision based solely on the evidence presented by both parties at the hearing. The ALJ does not critique the quality of the investigation CPS conducted, review the logic of the reasoning process CPS used to reach its finding that child neglect occurred, or scrutinize the conduct of CPS staff. None of these issues are before the ALJ to decide as the Department has not given the ALJ jurisdiction over this subject matter.

CP 97-98.

CPS conducted an investigation of the referral for child neglect against Mr. Richardson, as it is required to do by RCW 26.44. It exercised its discretion appropriately and determined that the finding of child neglect was founded. There is no action CPS failed to take or procedure it failed to follow that would justify a remand for further proceedings. RCW 34.05.570(3).

F. Mr. Richardson's Subsequent "Good Behavior" Does Not Warrant Changing The Founded Finding.

Mr. Richardson asserts that he subsequently engaged in drug/alcohol treatment. *See, e.g.*, CP 177-78, 229-30, 235, 239; *see also* Br. of App. at 14, 37. While that is commendable and a healthier choice for him and his family, it does not negate his behavior on August 29, 2005, when he provided sole care for his 6 month old daughter KMR while he was under the influence of crack cocaine and when he smoked crack cocaine in her presence. The Department's responsibility in investigating an allegation of child abuse or neglect is to determine whether or not the alleged abuse or neglect actually occurred. The Department must make a finding of founded, unfounded, or inconclusive.⁷ Good behavior after committing an act of child abuse or neglect does not operate to negate or excuse that act of child abuse or neglect.

Mr. Richardson has expressed concern that he doesn't want to have a founded finding of child abuse or neglect on his record, because that may limit his opportunities to go on field trips or be a coach or a scout leader in the future. CP 178, 270-72. As ALJ Wagner explained to Mr. Richardson during the administrative hearing, that concern is beyond the scope of the hearing and beyond the authority of the ALJ. CP 271. The

⁷ Effective October 1, 2008, the law has changed such that the Department now must determine whether an allegation is founded or unfounded. "Inconclusive" is no longer a possible determination. However, "inconclusive" was a possible outcome at the time of the events in this case. RCW 26.44.020(9); RCW 26.44.030(11)(a) (versions effective 10/1/08).

ALJ, the Review Judge, the Superior Court Judge, and the Court of Appeals do not have the authority to excuse a founded finding of child abuse or neglect just because the person later regrets the action or the effect of the founded finding. Moreover, excusing Mr. Richardson from this founded finding would be contrary to public policy. RCW 26.44.100(2)(c) provides that “[f]ounded reports of child abuse and neglect may be considered in determining whether the person is disqualified from being licensed to provide child care, employed by a licensed child care agency, or authorized by the department to care for children.” *See* Statement of Legislative Intent, which follows RCW 74.15.010.⁸ The whole purpose of having a registry of persons who have abused or neglected children is to protect children. Schools, youth organizations, and agencies that license people to care for children or developmentally disabled persons need to be able to determine whether

⁸ The legislature declares that the state of Washington has a compelling interest in protecting and promoting the health, welfare, and safety of children, including those who receive care away from their own homes. The legislature further declares that no person or agency has a right to be licensed under this chapter to provide care for children. The health, safety, and well-being of children must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, and whether to take other licensing action. The legislature intends, through the provisions of this act, to provide the department of social and health services with additional enforcement authority to carry out the purpose and provisions of this act. Furthermore, administrative law judges should receive specialized training so that they have the specialized expertise required to appropriately review licensing decisions of the department. Laws of Washington, 1995 c 302.

someone who wishes to work or volunteer with children should be allowed to do so. *See, e.g.*, WAC 388-06-0010; WAC 170-06-0010.

G. Mr. Richardson Has Failed To Establish Any Basis For Relief Under RCW 34.05.570(3).

The burden rests upon the Appellant, Monty Richardson, to prove that the agency's action was invalid and that he was substantially prejudiced by the agency's action. RCW 34.05.570(1). Mr. Richardson has failed to meet this burden. In addition, he has failed to establish any of the grounds for relief under RCW 34.05.570(3). In his Brief of Appellant, Mr. Richardson requests relief pursuant to RCW 34.05.570(3), as follows:

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:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (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;

...

- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

... or

- (i) The order is arbitrary or capricious.

RCW 34.05.570(3); Br. of App. at 20-23. However, Mr. Richardson has not demonstrated that he is entitled to relief under any of these grounds. There was no violation of constitutional provisions, as Mr. Richardson had an administrative hearing with the opportunity to call witnesses. He chose not to call his wife, Janet Blessing, but this does not represent any violation of his constitutional rights. The Review Decision and Final Order and the order denying reconsideration issued by the Review Judge were not outside the statutory authority or jurisdiction of DSHS. The Department has not engaged in any unlawful procedure or failed to follow any prescribed procedure, nor has it erroneously interpreted or applied the law. As discussed above, the Review Decision and Final Order is supported by

substantial evidence in light of the whole record before the court. Mr. Richardson did not make any motion for disqualification of the ALJ or the Review Judge pursuant to RCW 34.05.425 or RCW 34.12.050, nor were there any subsequently discovered facts to support such a motion.

In his Brief of Appellant, Mr. Richardson implies that Superior Court Judge Canova was biased against him, because his wife had previously appeared before Judge Canova on another matter. Br. of App. 15; *see* RP 11. However, at the time of the superior court hearing in the instant case, Mr. Richardson did not allege that this amounted to a conflict, nor did he file an Affidavit of Prejudice pursuant to RCW 4.12.050. It was incumbent upon Mr. Richardson to raise this issue so that Judge Canova could address it. In any event, Mr. Richardson cannot show that he was prejudiced by Judge Canova hearing his case on December 5, 2008, because this court reviews the final agency action, not the action of the superior court. *Costanich*, 138 Wn. App. at 554. Thus, any alleged error is harmless.

Finally, Mr. Richardson has not shown that the Review Judge acted arbitrarily or capriciously in upholding the founded finding of child neglect against him.

Mr. Richardson is not entitled to relief. The Department correctly made a founded finding of child neglect against him, because he subjected

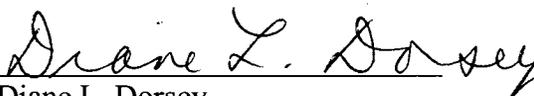
his infant daughter to negligent treatment or maltreatment. Mr. Richardson's action of caring for his infant daughter KMR while under the influence of crack cocaine and/or his action of smoking crack cocaine in her presence on August 29, 2005 showed a serious disregard for the consequences to KMR of such magnitude as to present a clear and present danger to her health, welfare and safety.

V. CONCLUSION

For the above stated reasons, the Department respectfully requests that this court affirm the Review Decision and Final Order of the DSHS Review Judge dated March 19, 2007. The Review Judge's order denying reconsideration dated April 20, 2007 should likewise be affirmed. The founded finding of child neglect against Mr. Richardson should be upheld.

RESPECTFULLY SUBMITTED this 25th day of November, 2009.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

<p>MONTY RICHARDSON,</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES</p> <p style="text-align: center;">Respondent.</p>	<p>DECLARATION OF SERVICE</p>
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I, Nick C. Baluca, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On November 25, 2009, I sent a copy of: **Brief of Respondent; and Declaration of Service** via ABC Legal Messenger Service to:

1. Court of Appeals of the State of Washington, Division I, One Union Square, 600 University Street, Seattle, WA 98101-1176; and
and by United States mail, postage prepaid to:
2. Monty Richardson, 5906 41st Ave SW, Seattle, WA 98136.

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*Filed At
11-25-09
COA/DWI*

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 25th day of November, 2009 at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Nick Baluca', written over a horizontal line.

NICK BALUCA, Legal Assistant