

64007-1

64007-1

NO. 64007-1

---

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

---

JACQUELINE WARE,

Appellant,

v.

TIMOTHY COLLINS and DSHS,

Respondents.

---

**BRIEF OF RESPONDENT DSHS**

---

ROBERT M. MCKENNA  
Attorney General

Scott Majors  
Assistant Attorney General  
WSBA No. 20203  
3501 Colby Avenue, Suite 200  
Everett, WA 98201  
(425) 257-2170

~~FILED~~  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 29 PM 3:08

 ORIGINAL

**TABLE OF CONTENTS**

I. SUMMARY OF ARGUMENT ..... 1

II. STATEMENT OF THE CASE..... 1

    A. Role of DSHS ..... 1

    B. Procedural History .....2

III. ARGUMENT ..... 12

    A. Standard Of Review..... 12

        1. Judicial Review ..... 12

        2. Burden of Proof..... 14

        3. Questions of Law ..... 15

        4. Arbitrary and Capricious Agency Action..... 16

    B. DSHS Is Not Required To Pay Fees And Costs To Ms. Ware..... 17

        1. DSHS Took No Position On The Merits In Superior Court..... 18

        2. Ms. Ware Provides No Authority To Support Her Claim She Was Entitled to Fees And Costs Before The Superior Court..... 19

        3. Ms. Ware Has Not Satisfied RAP 18.1. ....21

IV. CONCLUSION .....21

## TABLE OF AUTHORITIES

### Cases

<i>Alyeska Pipeline Services Co. v. Wilderness Soc.</i> , 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).....	19
<i>Ancheta v. Daley</i> , 77 Wn.2d 255, 461 P.2d 531 (1969).....	19
<i>Ault v. Highway Comm.</i> , 77 Wn.2d 376, 462 P.2d 546 (1969).....	13
<i>Chancellor v. Dept. of Retirement Systems</i> , 103 Wn. App. 336, 12 P.3d 164 (2000).....	12, 13
<i>Clark v. Horse Racing Comm.</i> , 106 Wn.2d 84, 720 P.2d 831 (1986).....	19
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	13
<i>Franklin Co. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982), <i>cert. denied</i> , 459 U.S. 1106 (1983).....	16
<i>Grundy v. Brack Family Trust</i> , 116 Wn. App. 625, 67 P.3d 500 (2003).....	21
<i>Heinmiller v. Dept. of Health</i> , 127 Wn.2d at 609.....	17
<i>Hilltop Terrace Homeowners Assoc. v. Island Co.</i> , 126 Wn.2d 22, 891 P.2d 29 (1995).....	12
<i>Hilltop</i> , at 30; <i>Kabbae</i> , at 445.....	15
<i>Kabbae v. DSHS</i> , 114 Wn. App. 432, 192 P.3d 903 (2008).....	13
<i>Leschi Improvement Council v. Highway Comm.</i> , 84 Wn.2d 271, 525 P.2d 774 (1974) .....	13

<i>Markham v. Employment Security Dept.</i> , 148 Wn. App. 555, 200 P.3d 748 (2009).....	13
<i>Marriage of Thompson</i> , 97 Wn. App. 873, 988 P.2d 499 (1999).....	16
<i>Pierce Co. Sheriff v. Civil Service Comm.</i> , 98 Wn.2d 690, 658 P.2d 648 (1983) .....	17
<i>Potter v. Dept. of Retirement Systems</i> , 100 Wn. App. 898, 999 P.2d 1280 (2000).....	13, 16
<i>Rettkowski v. Dep't of Ecology</i> , 76 Wn. App. 384, 885 P.2d 852 (1994), <i>aff. in part, rev. on other grounds in part</i> , 128 Wn.2d 508, 910 P.2d 462 (1996).....	20
<i>Sanders v. Lloyd's of London</i> , 113 Wn.2d 330, 770 P.2d 249 (1989).....	13
<i>State v. Elliot</i> , 114 Wn.2d 6, 785 P.2d 440 (1990).....	13
<i>Tapper at 402; Hong v. DSHS</i> , 146 Wn. App. 698, 192 P.3d 21 (2008).....	13
<i>Tapper v. Employment Security Dept.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	12, 16
<i>Trucano v. Dept. of Labor and Industries</i> , 36 Wn. App. 758, 677 P.2d 770 (1984) .....	17
<i>US West v. Washington UTC</i> , 134 Wn.2d 48, 949 P.2d 1321 (1997) .....	13
<i>Verizon Northwest, Inc. v. Employment Security Dept.</i> , 162 Wn.2d 909, 194 P.3d 225 (2008).....	13
<i>Wagner v. Foote</i> , 128 Wn.2d 408, 908 P.2d 884 (1996).....	19

<i>ZDI Gaming, Inc., v. Wash. State Gambling Comm.</i> 151 Wn. App. 788, 214 P.3d 938 (2009).....	21
--	----

**Statutes**

42 U.S.C. § 654(4).....	1
RCW 34.04.526 .....	12
RCW 34.05.....	1, 12
RCW 34.05.413 (3).....	3
RCW 34.05.425 .....	14
RCW 34.05.514 .....	12
RCW 34.05.554 .....	13
RCW 34.05.558 .....	13
RCW 34.05.570(1)(a) .....	14
RCW 34.05.570(1)(b).....	14
RCW 34.05.570(1)(d).....	15
RCW 34.05.570(3) .....	14, 15
RCW 34.05.570(3)(c) .....	3
RCW 34.05.570(3)(e) .....	15
RCW 34.05.570(3)(i).....	16
RCW 34.12.050 .....	14
RCW 4.84.340 .....	20
RCW 4.84.350(1).....	20

RCW 4.84.350(1)(a) .....20

RCW 74.20.040(2).....1

RCW 74.20.220(4).....2, 19

**Rules**

RAP 10.3(a) .....12

RAP 10.3(g) .....12

RAP 10.3(h) .....12

RAP 18.1(b) .....21

WAC 388-01-0217(2)(b) .....5

WAC 388-14A-5000(1)(b) .....2

WAC 388-14A-6100 .....3

## **I. SUMMARY OF ARGUMENT**

This case involves judicial review of an administrative order under the Administrative Procedures Act, chapter 34.05 RCW. The administrative order held that the Department of Social and Health Services, Division of Child Support (DSHS), could not enforce Tim Collins' court-ordered obligation to pay for violin lessons. It found that Jacqueline Ware, the obligee under the child support order, failed to provide proof of payment of the expenses as required by the order.

DSHS takes no position as to whether the administrative order should be affirmed or reversed. It has no financial or other interest in the matter. Ms. Ware asks that fees and costs be assessed against DSHS. DSHS opposes that request, which is unsupported by citation to legal authority or argument.

## **II. STATEMENT OF THE CASE**

### **A. Role of DSHS**

DSHS provides support enforcement services to persons who do not receive public assistance consistent with federal child support program requirements. RCW 74.20.040(2); 42 U.S.C. § 654(4). In this case, DSHS was authorized to collect Mr. Collin's share of the violin lesson costs under the terms of a 2007 child support order. CP at 244-251. *See also* RCW 74.20.040(2). Because Ms. Ware has never received public

assistance, all amounts collected by DSHS are distributed to Ms. Ware. WAC 388-14A-5000(1)(b).

In child support actions, the Attorney General's Office represents "the state, the best interests of the child relating to parentage, and the best interests of the children of the state, but does not represent the interests of any other individual." RCW 74.20.220(4). The Attorney General's Office does not represent Ms. Ware or Mr. Collins. *Id.* In non-public assistance cases like this one where the State has no direct financial interest in the outcome of the case, DSHS generally serves in a neutral advisory capacity.

**B. Procedural History**

Jacqueline Ware and Tim Collins are the parents of two children, Taylor and Christian. CP at 219 (Final Order, Finding No. 3). On November 1, 2007, the King County Superior Court entered a child support order that required Mr. Collins to pay Ms. Ware \$986 per month as child support. CP at 244-251. *See also* CP at 257-59. The order also required him to pay 55% of any expenses incurred on behalf of the children for "[v]iolin lessons and any violin rental fee." CP at 248. He was required to reimburse Ms. Ware for such expenses "within 30 days of receiving proof of payment." *Id.* If he failed to reimburse her, then "[u]pon the mother [Ms.

Ware] providing proof of payment of this expense to DSHS, DSHS shall collect this obligation along with the basic support obligation.” CP at 248.

On or about January 24, 2008, Ms. Ware sent DSHS a letter claiming that Mr. Collins failed to reimburse her for violin lessons as required by the court’s order. CP at 267. In her letter, Ms. Ware stated that the cost of violin lessons was \$200 and that “The Father owes the Mother \$105.”<sup>1</sup> *Id.* On or about January 28, 2008, Mr. Collins sent a letter to DSHS claiming that he attempted payment, but Ms. Ware refused to accept it. CP at 268-69.

On February 22, 2008, DSHS served Mr. Collins with a Notice of Support Owed alleging his share of Taylor’s violin lessons was \$110 per month beginning January 1, 2008. CP at 237, 238-44. On February 25, 2008, Mr. Collins orally objected to the Notice and requested an administrative hearing.<sup>2</sup> CP at 232-33.

At the April 28, 2008 administrative hearing, both Ms. Ware and Mr. Collins appeared *pro se* and testified. CP at 219, 229. *See also* CP at 234. Unfortunately, the tape recording from the hearing only preserved administrative law judge’s (ALJ) statements, but did not the statements or

---

<sup>1</sup> This appears to be a typographical error on Ms. Ware’s part as 55% of \$200 would be \$110.

<sup>2</sup> In her brief, Ms. Ware claims DSHS engaged in an unlawful procedure pursuant to RCW 34.05.570(3)(c) by accepting an oral request for a hearing. Br. at 6. Pursuant to RCW 34.05.413 (3), an agency may by rule provide procedures for requesting administrative hearing. DSHS’s rules allow for oral requests for administrative hearings in child support cases. WAC 388-14A-6100.

testimony of any other participant. CP at 201. In her written ruling, the ALJ explained that the parties disputed what constituted proof of payment for violin lessons. Ms. Ware believed sending Mr. Collins a carbon copy duplicate of a check constituted proof of payment. CP at 220 (Final Order, Finding No. 8). Mr. Collins believed Ms. Ware was required to provide proof the expense was incurred. *Id.*

On May 19, 2008, the ALJ issued a final administrative order. CP at 219-28. She found that the 2007 child support order required Mr. Collins to reimburse Ms. Ware for 55% of the cost of violin lessons and violin rental fee upon receipt of proof of payment. CP at 220 (Final Order, Finding No. 4). The ALJ concluded that the 2007 child support order required Ms. Ware to provide Mr. Collins with “proof of payment” of violin lessons and rental fees as a condition precedent to DSHS’s ability to collect any amounts that may be owed. CP at 223 (Final Order, Conclusion Nos. 4 and 5).

Factually, the ALJ found that Ms. Ware sent Mr. Collins a letter requesting reimbursement for violin lessons for one month, and that she attached a carbon copy check duplicate to the letter. CP at 220 (Final Order, Finding No. 7). *See* CP at 260-61. She concluded that providing a carbon copy duplicate of a check did not constitute proof of payment. CP at 223 (Final Order, Conclusion No. 5). Because Ms. Ware failed to satisfy the condition precedent, the ALJ concluded DSHS had no authority to enforce

the child support order. CP at 224 (Final Order, Conclusion No. 7). The ALJ denied Ms. Ware's motion for reconsideration on July 3, 2008. CP at 206-09.<sup>3</sup>

Ms. Ware filed a timely petition for judicial review in King County Superior Court. CP at 299-305. The Attorney General's Office appeared on behalf of DSHS. CP at 281. On July 30, 2009, the case was assigned to Judge Barnett. CP at 294-296. That same date, Ms. Ware requested that her petition for judicial review be heard by Judge Craighead, the same judge who entered the 2007 child support order at issue. CP at 288. On August 13, 2008, Ms. Ware's request was granted over Mr. Collins' objections. CP at 285-86, 204.

On August 4, 2008, DSHS filed the documentary record of the administrative proceedings with the superior court. CP at 205, 206-80. Ms. Ware requested that a transcript of the administrative hearing be filed with the court. CP at 203. By letter dated September 18, 2008, the Attorney General's Office advised Ms. Ware that the tape recording of the hearing was defective and that no transcript of the hearing could be prepared for the superior court to review. CP at 201. The assistant attorney general suggested that if only legal issues were presented by Ms. Ware's petition, it

---

<sup>3</sup> By rule, DSHS has delegated the authority to issue final administrative orders in child support cases to the ALJ who hears the case. WAC 388-01-0217(2)(b). The ALJ's administrative decision is therefore the final order subject to review.

may be possible to proceed without a transcript. *Id.* She also suggested the parties may be able to agree to a set of facts to be presented to the court. *Id.* Otherwise, the matter may need to be remanded to the Office of Administrative Hearings to recreate the record. *Id.*

In response, Ms. Ware sent the assistant attorney general a letter dated September 22, 2008, alleging it was the assistant attorney general's "responsibility to provide a full and complete record to the court and you have failed to fulfill your statutory duties." CP at 200. Ms. Ware wrote that she would agree to proceed without a transcript "If the department agrees to reimburse me for my incurred attorney fees to date and for 12 months of back violin lessons, including 12 percent interest." *Id.* If DSHS did not agree, Ms. Ware wrote she will require representation and seek attorney's fees against DSHS. *Id. See also* CP at 186.

On October 8 and 16, 2008, Mr. Collins filed motions requesting that a different judge be assigned to the case and that venue be changed to Snohomish County. CP at 161-66, 187-92. He alleged he could not receive a fair and impartial trial before Judge Craighead, and that she was biased against him when she entered the 2007 child support order. CP at 162, 188. In support of his request for a change of venue, Mr. Collins claimed he could not get a fair hearing because Ms. Ware was employed as a judicial assistant by the King County Superior Court. *Id.*

DSHS filed responses to the motions on October 9 and 23, 2008. CP at 158-59, 180-84. With regard to the request for a change in judge, DSHS summarized the law on affidavits of prejudice noting that pursuant to RCW 4.12.050 every party is entitled to one change of judge upon motion and supporting affidavit. CP at 159, 181-82. Because Mr. Collins had filed a proper motion and affidavit, DSHS supported his request for a change of judge. CP at 182-84. DSHS did not support the motion for a change of venue, noting that an impartial judge could be found in King County. CP at 183-84.

Ms. Ware filed responses to Mr. Collins' motions on October 10 and 13, 2008. CP at 169-70, 172-78. On November 14, 2008, attorney Michael Louden filed a notice of appearance on behalf of Ms. Ware, and filed a memorandum opposing Mr. Collins' motions for a change of judge and a change of venue. CP at 150-54, 157. In his memorandum, Mr. Louden asked that attorney's fees be assessed against Mr. Collins; he did not ask that fees be assessed against DSHS. CP at 153. The record does not show that Mr. Louden ever filed a notice of withdrawal. However, he has not participated in any hearings and at all times subsequent to November 14, 2008, Ms. Ware has represented herself *pro se*.

On November 25, 2008, Judge Craighead granted Mr. Collins' motion for a change of judge. CP at 149. The case was reassigned to Judge

Cahan. CP at 148. *See also* CP at 147. On December 11, 2008, Judge Cahan denied Mr. Collins' motion for a change of venue. CP at 145. In her order Judge Cahan noted, "This court has no acquaintance with the appellant [Ms. Ware] and has every confidence that she can be fair to all parties." *Id.*

On December 16, 2008, Ms. Ware filed a motion for attorney's fees against Mr. Collins and DSHS on the grounds that Mr. Collins' motion for a change of venue was denied. CP at 127-42. DSHS filed a response on December 18, 2008, asking that the motion be denied. CP at 122-24. Judge Cahan issued an order denying Ms. Ware's motion on January 15, 2009. CP at 76-77.

On January 8, 2009, Ms. Ware filed a motion for a "new trial" due to the ALJ's failure to provide a transcript of the April 2008 administrative hearing. CP at 97-112. In her motion, she also asked that CR 11 sanctions be imposed against DSHS because it "joined" in Mr. Collins' motion for a change of venue. CP at 99. As noted above, DSHS argued a change of venue was unnecessary. CP at 183-84. DSHS filed a response to Ms. Ware's motion for a "new trial" on January 13, 2009. CP at 88-94. DSHS took no position on the request for a remand, noting that the superior court had the authority to order a remand if the record was inadequate for review. CP at 91-94. DSHS argued there was no basis for the imposition of sanctions. CP at 90-91.

On January 15, 2009, Judge Cahan *sua sponte* vacated her earlier order denying Mr. Collins' motion for a change in venue and transferred the case to Snohomish County Superior Court. CP at 73-74. It does not appear Ms. Ware's motion for a remand was ever heard or considered by Judge Cahan.

On March 3, 2009, the Snohomish County Superior Court assigned Ms. Ware's petition for judicial review to Judge Weiss. CP at \_\_\_ (Sub # 4, filed March 12, 2009). By letter dated April 16, 2009, Judge Weiss' chambers advised the parties that, absent a motion or stipulation to strike, a hearing to consider the merits of the petition would be held on June 5, 2009. CP at \_\_\_ (Sub # 5, filed April 17, 2009).

Subsequently, Ms. Ware filed a second motion for remand for a new administrative hearing.<sup>4</sup> CP at 51-54. Citing to the Rules for Appeal of Courts of Limited Jurisdiction (RALJ) 5.4, she argued she was entitled to a new "trial" because the electronic record of the administrative hearing was defective. CP at 52-53. Ms. Ware also asked that she be awarded unspecified costs and fees associated with a new hearing. CP at 53. She implied that DSHS should be responsible for the fees and costs because it "joined" in Mr. Collins' October 2008 motion for a change of judge and change of venue. *Id.* Ms. Ware filed a calendar note asking that the motion

---

<sup>4</sup> The motion was dated April 23, 2009. CP at 53. However, it was not filed with the court until May 4, 2009. CP at 51, 55.

for remand be considered on May 7, 2009 without oral argument. CP at \_\_\_\_ (Sub # 13, filed May 4, 2009).

DSHS filed its response on May 1, 2009. CP at 56-64. Having no financial or other interest in the case, DSHS again took no position with respect to the substance of the motion for a remand but summarized the applicable law for the court. CP at 59, 60-62. It did, however, oppose the assessment of fees and costs on the grounds there was no factual basis or legal authority for Ms. Ware's request. CP at 59, 63.

On May 5, 2009, Judge Weiss' chambers sent a letter to all parties stating that it received the motion for remand and the responses filed by DSHS and Mr. Collins. CP at \_\_\_\_ (Sub # 13, filed May 5, 2009). The superior court indicated it would consider all issues on June 5, 2009, the date previously set for the hearing on the merits of her petition for judicial review. *Id.*

On June 5, 2009, Judge Weiss heard argument from Ms. Ware and Mr. Collins as to the merits of the petition for judicial review. Ms. Ware argues the superior court impermissibly conducted a trial *de novo* when it decided her petition for judicial review. Br. at 13. However, there is nothing in the record to support her contention. During the June 5, 2009 hearing on the petition for judicial review, Judge Weiss heard argument from Ms. Ware and Mr. Collins on the merits. He did not take, solicit or

otherwise accept testimony or new evidence at the hearing and did not conduct a trial *de novo*.

In his order, Judge Weiss affirmed the final administrative order but also remanded the case for further proceedings. CP at 17-19. The superior court found that the ALJ did not commit error of law or fact when it issued the final administrative order. CP at 17. It concurred with the ALJ's conclusion that providing a copy of the front of a check did not constitute proof of payment for violin lessons. *Id.* The court concluded, however, that Ms. Ware should be given an opportunity to present additional evidence as proof of payment of violin lessons to the ALJ. CP at 18. The case was remanded for that limited purpose. *Id.* Ms. Ware was given 30 days to submit proof of payment with respect to those checks presented to the ALJ during the April 2008 administrative hearing.<sup>5</sup> CP at 18. Ms. Ware's request for fees and costs was denied. CP at 19.

On June 12, 2009, Ms. Ware filed a motion for reconsideration. CP at 12-16. It was denied on July 14, 2009. CP at 6. This appeal followed.

---

<sup>5</sup> On July 22, 2009, the superior court extended the deadline to provide proof of payment to August 1, 2009. CP at 5. Ms. Ware filed a copy of the front and back of one cancelled check with the superior court on July 29, 2009. CP at 3-4. The one check submitted appears to constitute the amount in dispute between Ms. Ware and Mr. Collins. It is unclear whether Ms. Ware provided a copy of the proof of payment to the ALJ as contemplated by the superior court's order, or whether either party has requested an administrative hearing on remand.

### III. ARGUMENT

#### A. Standard Of Review

##### 1. Judicial Review

Under the Administrative Procedures Act (APA), chapter 34.05 RCW, an aggrieved party may seek judicial review of an administrative order by filing a petition for judicial review in superior court. RCW 34.05.514. Following review by the superior court, the aggrieved party may seek appellate review of the administrative order. RCW 34.04.526. *See also Tapper v. Employment Security Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Chancellor v. Dept. of Retirement Systems*, 103 Wn. App. 336, 341, 12 P.3d 164 (2000). In appeals pursuant to the APA, the same procedures are followed as in appeals from the superior court in civil cases, with one exception. *Id.* In addition to assignments of error called for by RAP 10.3(a) and (g), the Appellant must also “set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.” RAP 10.3(h).

Absent assignments of error to specific findings of fact in the administrative order under review, those findings are considered verities on appeal. *Hilltop Terrace Homeowners Assoc. v. Island Co.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995); *Kabbae v. DSHS*, 114 Wn. App. 432, 445, 192

P.3d 903 (2008). Further, the appellate court will not consider arguments that are not supported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliot*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Sanders v. Lloyd's of London*, 113 Wn.2d 330, 345, 770 P.2d 249 (1989).

In reviewing the administrative action, the appellate court sits in the same position as the superior court, reviews the record before the administrative agency and applies the standards set forth in the APA. *Tapper* at 402; *Hong v. DSHS*, 146 Wn. App. 698, 712, 192 P.3d 21 (2008). See also RCW 34.05.558; *Ault v. Highway Comm.*, 77 Wn.2d 376, 378, 462 P.2d 546 (1969); *Potter v. Dept. of Retirement Systems*, 100 Wn. App. 898, 903, 999 P.2d 1280 (2000). The appellate court does not review or consider the superior court's judicial review order, and gives no deference to its rulings. *Verizon Northwest, Inc. v. Employment Security Dept.*, 162 Wn.2d 909, 915, 194 P.3d 225 (2008); *Markham v. Employment Security Dept.*, 148 Wn. App. 555, 560-61, 200 P.3d 748 (2009); *Chancellor*, at 341. Issues not raised in the administrative forum cannot be considered by the reviewing court. RCW 34.05.554; *US West v. Washington UTC*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997); *Leschi Improvement Council v. Highway Comm.*, 84 Wn.2d 271, 274, 525 P.2d 774 (1974).

## 2. Burden of Proof

The burden of proof on judicial review rests with Jacqueline Ware, the Appellant. RCW 34.05.570(1)(a). To satisfy the burden, Ms. Ware must show that the final administrative order is invalid on one of the grounds listed in RCW 34.05.570(3) as applied to the administrative action at the time it was taken. RCW 34.05.570(1)(b). The APA provides:

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) [emphasis added].

In addition, the reviewing court “shall grant relief only if it determines that a person seeking judicial review has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

Here, all of the errors alleged by Ms. Ware appear to pertain to the superior court’s judicial review order. Br. at 1-3. She does not assign error to any of the factual findings made by the administration law judge in the final administrative order. Therefore, all of the ALJ’s factual findings must be considered verities on appeal. *Hilltop*, at 30; *Kabbae*, at 445. Thus, Ms. Ware’s appeal raises no questions of fact and the substantial evidence standard set forth in RCW 34.05.570(3)(e) is not implicated.

### **3. Questions of Law**

Ms. Ware alleges generally that the administrative law judge incorrectly interpreted the reimbursement provisions of the 2007 child support order as to what constitutes proof of payment of violin lessons. BR. at 8, 20-21, 23. Interpretation of a superior court order presents a

question of law. *See Marriage of Thompson*, 97 Wn. App. 873, 877-78, 988 P.2d 499 (1999). She further argues that the superior court erred when it reviewed the administrative order without the benefit of the transcript of the administrative hearing, and that it erred when it denied her request for fees and costs. Br. at 21-22, 24, 25. These alleged errors also present questions of law.

When reviewing a question of law, the court reviews the agency's legal conclusions *de novo*. *Franklin Co. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). The court independently determines the applicable law and its meaning, and applies that law to the facts found by the ALJ. *Id.*; *Potter*, 100 Wn. App. at 903. Notwithstanding the *de novo* standard of review, the court will give substantial weight to an agency's interpretation of its own rules. *Tapper*, 122 Wn.2d at 403.

#### **4. Arbitrary and Capricious Agency Action**

Ms. Ware generally alleges, without specific argument or analysis, that the administrative decision was arbitrary and capricious. Br. at 9. Under RCW 34.05.570(3)(i), an order by an administrative agency is "arbitrary and capricious" when it is willful and unreasoning without

consideration for, or in disregard of, the facts. *Pierce Co. Sheriff v. Civil Service Comm.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

Action is not arbitrary and capricious if taken honestly and upon due consideration of the facts, even if the reviewing court may have reached a different conclusion. *Trucano v. Dept. of Labor and Industries*, 36 Wn. App. 758, 762, 677 P.2d 770 (1984). “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 was erroneous.” *Heinmiller v. Dept. of Health*, 127 Wn.2d at 609. Harshness is not a factor for arbitrary and capricious action. *Id.* at 610. The test for arbitrary and capricious action is a narrow one, and the party asserting it “. . . must carry a heavy burden.” *Pierce Co. Sheriff*, 98 Wn.2d at 695.

**B. DSHS Is Not Required To Pay Fees And Costs To Ms. Ware**

Ms. Ware argues the superior court should have remanded the case to the administrative law judge for a new hearing because there was no transcript of the initial administrative hearing. Br. at 21, 22. She further alleges that DSHS consistently opposed her motion for remand and, as a consequence, should be ordered to pay her unspecified fees and costs. Br. at 16, 17-18, 23-25. She argues that DSHS “forced Ware into a litigious position with frivolous briefing objecting to Ware’s request for remand

and substantially delaying justice.” Br. at 25. Ms. Ware’s argument is without legal or factual support.

**1. DSHS Took No Position On The Merits In Superior Court.**

Ms. Ware filed two motions requesting a new administrative hearing or “trial” on the grounds that DSHS was unable to provide a transcript of the April 2008 administrative hearing. The first motion was filed in King County Superior Court on January 8, 2009, and included a request for sanction against DSHS. CP at 97-112. In its response to the motion, DSHS summarized the applicable law, noting that the superior court could remand the case for further administrative proceedings where the record was inadequate for review. CP at 91-92. It also noted that, in light of the issues raised by the petition for judicial review, a remand may not be necessary. CP at 92-94. However, DSHS made clear it was deferring to the court on the merits of the motion. CP at 94. DSHS did not argue either for or against the motion for remand.

Ms. Ware filed her second motion for remand on May 4, 2009, in Snohomish County Superior Court. CP at 51-54. In its response, DSHS again summarized the applicable legal authority. CP at 60-62. It also noted there was conflicting case law as to whether the failure of an agency to provide a transcript of an adjudicative proceeding mandated a remand

for further proceedings. CP at 61-62. If the superior court concluded that a transcript was necessary for proper review of the issues raised, DSHS noted that Ms. Ware's motion should be granted. CP at 62. Again, DSHS did not argue for or against Ms. Ware's second motion for remand.

The pleadings filed by DSHS in superior court reflect its statutory responsibility to remain neutral. *See* RCW 74.20.220(4). At no time did DSHS oppose Ms. Ware's motion for a remand. Ms. Ware's argument to the contrary is without merit.

**2. Ms. Ware Provides No Authority To Support Her Claim She Was Entitled to Fees And Costs Before The Superior Court.**

Even assuming Ms. Ware correctly portrayed what occurred below—and she has not—she has failed to identify any authority that entitles her to fees and costs. Washington follows the so-called “American rule” where each party bears his or her own litigation costs. *See Alyeska Pipeline Services Co. v. Wilderness Soc.*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). Litigation fees and costs are not generally recoverable absent specific statutory authority, contractual provision, or recognized ground in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996); *Clark v. Horse Racing Comm.*, 106 Wn.2d 84, 720 P.2d 831 (1986); *Ancheta v. Daley*, 77 Wn.2d 255, 461 P.2d 531 (1969).

In judicial review proceedings under the Administrative Procedures Act, an award of attorney's fees and cost is allowed under the Washington Equal Access to Justice Act (EAJA), RCW 4.84.340 through .360. The EAJA provides in relevant part:

Except as otherwise specifically provided by statute, a court shall award a qualified party that 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. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1)(a) [emphasis added].

The Washington EAJA, like any statute awarding attorney's fees against the state, should be strictly construed since it constitutes a waiver of sovereign immunity and runs counter to the American rule barring an award of attorney's fees without specific authority. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff. in part, rev. on other grounds in part*, 128 Wn.2d 508, 910 P.2d 462 (1996).

Here, Ms. Ware was not entitled to an award of fees and costs by the superior court because she did not prevail on her petition for judicial review. A party "prevails" if she obtains "relief on a significant issue that achieves some benefit" that the party sought in the judicial review proceeding. RCW 4.84.350(1). Ms. Ware did not obtain relief on any significant issue raised her petition and is not entitled to fees and costs

under the Equal Access to Justice Act. The request for fees and costs is without merit and should be denied.

**3. Ms. Ware Has Not Satisfied RAP 18.1.**

A party seeking an award of fees and costs must devote a section of his or her brief to the request. RAP 18.1(b). Failure to do so will be deemed a waiver of the request. See *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 631, 67 P.3d 500 (2003) (appellate brief must contain more than a bald request for fees). Further, the appellant brief the fee issue for every level of judicial review for which attorney's fees are sought. *ZDI Gaming, Inc., v. Wash. State Gambling Comm.* 151 Wn. App. 788, 817-18, 214 P.3d 938 (2009) (no fees awarded for appellate phase because opening brief was limited to contesting the EAJA fees at the superior court level).

Here, Ms. Ware has failed to follow the requirements of the appellate rules. She includes only one sentence at the very end of this brief, and it identifies no supporting statute or case law. Ms. Ware's failure to cite authority precludes this court from considering her request for fees and costs.

**IV. CONCLUSION**

DSHS has no financial or other interest as to the substantive issues raised by Ms. Ware and takes no position regarding them. Similarly, it

takes no position as to whether the matter should have been remanded due to the administrative law judge's failure to make an adequate electronic record of the administrative hearing. DSHS's position as to these issues has been consistent throughout the proceedings. Further, there is no factual or legal basis to assess fees and costs against DSHS. To the extent Ms. Ware requests that relief, it should be denied.

RESPECTFULLY SUBMITTED this ~~28<sup>th</sup>~~ day of January, 2010.

ROBERT M. MCKENNA  
Attorney General

  
\_\_\_\_\_  
**SCOTT MAJORS, WSBA #20203**  
Assistant Attorney General

NO. 64007-1  
**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

JACQUELINE WARE,

Appellant,

v.

TIMOTHY COLLINS and DSHS,

Respondents.

DECLARATION OF  
SERVICE

I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

1. My name is Dawn R. Clarke and I am employed as a legal assistant for counsel for respondent.

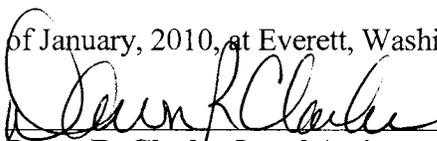
2. On **January 28, 2010**, I sent via legal messenger and/or regular mail a true and accurate copy of Brief of Respondent DSHS to the following persons:

Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101

Jacqueline Ware  
4627 43<sup>rd</sup> Ave. S.  
Seattle, WA 98118

Timothy E. Collins  
15228 Sunwood Blvd. S.  
Sea Tac, WA 98188

DATED this 28 day of January, 2010, at Everett, Washington.

  
Dawn R. Clarke, Legal Assistant

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2010 JAN 29 PM 3:08

 ORIGINAL