

66168-0

66168-0

NO. 66168-0-I

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

JOHN WOODFORD MORRISON & WOOFORD ELECTRICAL
SERVICE,

Appellant,

v.

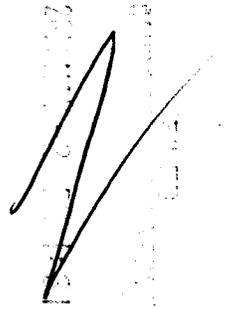
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE.....2

III. STATEMENT OF THE CASE2

IV. STANDARD OF REVIEW.....3

V. ARGUMENT3

 A. RCW 19.28.131 Does Not Violate Due Process.....3

 1. Mr. Morrison provides no authority in support of his arguments, including his claim raised under the state constitution, and they should be disregarded by the Court.....3

 2. The government may impose financial prerequisites to appeals4

 B. A Filing Fee Is Due under RCW 4.84.010.....10

VI. CONCLUSION10

TABLE OF AUTHORITIES

Cases

<i>Boddie v. Connecticut</i> , 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed.2d 113 (1981).....	6, 7
<i>Bowman v. Waldt</i> , 9 Wn. App. 562, 513 P.2d 559 (1973).....	7
<i>Burman v. State</i> , 50 Wn. App. 433, 749 P.2d 708 (1988).....	5, 6
<i>Chamberlin v. U.S.</i> , 664 F. Supp. 663 (N.D. N.Y. 1987).....	6
<i>Crooker v. EPA</i> , 763 F.2d 16 (1st Cir. 1985).....	10
<i>Demarest v. Manspeaker</i> , 948 F.2d 655 (10th Cir. 1991)	10
<i>Hexamer v. Foreness</i> , 997 F.2d 93 (5th Cir. 1993)	10
<i>Housing Auth. of King County v. Saylor</i> , 87 Wn.2d 732, 557 P.2d 321 (1976).....	7, 8, 10
<i>Housing Authority of City of Everett v. Terry</i> , 114 Wn.2d 558, 789 P.2d 745 (1990).....	9
<i>In re Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995).....	6
<i>In re Request of Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986).....	4
<i>In re Welfare of C.B.</i> , 134 Wn. App. 336, 139 P.3d 1119 (2006).....	3, 5

<i>Marriage of Brown</i> , 159 Wn.2d 931, 247 P.3d 466 (2011).....	10
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	5, 6, 8, 9
<i>Merrell v. Block</i> , 809 F.2d 639 (9th Cir. 1987)	10
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).....	5
<i>O'Connor v. Matzdorff</i> , 76 Wn.2d 589, 458 P.2d 154 (1969).....	9
<i>Ortwein v. Schwab</i> , 410 U.S. 656, 93 S. Ct. 117, 35 L. Ed. 2d. 572 (1973).....	7
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006).....	5
<i>Rafn Co. v. Dep't of Labor & Indus.</i> , 104 Wn. App. 947, 17 P.3d 711 (2001).....	4
<i>Sommer v. Sullivan</i> , 898 F.2d 895 (2d Cir. 1990)	10
<i>State v. McCormick</i> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	4
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003).....	9
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	5
<i>United States v. Kras</i> , 409 U.S. 434, 93. S. Ct. 631, 34 L. Ed. 2d (1973).....	7
<i>United States v. Phillips</i> , 433 F.2d 1364 (8th 1970)	4

Statutes

28 U.S.C. § 2412.....	10
Laws of 1987, ch. 403, § 1.....	4
RCW 19.28	2, 9
RCW 19.28.131	passim
RCW 4.84.010	2, 10
RCW 4.84.340(3).....	10
RCW 4.84.350	10
RCW 4.84.350(1).....	10

Rules

RAP 3.1.....	9
--------------	---

I. INTRODUCTION

The Department of Labor and Industries cited John Morrison and Woodford Electrical Services (Mr. Morrison) for eight violations of electrical laws. Mr. Morrison sent a letter of appeal to the Electrical Board, however, he did not include the \$200 appeal bond for each citation as required by RCW 19.28.131. The Electrical Board properly rejected the appeal for Mr. Morrison's failure to comply with the statute.

Mr. Morrison appealed to superior court, arguing that that the appeal bond violated due process. The superior court upheld RCW 19.28.131, finding no due process violation. The superior court reduced the bond amount total of \$1600 to \$200, finding that the bonds imposed a financial hardship.

The superior court should be affirmed. Case law allows the government to impose financial prerequisites to filing appeals provided the right involved is not fundamental. Here, the interest is a financial one and not a fundamental interest, and it is therefore proper for Electrical Board to require an appeal bond. The Electrical Board uses the appeal bond proceeds to offset the expenses of the Board, which serves an important state interest.

Mr. Morrison requests his superior court filing fee in the amount of \$200. The Department does not contest that he is entitled to it under RCW 4.84.010.

II. ISSUE

1. Does RCW 19.28.131's requirement of a \$200 appeal bond violate the due process clauses of the state and federal constitutions?

III. STATEMENT OF THE CASE

In December 2008, the Department cited John Morrison and Woodford Electrical Services with eight violations of the electrical laws under RCW 19.28. The citations were for the failure to obtain an electrical permit, failure to request an inspection within three days of completing work, failure of the administrator to ensure a permit was obtained, and failure of the administrator to ensure that all electrical work complies with the electrical laws. CP 34, 35, 42, 43, 51, 52, 60, 61. The violations occurred on two different dates, and the citations totaled \$4000. CP 30-61.

Mr. Morrison sent a letter to the Department to appeal the citations, but did not include the appeal bonds as required by RCW 19.28.131. CP 26. He asserted that he should not be assessed the appeal bonds. CP 26. The Department rejected the appeal because the appeal bonds were not included. CP 22.

Mr. Morrison petitioned for judicial review in superior court. He argued that that the appeal bond requirement violated due process under the state and federal constitutions. CP 11.

The superior court rejected the constitutional argument, concluding that there was a rational basis for the statute. CP 3. The superior court found that payment of the appeal bonds created a financial hardship. CP 3. The superior court ordered Mr. Morrison to pay \$200 in order to appeal the eight citations, waiving \$1400. *See* CP 4. The superior court did not award costs or attorney fees. CP 5.

Mr. Morrison appealed. The Department did not appeal.

IV. STANDARD OF REVIEW

Constitutional challenges are questions of law reviewed de novo. *In re Welfare of C.B.*, 134 Wn. App. 336, 342, 139 P.3d 1119 (2006).

V. ARGUMENT

A. RCW 19.28.131 Does Not Violate Due Process

- 1. Mr. Morrison provides no authority in support of his arguments, including his claim raised under the state constitution, and they should be disregarded by the Court**

Mr. Morrison argues that the appeal bond provision of RCW 19.28.131 violates the due process clauses of the state and federal constitution. Brief of Appellant (AB) at 3. He provides no citation to

authority and this Court may disregard his argument on this basis. *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), *superseded by statute on other grounds*, Laws of 1987, ch. 403, § 1, (“‘‘naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.’’”) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th 1970)). He also does not provide any argument why the state constitution would provide any broader effect than the federal constitution. Accordingly, the Court should not consider his claim of state law violation. *Rafn Co. v. Dep’t of Labor & Indus.*, 104 Wn. App. 947, 951, 17 P.3d 711 (2001).

In any event, Washington’s due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

2. The government may impose financial prerequisites to appeals

Mr. Morrison challenges RCW 19.28.131, which provides in relevant part:

Any penalty is subject to review by an appeal to the board. The filing of an appeal stays the effect of the penalty until the board makes its decision. The appeal shall be filed within twenty days after notice of the penalty is given to the assessed party by certified mail, return receipt requested, sent to the last known address of the assessed

party and shall be made by filing a written notice of appeal with the department. *The notice shall be accompanied by a certified check for two hundred dollars, which shall be returned to the assessed party if the decision of the department is not sustained by the board. If the board sustains the decision of the department, the two hundred dollars shall be applied by the department to the payment of the per diem and expenses of the members of the board incurred in the matter, and any balance remaining after payment of per diem and expenses shall be paid into the electrical license fund.*

The heavy burden of establishing that a statute results in a constitutional violation is on the party challenging the regulation. *See C.B.*, 134 Wn. App. at 342; *Peste v. Mason County*, 133 Wn. App. 456, 469 n.10, 136 P.3d 140 (2006). “A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.” *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

Due process is a flexible concept and calls for different procedural protections in different situations. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The essential requirements of procedural due process are notice and an opportunity to be heard, appropriate to the nature of the case. *Burman v. State*, 50 Wn. App. 433, 440, 749 P.2d 708 (1988) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The procedural safeguards afforded in each situation should be tailored to the

specific function to be served in a given case. *Burman*, 50 Wn. App. at 440.

Under *Mathews*, there are three relevant factors in determining what process is due a liberty or property interest: (1) the private interests that will be affected by the official action; (2) the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the governmental interest, including the function involved and the fiscal and administrative burden that additional process would entail. *Mathews*, 424 U.S. at 335.

As to the first factor, here the private interest is minimal if existing at all. There is no liberty interest or property interest implicated in the assessment of a civil monetary penalty. *Chamberlin v. U.S.*, 664 F. Supp. 663, 664 (N.D. N.Y. 1987). Moreover, “[w]here . . . the interest at stake is only a financial one, the right which is threatened is not considered ‘fundamental’ in a constitutional sense.” *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995). The United States Supreme Court has found that monetary prerequisites, such as filing fees, to court access are permissible unless the right attempted to be vindicated is fundamental and the courts provide the only means through which vindication of such right may be obtained. See *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct.

780, 28 L. Ed.2d 113 (1981); *United States v. Kras*, 409 U.S. 434, 444, 93 S. Ct. 631, 34 L. Ed. 2d (1973); *Ortwein v. Schwab*, 410 U.S. 656, 658-59, 93 S. Ct. 117, 35 L. Ed. 2d. 572 (1973); see *Housing Auth. of King County v. Saylor*s, 87 Wn.2d 732, 739, 557 P.2d 321 (1976).

In *Boddie*, the Court found impermissible filing fees for divorces for indigents because of the nature of divorce proceedings, which involved a fundamental interest in marriage and the state controlled access to the courts leaving no other method under which to obtain a divorce. *Boddie*, 401 U.S. at 376. The Court in *Kras* upheld statutorily imposed filing fees in bankruptcy matters against a challenge under *Boddie*. *Kras*, 409 U.S. at 444. The Court emphasized the special nature of the marital relationship involved in *Boddie* and found no such interest in bankruptcy proceedings, which were in the area of economics and social welfare. *Kras*, 409 U.S. at 444-46. Recognizing that *Boddie* applied to the limited situation of the fundamental right of marriage, the Court in *Ortwein* held that the state may require a fee to obtain review of a denial of welfare benefits. *Ortwein*, 410 U.S. at 658-60.

Here, as stated above, there is no fundamental right involved, the interest is an economic one. The interest is only pecuniary. Thus, it is permissible under the *Boddie*, *Kras*, *Ortwein* line of cases to impose a monetary prerequisite to file an appeal. See *Bowman v. Waldt*, 9 Wn.

App. 562, 568-70, 513 P.2d 559 (1973) (filing fee for writ of execution permissible under *Boddie, Kras, Ortwein*).

The second *Mathews* factor is whether there would be an erroneous deprivation of interests through the procedures used. *Mathews*, 424 U.S. at 335. Here, the interest is in the assessment of a monetary penalty regarding electrical citations. Mr. Morrison wishes to contest the citations. As is always the case involving fees for court or hearings, if he does not pay he will not obtain access to a hearing. However, the opportunity for a hearing is available.

Moreover, the amount of the bond amount is not unduly high and is reasonable. In the context of an equal protection challenge, the Washington Supreme Court found filing fees permissible if they are not disproportionate and if they provide some revenue to assist in offsetting the courts' operating costs. *Saylor*, 87 Wn.2d at 739. A \$200 bond is not disproportionate to the penalties assessed which ranged in amounts from \$250 to \$500 to \$1000. CP 30-61. The bond funds are used to offset the Board's expenses, with any excess going to the electrical license fund. RCW 19.28.131.

Finally, if a litigant is successful upon appeal the bond amount is refunded. RCW 19.28.131. This imposes a reasonable burden upon the appealing party and a means for recouping the fee.

Here, Mr. Morrison was able to get his bond amount reduced upon showing of financial hardships at superior court. This provided relief for him. Mr. Morrison argues that the superior court does not have the authority to reduce the bond amount. AB 3. Washington courts have long applied equity to waive filing fee amounts for financial hardship and by analogy this would appear to apply here. *O'Connor v. Matzdorff*, 76 Wn.2d 589, 600, 458 P.2d 154 (1969). In any event, the Department did not appeal, and this Court should decline to address an abstract legal proposition. *Housing Authority of City of Everett v. Terry*, 114 Wn.2d 558, 570, 789 P.2d 745 (1990). Moreover, one who prevailed in the superior court but who is “disappointed over a certain result” is not an “aggrieved party” under RAP 3.1. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003).

The third *Mathews* factor considers the governmental interest. *Mathews*, 424 U.S. at 335. Electrical laws protect the public by attempting to ensure that electrical equipment is safely installed. See RCW 19.28. Here the Department has an interest in enforcing the electrical laws through its citations. The Department also has an interest in ensuring that the appeal process is done in a cost efficient manner. The Legislature decided to offset the costs of the Electrical Board through use

of the bond. This is a reasonable legislative choice. *See Saylor*, 87 Wn.2d at 741.

B. A Filing Fee Is Due under RCW 4.84.010

Mr. Morrison argues that the superior court erred in not awarding his filing fee under RCW 4.84.350. AB 4. RCW 4.84.350 provides for attorney fees and expert witnesses fees; it does not appear to include court filing fees.¹ However, RCW 4.84.010 provides that prevailing parties shall receive their superior court filing fees. Accordingly, the Department agrees he should receive his filing fee after he prevailed when the superior court waived a portion of his bond amount.

VI. CONCLUSION

The Department requests that the Court affirm the October 18, 2010 order of the Superior Court.

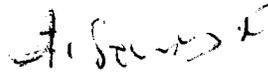
Without any legal argument or citation to authority, Mr. Morrison argues that the relief he should obtain is reversal of the citations. AB 4. If

¹ Mr. Morrison would not be entitled to attorney fees under the Equal Access to Justice Act (EAJA), as he appeared pro se and did not incur attorney fees. RCW 4.84.350(1) (providing for award of attorney fees); RCW 4.84.340(3) (reasonable attorney fees based on the prevailing market for services furnished); *see also Marriage of Brown*, 159 Wn.2d 931, 938, 247 P.3d 466 (2011) (no attorney fees for pro se litigants under arbitration statute). The federal courts have held that pro se litigants are not entitled to attorney fees under the federal EAJA, 28 U.S.C. § 2412. *Hexamer v. Foreness*, 997 F.2d 93, 94 (5th Cir. 1993); *Demarest v. Manspeaker*, 948 F.2d 655, 655-56 (10th Cir. 1991); *Sommer v. Sullivan*, 898 F.2d 895, 895-96 (2d Cir. 1990); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987); *Crooker v. EPA*, 763 F.2d 16, 17 (1st Cir. 1985).

the Court decides to reverse the superior court, the remedy would be to remand to allow Mr. Morrison's electrical appeal without the appeal bond.

RESPECTFULLY SUBMITTED this 2 day of May, 2011.

ROBERT M. MCKENNA
Attorney General



Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993