

FILED  
COURT OF APPEALS  
DIVISION II

10 MAR 24 PM 1:39

No. 39807-9-II  
STATE OF WASHINGTON  
BY  DEPUTY

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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**PUGET SOUND MEDICAL SUPPLY, Appellant,**

and

**DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.**

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**REPLY BRIEF OF APPELLANT**

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Appellant

**ORIGINAL**

## REPLY

The trial court improperly dismissed PSM's request for review for failure to exhaust administrative remedies. The DSHS Board of Appeals had the opportunity to accept further administrative review of the matter and elected not to. PSM pursued available administrative remedies.

Contrary to the Department's argument, PSM did not attempt to skip a level of administrative review. PSM first appealed the audit findings to OAH and then requested further review by the Board of Appeals, who had the authority to accept review and elected not to. At that point, PSM's only recourse was to seek judicial review.

The applicable code sections do not require review by the Board of Appeals, but only require that the party request such review: "If a party disagrees with an initial order for a case listed in WAC 388-02-0215(4) and wants it changed, the party must *request* review by BOA...." WAC 388-02-0530(2) (2007) (emphasis added). PSM requested review by the Board of Appeals. When that request for review was denied, the Initial Order by OAH became a final order 21 days after it was mailed: "If no one requests review of the initial order *or if a review request is dismissed*, the initial order is final twenty-one calendar days after it is mailed." WAC 388-02-0525 (emphasis added). A party can petition for judicial review of

a final order of either OAH or BOA. WAC 388-02-0605; *see also* WAC 388-02-0530(4) (2007).

PSM does not argue that applicable code sections do not require a request for review by the Board of Appeals. PSM did file a request for review with the Board of Appeals, and requested reconsideration of its decision to deny further review. The Board of Appeals had authority to accept the request for review. WAC 388-02-0530(2), cited above, only requires that a party request review, which PSM did. It does not explicitly require that the Board of Appeals hear the matter on the merits. PSM exhausted its administrative remedies by requesting further review.

In addition, PSM's petition for judicial review was timely filed. The Department suggests that the petition for review was untimely because it was filed more than thirty days after the mailing date of the Initial Order. The Department relies on WAC 388-02-0645(1), which provides: "You must file your petition for judicial review with the superior court within thirty calendar days after OAH or BOA mails its final order."

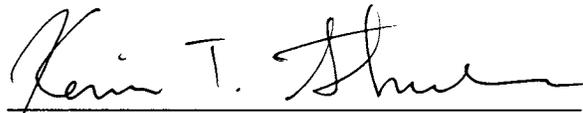
This cannot mean that PSM had to file its petition within thirty days of December 24, 2007, the mailing date of the Initial Order. WAC 388-02-0645(1) specifically refers to the mailing date of the *final order*. On December 24, 2007, OAH mailed the Initial Order. The Initial Order did not become a final order until 21 days after it was mailed. WAC 388-

02-0525. PSM's petition for judicial review was filed within thirty days after January 14, 2008, the date the order became final. This is consistent with RCW 34.05.542, requiring that a request for review be filed within 30 days of service of a final order. The petition was timely.

The trial court erred in granting the motion to dismiss. PSM requested further administrative review by the Board of Appeals and BOA had the opportunity to apply its expertise. PSM sufficiently exhausted its administrative remedies, and the trial court's decision should be reversed.

Respectfully submitted this 23<sup>rd</sup> day of March, 2010.

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DIVISION III

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**Certificate of Service**

STATE OF WASHINGTON

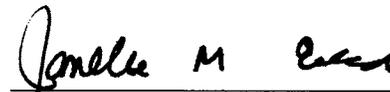
I, the undersigned, hereby certify under penalty of perjury of the laws of  
the State of Washington that I caused the foregoing Reply Brief of Appellant to be  
served upon:

Angela D. Coats McCarthy  
P.O. Box 40124  
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Service was accomplished by:

Hand delivery  
 First class mail  
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DATED this 24<sup>th</sup> day of March, 2010 at Tacoma, Washington.



Janelle Elrod  
Legal Assistant