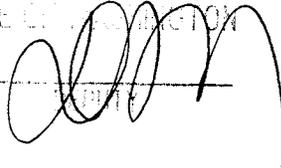


FILED  
COURT OF APPEALS  
DIVISION II

10 JUN -9 PM 1:09

STATE OF WASHINGTON

BY \_\_\_\_\_



No. 40159-2-II

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

---

**ALICIA L. GREEN, on behalf of herself and all others similarly  
situated,  
Respondent,**

**v.**

**WASHINGTON STATE, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES  
Appellant.**

---

**BRIEF OF THE RESPONDENT**

---

**Attorneys for Respondent:**

**Gregory D. Provenzano and Amy L. Crewdson**  
COLUMBIA LEGAL SERVICE  
711 Capitol Way S #304  
Olympia WA 98501  
360-943-6260

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	STATEMENT OF ISSUES.....	2
IV.	STATEMENT OF THE CASE.....	3
V.	ARGUMENT .....	6
A.	This Court should reverse the agency order because the ALJ and agency erroneously interpreted or applied the law. ....	6
	1. Standard of Review.....	6
	2. The ALJ and agency ignored settled rules of statutory and regulatory construction.....	7
	3. The language of the former regulations was plain and unambiguous. ....	9
	a. Former WACs 388-450-0162 and 388-450-0175.....	9
	b. John Camp’s testimony.....	14
	c. There is no conflict between or among the former regulations which create an ambiguity. ....	17
	4. Where a regulation is not ambiguous, a court must give effect to its plain meaning even if the agency intended something else but failed to express it. ....	21
	5. The Department should not be allowed to disregard legislative rules without going through APA notice and comment rule making.....	26
B.	This Court should affirm the class certification order. ....	30
	1. Standard of Review.....	31
	2. The trial court considered all the CR 23 criteria.....	31
	3. The Department ignores the fact that class certification is an ancillary procedural matter. ....	32
	4. Class members’ claims were not time-barred.....	34

a.	The applicable statute of limitation is 12 months.....	35
b.	The 12-month limit was equitably tolled. .	39
C.	The trial court properly ordered the Department to restore wrongfully withheld food benefits back to March 26, 2007. ....	43
1.	The Department’s arguments concerning relief are at odds with federal law and its own regulations.....	44
2.	The Department’s arguments would unfairly deprive class members of relief because Ms. Green had no choice but to exhaust her administrative remedies. .	45
D.	This Court should affirm the trial court’s award of attorneys’ fees and award fees for time spent opposing the motion for discretionary review and this appeal.....	46
VI.	CONCLUSION .....	48

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Department of Social and Health Services</i> , 38 Wash. App. 13, 683 P.2d 1133 (1984).....	22
<i>American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority</i> , 777 F.2d 751 (D.C. Cir. 1985) .....	27, 28
<i>Aponte v. Department of Social and Health Services</i> , 92 Wash. App. 604, 965 P.2d 626 (1998).....	9
<i>Belfor USA Group, Inc. v. Thiel</i> , 160 Wash.2d 669, 160 P.3d 39 (2007).....	48
<i>Blade v. Department of Social and Health Services</i> , 25 Wash. App. 630, 610 P.2d 929 (1980).....	47
<i>Bowen v. City of New York</i> , 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) .....	40
<i>Carlton v. Vancouver Care, LLC.</i> , 155 Wash. App. 151 (2010) .....	48
<i>Cerrillo v. Esparza</i> , 158 Wash. 2d 194, 142 P.3d 155 (2006).....	21
<i>City of Kent v. Beigh</i> , 145 Wash.2d 33, 32 P.3d 258 (2001) .....	23
<i>Construction Industry Training Council of Washington v. Seattle Building and Construction Trades Council</i> , 520 U.S. 1210, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997).....	16
<i>Consumer Energy Council of America v. FERC</i> , 673 F.2d 425, (D.C.Cir.1982) .....	28
<i>Conway v. Washington State Department of Social and Health Services</i> , 131 Wash. App. 406, 120 P.3d 130 (2005).....	7
<i>Costanich v. Department of Social and Health Services</i> , 138 Wash. App. 547, 156 P.3d 232 (Div. 1 2007).....	27
<i>Cox v. Helenius</i> , 103 Wash.2d 383, 693 P.2d 683 (1985) .....	9
<i>Cubanski v. Heckler</i> , 781 F.2d 1421 (9 <sup>th</sup> Cir. 1986).....	27
<i>Danzer v. Dep't of Labor &amp; Industries</i> , 104 Wash. App. 307, 16 P.3d 35 (2000).....	42
<i>Deffenbaugh v. Department of Social and Health Services</i> , 53 Wash. App, 868, 770 P.2d 1084 (1989).....	27
<i>Department of Labor &amp; Industries v. Gongyin</i> , 154 Wash.2d 38, 109 P.3d 816 (2005).....	8
<i>Department of Labor &amp; Industries v. Tyson Foods, Inc.</i> , 143 Wash. App. 576, 178 P.3d 1070 (2008).....	7, 8, 9
<i>Exportal Ltd. v. United States</i> , 902 F.2d 45 (D.C.Cir.1990) .....	16
<i>Harold Meyer Drug v. Hurd</i> , 23 Wash. App. 683, 598 P.2d 404 (1979) ....	47
<i>Hertzke v. Dep't of Ret. Sys.</i> , 104 Wash. App. 920, 18 P.3d 588 (2001).....	6, 7

<i>Hosea v. Toth</i> , --- P.3d ----, 2010 WL 2026734 (2010).....	23
<i>In re Forfeiture of One 1970 Chevrolet Chevelle</i> , 166 Wash.2d 834, 215 P.3d 166 (2009).....	22
<i>In the Matter of Detention of Martin</i> , 163 Wash.2d 501, 182 P.3d 951 (2008).....	24, 25, 26
<i>Jenkins v. Department of Social and Health Services</i> , 160 Wash.2d 287, 157 P.3d 388 (2007).....	47
<i>Killian v. Atkinson</i> , 147 Wash.2d 16, 50 P.3d 638 (2002).....	21
<i>Lacey Nursing Ctr. v. Department of Revenue</i> , 128 Wash.2d 40, 905 P.2d 338 (1995).....	31
<i>Levy v. State</i> , 91 Wash. App. 934, 957 P.2d 1272 (1998) .....	34
<i>Lopez v. Heckler</i> , 725 F.2d 1489 (9th Cir. 1984) .....	40
<i>Mader v. Health Care Authority</i> , 149 Wash.2d 458, 70 P.3d 931 (2003).....	8
<i>Multicare Medical Center v. Department of Social and Health Services</i> , 114 Wash.2d 572, 790 P.2d 124 (1990).....	7, 8
<i>Musselman v. Department of Social and Health Services</i> , 132 Wash. App. 841, 134 P.3d 248 (2006).....	6
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 160 Wash.2d 173, 157 P.3d 847 (2007).....	31
<i>Oda v. State</i> , 111 Wash. App. 79, 44 P.3d 8 (2002) .....	33, 34
<i>Oda v. State</i> , 147 Wash. 2d 1018, 56 P.3d 992 (2002).....	33
<i>Odyssey Healthcare Operating BLP v. Department of Health</i> , 145 Wash. App. 131, 185 P.3d 652 (2008).....	8
<i>Pacific Bell Telephone Co. v. California Public Utilities Com'n</i> 597 F.3d 958 (9 <sup>th</sup> Cir. 2010).....	15
<i>Panhandle Eastern Pipe Line Company v. Federal Energy Regulatory Commission</i> , 613 F.2d 1120 (D.C. Cir. 1979) .....	27
<i>Pickett v. Holland America Line-Westours, Inc.</i> 145 Wash.2d 178, 35 P.3d 351 (2001).....	35
<i>Portland General Electric Company v. Bonneville Power Administration</i> , 501 F.3d 1009 (9 <sup>th</sup> Cir. 2007) .....	27
<i>Process Gas Consumers Group v. Consumer Energy Council of America</i> , 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983).....	28
<i>Safe Air For Everyone v. United States Environmental Protection Agency</i> , 488 F.3d 1088 (9 <sup>th</sup> Cir. 2007) .....	15
<i>Samson v. City of Bainbridge Island</i> , 149 Wash. App. 33, 202 P.3d 334 (2009).....	26
<i>Schoonover v. State</i> 116 Wash. App. 171, 64 P.3d 677 (2003) .....	34
<i>Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council</i> 129 Wash.2d 787, 920 P.2d 581, 587 (1996).....	16

<i>Simpson Tacoma Kraft Co. v. Department of Ecology</i> , 119 Wash.2d 640, 835 P.3d 1030 (1992).....	29
<i>Sitton v. State Farm Mutual Automobile Insurance Company</i> , 116 Wash. App. 245, 63 P.3d 198 (2003).....	31
<i>Skamania County v. Woodall</i> , 104 Wash. App. 525, 16 P.3d 701 (2001).....	26
<i>Skamania County v. Woodall</i> , 144 Wash.2d 1021, 34 P.3d 1232 (2001).	27
<i>State v. Delgado</i> , 148 Wash.2d 723, 63 P.3d 792 (2003).....	25
<i>State v. Stately</i> , 152 Wash. App. 604, 216 P.3d 1102 (2009).....	18
<i>State v. Stately</i> , 168 Wash.2d 1015, 227 P.3d 852 (2010).....	18
<i>State v. Taylor</i> , 97 Wash.2d 724, 649 P.2d 633 (1982).....	25
<i>Tofte v. Department of Social and Health Services</i> , 85 Wash.2d 161, 531 P.2d 808 (1975).....	47
<i>U.S. v. Nixon</i> , 418 U.S. 683, 94 S.Ct. 3090, 41 L.3d.2d 1039 (1974).....	27
<i>Union Bay Preservation Coalition v. Cosmos Development &amp; Admin. Corp.</i> 127 Wash.2d 614, 902 P.2d 1247, 1250 (1995).....	16
<i>VanHess v. Dep't of Labor and Industries</i> , 132 Wash. App. 304, 130 P.3d 902 (2006).....	42
<i>Washington Cedar &amp; Supply Co., Inc. v. Department of Labor &amp; Industries</i> , 137 Wash. App. 592, 54 P.3d 287 (2007).....	7, 8
<i>Washington State Coalition for the Homeless v. Department of Social and Health Services</i> , 133 Wash.2d 894, 949 P.2d 1291 (1997).....	22
<i>Webb v. Smart Document Solutions, LLC</i> , 499 F.3d 1078 (9 <sup>th</sup> Cir. 2007).....	15
<i>Woodall v. Skamania County</i> , 535 U.S. 980, 122 S.Ct. 1459, 152 I.Ed.2d 399 (2002).....	27

**Statutes**

5 U.S. C. § 552(a)(1).....	15
5 U.S. C. § 553(b).....	15
5 U.S.C. § 551(5).....	28
5 U.S.C. § 553.....	28
7 U.S.C. § 2020(b).....	43
7 U.S.C. § 2020(e)(11).....	43
7 U.S.C. § 2014(a).....	18
7 U.S.C. § 2023(b).....	36, 41
42 U.S.C. § 405(g).....	40
RCW 34.05.001.....	16
RCW 34.05.010(16).....	29
RCW 34.05.510.....	32
RCW 34.05.510(2).....	30
RCW 34.05.534.....	32, 34
RCW 34.05.542.....	32, 34, 35
RCW 34.05.542(2).....	41
RCW 34.05.570.....	6
RCW 34.05.570(1)(a).....	7
RCW 34.05.570(3).....	30
RCW 34.05.570(3)(d).....	7, 30
RCW 34.05.570(3)(h).....	30
RCW 34.05.574.....	6
RCW 4.92.100.....	33, 34
RCW 4.92.110.....	33, 34
RCW 74.04.....	24
RCW 74.04.050.....	24
RCW 74.04.055.....	24
RCW 74.04.057.....	24
RCW 74.04.500.....	24
RCW 74.04.510.....	24
RCW 74.08.080.....	47
RCW 74.08.080(2)(a).....	42
RCW 74.08.080(3).....	46, 47, 48

**Other Authorities**

55 PA Code § 275.3(b)(4)..... 42  
California Food Stamp Regulations 63-804.5 ..... 42  
Maryland Food Stamp Manual 460.4 ..... 42  
North Carolina Food and Nutrition Services Manual 705.09 ..... 42  
Rules of Appellate Procedure (RAP) 18.1 ..... 47, 48  
Superior Court Civil Rule (CR) 23 ..... 30, 31, 33  
Superior Court Civil Rule (CR) 23(b)(2)..... 5

**Rules**

44 Fed. Reg. 33381 ..... 36  
7 C.F.R. § 273.15(g) ..... 36, 41, 42  
7 C.F.R. § 273.17(a)(1)(ii) ..... 43  
7 C.F.R. § 273.17(a)(2) ..... 37, 41, 44  
WAC 388-02 ..... 40  
WAC 388-400-0040 ..... 17  
WAC 388-400-0040(2) ..... 18  
WAC 388-410-0040 ..... 41  
WAC 388-410-0040(2) – (5) ..... 38  
WAC 388-410-0040(3) ..... 39  
WAC 388-410-0040(3)(a) ..... 39  
WAC 388-410-0040(3)(a),(b),(c), and (d) ..... 39  
WAC 388-410-0040(3)(b) ..... 43  
WAC 388-410-0040(3)(d) ..... 44  
WAC 388-414-0001 ..... 18  
WAC 388-450-0162 ..... passim  
WAC 388-450-0162(1)(b) ..... 11, 13, 23  
WAC 388-450-0170 ..... 23  
WAC 388-450-0170 – 388-450-0200 ..... 11, 13  
WAC 388-450-0175 ..... passim  
WAC 388-450-0185 ..... 11, 17, 19, 21  
WAC 388-450-0185 through 388-450-0200 ..... 23  
Washington State Register (WSR) 06-07-078 ..... 14, 23  
Washington State Register (WSR) 06-13-53 ..... 17  
Washington State Register (WSR) 07-22-035 ..... 21  
Washington State Register (WSR) 08-05-042 ..... 45  
Washington State Register (WSR) 08-12-031 ..... 5, 12, 23  
Washington State Register (WSR) 08-15-009 ..... 9  
Washington State Register (WSR) 09-07-054 ..... 17, 21  
Washington State Register (WSR) 99-19-161 ..... 9  
Washington State Register (WSR) 99-24-008 ..... 9

**Treatises**

2 A Sutherland Statutory Construction §46.5 (7<sup>th</sup> Ed.)(June 2009)..... 18  
William R. Andersen, *The 1988 Washington Administrative Procedure Act: An Introduction*, 64 Wash. L. Rev. 781, (1989)..... 29

## I. INTRODUCTION

This Court should reverse the final agency order and declare that the Department of Social and Health Services (DSHS or Department) and Administrative Law Judge (ALJ), erroneously interpreted or applied the law when it calculated Ms. Green's and other class members' Basic Food (aka Food Stamp) benefits. The Court should find that the language of the regulations at issue here was (1) unambiguous, and (2) required the state agency to provide Ms. Green and class members with the earned income deduction/incentive set forth in former WAC 388-450-0175 when determining both their cash and food assistance benefits. The Department's arguments to the contrary overlook rules of statutory construction, make the agency's Basic Food regulations superfluous, and undermine the rulemaking requirements of the Administrative Procedure Act.

The Court should affirm the trial court's class certification order, its order restoring wrongfully withheld Basic Food benefits, and award of attorneys' fees. As shown below, the trial court did not abuse its discretion in entering these orders. Lastly, the Court should award Ms. Green reasonable attorneys' fees.

## **II. ASSIGNMENT OF ERROR**

1. The ALJ erred in making Findings of Fact 14 and 16 because the Testimony of John Camp was not part of the rulemaking file, was irrelevant, and was admitted in error over the objection of Ms. Green's counsel.

2. The ALJ also erred in entering Conclusions of Law 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 by erroneously interpreting and applying former WAC 388-450-0162 and former WAC 388-450-0175.

## **III. STATEMENT OF ISSUES**

1. Did the ALJ and Department erroneously interpret or apply the law when calculating Ms. Green's and other class members' countable income under the Basic Food program and their food benefits, without providing them with the earned income deduction/incentive described in former WAC 388-450-0175?

2. Did the trial court abuse its discretion in allowing this matter to proceed as a class action? Was its class certification order manifestly unreasonable or based upon untenable grounds?

3. Did the trial court erroneously interpret or apply the law or abuse its discretion in ordering the Department to restore wrongfully withheld Basic Food benefits going back to March 26, 2007?

4. Did the trial court abuse its discretion in awarding Ms. Green reasonable attorneys' fees?

#### IV. STATEMENT OF THE CASE

The legal issue now before this Court was first raised by another Basic Food recipient, Tabitha Montgomery. In Ms. Montgomery's case, the ALJ ruled in her favor on December 5, 2007. *See* Exhibit A: AR 000098-000107.<sup>1</sup> Based on the *Montgomery* decision and on behalf of a similarly situated client, Columbia Legal Services sent a letter to DSHS Secretary Robin Arnold-Williams on March 26, 2008 demanding that the agency take immediate steps to recalculate the monthly food benefits of all Basic Food recipients who receive income from work while receiving General Assistance in accordance with former WAC 388-450-0162 and WAC 388-450-0175. Exhibit B: AR 000108-000109. The Secretary responded on April 2, 2008. Exhibit C: AR 000110-000111. The Secretary made it clear she had no intention of restoring benefits to other similarly situated households, stating she disagreed with the *Montgomery* decision. *Id.*

On April 7, 2008, James Davis filed a Petition for Judicial Review and Declaratory Judgment in Thurston County Superior Court to compel

---

<sup>1</sup> AR refers to the Administrative Record created during the administrative proceedings below.

the Department to apply the *Montgomery* decision to all similarly situated households. Exhibit D: AR 000112-000124. On May 15, 2009, Ms. Green intervened in this lawsuit as an additional class representative. Exhibits E and F: AR 000125-000141; AR 000142-000155. The Department moved to dismiss the case arguing that the petitioners had failed to exhaust administrative remedies and had failed to file their action in a timely manner. Exhibit 8: AR 000693-706. The motion was granted on June 13, 2008. Exhibit I: AR 000193-000195.

While the above lawsuit was pending, the Department recalculated Ms. Green's Basic Food benefits. Finding 10: AR 000002; Exhibit 1: AR 000198-000201; and Exhibit 2: AR 000202-000205. DSHS sent Ms. Green two letters explaining its calculations on June 6, and June 9, 2008. *Id.*

On July 17, 2008, Ms. Green filed a request for an administrative hearing based on these notices rather than appeal the dismissal of her lawsuit. Finding 11: AR 000003; Exhibit J: AR 000196-000197. An administrative hearing was held on January 6, 2009. AR 000001-000009. The Final Order was entered on February 27, 2009. *Id.* The ALJ found that the version of WAC 388-450-0175 in effect in May and June 2008 did not apply to the calculation of Basic Food benefits. *Id.*

On March 25, 2009, Ms. Green filed her Petition for Judicial

Review and Declaratory Judgment. CP 5-48.<sup>2</sup> On May 1, 2009, Ms. Green filed her motion for class certification. CP 49-55. The trial court granted Ms. Green's motion for class certification on June 18, 2009. CP 107-111. In doing so, the trial court certified a class under CR 23(b)(2) that included all persons who, between March 26, 2007 and June 30, 2008, received income from work while receiving General Assistance who received fewer or no Basic Food benefits because the Department did not apply former WAC 388-450-0162 and former WAC 388-450-0175 when determining their eligibility for the Basic Food program or when calculating their Basic Food benefits.<sup>3</sup> *Id.*

On July 17, 2009, the Department filed a motion for discretionary review with this Court seeking to overturn the trial court's class certification order. The motion was denied on September 29, 2009.

The case was tried on August 28, 2008. The sole question at trial was whether the Department erroneously interpreted or applied the law when it calculated Ms. Green's and other class members' Basic Food benefits without providing them with the earned income

---

<sup>2</sup> CP followed by the page number refers to the pleadings filed in the trial court as designated in the Second Amended Clerk's Papers Index.

<sup>3</sup> The Department amended WAC 388-450-0175 effective July 1, 2008 to state that it only applied to general assistance cash benefits only. *See* Washington State Register (WSR) 08-12-031 (May 29, 2008).

incentive/deduction described in former WAC 388-450-0175.<sup>4</sup>

On November 5, 2009, the trial court issued a letter opinion in favor of Ms. Green. CP 178-182. On December 4, 2009 the trial court entered Findings of Fact, Conclusions of Law and Declaratory Judgment Order under RCW 34.05.574. CP 358-376. On the same day, the trial court also entered a separate order awarding Ms. Green reasonable attorneys' fees. On December 16, 2009 an Amended Order Awarding Reasonable Attorneys' Fees was entered. CP 377-383.

## V. ARGUMENT

### A. **This Court should reverse the agency order because the ALJ and agency erroneously interpreted or applied the law.**

#### 1. **Standard of Review.**

Superior and appellate courts review final agency orders under the Administrative Procedure Act (APA), RCW 34.05. *Musselman v. Department of Social and Health Services*, 132 Wash. App. 841, 846, 134 P.3d 248 (2006). The Court applies the APA's standards governing judicial review directly to the administrative record. *Id. citing* RCW 34.05.570 and *Hertzke v. Dep't of Ret. Sys.*, 104 Wash. App. 920, 926, 18 P.3d 588 (2001). Under the APA, a court may reverse an agency order in

---

<sup>4</sup> Ms. Green had originally pled that the Department's actions were also inconsistent with its own rules and were arbitrary or capricious. CP 19. She abandoned these claims, however, before trial. CP 118.

an adjudicative proceeding when the agency erroneously interpreted or applied the law. *Id. citing* RCW 34.05.570(3)(d). The party challenging the agency action bears the burden of establishing its invalidity. *Id. citing* RCW 34.05.570(1)(a).

A court reviews an agency's interpretation or application of the law *de novo* under an error of law standard. *Conway v. Washington State Department of Social and Health Services*, 131 Wash. App. 406, 414, 120 P.3d 130 (2005). This standard allows a court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *Department of Labor & Industries v. Tyson Foods, Inc.*, 143 Wash. App. 576, 582, 178 P.3d 1070 (2008). A court gives great weight to an agency's interpretation of a regulation within its area of expertise, if the interpretation is not in conflict with the regulatory language; a court is not bound, however, by an agency's interpretation. *Id. citing Washington Cedar & Supply Co., Inc. v. Department of Labor & Industries*, 137 Wash. App. 592, 598, 54 P.3d 287 (2007).

**2. The ALJ and agency ignored settled rules of statutory and regulatory construction.**

The rules of statutory construction apply to the interpretation of administrative rules and regulations. *Multicare Medical Center v. Department of Social and Health Services*, 114 Wash.2d 572,590, 790

P.2d 124 (1990). Accordingly, when faced with an unambiguous regulation, the court may not speculate as to the intent of the regulation or add words to the regulation. *Id.* The court's task is not to question the wisdom of a particular regulation; rather, its review is limited to determining what the regulation requires. *Id.*

Where a regulation is unambiguous, a court will not look beyond the plain meaning of the words in the regulation. *Washington Cedar*, 137 Wash. App. at 599, citing *Mader v. Health Care Authority*, 149 Wash.2d 458, 473, 70 P.3d 931 (2003). A regulation is unambiguous if it is susceptible to one reasonable interpretation after considering the entire statutory scheme, including related regulations. *Department of Labor & Industries v. Tyson Foods, Inc.*, 143 Wash. App. 576, 582, 178 P.3d 1070 (2008), citing *Washington Cedar*, 137 Wash. App. at 599-600 and *Department of Labor & Industries v. Gongyin*, 154 Wash.2d 38, 45, 109 P.3d 816 (2005).

To ascertain its meaning, terms in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole. *Odyssey Healthcare Operating BLP v. Department of Health*, 145 Wash. App. 131, 142, 185 P.3d 652 (2008). The goal in interpreting an administrative regulation is to “achieve a harmonious total statutory scheme and avoid conflict between different provisions.”

*Department of Labor & Industries v. Tyson Foods, Inc.*, 143 Wash. App at 582.

**3. The language of the former regulations was plain and unambiguous.**

To determine whether a regulation is ambiguous, the Court should look first to its plain language. In doing so, “courts must give effect to every word, clause, and sentence whenever possible; no part should be deemed inoperative or superfluous unless the result of obvious mistake or error.” *Aponte v. Department of Social and Health Services*, 92 Wash. App. 604, 617, 965 P.2d 626 (1998), *citing Cox v. Helenius*, 103 Wash.2d 383, 387-88, 693 P.2d 683 (1985).

**a. Former WACs 388-450-0162 and 388-450-0175.**

Here, the analysis begins with the provisions of former WAC 388-450-0162 which were in place when this dispute arose. This version of WAC 388-450-0162 was adopted in 1999. *See* WSR 99-24-008: AR 000271-000272.<sup>5</sup> According to the CR-102, Proposed Rulemaking Statement, this rule was created to reflect prospective budgeting *and* to provide *one rule* for cash and food assistance. WSR 99-19-161 (emphasis added). *See* AR 000230-000231.

---

<sup>5</sup> In response to the *Montgomery* decision, the Department took steps to amend WAC 388-450-0162. These amendments took effect August 3, 2008. WSR 08-15-009.

Under this former rule, the Department should have used Ms. Green's countable income to determine her eligibility and the amount of *both* her cash and food assistance benefits:

**WAC 388-450-0162 The department uses countable income to determine if you are eligible and the amount of your *cash and food assistance benefits*.**

1. Countable income is all income that remains after we subtract the following:
  - a. Excluded or disregarded income under WAC 388-450-0015;
  - b. Deductions or earned income incentives under *WAC 388-450-0170 through 388-450-0200*;
  - c. Allocations to someone outside of the assistance unit under WAC 388-450-0095 through 388-450-0160.

.....

4. For food assistance:
  - a. We compare your countable income to the monthly net income standard specified in WAC 388-478-0060.
  - b. You are not eligible for benefits when your assistance unit's income is equal to or greater than the monthly net income standards.
  - c. Your benefit level is the maximum allotment in WAC 388-478-0060 minus thirty percent of your countable income.

WAC 388-450-0162 (emphasis added): AR 000081. This regulation states that it applies *both* to the Department's cash and food assistance programs.

Under this regulation, “countable income” is all income that remains after the Department subtracts various amounts, including “[d]eductions or earned income incentives under WAC 388-450-0170 *through* 388-450-0200. (Emphasis added.)

In this case, the Department provided Ms. Green with the deductions in WAC 388-450-0185 which was within the range of rules (WAC 388-450-0170 – 388-450-0200) cited in former WAC 388-450-0162(1)(b), but not the earned income deduction/incentive as provided in former WAC 388-450-0175 which was also within the same range of rules.

The question this Court must decide is whether the Department was required to determine Ms. Green’s and other class members’ countable income by subtracting the deductions and earned income incentives of *both* former WAC 388-450-0175 and WAC 388-450-0185. The ALJ decided this was not required, but did so only by ignoring the rules of statutory and regulatory construction discussed above. The trial court disagreed; it found that the ALJ and agency had erroneously interpreted or applied the law. This Court should do the same.

The language of former WAC 388-450-0162 and former WAC 388-450-0175 was unambiguous. WAC 388-450-0162 stated unequivocally that it governed both cash and food assistance benefits. It

also contained a specific range of rules governing deductions and earned income incentives. The second regulation, former WAC 388-450-0175 fell within this range of rules. At the time this case arose, WAC 388-450-0175 described the required earned income deduction/incentive for GA-U recipients with earned income and had no words limiting its application to the Department's cash assistance programs. Rather, it provided:

**WAC 388-450-0175 Does the department offer an income deduction as an incentive for GA-U clients to work?**

The department gives special deductions to people who receive income from work while receiving General Assistance - Unemployable (GA-U). We allow the following deductions before using your earnings to determine your eligibility and monthly benefits:

1. We subtract eighty-five dollars plus one half of the remainder of your monthly gross earned income as an incentive to employment.
2. We also subtract an amount equal to twenty percent of your gross earned income to allow for work expenses.

Former WAC 388-450-0175: AR 00080.<sup>6</sup>

The Department argues that former WAC 388-450-0175 was never intended to apply to the Basic Food program. The Department ignores two

---

<sup>6</sup> In May 2008, in response to the *Montgomery* decision and while this dispute was pending, the Department published a permanent rule amending WAC 388-450-0175 to "clarify" that the earned income deduction/incentive only applied to General Assistance cash grants. This rule took effect July 1, 2008. WSR 08-12-031 (May 29, 2008).

facts. First, former WAC 388-450-0162(1)(b) stated unequivocally that the deductions or earned income incentives contained in WAC 388-450-0170 – 0200 were to be used to determine countable income for purposes of *both* its cash and food assistance programs. Second, there is no language in former WAC 388-450-0175 limiting its earned income deduction/incentive to GA-U cash assistance.

The Department's argument is also undercut by its 2006 amendment of WAC 388-450-0175. That amendment deleted language in the rule that limited its application to the GA-U cash assistance program:

**WAC 388-450-0175 ((GA-U earned income incentive and deduction.)) Does the department offer an income deduction as an incentive to GA-U clients to work?**

(( This section applies to the GA-U cash assistance program.))

The department gives special deductions to people who receive income from work while receiving General Assistance-Unemployable (GA-U). We allow the following deductions before using your earnings to determine your eligibility and monthly benefits:

- (1) ((When a client's countable income is determined,)) We subtract eighty-five dollars plus one half of the remainder of ((a client's)) your monthly gross earned income ((is disregarded)) as an incentive to employment.

(2) ~~((In addition to the work incentive provided in subsection (1) of this section, work expenses are disregarded in an amount equal to))~~ We also subtract an amount equal to twenty percent of ((the)) your gross earned income to allow for work expenses.

WSR 06-07-078 (effective May 1, 2006): AR 000564, 000569.

**b. John Camp's testimony.**

In ruling against Ms. Green, the ALJ relied in part on testimony from Department employee John Camp explaining why the words limiting the regulation to cash assistance were removed from the regulation.<sup>7</sup> See Finding 14: AR 000003; Finding 16: AR 000004. This testimony, however, cannot be squared with the actual language of the amendment or the purpose statement filed with the rule. See WSR 06-07-078 (effective May 1, 2006) (stating that these rules, including WAC 388-450-0175, were being amended “in order to update references to other department rules and reflect current policy how the department considers various sources of income in determining eligibility and benefits for department programs”). AR 000564.

---

<sup>7</sup> Ms. Green moved to exclude Mr. Camp's testimony and the Department's Exhibit 10 prior to the administrative hearing. AR 000057-000060. As explained *infra* at 16-17, testimony surrounding the Department's unexpressed intentions at the time the rules were adopted is not relevant unless part of the rulemaking file. The ALJ erroneously denied the motion. AR 000033.

The ALJ's reliance on Mr. Camp's testimony was misplaced. While there are cases where federal courts have not allowed the plain language of a regulation to control if clearly expressed administrative intent is to the contrary, these courts have concluded that the notice requirements of the Administrative Procedure Act, 5 U.S. C. §§ 552(a)(1) and 553(b), require that some indication of the regulatory intent that overcomes the plain language of the regulation be referenced in the published notices that accompanied the rulemaking process. *See, e.g., Safe Air For Everyone v. United States Environmental Protection Agency*, 488 F.3d 1088, 1097-1098 (9<sup>th</sup> Cir. 2007); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1085 (9<sup>th</sup> Cir. 2007); *Pacific Bell Telephone Co. v. California Public Utilities Com'n* 597 F.3d 958, 970 (9<sup>th</sup> Cir. 2010). Otherwise, interested parties would not have the meaningful opportunity to comment on proposed regulations that the APA contemplates because they would have had no way of knowing what was actually proposed. *Safe Air*, 488 F.3d at 1098.

As the D.C. Circuit has recognized:

Courts' reliance on the "plain meaning" rule in this setting [of interpreting administrative regulations] is not a product of some fetishistic attraction to legal "formalism." In order to infuse a measure of public accountability into administrative practices, the APA mandates that agencies provide interested parties notice and an opportunity for comment before promulgating rules of general

applicability. This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say. Moreover, if permitted to adopt unforeseen interpretations, agencies could constructively amend their regulations while evading their duty to engage in notice and comment procedures. As applied to agency regulations, then, the plain meaning doctrine is an interpretive norm essential to perfecting the scheme of administrative governance established by the APA.

*Exportal Ltd. v. United States*, 902 F.2d 45, 50-51 (D.C.Cir.1990).

This Court should apply the same rule here to ensure that the notice and comment rulemaking procedures set forth in RCW 34.05 retain their vitality. In enacting the APA, the Washington Legislature intended that courts should interpret provisions of the Act consistently with decisions of other courts interpreting similar provisions, including the federal government. RCW 34.05.001. Given this directive, Washington Courts have routinely looked to federal court precedent in APA cases.

*E.g., Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council* 129 Wash.2d 787, 801, 920 P.2d 581, 587 (1996), *cert. den.* 520 U.S. 1210, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997); *Union Bay Preservation Coalition v. Cosmos Development & Admin. Corp.* 127 Wash.2d 614, 619, 902 P.2d 1247, 1250 (1995). This Court should do the same.

**c. There is no conflict between or among the former regulations which create an ambiguity.**

To ascertain the meaning of a regulation, it should not be read in isolation but rather within the context of the entire regulatory scheme.

There are a number of regulations that pertain to the Basic Food program scattered among several chapters. *See* AR 000005. They include: WAC 388-400-0040, which summarizes the rules governing the Basic Food Program, and WAC 388-450-0185, which describes deductions that pertain exclusively to the Basic Food program. Neither of these two regulations contains provisions which conflict with or would be rendered superfluous by the plain language found in former WAC 388-450-0162 and WAC 388-450-0175.<sup>8</sup>

The provisions of WAC 388-400-0040 as it existed when this dispute arose summarize, in broad strokes, the rules of the Basic Food programs. *See* WSR 06-13-53 which took effect July 17, 2006.<sup>9</sup> This rule refers to the deductions set forth in WAC 388-450-0185, but does not mention the earned income deduction/incentive in WAC 388-450-0175.

---

<sup>8</sup> The ALJ correctly noted that WAC 388-400-0040 requires Basic Food recipients to meet federal Food Stamp *eligibility requirements*, but her conclusion that this meant that *all* state food assistance rules be interpreted consistently with the provisions of federal law does not follow. AR 000005. The issue is not whether Ms. Green and class members were eligible; it's whether the *amount* of the benefits they received was correct. *See, infra* at 18.

<sup>9</sup> WAC 388-400-0040 was amended in March 2009. *See* WSR 09-07-054 (March 11, 2009). These amendments were not in place when this case arose.

This general rule or summary cannot be read to limit the more specific provisions of WAC 388-450-0162 and WAC 388-450-0175. *See Montgomery* at AR 000103. *Accord* 2 A Sutherland Statutory Construction §46.5 (7<sup>th</sup> Ed.)(June 2009) (“Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail”). *See, e.g., State v. Stately*, 152 Wash. App. 604, 216 P.3d 1102, 1105 (2009), *rev. den.* 168 Wash.2d 1015, 227 P.3d 852 (2010).

The Department makes the same mistake the ALJ made by asserting that Ms. Green’s interpretation of the former rules would conflict with the provision of WAC 388-400-0040(2) that to be *eligible* for federal food benefits, households “must meet the eligibility requirements of the most current version of the Food Stamp Act of 1977.” In doing so, it confuses Basic Food rules concerning “eligibility” with those relating to “benefit levels.” Ms. Green and the class she represents however, *are* “categorically eligible” for the Basic Food program pursuant to federal law and state regulations. 7 U.S.C. § 2014(a); WAC 388-414-0001. The Department does not dispute that. AR 000022 – 000023. Once an applicant is eligible for Food Stamps, the Department determines how much assistance will be awarded. The focus of this litigation is on the latter, i.e., how much food assistance class members are entitled to receive, not eligibility.

The Department argues that the language of WAC 388-450-0185 calls into question Ms. Green’s interpretation of the law. There are no provisions, however, in this regulation that are in conflict with a plain reading of former WAC 388-450-0162 and WAC 388-450-0175. A careful reading of WAC 388-450-0185 shows that none of its provisions would be made superfluous or meaningless by Ms. Green’s interpretation:

**WAC 388-450-0185 Does the department count all of my income to determine my eligibility and benefits for Basic Food?** We subtract the following amounts from your assistance unit's (AU's) countable income before we determine your Basic Food benefit amount:

(1) A standard deduction based on the number of people in your AU under WAC 388-408-0035:

Eligible and ineligible

AU members	Standard deduction
1	\$134
2	\$134
3	\$134
4	\$143
5	\$167
6 or more	\$191

(2) Twenty percent of your AU's gross earned income (earned income deduction);

(3) Your AU's expected monthly dependent care expense as described below:

(a) The dependent care must be needed for AU member to:

(i) Keep work, look for work, or accept work;

(ii) Attend training or education to prepare for employment; or

(iii) Meet employment and training requirements under chapter .

(b) We subtract allowable dependent care expenses that are payable to someone outside of your AU:

(i) Up to two hundred dollars for each dependent under age two; and

(ii) Up to one hundred seventy-five dollars for each dependent age two or older.

(4) Medical expenses over thirty-five dollars a month owed or anticipated by an elderly or disabled person in your AU as allowed under WAC 388-450-0200.

(5) Legally obligated current or back child support paid to someone outside of your AU:

(a) For a person who is not in your AU; or

(b) For a person who is in your AU to cover a period of time when they were not living with you.

(6) A portion of your shelter costs as described in WAC 388-450-0190.

WSR 07-22-035 (October 30, 2007): AR 000669, 000671. The rule quoted above is the rule in effect at all relevant times during this litigation.<sup>10</sup>

To determine a recipient's "countable income" and Basic Food benefits, the Department was required to provide all the deductions set forth in WAC 388-450-0162, including those in both WAC 388-450-0175 and WAC 388-450-0185. WAC 388-450-0185 was drafted in a way to ensure that the Department deducted not only those deductions available to certain cash assistance programs, including the GA-U earned income deduction/incentive, but also those deductions that specifically apply only to the Basic Food program. Unlike the language found in former WAC 388-450-0175, the language found in WAC 388-450-0185 was explicit. It clearly stated that the deductions set forth in WAC 388-450-0185 only applied to the determination of Basic Food benefits.

**4. Where a regulation is not ambiguous, a court must give effect to its plain meaning even if the agency intended something else but failed to express it.**

Washington courts will not add language to an unambiguous statute or regulation even if they believe the Legislature or agency intended something else but did not adequately express it. *Cerrillo v. Esparza*, 158 Wash. 2d 194, 201, 142 P.3d 155 (2006), *citing Killian v.*

---

<sup>10</sup> WAC 388-450-0185 was amended in 2009. These amendments took effect on April 11, 2009. WSR 09-07-054.

*Atkinson*, 147 Wash.2d 16, 20, 50 P.3d 638 (2002); *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wash.2d 894, 904, 949 P.2d 1291 (1997); *Adams v. Department of Social and Health Services*, 38 Wash. App. 13, 16, 683 P.2d 1133 (1984).

Here, the Department is asking that the Court limit application of the earned income deduction/incentive set forth in former WAC 388-450-0175 to GA-U cash assistance. In doing so, the Department is asking the Court to: (1) remove words from former WAC 388-450-0162 that describe how to determine countable income in both the Department's cash and food assistance programs, and (2) add words of limitation to former WAC 388-450-0175 which the agency previously deleted through notice and comment rulemaking procedures. In short, the Department is asking the Court to rewrite these regulations. As both regulations are unambiguous, this Court must decline to remove or add words of limitation to them even if it finds that the Department did not intend to adopt regulations inconsistent with federal law.

The Department's arguments also violate two additional rules of statutory construction. First, the Department asks the Court to ignore the rule that where the legislature or an agency uses certain statutory or regulatory language in one instance and different language in another, there is a difference in legislative intent. *See, e.g., In re Forfeiture of One*

*1970 Chevrolet Chevelle*, 166 Wash.2d 834, 842, 215 P.3d 166 (2009); *City of Kent v. Beigh*, 145 Wash.2d 33, 45-46, 32 P.3d 258 (2001); *Hosea v. Toth*, --- P.3d ----, 2010 WL 2026734 (2010). Second, the Department overlooks the statutory rules of construction concerning legislative omissions. Both of these rules of construction are discussed below.

Here, the ALJ and the Department reason that since the regulations referenced by WAC 388-450-0162(1)(b), i.e., WAC 388-450-0170 and WAC 388-450-0185 through 388-450-0200 are only applicable to certain programs, former WAC 388-450-0175 should be read to apply only to the General Assistance cash assistance program. *See* Conclusions of Law 10 and 11, AR 000007-000008. This reasoning turns the first rule of statutory construction discussed above on its head. The fact that all the other regulations referenced by WAC 388-450-0162(1)(b) contain language which makes them program specific, *except* for WAC 388-450-0175, clearly indicates that WAC 388-450-0175 should be read to apply to both cash and food assistance programs *because* it has no similar limiting language.<sup>11</sup>

---

<sup>11</sup> This conclusion is further supported by the history of former WAC 388-450-0175. In March 2006, the Department removed language from WAC 388-450-0175 which specifically limited its applicability to the General Assistance cash program; and after the decision in *Montgomery* restored this language. *See* WSR 06-07-078 (effective May 1, 2006) found at AR 000564, 000569 quoted *supra* at 13-14; post-*Montgomery* rule making. WSR 08-12-031 (May 29, 2008).

Rather than discuss the language of the relevant rules, the Department argues that Ms. Green’s analysis is flawed because it is limited to the agency’s Basic Food regulations and ignores the statutory mandate found in RCW 74.04.510 that it adopt rules conforming to the federal law governing the Food Stamp program.<sup>12</sup> In essence, the Department argues that its Basic Food regulations must be read to be consistent with federal law, regardless of what the regulations actually state. At most, however, this statutory mandate suggests that the March 2006 amendment of former WAC 388-450-0175 removing the limiting language was inadvertent rather than intentional. As discussed below, however, Washington courts generally do not correct omissions from statutes or regulations, be they intentional or inadvertent.

While there are cases where courts have stated they should “avoid a literal reading [of a statute or regulation] resulting in unlikely, absurd or strained consequences”, the analysis articulated by the Supreme Court in responding to such omissions is much more nuanced. *See, e.g., In the Matter of Detention of Martin*, 163 Wash.2d 501, 511-515, 182 P.3d 951

---

<sup>12</sup> The Department also repeatedly cites to RCW 74.04.050, 74.04.055, and 74.04.057. It is unclear how these three statutes have any bearing on this case, given the provisions of RCW 74.04.500 and 74.04.510 that *specifically* deal with the Food Stamp program. The Department’s reliance on the rule of construction set forth in RCW 74.04.055 is also misplaced because it pertains solely to provisions found in RCW 74.04 and not to agency regulations.

(2008); *State v. Taylor*, 97 Wash.2d 724, 729-731, 649 P.2d 633 (1982);  
*State v. Delgado*, 148 Wash.2d 723, 730-731, 63 P.3d 792 (2003).

In *Martin*, the Supreme Court dismissed the Thurston County Prosecutor's petition to commit a sexually violent predator who was previously convicted in Clark County of nonsexually violent offenses because the commitment statute authorized *only* the Clark County prosecutor or the Attorney General's office, *at the request of* the Clark County Prosecutor, to initiate the petition. The majority held:

As we explained in *Taylor* and applied in *Delgado*, there are three types of cases addressing legislative omissions: an understandable omission, an omission creating an inconsistency, and an omission rendering the statute meaningless. (Citations omitted.) In the first type of case the court is able to ascertain why the legislature intended a literal reading of the statute. *Taylor*, 97 Wash.2d at 729, 649 P.2d 633. "The court does not correct this type of perceived legislative error." *Delgado*, 148 Wash.2d at 730, 63 P.3d 792.

...

In the second type of omission case, the omission does not undermine the effectiveness of the entire statute but "simply kept the purposes [of the statute] from being effectuated comprehensively." *Id.* If a statute contains an inconsistency but remains rational as a whole, this court will not correct any supposed legislative omission in order to make the statute "more perfect, more comprehensive and more consistent." *Id.* Under these circumstances the court does not "suppl[y] the omitted language because it [is] not 'imperative' to make the statute rational." *Id.*

By contrast, in the third type of omission case, the omission makes the "statute entirely meaningless." *Delgado*, 148

Wash.2d at 731, 63 P.3d 792. This court will compensate for this type of omission if "it is 'imperatively required to make it a rational statute.' " *Taylor*, 97 Wash.2d at 729, 649 P.2d 633 (citation omitted). For example, an omission simultaneously qualifying a person for confinement *and* release is meaningless. *Id.* at 730, 649 P.2d 633. Under this circumstance the statute is *completely* ineffectual unless corrected.

*Martin* at 512-513. In *Martin*, the court found that the omission was of the second type and refused to correct it. *Id.* at 514. The omission did not render the statute meaningless, nor did it make the sexually violent predator law completely ineffectual to achieving its purpose. *Id.*

To the extent that this Court finds that the March 2006 amendment of former WAC 388-450-0175 was an inadvertent omission, it should find that the omission is of the second type and refuse to correct it. Construing this rule in the manner suggested by the Department is not imperative to make the rule rational as a whole. This omission does not render the rule meaningless; nor does it make the rule completely ineffectual to achieving its purpose.

**5. The Department should not be allowed to disregard legislative rules without going through APA notice and comment rule making.**

It is well-settled law in Washington that public agencies must follow their own rules and regulations. *Samson v. City of Bainbridge Island*, 149 Wash. App. 33, 44, 202 P.3d 334 (2009), *citing Skamania*

*County v. Woodall*, 104 Wash. App. 525, 539, 16 P.3d 701 (2001), *rev. den.* 144 Wash.2d 1021, 34 P.3d 1232 (2001), *cert. den.* 535 U.S. 980, 122 S.Ct. 1459, 152 l.Ed.2d 399 (2002). This includes the Department of Social and Health Services. *See, e.g., Costanich v. Department of Social and Health Services*, 138 Wash. App. 547, 554, 156 P.3d 232 (2007); *Deffenbaugh v. Department of Social and Health Services*, 53 Wash. App. 868, 871, 770 P.2d 1084 (1989).

Courts have recognized that legislative rules which have been promulgated through required rulemaking procedures carry the force of law. *Cubanski v. Heckler*, 781 F.2d 1421, 1425-1426, 1429 (9<sup>th</sup> Cir. 1986). Thus, unless and until an agency amends or repeals a legislative rule or regulation, an agency is bound by such rule or regulation. *U.S. v. Nixon*, 418 U.S. 683, 695-696, 94 S.Ct. 3090, 41 L.3d.2d 1039 (1974); *American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority*, 777 F.2d 751, 759 (D.C. Cir. 1985). *Accord, Portland General Electric Company v. Bonneville Power Administration*, 501 F.3d 1009, 1035-1036 (9<sup>th</sup> Cir. 2007).

In short, an agency does not have authority to interpret its regulations in a manner inconsistent with the plain language of those regulations. *Panhandle Eastern Pipe Line Company v. Federal Energy Regulatory Commission*, 613 F.2d 1120, 1135, (D.C. Cir. 1979)(“... we do

not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations.”).

As explained by the D.C. Court of Appeals in *American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority*, 777 F.2d 751, 759 (D.C. Cir. 1985):

. . . an agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal, see *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 798-801 (D.C.Cir.1983), and to provide a reasoned explanation for the change addressing with some precision any concerns voiced in the comments received. *Id.* at 798 note 2. See also, *Action on Smoking and Health v. Civil Aeronautics Board*, 699 F.2d 1209, 1216, 1218 (D.C.Cir.1983). Thus, unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation. See *United States v. Nixon, supra; Davis, supra.*

The federal Administrative Procedure Act provides that a rule can only be repealed by rulemaking and federal courts have recognized this. 5 U.S.C. §§ 551(5), 553 (1982). See, e.g., *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-46 (D.C.Cir.1982), *aff'd mem.*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983).

The Washington Administrative Procedure Act's definition of a “rule” is similar to that in the federal Act and should be interpreted similarly. It specifically defines “rule” to include the amendment or repeal

of a prior rule. RCW 34.05.010(16).

A holding that allowed the Department to ignore a regulation that it promulgated in accordance with the requirements of the APA would deprive members of the public of the opportunity to participate in the development of agency rules and undermine the public policy behind the rule making requirements of the APA. Washington law recognizes the importance of the notice and comment rule making procedures. *See, e.g., Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash.2d 640, 648-649, 835 P.3d 1030 (1992). These rule making procedures are essential to ensure that agency rules are technically sound, lawful, and politically responsive. William R. Andersen, *The 1988 Washington Administrative Procedure Act: An Introduction*, 64 Wash. L. Rev. 781, 791 (1989).

While the Department cites several cases where courts have declared a rule invalid because it was beyond the statutory authority of the agency or in conflict with a statute, none of these cases allowed an agency to ignore or disregard rules that they considered beyond their authority

prior to their repeal.<sup>13</sup>

**B. This Court should affirm the class certification order.**

This Court should affirm the class certification order. The trial court's decision was not manifestly unreasonable or based upon untenable grounds. Its analysis was thorough and addressed all the requirements of CR 23. The Department's opposition to class certification is based on a convoluted reading of the Administrative Procedure Act which does not withstand scrutiny.

Here, the trial court found that because Ms. Green had exhausted her administrative remedies and timely filed her petition for review, individual class members were not required to do the same. The Department's arguments to the contrary ignore the provisions of RCW 34.05.510(2), applicable case law, and the actual language of the APA dealing with exhaustion and the time limits for filing petitions for judicial review.

The Department's assertion that the class claims were time barred

---

<sup>13</sup> As an afterthought, the Department asks the Court to deny Ms. Green's request for relief because the agency has demonstrated a rational basis for acting inconsistent with its rules, citing RCW 34.05.570(3)(h). Ms. Green, however, is seeking relief under RCW 34.05.570(3)(d) arguing that the Department erroneously interpreted or applied the law. She is not seeking relief under RCW 34.05.570(3)(h). She abandoned this claim prior to trial. CP 118. RCW 34.05.570(3) sets forth nine independent grounds for granting relief from an agency order, each of them providing a separate and sufficient basis for granting relief from an agency order.

is at odds with the applicable statute of limitations. To the extent that some portion of these claims might otherwise be time barred, the trial court correctly applied the principles of equitable tolling.

**1. Standard of Review**

An appellate court reviews class certification for abuse of discretion and will not disturb a trial court's certification decision if the record indicates the court properly considered all CR 23 criteria. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 188, 157 P.3d 847 (2007). A class certification order will not be overturned unless it is "manifestly unreasonable or based upon untenable grounds." *Lacey Nursing Ctr. v. Department of Revenue*, 128 Wash.2d 40, 47, 905 P.2d 338 (1995). Appellate courts resolve close cases in favor of allowing or maintaining the class. *Sitton v. State Farm Mutual Automobile Insurance Company*, 116 Wash. App. 245, 250, 63 P.3d 198 (2003).

**2. The trial court considered all the CR 23 criteria.**

The record indicates that the trial court's decision was thorough and addressed every CR 23 criteria. CP 107-111; RP June 18, 2009 p. 3-14. Rather than discuss these criteria, the Department has chosen to argue that the trial court lacked subject matter jurisdiction over the Ms. Green's class claims. As demonstrated below, however, this argument does not withstand scrutiny.

**3. The Department ignores the fact that class certification is an ancillary procedural matter.**

The Department acknowledges that the trial court had subject matter jurisdiction over Ms. Green's individual claim for relief, but argues that it lacked jurisdiction over her class claims. The crux of the Department's argument regarding class certification is that every class member had to do exactly what Ms. Green did in order to be included in the class. In short, the Department's position is that every class member must have proceeded through the administrative hearing process, obtained a final order, and filed a petition for review within thirty days of the order.

The Administrative Procedure Act specifically mentions class actions in RCW 34.05.510. The Department overlooks the fact that under the APA, class actions are considered an ancillary procedural matter governed by the civil rules to the extent not inconsistent with the Act. In its haste to avoid class relief, the Department attempts to read into the APA a requirement that each individual class member exhaust their administrative remedies under RCW 34.05.534 and file their own petition for judicial review within thirty days after service of a final adjudicative order under RCW 34.05.542.

The Department's contention, if accepted, would deprive the 6,070 or so class members of their day in court and effectively insulate the

Department from liability. The trial court rejected this argument.<sup>14</sup> *See* CP 109-110. This Court should do the same.

The Department's position here is remarkably similar to the position taken by the State of Washington in *Oda v. State*, 111 Wash. App. 79, 44 P.3d 8 (2002); *rev. den.* 147 Wash. 2d 1018, 56 P.3d 992 (2002). In *Oda*, the Court of Appeals held that when a tort action against the State is properly initiated by a plaintiff who has timely filed a notice of claim as required by RCW 4.92.100 and RCW 4.92.110, additional claimants later added to the action when it is certified for class treatment need not separately fulfill the claim filing requirement. 111 Wash.App.at 83.

In deciding *Oda*, the court considered and rejected arguments made by the University of Washington that a class action for tort damages may maintained only if *all* members of the class have complied individually with the statutory requirements for filing tort claims, or at a minimum, if at least one properly filed tort claim gives notice that the claimant intends to seek class certification. *Id.* at 87. Although the court conceded that strict compliance with the requirements of the notice of

---

<sup>14</sup> Ms. Green asks the Court to assume, for the sake of discussion, that 6,000 GA-U recipients asked for administrative hearings. Putting aside the matter of whether this number of requests could even be handled by the administrative hearing system, some of them, like Tabitha Montgomery, might prevail before an ALJ and some, like Ms. Green, would not. For those who did not prevail and sought judicial review, some like Ms. Green, would prevail and (we assume) others would not. The prevention of piecemeal litigation leading to inconsistent outcomes is one of the primary reasons behind the adoption of CR 23.

claim statutes is generally a condition precedent to recovery, it noted that these statutes did not require a claimant to anticipate and describe future procedural developments that might occur in the lawsuit once it is filed.<sup>15</sup>

*Id.* The court also noted that to require dismissal of all class plaintiffs who had not filed a verified tort claim would make it virtually impossible to proceed with a class tort action against the State. *Id.* at 88. This Court should follow *Oda* and affirm the trial court's class certification order.

**4. Class members' claims were not time-barred.**

The Court should also reject the major premise of the Department's argument against class certification: that class members' claims were time-barred when this action was filed. This argument is based on a misreading of the APA. The Department ignores the fact that the trial court specifically held that where, as here, Ms. Green had exhausted her administrative remedies, individual class members were not required by RCW 34.05.534 to do the same. The Department's reliance on the thirty day provision for filing a petition for judicial review found in RCW 34.05.542 is also misplaced. This provision only comes into play

---

<sup>15</sup> At the time *Oda* was decided, the filing of a verified tort claim under RCW 4.92.100 and RCW 4.92.110 was clearly considered a jurisdictional prerequisite to bringing a tort action against the State for damages. *Levy v. State*, 91 Wash. App. 934, 957 P.2d 1272 (1998). After *Oda*, Washington courts continue to hold that an individual cannot commence a tort action against the State without first filing a tort claim. *E.g., Schoonover v. State* 116 Wash. App. 171, 175, 64 P.3d 677 (2003).

after the conclusion of the administrative hearing process and the issuance of a final agency order.

Ms. Green concedes that the trial court should not include in the class any person whose claims for the restoration of wrongfully withheld Basic Food benefits are time-barred. *See Pickett v. Holland America Line-Westours, Inc.* 145 Wash.2d 178, 195, 35 P.3d 351 (2001)(The filing of a class action preserves the claims of only those persons whose claims were not time barred at the time the class suit was filed). The applicable “statute of limitation”, however is not found in RCW 34.05.542, but in other federal and state laws and is subject to equitable tolling.

**a. The applicable statute of limitation is 12 months.**

Since at least 1979, the federal regulations governing the Food Stamp program have made it clear that a household can seek restoration of any benefits lost within the last twelve months and request a hearing where the State agency refuses to restore these benefits. These regulations provide:

Time period for requesting hearing. A household shall be allowed to request a hearing on any action by the State agency or loss of benefits which occurred in the prior 90 days. Action by the State agency shall include a denial of a request for restoration of any benefits lost more than 90 days but less than a year prior to the request. In addition, at any time within a certification period a household may request a fair hearing to dispute its current level of benefits.

7 C.F.R. § 273.15(g).

The federal Food and Nutrition Service explained why it was adopting the rule by noting there were some questions posed about the time period for requesting a hearing. 44 Fed. Reg. 33381, 33385 (June 8, 1979). Thus, language was added to the rule to make clear that a household could request a hearing in cases where the household had asked the state Food Stamp agency to restore benefits and that request was denied even though the agency's action causing the loss of benefits occurred more than 90 days prior to the hearing request. *Id.*

In 1981, Congress made amendments to the Food Stamp Act of 1977 that clarified that households had the right to seek restoration of lost benefits, but placed a cap on how far back a State agency could award back benefits. The federal statute pertaining to judicial actions is explicit:

In any judicial action arising under this chapter, any allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments *or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.*

7 U.S.C. § 2023(b). (Emphasis added.)

The provisions of this statute are also reflected in the Food Stamp

regulations:

(2) The State agency shall restore to households benefits which were found by any judicial action to have been wrongfully withheld. If the judicial action is the first action the recipient has taken to obtain restoration of lost benefits, then benefits shall be restored for a period of not more than twelve months from the date the court action was initiated. When the judicial action is a review of a State agency action, the benefits shall be restored for a period of not more than twelve months from the first of the following dates:

(i) The date the State agency receives a request for restoration:

(ii) If no request for restoration is received, the date the fair hearing action was initiated; but

(iii) *Never more than one year from when the State agency is notified of, or discovers, the loss.*

(3) Benefits shall be restored even if the household is currently ineligible.

7 C.F.R. § 273.17(a)(2). (Emphasis added.)

The Department's Basic Food regulations concerning the restoration of lost benefits are consistent with the above Federal requirements and provide:

(2) All food assistance benefits underpaid are restored when:

(a) An underpayment was caused by department error;

(b) An administrative disqualification for intentional program violation was reversed;

- (c) A rule or instruction specifies restoration of unpaid benefits; or
  - (d) A court action finds benefits were wrongfully withheld.
- (3) A client is eligible for restoration of underpaid benefits for any of the twelve months prior to:
- (a) The month the client requests restoration;
  - (b) The month the department discovers an underpayment;
  - (c) The date the household makes a fair hearing request when a request for restoration of benefits was not received; or
  - (d) The date court action was started when the client has taken no other action to obtain restoration of benefits.
- (4) The client may request a fair hearing if they disagree with the amount of benefits the department determines were underpaid.
- (5) If household composition changes prior to the department's restoration of an underpayment, the underpayment is paid to:
- (a) First, the household containing a majority of the persons who were household members at the time of the underpayment; or
  - (b) Second, the household containing the head of the household at the time of the underpayment.

WAC 388-410-0040(2) – (5).

Although there may have been some confusion when Ms. Green's class certification motion was decided, by the time the trial court entered its December 4, 2009 declaratory judgment order, it was clearly

understood that the only applicable statute of limitations at issue was set forth in WAC 388-410-0040(3). *See* CP 199-214. The trial court took this regulation into account in both defining the class and ordering the restoration of wrongfully withheld Basic Food benefits. Under this regulation, the trial court had the authority to restore wrongfully withheld Basic Food benefits going back twelve months from the earliest of one of four events. *See* WAC 388-410-0040(3)(a),(b),(c), and (d).

Here, Ms. Green argued that benefits should be restored going back twelve months prior to the date that her counsel sent a demand letter to the Department on March 26, 2008. The trial court agreed. This interpretation of federal and state law is clearly consistent with the plain language of the applicable statutes and regulations. There is no basis for setting it aside.

**b. The 12-month limit was equitably tolled.**

The Department argues that neither Ms. Green nor her counsel was in a position to ask that the Department restore wrongfully withheld Basic Food benefits to other similarly situated households under WAC 388-410-0040(3)(a). To the extent that this Court agrees, it should nevertheless conclude as a matter of law that by serving the Department with its March 26, 2008 demand letter, filing the previous lawsuit, and exhausting her administrative remedies, Ms. Green and her counsel equitably tolled

the applicable statute of limitations that might have otherwise barred class members' claims.

Although there are no Washington cases discussing equitable tolling in the public assistance context, there are federal cases where the courts have found grounds to equitably toll applicable statutes of limitations in this context because of the conduct of the agency in failing to systematically follow the law or where the class representative has taken some action to toll the requirement. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 479-482, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); *Lopez v. Heckler*, 725 F.2d 1489, 1504-1507 (9th Cir. 1984).

In *Lopez v. Heckler*, the Ninth Circuit, borrowing from the analogous Title VII employment discrimination context, held that even if the sixty-day rule set forth in 42 U.S.C. § 405(g) was applicable to claims of class members, that rule would be deemed tolled retroactively for all unnamed class members from the date the class representative first filed his or her administrative appeal. 725 F.2d at 1506-1507. The Ninth Circuit noted that the statute was tolled even if the administrative appeal, as here, was not filed on behalf of a class.<sup>16</sup>

---

<sup>16</sup> Ms. Green did not seek class relief during the administrative hearing process as the Department's rules governing such procedures, WAC 388-02, do not provide for such relief and her counsels' attempt to secure such relief in a previous hearing involving a different matter was unsuccessful.

The Department's arguments concerning equitable tolling should be rejected. First, the Department erroneously asserts that the applicable statute of limitations is the thirty day period for filing a petition for review after issuance of a final order as provided in RCW 34.05.542(2). As explained above, this statute has no bearing on the class claims, as the trial court excused class members from having to exhaust their administrative remedies and the Department did not raise this as an error of law in its opening brief. The actual statute of limitations applicable to this case are found in 7 C.F.R. § 273.15(g) and 7 U.S.C. § 2023(b), 7 C.F.R. § 273.17(a)(2), and WAC 388-410-0040. None of these statutes or regulations are jurisdictional; all are subject to equitable tolling.

The Department's assertion that the trial court misapplied the equitable tolling doctrine should also be rejected. As noted previously, courts from other jurisdictions have equitably tolled statutes of limitations without requiring a finding of bad faith on the part of the defendant. There are no Washington cases discussing equitable tolling in the public assistance context. It's not clear that Washington courts would apply the same analysis in the public assistance context as it has applied in other circumstances. In any case, the Department asserts erroneously that there is no evidence of bad faith, deception, or false assurances by the agency to justify the trial court's decision concerning equitable tolling.

As explained above, federal regulations have long required that the Department allow recipients to request the restoration of wrongfully withheld food benefits going back at least twelve months. 7 C.F.R. § 273.15(g). Despite this regulation, the Department routinely advises Basic Food recipients that they only have ninety (90) days to challenge the calculation of their benefits. *See, e.g.*, AR 000198-000201; 000202-000205. In doing so, the agency apparently relies upon the provisions of RCW 74.08.080(2)(a) even those provisions are inconsistent with and thereby preempted by 7 C.F.R. § 273.15(g). To our knowledge, the Department has taken no action to comply with the provisions of 7 C.F.R. § 273.15(g).<sup>17</sup>

The Department's failure to adequately advise Basic Food benefits that they have twelve months rather than ninety days to request the restoration of wrongfully withheld Basic Food benefits is grounds to equitably toll the twelve-month statute of limitations. It also distinguishes this case from *VanHess v. Dep't of Labor and Industries*, 132 Wash. App. 304, 312, 130 P.3d 902 (2006) and *Danzer v. Dep't of Labor & Industries*,

---

<sup>17</sup> Other states do comply with the federal rule. *See, e.g.*, rules/guidance from California, Maryland, North Carolina, and Pennsylvania.  
<http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/fsman10.pdf> at p. 37.  
[http://www.dhr.state.md.us/manuals/fstamp/460\\_fair.pdf](http://www.dhr.state.md.us/manuals/fstamp/460_fair.pdf) at p. 1.  
[http://info.dhhs.state.nc.us/olm/manuals/dss/ei-30/man/FSs705.htm#P12\\_62](http://info.dhhs.state.nc.us/olm/manuals/dss/ei-30/man/FSs705.htm#P12_62)  
<http://www.pacode.com/secure/data/055/chapter275/s275.3.html>

104 Wash. App. 307, 318-319, 16 P.3d 35 (2000) – cases where there was no showing of bad faith, deception, or false assurances.

The trial court correctly found that Ms. Green and her counsel exercised due diligence in pursuing her class claims. They sent a demand letter to the Department on March 26, 2008. When the agency refused to comply, they filed a class action in Thurston County Superior Court. When this action was dismissed for failure to exhaust administrative remedies, Ms. Green requested a fair hearing. As soon as she got a final order, she filed this lawsuit.

**C. The trial court properly ordered the Department to restore wrongfully withheld food benefits back to March 26, 2007.**

This court should affirm the trial court’s order that the Department restore all wrongfully withheld food benefits for the period beginning March 26, 2007 and ending June 30, 2008. The beginning date of this time period is twelve months prior to the March 26, 2008 demand letter that Columbia Legal Services sent the Department asking the agency to restore benefits to all those households who had been underpaid as a result of its failure to comply with former WAC 388-450-0175.<sup>18</sup> June 30, 2008 is the

---

<sup>18</sup> The Department actually had notice that it was violating former WAC 388-450-0175 when the *Montgomery* decision was entered on December 5, 2007. Under 7 U.S.C. §§ 2020(b) and (e)(11), 7 C.F.R. § 273.17(a)(1)(ii), and WAC 388-410-0040(3)(b) the trial court could have ordered the Department to restore lost benefits twelve months prior December 5, 2007.

last day that former WAC 388-450-0175 was in effect.

**1. The Department's arguments concerning relief are at odds with federal law and its own regulations.**

The Department argues that the trial court should have used the date Ms. Green filed this lawsuit and restore benefits for the previous twelve months, i.e., back to March 25, 2008. Its arguments, however, ignore the plain language of the federal and state rules which provide that the date a lawsuit is filed is used for the calculation of the amount of benefits to be restored *only* if judicial action is the *first* action taken to obtain restoration of underpaid benefits. 7 C.F.R. § 273.17(a)(2); WAC 388-410-0040(3)(d). The record demonstrates that the commencement of this case was not the first action taken to obtain wrongfully withheld benefits.

The record shows that Columbia Legal Services sent a letter to the Department on March 26, 2008 requesting class-wide relief. A lawsuit was commenced less than thirty days later. The Department moved to dismiss this lawsuit because of failure to exhaust administrative remedies and an alleged failure to file the lawsuit in a timely manner. Although this lawsuit was dismissed, this was done without prejudice. Rather than appeal this dismissal, Ms. Green asked for an administrative hearing on July 17, 2008. The Final Order in the administrative proceeding was not mailed until

February 27, 2009. On March 25, 2009, Ms. Green filed this action for judicial review in a timely manner.

An argument could be made that December 5, 2007 is the date that the trial court should have used because of the *Montgomery* decision.<sup>19</sup>

Regardless, the Department knew that it was facing class action litigation on behalf of affected recipients as of March 26, 2008.

**2. The Department's arguments would unfairly deprive class members of relief because Ms. Green had no choice but to exhaust her administrative remedies.**

The Department's position also ignores the fact that Ms. Green was prevented from filing her case in the trial court sooner because the Department argued that she was required to first exhaust her administrative remedies. As was readily apparent once this matter was finally tried on its merits, none of the policies behind the exhaustion doctrine were advanced by requiring Ms. Green to first go through an administrative hearing although the Department contended in the previous case dismissed on exhaustion grounds that there were. AR 0000173-0000175. There were no factual disputes to be resolved or any need to

---

<sup>19</sup> Notably, the Department began rule making to amend now-former WAC 388-450-0175 in February 2008. Its Preproposal Statement of Inquiry indicated: Rule change is needed to clarify that the work incentive deductions in WAC 388-450-0175 only apply to ... benefit level for the general assistance ... cash grant. *See* WSR 08-05-042. It is clear the rule making was precipitated by the *Montgomery* Final Order – a case handled by Columbia Legal Services.

develop an administrative record. Instead, this case turned solely on a question of law that could only be decided by a court of law using basic rules of statutory and regulatory construction.

It would be unfair to limit class relief to the twelve months prior to the filing of this lawsuit where Ms. Green's was prevented from litigating this matter sooner by a court ruling, sought by the Department, requiring that she first exhaust administrative remedies. If the Court accepts the Department's arguments, class members will be denied the restoration of wrongfully withheld benefits solely because the agency was successful in forcing Ms. Green to exhaust administrative remedies and the administrative proceeding took almost seven months to be completed.

**D. This Court should affirm the trial court's award of attorneys' fees and award fees for time spent opposing the motion for discretionary review and this appeal.**

If Ms. Green prevails, she is entitled to an award of reasonable attorneys' fees and costs pursuant to RCW 74.08.080(3). The statute is explicit:

When a person files a petition for judicial review as provided in RCW 34.05.514 of an adjudicative order entered in a public assistance program, no filing fee shall be collected from the person and no bond shall be required on any appeal. In the event that the superior court, the court of appeals, or the supreme court renders a decision in favor of the appellant, said appellant shall be entitled to reasonable attorneys' fees and costs ....

RCW 74.08.080(3). This includes any time spent obtaining a favorable decision from the court of appeals or supreme court. *See, e.g., Jenkins v. Department of Social and Health Services*, 160 Wash.2d 287, 301, 157 P.3d 388 (2007); *Blade v. Department of Social and Health Services*, 25 Wash. App. 630, 610 P.2d 929 (1980); *Tofte v. Department of Social and Health Services*, 85 Wash.2d 161, 531 P.2d 808 (1975).

The reason for the awarding of fees under RCW 74.08.080 is to “provide an incentive for more careful scrutiny” by the Department of Social and Health Services in making decisions regarding public assistance. *Tofte*, 85 Wash.2d at 165. In *Tofte*, the court specifically found “the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent” that would “[shift] to the respondent the costs of righting its mistakes.” *Id.* There is no requirement, however, for a showing of bad faith; petitioners need only show they obtained a favorable decision. *Blade*, 25 Wash. App. 630 at 634.<sup>20</sup>

If Ms. Green prevails, this Court should affirm the trial court’s award of reasonable attorneys’ fees. The Court should also award fees for all the time spent before it. RAP 18.1. This includes the time Ms. Green’s counsel

---

<sup>20</sup> Moreover, Ms. Green is entitled to recover fees even though she was represented without charge by Columbia Legal Services. *E.g., Tofte v. Social and Health Services*, 85 Wn.2d 161, 163-165, 531 P.2d 808 (1975); *Harold Meyer Drug v. Hurd*, 23 Wash. App. 683, 687-688, 598 P.2d 404 (1979).

spent successfully opposing the Department's motion for discretionary review and responding to the Department's other motions.<sup>21</sup>

## VI. CONCLUSION

This Court should affirm the trial court's decision reversing the final adjudicative order mailed February 27, 2009. It should hold that the Department erroneously interpreted or applied the law when it calculated Ms. Green's and other class members' Basic food benefits. It should find that the Department's arguments to the contrary, overlook important rules of statutory construction, make the agency's Basic Food regulations superfluous, and undermine the rule making requirements of the Administrative Procedure Act.

The Court should hold that the trial court did not abuse its discretion in certifying this matter as a class action, ordering the restoration of wrongfully withheld Basic Food benefits, and awarding

---

<sup>21</sup> The Court of Appeals denied the Department's motion for discretionary review on September 29, 2009. In the ruling dismissing the motion, the Court Commissioner neglected to rule on Ms. Green's request for attorneys' fees under RCW 74.08.080(3) and RAP 18.1. As Ms. Green was not yet a prevailing party when this ruling was made, she did not seek modification of this ruling. *See Belfor USA Group, Inc. v. Thiel*, 160 Wash.2d 669, 671, 160 P.3d 39 (2007); *Carlton v. Vancouver Care, LLC.*, 155 Wash. App. 151, 171, (2010). If Ms. Green prevails on appeal, she should now be awarded fees for the time she successfully spent opposing the Department's motion for discretionary review.

attorneys' fees. The Court should also award Ms. Green attorneys' fees for the time spent before this Court.

RESPECTFULLY SUBMITTED this 2nd day of June, 2010.

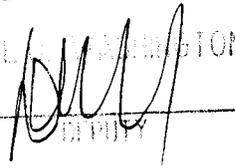
**COLUMBIA LEGAL SERVICES**

  
\_\_\_\_\_  
Gregory D. Provenzano, WSBA # 12794  
Amy L. Crewdson, WSBA #9468  
Attorneys for Respondent Alicia Green

FILED  
COURT OF APPEALS  
OFFICE 3

10 JUN -3 PM 1:09

STATE OF WASHINGTON

BY   
CLERK

## CERTIFICATE OF SERVICE

I certify that I personally hand-delivered a copy of this document  
to the office of counsel for respondent at:

Joseph Christy, Jr.  
Assistant Attorney General  
7141 Cleanwater Dr SW  
Olympia WA 98504-0124

I declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

  
Carol Chestnut