

NO. 45594-3-II

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

MAGDALENE PAL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

Karen L. Campbell, WSBA #23618
NORTHWEST JUSTICE PROJECT
500 W 8th, Suite 275
Vancouver, Washington 98660
Tel. (360) 693-6130

TABLE OF CONTENTS

Page

Contents

I. INTRODUCTION 1

II. ARGUMENT 2

 A. MS. PAL’S APPEAL MUST BE REINSTATED
 BECAUSE SHE COMPLIED WITH WAC 388-71-
 01240..... 2

 1. A “[C]alendar [D]ay,” As Used in WAC 388-
 71-01240, Should Be Construed To Mean 24
 Hours..... 2

 2. Ms. Pal Complied With The Mailing
 Requirement In WAC 388-71-01240(1). 5

 3. Even If This Court Concludes That The
 Regulation Requires The Mailed Copy To Be
 Received By OAH As A Matter Of Law, Ms.
 Pal Substantially Complied With The Mailing
 Requirement. 6

 B. THE NOTICE VIOLATES DUE PROCESS
 BECAUSE IT LACKS A SPECIFIC DEADLINE FOR
 APPEAL OR A CITATION TO THE SPECIFIC
 SECTION OF THE WAC THAT APPLIED. 9

 C. IF THIS COURT FINDS THAT THE APPEAL
 REQUEST WAS UNTIMELY FILED AND THAT
 THE NOTICE COMPLIED WITH DUE PROCESS,
 THIS COURT SHOULD REINSTATE MS. PAL’S
 APPEAL FOR GOOD CAUSE. 15

 1. This Issue Is Properly Before The Court. 15

 2. The Misleading Notice Constitutes Good Cause
 To Reinstate Ms. Pal’s Appeal..... 17

 D. MS. PAL IS ENTITLED TO ATTORNEY FEES
 UNDER RCW 4.84.350..... 20

TABLE OF CONTENTS

| | <u>Page</u> |
|----------------------|-------------|
| III. CONCLUSION..... | 22 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|----------------|
| Cases | |
| <i>Beckman v. Dep't of Soc. & Health Servs.</i> , 102 Wn. App. 687, 11 P.3d 313 (2000)..... | 19 |
| <i>Caouette v. Martinez</i> , 71 Wn. App. 69, 856 P. 2d 725 (1993)..... | 20 |
| <i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.2d 228 (2007)..... | 3 |
| <i>City of Seattle v. Pub. Emp. Relations Comm'n (PERC)</i> , 116 Wn.2d 923, 809 P.2d 1377 (1991)..... | 7, 8 |
| <i>Constr. Indus. Training Counsel v. Washington State Apprenticeship & Training Counsel</i> , 96 Wn. App. 59, 977 P.2d 655 (1999)..... | 20 |
| <i>Crosby v. Spokane County</i> , 137 Wn. 2d 296, 971 P.2d 32 (1999)..... | 7, 8 |
| <i>Elkins v. Dreyfus</i> , 2011 WL 3438666 (W.D. WA 2011)..... | 10, 11, 14, 15 |
| <i>Griggs v. Averbeck Realty, Inc.</i> , 92 Wn.2d 576, 599 P. 2d 1289 (1979)..... | 16, 18 |
| <i>In re Marriage of Hansen</i> , 81 Wn. App. 494, 914 P.2d 799 (1996)..... | 3 |
| <i>In re Saltis</i> , 94 Wn.2d 889, 621 P.2d 716 (1980)..... | 7, 8 |
| <i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003)..... | 19 |
| <i>McConnell v. City of Seattle</i> , 44 Wn. App. 316, 722 P.2d 121 (1986)..... | 10 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|----------------|
| <i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007)..... | 16, 17, 19 |
| <i>Mullane v. Cent. Hanover, Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950)..... | 9 |
| <i>Norton v. Brown</i> , 99 Wn. App. 118, 992 P.2d 1019 (1999)..... | 18 |
| <i>Payne v. Mount</i> , 41 Wn. App. 627, 705 P. 2d 297 (1985)..... | 10, 13, 14 |
| <i>Prest v. Am. Bankers Life Assurance Co.</i> , 79 Wn. App. 93, 900 P.2d 595 (1995)..... | 19 |
| <i>Puget Sound Medical Supply v. Dept. of Social and Health Services</i> , 156 Wn. App. 364, 234 P.3d 246 (2010)..... | 3, 17, 18, 19 |
| <i>Rhyne & Assocs. v. Swanson</i> , 41 Wn. App. 323, 704 P.2d 164 (1985)..... | 19 |
| <i>Rodriquez v. Chen</i> , 985 F. Supp. 1189 (D.C. Ariz. 1996)..... | 10, 11, 14, 15 |
| <i>Ryan v. Department of Social and Health Services</i> , 171 Wn. App. 454, 287 P. 3d 629 (2012)..... | 9 |
| <i>Snohomish Cnty. Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd. Snohomish Cnty.</i> , 121 Wn. App. 73, 87 P.3d 1187 (2004)..... | 3 |
| <i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997)..... | passim |
| <i>TMT Bear Creek</i> , 140 Wn.App.191, 165 P.3d 1271..... | 19 |
| <i>Troxell v. Rainier School Dist. No. 307</i> , 154 Wn.2d 345, 111 P.3d 1173 (2005)..... | 3 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---------------------------|--------------|
| Statutes | |
| RCW 34.05 | 2 |
| RCW 34.05.461(3)..... | 4, 6 |
| RCW 34.05.570(3) (d)..... | 17 |
| RCW 34.05.570(3) (f)..... | 17 |
| RCW 34.05.574(1)(b)..... | 17 |
| RCW 4.84.350 | 21 |
| RCW 4.84.350(1)..... | 21 |
| Rules | |
| CR 60 | 16 |
| CR 60(b)..... | 18 |
| CR 60(b)(1)..... | 18 |
| CR 60(b)(11)..... | 20 |
| GR 14.1(b) | 10 |
| Regulations | |
| WAC 388-02..... | 2, 4, 11, 12 |
| WAC 388-02-0005(3)..... | 4 |
| WAC 388-02-0020..... | 17 |
| WAC 388-02-0020(1)..... | 16 |
| WAC 388-02-0020(2)..... | 18 |
| WAC 388-02-0035..... | 3, 4, 12 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--------------------------|-------------|
| WAC 388-02-0035(2)..... | 13 |
| WAC 388-02-0070..... | 3, 4, 12 |
| WAC 388-02-0115(1)..... | 16 |
| WAC 388-02-0215..... | 17 |
| WAC 388-71..... | 2, 4, 12 |
| WAC 388-71-01240..... | passim |
| WAC 388-71-01240(1)..... | 5, 6 |
| WAC 388-71-01240(2)..... | 22 |
| WAC 388-71-01245..... | 4 |

I. INTRODUCTION

The Department of Social and Health Services (the Department) has denied Ms. Pal her right to a hearing because, it claims, she filed her request two hours late. The Department argues that its vague and contradictory notice is no excuse for misunderstanding the intended deadline. Instead, the Department blames Ms. Pal for her “failure to understand the rules” governing administrative appeals. Respondent’s Brief at p. 29. However, it is *the Department’s* responsibility to ensure that persons against whom it takes adverse action receive clear and unambiguous notice of the alleged misconduct and how to challenge or appeal the allegations.

This is a fundamental principle of the due process, owed Ms. Pal because of the devastating impact of a finding of neglect of a vulnerable adult on the reputation and employment opportunities of persons so accused. The Department should be held to a standard that complies with due process and promotes hearings on the merits versus findings by default. A person accused of neglect should not be denied her right to a hearing based on an unstated, technical and arbitrary time limit of 5:00 p.m. or on an unsupported policy that requires a duplicative mailing, which can only be met by proving it was received. This court should

reverse the dismissal of Ms. Pal's hearing and remand for a hearing on the merits.

II. ARGUMENT

A. MS. PAL'S APPEAL MUST BE REINSTATED BECAUSE SHE COMPLIED WITH WAC 388-71-01240.

Ms. Pal faxed her request for a hearing within 30 calendar days, the timeline provided in the notice she received from the Department. The notice specifically referenced WAC 388-71-01240 as the applicable regulation governing the time period in which to appeal.¹ Ms. Pal reasonably relied on the generally accepted definition of a "calendar day" and faxed her hearing request to the Vancouver Office of Administrative Hearings (OAH) within that time limit.

1. A "[C]alendar [D]ay," As Used in WAC 388-71-01240, Should Be Construed To Mean 24 Hours.

In this case, WACs 388-02-0035 and 388-02-0070 do not modify the clear and unambiguous time frame for filing an appeal set out in the

¹The notice provides as follows: "At this time you have a right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to:" CP 79 (original emphasis).

Adult Protective Services (APS) regulation authorizing notice of the neglect finding (WAC 388-71-01240) and contained in the notice to the alleged perpetrator. “30 calendar days” is not expressly defined in WAC 388-71-01240. Undefined statutory phrases are given their usual and ordinary meaning. *Puget Sound Medical Supply v. Dept. of Social and Health Services*, 156 Wn. App. 364, 370, 234 P.3d 246 (2010).

Because a “calendar day” is not expressly defined in WAC 388-71-01240, rules of statutory construction compel this court to apply the common dictionary definition, which is 24 hours, or midnight to midnight. *Snohomish Cnty. Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd. Snohomish Cnty.*, 121 Wn. App. 73, 78, 87 P.3d 1187 (2004); *Troxell v. Rainier School Dist. No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005); cf. *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.2d 228 (2007) and *In re Marriage of Hansen*, 81 Wn. App. 494, 914 P.2d 799 (1996). Under the usual and ordinary meaning of “calendar day,” Ms. Pal’s appeal was timely and must be reinstated.

This interpretation would not lead to the absurd result as argued by the Department. Respondent’s Brief, p. 16. OAH would not have to be open to verify receipt and date stamp the document. The regulation allows APS appeal requests to be faxed. Presumably, because the rules allow for the faxing of appeal requests, a fax time stamp can establish when the fax

was received. The time a request is “date stamped” by OAH cannot be determinative, and no regulation adopts “date stamped” as the basis for when a document is timely filed with OAH. Nor is “date stamped” a practical trigger, as it is unlikely that OAH employs staff to hover over the fax machine, ready with a date stamp or be available to otherwise verify exactly when a document was received.

Interpreting the regulations in the manner advanced by the Department leads to an absurd result. Under the Department’s argument, had Ms. Pal faxed her appeal at 4:59 p.m., it would have been timely, even if OAH personnel did not date stamp it until the next business day. The primary authority for the APS administrative process is WAC 388-71. WAC 388-71-01240 expressly provides a 30th calendar day time frame to appeal an administrative finding. WAC 388-71-01240 makes no reference to WAC 388-02-0035 or WAC 388-02-0070. WAC 388-02-0005(3) states that specific DSHS program hearing rules prevail over the rules in WAC 388-02. WAC 388-71-01245 states that “[i]n the event of a conflict between the provisions of [chapter 388-71] and chapter 388-02 WAC, the provisions of this chapter shall prevail.”

There is no basis to find that the 388-02 provisions are incorporated by reference or otherwise modify the APS-specific time frame to appeal an APS finding. The 5:00 p.m. deadline in WAC 388-02

conflicts with the timeline set forth in WAC 388-71-01240, and the latter prevails. This interpretation is consistent with the notice of hearing rights the Department sent to Ms. Pal. Neither says anything about a 5:00 p.m. deadline. CP 79.

2. Ms. Pal Complied With The Mailing Requirement In WAC 388-71-01240(1).

Both the notice and WAC 388-71-01240 instructed Ms. Pal to mail *a copy of her appeal request to OAH if she requested her hearing by fax.* The notice states: “If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day.” CP 79. The Request for Hearing Form told Ms. Pal she could *either mail or fax* the request. CP 55, 65, 82 (emphasis ours).

Ms. Pal testified repeatedly that she mailed a copy of the request to OAH on the same day she faxed it. CP 108-109, 111-114, 117, 121-122, 127. The ALJ made no finding that Ms. Pal was not credible², and nothing in the record refutes her testimony. The Board of Appeals (BOA) found “that OAH did not receive any mailed copy of the Appellant’s appeal.” CP 22 (Review Decision, Finding of Fact No. 7).

² A lack of credibility cannot be implied. Absent conflicting evidence, a witness is presumed credible, and findings going to lack of credibility must be express. RCW 34.05.461(3) requires that “any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.” Neither the ALJ nor the BOA Review Judge made any express findings that Ms. Pal is not credible.

The notice (CP 79), the hearing request form (CP 65, 82, 85)³, and WAC 388-71-01240(1) do not require that OAH receive a copy of the mailed request. The regulation does not require the mailed copy be certified, or postmarked or received by the 30th calendar day. The plain and unambiguous regulatory mandate is that the request be mailed on the same day it is faxed. The Department asks this court to ignore the express language of the regulation and Ms. Pal's uncontroverted testimony and read into WAC 388-71-01240 a requirement that is simply not there. This court should rule that the BOA erred in concluding that Ms. Pal failed to satisfy the same day mailing requirement in WAC 388-71-01240.

3. Even If This Court Concludes That The Regulation Requires The Mailed Copy To Be Received By OAH As A Matter Of Law, Ms. Pal Substantially Complied With The Mailing Requirement.

The duplicate mailing of a copy of the hearing request is neither jurisdictional nor required to be received by OAH. Even if this Court disagrees, it should rule that Ms. Pal substantially complied with the process for requesting a hearing. The Department misrepresents both the facts and the law in arguing that "strict compliance" with duplicative service is required. Respondent's Brief, p. 19. Ms. Pal met the

³ The actual form provided to Ms. Pal on which to lodge her appeal very clearly directed her to "MAIL YOUR REQUEST [TO THE VANCOUVER OAH ADDRESS]" OR "FAX TO THIS NUMBER: (360) 696-6255 (FAX)". CP 65, 82, 85(emphasis ours).

jurisdictional deadline for filing her hearing request when she faxed the request to OAH on the 30th calendar day. She substantially complied with the appeal process by doing so, regardless of whether she also fulfilled the duplicative procedural requirement of mailing the request the same day.

In contrast to jurisdictional time limits, under some circumstances other procedural requirements for administrative appeals may be satisfied by substantial compliance. *Ruland v. Dept. of Social and Health Services*, 114 Wn. App. 263, 274 182 P.2d 470 (2008) citing, *Crosby v. Spokane County*, 137 Wn. 2d 296, 971 P.2d 32 (1999). Substantial compliance requires a certain degree of actual compliance with the essential substance of a statute that sets out hearing rights, despite procedural defects that made the compliance imperfect. *City of Seattle v. Pub. Emp. Relations Comm'n* (PERC), 116 Wn.2d 923, 928, 809 P.2d 1377 (1991). Courts have found substantial compliance when there is actual compliance with the time limit of a statute but minor procedural defects in the filings. *Id.*

The test for determining substantial compliance is whether the notice was reasonably calculated to reach the intended parties. *In re Saltis*, 94 Wn.2d 889, 895, 621 P.2d 716 (1980). The question becomes not whether there was precise compliance with the statutory requirements but whether the level of compliance achieved fulfills the objective of the statute. *Saltis*, 94 Wn. 2d at 896.

The Department advances the same arguments here as it did in *Ruland*. In *Ruland*, the Department argued that the holding in *PERC* required dismissal of the Appellant's appeal. *Ruland*, 144 Wn.2d at 274-275. The *Ruland* Court rejected this argument and found that *PERC* was distinguishable. *Id.* at 275. The Court stated:

“In this case, DSHS had actual notice from the outset that the Rulands challenged the neglect finding; whereas in *PERC*, the commission received no such notice prior to the filing deadline. We find this distinction critical because the foundation of substantial compliance is meeting the basic purposes of the statute, which include timeliness, appropriate forum, and notice.”

Id. citing *Saltis*, 94 Wn.2d at 896; *Crosby v. Spokane County*, 137 Wn.2d at 303.

In this case, as in *Ruland*, OAH received the faxed hearing request within the filing deadline. Ms. Pal was authorized to fax the request and did so within the 30 day time period set forth in WAC 388-71-01240. There is no evidence that OAH's transmittal of the hearing request to the Department was delayed because OAH did not receive a mailed copy of the request. Ms. Pal also hand-delivered a copy of her hearing request to the Department the next day and again faxed it to OAH. CP 61-66, 104-105. There is no evidence that the Department or OAH were in any way prejudiced by not receiving a mailed copy. Because Ms. Pal substantially

complied with the requirements of WAC 388-71-01240, her appeal must be reinstated.

B. THE NOTICE VIOLATES DUE PROCESS BECAUSE IT LACKS A SPECIFIC DEADLINE FOR APPEAL OR A CITATION TO THE SPECIFIC SECTION OF THE WAC THAT APPLIED.

If this court finds that the appeal deadline is something other than what the notice and WAC 388-71-01240 say it is, the notice violates due process of law. The gravamen of the Department's argument is that a "common sense" standard should satisfy due process. The Department argues that Ms. Pal should have known the "thirtieth calendar day" means "the close of business" on the 30th day and that this means 5:00 p.m. Respondent's Brief, p. 26.

"A common sense approach" is not the standard by which courts measure due process.

"It has long been held that before depriving a person of life, liberty, or property, '[a]n elementary and fundamental requirement of due process, in any proceeding which is to be accorded finality, is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

Ryan v. Department of Social and Health Services, 171 Wn. App. 454, 472, 287 P. 3d 629 (2012), citing *Mullane v. Cent. Hanover, Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

Citations to lengthy WAC chapters and the entire APA do not satisfy this test. Cases including *Rodriquez v. Chen*, 985 F. Supp. 1189 (D.C. Ariz. 1996), *Payne v. Mount*, 41 Wn. App. 627, 705 P.2d 297 (1985), and *McConnell v. City of Seattle*, 44 Wn. App. 316, 325, 722 P.2d 121 (1986) all support this conclusion.⁴ In *Rodriquez*, the court made very clear that “[w]hile citing to the general provisions is rudimentary, the *applicable provision as applied to the particular case is mandatory.*” *Id.* at 635, emphasis added. In *Payne*, the court held that citing to the particular statute satisfied the minimum requirements of due process. *Id.* at 635.

In *McConnell*, the court held that due process was satisfied because Mr. McConnell was provided with copies of the specifically applicable appeal procedures. *Id.* at 325. In *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997) the court held that citing to the entire Washington Habitual Traffic Offenders Act satisfied due process because it was *only two pages long* and it would have been a “simple matter” to locate the hearing request timeframe in the specific statutory provision. *Id.* at 528.

⁴ Cf. *Elkins v. Dreyfus*, 2011 WL 3438666 (W.D. WA 2011) (in which the federal District Court of Western Washington found that the State denied due process when its notices terminating Disability Lifeline benefits did not include copies of cited regulations or any way to access them). As stated in Appellant’s opening brief, this unpublished opinion is cited as an example of how federal courts have resolved similar types of notice issues in the public benefits context and complies with GR 14.1(b).

The *Storhoff* court also found that the Defendants failed to show actual prejudice, something Ms. Pal has established. *Id.* at 531. Two of the defendants in *Storhoff* never received their notices and did not request a hearing; the third Defendant received his notice but did not even attempt to request a hearing. *Id.* at 526. The present case is distinguishable.

Ms. Pal did attempt to comply with the instructions in the notice. Any failure on Ms. Pal's part is attributable to lack of clarity of the appeal deadline as set out in the notice. Ms. Pal was prejudiced by the Department's failure to provide her with proper notice of what it now claims is the appeal deadline. She was denied her right to a hearing, her right to contest a finding of neglect that is now on her permanent record, and the ability to engage in her chosen employment.

The Department argues that Ms. Pal's case is more analogous to *Storhoff* than *Rodriquez* or *Elkins*. This is simply not the case. In addition to the actual prejudice the defective notice caused Ms. Pal, the cited RCW and WAC chapters are extensive, and the specific regulation in the notice itself was inconsistent with the chapters cited. An average person would not peruse this bulk of material and be able to determine the priority of conflicting provisions. The APA is 239 pages long. WAC 388-71 contains 159 sections. WAC 388-02 contains 139 sections.

The Department argues that WAC 388-02 is written in plain English, with headings in bold, including one section entitled “DEADLINES.” Respondent’s Brief, p. 24. WAC 388-02-0035 is included in the “deadlines” section, but WAC 388-02-0070 is not. WAC 388-02-0035 being included in the “deadlines” section does not reveal the 5:00 p.m. time limit.

Throughout this case, the Department and the administrative tribunals have relied on different WACs to support their proffered limitation on the deadline in WAC 388-71-01240. The ALJ cited WAC 388-02-0070 for the filing deadline (CP 46), but this regulation merely says that filing is complete when documents are received “during business hours.” It does not specify “business hours.” The BOA Review Judge did not rely on any provision of WAC 388-02, citing solely to WAC 388-71-01240 as the regulatory deadline that applied. CP 24-25.⁵

If neither the ALJ nor the BOA Review Judge found or relied on the regulation that states a 5:00 p.m. filing deadline, then a layperson is unlikely to find it “a comparatively simple matter” to locate this time limit

⁵ The Department now claims that WAC 388-02-0035(2) is the regulation that controls and thus modifies WAC 388-71-01240. Applying the Department’s argument that issues not raised at the administrative hearing are not properly before this court (Respondent’s Brief, pp. 26-27), the court should not consider the application of WAC 388-02-0035(2) in this appeal.

regulation, as required in *Storhoff*. This conclusion is supported by the discussion between Ms. Pal and the ALJ.

Ms. Pal: I – I had one question, Judge Lewis.

ALJ: Uh huh.

Ms. Pal: Does that letter from Ms. Petshow, the original letter—

ALJ: Uh huh.

Ms. Pal: --does it also state that it must be received—that the office must have it before five p.m.?

ALJ: No.

Ms. Pal: Okay. So then, um – so the letter doesn't say that it – it should be received by five p.m., but just that it should be received—

ALJ: Uh huh.

Ms. Pal: --into the office within 30 days.

Judge Lewis: It's – it's a – it's a good point, and it's something I have to think about. ...

CP 111-112.

In her concurring opinion in *Storhoff*, Justice Madsen emphasized how due process fails in cases like Ms. Pal's. 133 Wn.2d at 532. Justice Madsen stated that, although she agreed with the result reached by the court as to two of the defendants, she did not agree that procedural due process was satisfied by a revocation notice bearing an incorrect number of days to appeal coupled with an incomplete statutory cite.⁶ *Id.* Justice Madsen concluded that the majority's finding that the information provided in the revocation notices fulfilled the procedural due process was inconsistent with *Payne v. Mount, infra. Storhoff*, 133 Wn.2d at 532-533.

⁶ Justice Madsen concluded that the third Defendant's case needed to be remanded to ascertain whether he was prejudiced by the incorrect notice. *Id.*

Justice Madsen further determined *Payne* was distinguishable because the notice in *Payne* cited to a specific statute rather than to an entire chapter. *Id.* at 533. Justice Madsen disagreed with the majority's conclusion that the average person presented with the entire Washington Habitual Traffic Offenders Act (even if only two pages long) would find it a comparatively simple matter to locate the hearing request time limit. *Id.* Justice Madsen stated:

“Contrary to the majority opinion, I would find that by receiving the specific, though incorrect, number of days in conjunction with an incomplete cite to a statute, the average lay person would be misled into believing the information provided was correct. Upon receipt of such a notice, a lay person could not reasonably be expected to go to a law library to find the chapter section dealing with time limits for appeal and then to compare the information provided in the notice with that of the statute.”
Id.

Ms. Pal's case is more akin to *Rodriguez* and *Elkins*, where the regulations cited were voluminous and difficult to navigate, than *Storhoff*, where the statute was two pages long. If the Department meant for a 5:00 p.m. deadline to apply, it should have included it in Ms. Pal's notice. Including this deadline would hardly create the administrative nightmare the Department describes in its brief. The Department would not have to write a “small book,” nor would the inclusion of the deadline impose needless fiscal and administrative burdens on the State. Respondent's

Brief, p. 23. Clarity and transparency would require only the addition of “by 5:00 p.m. on the 30th day”.

Given that the federal requirements of due process, as expressed by the *Rodriquez* and *Elkins* courts, take precedence over state court interpretations of due process, and that the concurring decision in *Storhoff* aligns with federal jurisprudence, it is appropriate to follow the reasoning of the *Storhoff* concurrence in this case. The Department’s notice to Ms. Pal violated her right to due process, and her appeal should be reinstated.

C. IF THIS COURT FINDS THAT THE APPEAL REQUEST WAS UNTIMELY FILED AND THAT THE NOTICE COMPLIED WITH DUE PROCESS, THIS COURT SHOULD REINSTATE MS. PAL’S APPEAL FOR GOOD CAUSE.

1. This Issue Is Properly Before The Court.

Even if this court rules that the hearing request was untimely and the notice complies with due process, the record establishes good cause for a late hearing request. Contrary to the Department’s argument (at Respondent’s Brief pp. 26-27), Ms. Pal explained how she read and interpreted the notice, clearly establishing “excusable neglect” as a basis for good cause. Use of the legal term “good cause” is not required to raise the issue. The administrative record fully supports Ms. Pal’s arguments, which are strictly legal.

WAC 388-02-0020(1) does not require the party raising a good cause claim to make any specific showing. It sets up an equitable basis for relief from a default in the interests of justice under the standards of CR 60. The plain language of the rule authorizes the ALJ to consider “good cause” if there is a substantial basis for doing so.

Pursuant to WAC 388-02-0115(1), ALJs have a duty to develop the record as necessary to rule on the issues they must consider. It is especially important for an ALJ to exercise this authority in a motion for a summary disposition and to construe the facts most favorable to the non-moving party if there is a dispute. This is because defaults judgments are disfavored, and courts prefer to resolve cases on their merits. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P. 2d 1289 (1979) and *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). Although the ALJ in this case extensively questioned Ms. Pal about how and when she filed her request, the ALJ failed to exercise her authority and consider whether there was good cause to overcome an untimely hearing request.

The BOA Review Judge mentioned good cause but erroneously concluded that “the regulations do not allow a late hearing request to be accepted upon a showing of good cause or reason for such tardiness.” CP 23 (Review Decision, Concl. of Law No. 5). The BOA Review Judge erred as a matter of law in either failing to apply the good cause rule to the

facts in this case as required under WACs 388-02-0020 and 388-02-0215 or in ruling that good cause did not apply at all. Either decision raises issues of law subject to *de novo* review by this court. RCW 34.05.570(3) (d) and (f). This court should rule on the basis of the record before it that Ms. Pal had good cause for any failure to meet the appeal deadline and remand the case for a hearing on the merits. RCW 34.05.574(1)(b).

2. The Misleading Notice Constitutes Good Cause To Reinstate Ms. Pal's Appeal.

Puget Sound v. Medical Supply v. DSHS, 156 Wn. App. 364, 373, 235 P.3d 246 (2010) requires this court to use CR 60(b) as a guideline when the party's reasons do not fall under the good cause examples set forth in WAC 388-02-0020(2). CR 60(b)(1) provides for relief from judgments based on "mistake, inadvertence, surprise, [and] excusable neglect..." Ms. Pal has satisfied this rule, and her appeal should be reinstated.

A proceeding to set aside a default judgment is equitable in character. *Morin v. Burris*, 160 Wn.2d at 754. "The overriding reason should be whether or not justice is being done. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of outcome." *Norton v. Brown*, 99

Wn. App. 118, 123, 992 P.2d 1019 (1999), citing *Griggs v. Averbeck Realty Inc.*, 92 Wn.2d at 582.

Ms. Pal received a confusing notice, which informed her that she had 30 calendar days to file her appeal request. The notice did not include a time of day deadline or other term that could be reasonably read to modify the time frame in the notice. The notice provided citations to the entire APA and two chapters of regulations containing over 100 sections each. Ms. Pal provided ample testimony that she was confused by the notice, that she sought assistance in understanding how to file her appeal, and that she was misled by the notice into thinking she filed her hearing request within the deadline.

Ms. Pal's case is factually distinguishable from *Puget Sound Medical Supply (PSM)*. Ms. Pal was not a corporation employing staff to calendar important dates and attorneys to provide representation. Ms. Pal was a *pro se* litigant trying very hard to understand a confusing notice while attempting to perfect her appeal rights with respect to an important legal matter. Her confusion was not due to a breakdown in office procedures, mislaying legal documents, or holiday disruptions, which

courts have found to not constitute excusable neglect.⁷ Rather, she was confused because the notice was misleading.

As the court pointed out in *PSM*, Washington courts have found “excusable neglect” in situations where the defaulted party was misled, for example, when (1) an alleged tortfeasor acted with due diligence but the victims' counsel attempted to conceal the commencement of the litigation, *Morin*, 160 Wn. 2d at 759; and (2) a plaintiff served but did not file a summons and complaint to which defendant served a timely answer, but was defaulted three months later when the plaintiff served a nearly identical complaint that the defendant failed to answer. *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 327, 704 P.2d 164 (1985).

Ms. Pal’s case is more analogous to *Morin* and *C. Rhyne Assocs.* than to the line of cases dealing with a breakdown in internal office procedures. Ms. Pal provided evidence that she tried to comply with a

⁷ For example, Washington courts have found no “excusable neglect” when (1) an insurer misplaced a copy of the legal process sent by the insurance commissioner when the person designated to receive process was reassigned to other duties, *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995); (2) an employee at an attorney general's office failed to timely route documents to the responsible attorney because of inadequate office procedures to “ ‘catch[] ’ ” administrative errors, *Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000); (3) someone other than general counsel accepted service of process and then neglected to forward the complaint, *Johnson v. Cash Store*, 116 Wn. App. 833, 848–49, 68 P.3d 1099 (2003); (4) a legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, failed to ensure that employees hired to replace her were trained on the calendaring system and competent in operating it and failed to institute any other procedures necessary to ensure that general counsel received notice of the dispute. *TMT Bear Creek*, 140 Wn.App.191, 213, 165 P.3d 1271. *PSM v. DSHS*, 156 Wn. App. at 375.

confusing notice as best as she could but was misled by the Department's failure to either 1) include the specific deadline that applied; or 2) cite the specific regulation that controlled.

Alternatively, the court should provide relief under CR 60(b)(11) for "any other reason justifying relief from the operation of judgment." This rule supports vacating a default order based upon incomplete, incorrect, or conclusory factual information such as that found in the misleading notice the Department sent to Ms. Pal. *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P. 2d 725 (1993). For these reasons, this court should reinstate Ms. Pal's appeal for good cause.

D. MS. PAL IS ENTITLED TO ATTORNEY FEES UNDER RCW 4.84.350.

Ms. Pal, as a prevailing party, is automatically entitled to attorney fees under RCW 4.84.350(1) unless the Department can prove that it's "actions were substantially justified or that circumstances would make that award unjust." *Constr. Indus. Training Counsel v. Washington State Apprenticeship & Training Counsel*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). Actions are substantially justified where the Department's action "has a reasonable basis in fact and law." *Id.*

The Department's actions in this case were not substantially justified. The notice to Ms. Pal did not include a 5:00 p.m. deadline for

filing her appeal, did not include a reference to a regulation or statute that modified the 30 calendar day deadline in the notice or regulation that authorized the notice (WAC 388-71-01240), and the BOA wrongly determined that the good cause regulation did not apply to this case.

Throughout these proceedings, the Department itself could not determine which WAC provision established the filing deadline. Despite case law to the contrary, the Department sent Ms. Pal a notice that failed to include the specific deadline to file the appeal request or a citation to the specific WAC it wished Ms. Pal to follow. In addition, the Department relied on requirements that were not in the WAC or the APA, specifically that OAH must receive the mailed copy of the faxed request within the 30 day period in order for the appeal to be perfected.

Despite the confusing and unclear notice, the harsh impact on Ms. Pal of an adverse APS finding that becomes final by default, the lack of prejudice or harm to the Department from a two hour “delay” in faxing her hearing request, and the miscarriage of justice that is inherent in the denial of a hearing to contest a finding of neglect, the Department has slavishly stuck to its position. The Department’s actions are in no way justified. Ms. Pal is entitled to attorney fees.

III. CONCLUSION

Ms. Pal respectfully requests this court to rule as follows: (1) that she either complied or substantially complied with the requirements of WAC 388-71-01240; (2) that her hearing request was timely, and there was jurisdiction to hear the appeal; (3) that the notice violates due process of law; (4) that she had good cause for requesting a late hearing;; and (5) that she is entitled to attorney fees and costs. The court should reverse the administrative decision to dismiss Ms. Pal's request for a hearing and provide her the opportunity to have a full determination on the merits of the Department's finding of neglect.

Respectfully submitted this 9th day of May, 2014.

NORTHWEST JUSTICE PROJECT



KAREN CAMPBELL
WSBA #23618
Counsel for Appellant

NORTHWEST JUSTICE PROJECT

May 02, 2014 - 2:41 PM

Transmittal Letter

Document Uploaded: 455943-Reply Brief.pdf

Case Name: Magdalene Pal v. Department of Social and Health Services, State of Washington
Court of Appeals Case Number: 45594-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Reply Brief of Appellant

Sender Name: Charity M Belanger - Email: charityb@nwjustice.org

A copy of this document has been emailed to the following addresses:

Karenc@nwjustice.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

MAGDALENE PAL,

Appellant,

v.

D.S.H.S., STATE OF WASHINGTON,

Respondent.

NO. 13-2-00566-6

COA NO. 45594-3-II

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that on the 2nd day of May, 2014, I caused a true and correct copy of the Appellant's Opening Brief to be served on the following in the manner indicated below:

Cindy Gideon
Assistant Attorney General
1220 Main Street, Suite 510
Vancouver, WA 98660

(X) U.S. Mail
() Hand Delivery
() _____

By: *Charity Belanger*
Charity Belanger, Legal Assistant

NORTHWEST JUSTICE PROJECT

May 02, 2014 - 3:54 PM

Transmittal Letter

Document Uploaded: 455943-Certificate of Service - Pal V. DSHS.pdf

Case Name: Magdalene Pal v. Department of Social and Health Services, State of Washington
Court of Appeals Case Number: 45594-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Certificate of Service - AG

Comments:

No Comments were entered.

Sender Name: Charity M Belanger - Email: charityb@nwjustice.org

A copy of this document has been emailed to the following addresses:

Karenc@nwjustice.org