

NO. 49063-3-II

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

DAYANARA CASTILLO,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

ROBERT W. FERGUSON
Attorney General

LAUREN E. RODDY, WSBA No. 45297
Assistant Attorney General

Washington Attorney General's Office
Social and Health Services Division
Attorneys for Respondent, Department of
Social and Health Services

SHO Division, OID No. 91021
PO Box 40124
7141 Cleanwater Drive SW
Olympia, WA 98504-0124
(360) 586-6506
LaurenRl@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION1

II. RESTATEMENT OF THE ISSUES2

III. COUNTERSTATEMENT OF THE FACTS.....3

 A. Notice and Service of the Department’s Founded Finding4

 B. Ms. Castillo’s Request for an Administrative Fair Hearing.....6

 C. Ms. Castillo’s Petition for Review of ALJ Manson’s Initial Decision.....8

IV. ARGUMENT11

 A. Ms. Castillo’s Request for Internal Review, Request for Administrative Review, and Request for Review by the Board of Appeals Were All Untimely.....16

 B. The Department Properly Declined To Review Ms. Castillo’s Founded Finding After It Lawfully Notified Her and She Failed To Timely Seek Internal Review20

 C. ALJ Manson Properly Dismissed Ms. Castillo’s Administrative Appeal For Her Failure To Timely Seek Internal Review25

 D. The BOA Properly Dismissed Ms. Castillo’s Appeal After She Failed To Seek Timely Review of ALJ Manson’s Initial Order30

 E. Ms. Castillo Was Not Denied Due Process of Law32

1.	Ms. Castillo Has Failed To Establish That She Has a Protected Interest That Has Been Implicated By the Dismissal of Her Appeal	36
2.	Ms. Castillo Has Failed To Show That the Risk Of Erroneous Deprivation Of Her Protected Interests Is Unjustifiably High.....	41
3.	The State’s Interest in the Welfare of Children and in the Finality of Investigative Findings is Significant.....	46
F.	Ms. Castillo’s Request for Attorney Fees Should Be Denied.....	48
V.	CONCLUSION.....	49

TABLE OF AUTHORITIES

Cases

<i>ARCO Products Co. v. Wash. Utilities & Transp. Comm'n</i> , 125 Wn.2d 805, 888 P.2d 728 (1995).....	14
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	24
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).....	36, 37
<i>Bond v. Dep't of Soc. & Health Servs.</i> , 111 Wn. App. 566, 45 P.3d 1087 (2002).....	13
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	24
<i>City of Redmond v. Arroyo-Murillo</i> , 149 Wn.2d 607, 70 P.3d 947 (2003).....	33
<i>City of Seattle v. Foley</i> , 56 Wn. App. 485, 784 P.2d 176 (1990).....	43, 44
<i>Conway v. Dep't of Soc. & Health Servs.</i> , 131 Wn. App. 406, 120 P.3d 130 (2006).....	13, 23
<i>Frazier v. Superintendent of Pub. Instruction</i> , 106 Wn.2d 754, 725 P.2d 619 (1986).....	13
<i>Greenhalgh v. Dep't of Corrections</i> , 180 Wn. App. 876, 324 P.3d 771 (2014).....	33
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	29
<i>Hardee v. Dep't of Soc. & Health Servs.</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	40, 41, 46

Cases

<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1996).....	14
<i>Humphries v. County of Los Angeles</i> , 554 F.3d 1170 (9th Cir. 2009)	35
<i>In re Anonymous v. Peters</i> , 189 Misc. 2d 203, 730 N.Y.S.2d 689 (2001).....	42
<i>In re Mahaney</i> , 146 Wn.2d 878, 51 P.3d 776 (2002).....	15
<i>In re Marriage of McLean</i> , 132 Wn.2d 301, 937 P.2d 602 (1997).....	44, 45
<i>In re Pers. Restraint of Matteson</i> , 142 Wn.2d 298, 12 P.3d 585 (2000).....	33
<i>Jamison v. Missouri Dep't of Soc. Servs.</i> , 218 S.W.3d 399 (Mo. 2007)	40
<i>Kentucky Dep't. of Corr. v. Thompson</i> , 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).....	34
<i>Longview Fibre Co. v. Dep't of Ecology</i> , 89 Wn. App. 627, 949 P.2d 851 (1998).....	32
<i>Los Angeles County v. Humphries</i> , 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010).....	35
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	34, 35, 40, 41
<i>McGuire v. State</i> , 58 Wn. App. 195, 791 P.2d 929 (1990).....	23
<i>Morrison v. Dep't of Labor & Indus.</i> , 168 Wn. App. 269, 277 P.3d 675, <i>review denied</i> , 175 Wn.2d 1012, 287 P.3d 594 (2012).....	33

Cases

<i>Pal v. Dep't of Soc. & Health Servs.</i> , 185 Wn. App. 775, 342 P.3d 1190 (2015).....	46
<i>Paul v. Davis</i> , 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).....	36, 37
<i>Pierce Cty. Sheriff v. Civil Service Comm'n of Pierce Cty.</i> , 98 Wn.2d 690, 658 P.2d 648 (1983).....	14
<i>Qwest Corp. v. Wash. Utilities & Transp. Comm'n</i> , 140 Wn. App. 255, 166 P.3d 732 (2007).....	29
<i>Ryan v. Dep't of Soc. & Health Servs.</i> , 171 Wn. App. 454, 287 P.3d 629 (2012).....	38
<i>Safeco Ins. Co. v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	12
<i>Scheeler v. Dep't of Emp't Sec.</i> , 122 Wn. App. 484, 93 P.3d 965 (2004).....	12
<i>Soundgarden v. Eikenberry</i> , 123 Wn.2d 750, 871 P.2d 1050 (1994).....	33
<i>State v. Vahl</i> , 56 Wn. App. 603, 784 P.2d 1280 (1990).....	43
<i>Stewart v. Dep't of Soc. & Health Servs.</i> , 162 Wn. App. 266, 252 P.3d 920 (2011).....	23
<i>Tapper v. Emp't Security Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	11
<i>United States v. Kwai Fun Wong</i> , ___ U.S. ___, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).....	22
<i>Univ. of Wash. Med. Ctr. v. Dep't of Health</i> , 164 Wn.2d 95, 187 P.3d 243 (2008).....	13

Cases

Valmonte v. Bane,
18 F.3d 992 (1994)..... 37, 41, 42

Washington Federal Sav. v. Klein,
177 Wn. App. 22, 311 P.3d 53 (2013)..... 22

Washington Indep. Tel. Ass'n v. Wash. Utilities & Transp. Comm'n,
148 Wn.2d 887, 64 P.3d 606 (2003)..... 14

Watso v. Colorado Dep't of Soc. Servs.,
841 P.2d 299 (1992)..... 47

Winston v. Kansas Dep't of Soc. & Rehab. Servs.,
274 Kan. 396, 49 P.3d 1274, 1285 (Kan. 2002) 42

Constitutional Provisions

U.S. Const. amend. XIV 32, 33, 36

U.S. Const. amend. XIV, § 1 33

Wash. Const. art. I, § 3..... 32, 33

Statutes

Chapter 13.50 RCW 39

Chapter 26.44 RCW 17, 21, 46

RCW 4.84.350 48

RCW 13.50.100 39

RCW 26.09.175 44

RCW 26.44.010 21, 46

RCW 26.44.020(21)..... 21

Statutes

RCW 26.44.030(11).....	21
RCW 26.44.100	7, 16-18, 20, 22, 24, 26, 32, 43, 45
RCW 26.44.100(2).....	16
RCW 26.44.100(2)(a)	18
RCW 26.44.100(2)(a)-(d)	17, 24
RCW 26.44.100(2)(b)-(c)	18
RCW 26.44.100(2)(d).....	19
RCW 26.44.100(3).....	17
RCW 26.44.100(3) and (4)	29
RCW 26.44.100(4).....	17
RCW 26.44.125	1-3, 6, 16, 21, 23, 25-28, 30, 32, 48
RCW 26.44.125(2).....	16, 23, 26
RCW 26.44.125(2)(d)-(e)	39
RCW 26.44.125(3).....	8, 16, 24
RCW 26.44.125(4).....	17
RCW 26.44.125(5).....	18
RCW 34.05.570(3).....	12
RCW 46.20.308(7).....	43
RCW 74.34.005	46

Regulations

Chapter 388-02 WAC	28
Chapter 388-15 WAC	28
Chapter 388-71 WAC	38
WAC 388-02-0005.....	28
WAC 388-02-0005(3).....	28
WAC 388-02-0020.....	26, 27, 28, 30
WAC 388-02-0085.....	8, 25, 27
WAC 388-02-0085(1).....	8
WAC 388-02-0085(6).....	25
WAC 388-15-005.....	42
WAC 388-15-085.....	27
WAC 388-15-085(1).....	25
WAC 388-15-089.....	28
WAC 388-15-109.....	28
WAC 388-15-129.....	43

Rules

RAP 2.5(a)	22
RAP 10.3(g)	15

Other Authorities

<i>Black's Law Dictionary</i> 1636 (10th ed. 2014).....	22
---	----

I. INTRODUCTION

This appeal concerns the Department of Social and Health Services Children's Administration's (Department's) authority and obligation to review a founded finding of child abuse or neglect where the subject of the finding repeatedly submits untimely requests for review. In this case, Dayanara Castillo, Appellant, was found to have neglected two of her three children by exposing them to firearms and by allowing an individual with CPS and criminal history to live in her basement, in violation of dependency court and Department requirements. While notice of the founded finding was duly provided to Ms. Castillo, she failed to submit her request for internal review within 30 days as required under RCW 26.44.125, and thus the Department declined to accept her request. Almost four months after receiving notice of the Department's decision not to review her finding, Ms. Castillo sought a hearing with the Office of Administrative Hearings. Upon a proper dismissal of her appeal by the Office of Administrative Hearings, Ms. Castillo again failed to submit timely review of its Initial Order of Dismissal to the Board of Appeals. Throughout the hearing process, both the Office of Administrative Hearings and the Board of Appeals considered Ms. Castillo's reasons for her untimeliness in requesting review, and both found her explanations to be unreasonable under the specific circumstances of her case.

Ms. Castillo now appeals, claiming that: (1) she timely requested internal review of the founded finding despite not submitting her request within 30 days as required by statute; (2) the Department erred in declining to accept Ms. Castillo's untimely request for internal review; (3) the Office of Administrative Hearings erred in dismissing Ms. Castillo's appeal for untimeliness; (4) the Board of Appeals' erred in declining to accept Ms. Castillo's untimely Petition for Review of Initial Decision; (5) Ms. Castillo's due process rights were violated; and (6) Ms. Castillo is entitled to attorney fees.

II. RESTATEMENT OF THE ISSUES

1. Was Ms. Castillo's request for internal review untimely when the Department received it after the 30-day deadline for her to request review had passed?
2. Was the Department's decision to decline to review Ms. Castillo's founded finding error of law when she failed to timely submit her request, and RCW 26.44.125 expressly requires requests for internal review to be timely in order for subjects to further challenge or seek review of founded findings?
3. Did the Office of Administrative Hearings act arbitrarily and capriciously in denying Ms. Castillo's appeal, initiated four months after the Department's decision to deny her untimely request for

review, when applicable regulations mandate dismissal of actions where an individual does not have the right to an administrative hearing?

4. Was the Department's process regarding founded findings, as applied to Ms. Castillo, unconstitutional when the Department clearly offered her meaningful notice and opportunity to challenge the founded finding issued as to her?
5. Was the Board of Appeals' decision to deny further review of Ms. Castillo's appeal arbitrary and capricious when she was, again, late in submitting her request, and she failed to show good cause for her untimeliness?
6. Is Ms. Castillo entitled to attorney fees when the Department's actions are substantially justified, in light of the plain language of RCW 26.44.125, such that awarding her attorneys fees would be unjust in this case?

III. COUNTERSTATEMENT OF THE FACTS

On June 11, 2013, the Department, Child Protective Services (CPS), received a referral alleging that Ms. Castillo had neglected two of her three children. Administrative Record (AR) 62-68; *see* AR 71. Specifically, the allegations were that Seattle Police discovered guns and ammunition in the living area of Ms. Castillo's family home and within

reach of these two children. AR 63. Additionally, it was alleged that Ms. Castillo had allowed an individual with criminal history, substance addiction, and CPS history that resulted in the removal of his children, to live in her basement. *Id.* At the time, Ms. Castillo's third child, who was not involved in these allegations, was a dependent child. *Id.* Allowing this individual who was not approved by the Department to live in her basement was in violation of rules set by the juvenile court and Ms. Castillo's social worker. *Id.*

Almost three months after receiving the report, CPS concluded its investigation by entering two founded findings of negligent treatment or maltreatment as to Ms. Castillo – one regarding each of the children involved in the allegations. *Id.*

A. Notice and Service of the Department's Founded Finding

The Department sent a written notice of the founded finding to Ms. Castillo via certified mail, return receipt requested. AR 62-69. This notice was delivered to the family home of Ms. Castillo and her husband Charles Kleeberger on September 9, 2013. AR 57 ¶ 5; AR 69. Mr. Kleeberger, who was over the age of 18 years, accepted service of this notice. *Id.*; RP at 6, 7. The Department's notice included the following instruction:

[Children's Administration (CA)] must receive your written request for a review within 30 calendar days from the date you receive this letter. **If CA does not receive the request within 30 calendar days of the date you receive this letter, you will have no further right to challenge the CPS findings.**

AR 64 (emphasis in original).

Ms. Castillo's deadline to appeal her founded finding was 30 days after delivery of the notice, which would have been October 9, 2013. However, it was not until October 10, 2013, that the Department received a request from Ms. Castillo to review the finding. AR 70-72. Dr. Erik Applebee, Department Area Administrator, notified Ms. Castillo via a letter dated October 16, 2013, that her request for review had been untimely and that the Department would therefore not change the founded finding. AR 73. Specifically, Dr. Applebee stated, "Unfortunately, your request for a review does not meet the required time frame. Therefore, I do not have the legal authority to fulfill your request to review the finding as stated in the certified letter." AR 73.

The Department sent this notice to Ms. Castillo via certified mail, and the notice was delivered on October 17, 2013. AR 73-74. Again, Mr. Kleeberger accepted service of this notice. AR 74.

B. Ms. Castillo's Request for an Administrative Fair Hearing

On February 4, 2014, almost four months after receiving notice of the Department's decision to uphold the founded finding, Ms. Castillo filed a request for a hearing with the Office of Administrative Hearings to further challenge it. AR 82. Attorney David Girard filed a Notice of Appearance on behalf of Ms. Castillo via telefax on March 28, 2014. CP 17 ¶ 11; AR 78.

The Department's representative filed a Motion to Dismiss for Lack of Jurisdiction on May 16, 2014. AR 60-61. That motion states, in part, "As the Appellant has failed to comply with the mandated procedures of RCW 26.44.125, she is without right or ability to challenge the Department's finding, and this agency is without subject matter jurisdiction to further proceed." AR 61. Attached to the Department's motion were the following documents: (Exhibit A) the Department's August 28, 2013, notice (AR 62-68); (Exhibit B) confirmation of delivery of that notice (AR 69); (Exhibit C) Ms. Castillo's written request for internal review of the finding (AR 70-72); and (Exhibit D) the Department's October 16, 2013, notice, along with confirmation of delivery (AR 73-74).

Ms. Castillo submitted her Opposition to the Department's Motion by telefax on May 30, 2014. AR 3, ¶ 13. Attached to Ms. Castillo's

Opposition was the Declaration of Dayanara Castillo. AR 56-58. In her declaration, Ms. Castillo asserts that she mailed her appeal on October 9, 2013, because she calculated her appeal deadline based upon the date on which her husband handed her the Department's August 28, 2013, notice, not the date upon which the notice was delivered and signed for at her home. AR 57 ¶¶ 7-10.

The Office of Administrative Hearings heard argument on the Department's motion on June 3, 2014. AR 60-61; 75. On December 31, 2014, Administrative Law Judge (ALJ) Jeffrey J. Manson issued an Initial Order of Dismissal. AR 33-38. He specifically concluded as follows:

[Ms. Castillo] asserts through a signed declaration that she believed that she "received" the notice on September 10, 2013, when Mr. Kleeberger handed her the envelope, and that October 10, 2013, was the 30-day deadline for requesting review of the finding. **This belief, even if credible, was not reasonable under the circumstances.** As such, [Ms. Castillo] has not shown that the Department's notice was insufficient under RCW 26.44.100(2)(d) insofar as it failed to clarify when the 30-day deadline began. **Additionally, there is no good cause exception for a late appeal under Chapter 26.44 RCW or Chapter 388-02 WAC** (*Compare* WAC 388-02-0305(1)).

AR 35 ¶ 5.3 (emphasis added).

ALJ Manson concluded that the Department's notice complied with the requirements of RCW 26.44.100, that the deadline for requesting review was October 9, 2013, and that because Ms. Castillo's request for

review was late, she did not have a right to a hearing under RCW 26.44.125(3) and WAC 388-02-0085(1). *Id.* ¶ 5.4. Ultimately, ALJ Manson did not find that he lacked subject matter jurisdiction and dismissed the appeal instead because Ms. Castillo did not have a right to a fair hearing, and WAC 388-02-0085 mandated dismissal under such circumstances. AR 35-36.

Attached to the Initial Order of Dismissal was information on Ms. Castillo's right to appeal the decision to the Board of Appeals, including a form for Ms. Castillo to use, a statement that the Board of Appeals must receive Ms. Castillo's request within 21 calendar days from the mail date stamped on the Initial Order of Dismissal, and clarification that the appeal form could be submitted by mail or facsimile. AR 37-38. This notification also included the mailing address, personal service location, telephone, and fax number for the Board of Appeals. AR 38. The mail date stamp on the Initial Order of Dismissal is December 31, 2014, which meant that Ms. Castillo's deadline for submitting her request for further review was January 21, 2015. AR 33.

C. Ms. Castillo's Petition for Review of ALJ Manson's Initial Decision

Ms. Castillo, acting through her attorney, used the Petition for Review of Initial Decision form provided by ALJ Manson but did not

submit her request to the Board of Appeals until January 22, 2015. AR 32. In her petition, Ms. Castillo stated generally, “I ask for a review of the initial decision because . . . it contains errors of fact and law and should be reversed.” *Id.*

On January 22, 2015, the Board of Appeals issued a Notice of Late Request for Review and Deadline to Give Explanation. AR 31. It set a deadline of February 2, 2015, for Ms. Castillo to file her explanation for why her request was one day late. AR 17-30. The Department did not submit a response to Ms. Castillo’s Petition to Review Initial Decision, nor did it submit a response to Ms. Castillo’s explanation for again untimely seeking review. Ms. Castillo’s attorney outlined his experience representing individuals before the Office of Administrative Hearings and the Board of Appeals, and he explained that he thought the request for review would arrive by the deadline if mailed instead of faxed. AR 23-24 ¶ 5. The postmark on the envelope used to send the petition is January 17, 2015. AR 3 ¶ 15. Notably, January 17, 18, and 19, 2015, was a three-day weekend in honor of the Reverend Doctor Martin Luther King, Jr. AR 4.

On April 28, 2015, the Board of Appeals issued its Review Decision and Final Order affirming the Initial Order of Dismissal. AR 1-15. In her Findings of Fact, Review Judge Marjorie R. Gray specifically stated as follows:

It was not reasonable to rely on timely delivery of an appeal mailed on that date, unless overnight mail, or second day mail, or some other form of guaranteed delivery was used. Or the Appellant's representative could have filed the one page appeal by telefax, the technology he used to file every other document he filed in this case. The late filing was not the result of excusable neglect and a bona fide mistake.

AR 4 ¶ 18.

Ultimately, Review Judge Gray upheld ALJ Manson's Initial Order of Dismissal for two reasons: (1) Ms. Castillo's Petition for Review of Initial Decision was untimely, and Ms. Castillo failed to show good cause for her untimeliness; and (2) Ms. Castillo's request for internal review to the Department was untimely. AR 12-13.

Ms. Castillo timely filed a Petition for Judicial Review of the Review Decision and Final Order in Thurston County Superior Court on May 20, 2015. CP at 4-14. On May 20, 2016, Superior Court Judge Carol Murphy denied Ms. Castillo's petition. CP at 32-34. Ms. Castillo now seeks further review from this Court.

IV. ARGUMENT

Judicial review of a final administrative decision is governed by the Washington Administrative Procedure Act (WAPA). *Tapper v. Emp't Security Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The WAPA allows relief to be granted in judicial review of adjudicative proceedings only if the following occurs:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the

challenging party at the appropriate time for making such a motion;

- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Washington courts have interpreted the requirements for judicial review of adjudicative agency proceedings to mean that a reviewing court may reverse an agency decision when “(1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious.” *Scheeler v. Dep’t of Emp’t Sec.*, 122 Wn. App. 484, 487-88, 93 P.3d 965 (2004) (citing *Tapper*, 122 Wn.2d at 402 (citing RCW 34.05.570(3))).

Conclusions of law are reviewed under the error of law standard. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984). This standard calls for “de novo” judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded the agency’s view. *Id.* A reviewing court accords substantial deference to an agency’s interpretation, particularly in regard to the law involving the agency’s special knowledge and expertise. *Univ.*

of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103.

To the extent that an agency interprets regulations as defining the right to administrative review, its view is not entitled to deference. *Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 416, 120 P.3d 130 (2006).

Factual determinations are sufficient only if supported by evidence that is substantial when viewed in light of the whole record before the court. *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002), citing *Tapper*, 122 Wn.2d at 402.

The court reviews questions of fact under the “clearly erroneous” standard. *Frazier v. Superintendent of Pub. Instruction*, 106 Wn.2d 754, 756, 725 P.2d 619 (1986). The prevailing definition of “clearly erroneous” is that courts do not retry factual issues and they accept the administrative findings unless the entire record leaves the court with a definite and firm conviction that a mistake has been made. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102. The existence of credible evidence that is contrary to the agency’s findings is not sufficient itself to label those findings clearly erroneous. *Id.*

The arbitrary and capricious test is a very narrow standard and the one asserting it “must carry a heavy burden.” *Pierce Cty. Sheriff v. Civil Service Comm’n of Pierce Cty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). “Arbitrary and capricious” has been defined as action that is willful and unreasoning in disregard of facts and circumstances. *Id.* “Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1996). Whether the agency action was willful and unreasoning considers whether the action was taken without regard to attending facts and circumstances. *Wash. Indep. Tel. Ass’n v. Wash. Utilities & Transp. Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). Under this test, a court “will not set aside a discretionary decision [of an agency] absent a clear showing of abuse.” *ARCO Products Co. v. Wash. Utilities & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quoting *Jensen v. Dep’t of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984)).

Here, Ms. Castillo challenges various decisions of the Department, Office of Administrative Hearings, and the Board of Appeals as follows: (1) the Department’s decision not to accept Ms. Castillo’s untimely request for internal review was error of law; (2) the Initial Order of Dismissal for Ms. Castillo’s untimeliness was arbitrary and capricious;

(3) the Review Decision and Final Order, issued after a subsequent untimely request by Ms. Castillo, was also arbitrary and capricious; and (4) the Department's process regarding founded findings is unconstitutional as applied to Ms. Castillo. Ms. Castillo does not challenge any findings of fact entered by the Office of Administrative Hearings or the Board of Appeals. Thus, the Board of Appeals' findings of fact are verities on appeal.¹ RAP 10.3(g); *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002).

The record shows that Ms. Castillo repeatedly submitted untimely requests for review of her founded findings. The Department properly declined to review the findings after it lawfully notified her and she failed to timely seek internal review. ALJ Manson properly dismissed Ms. Castillo's administrative appeal for her failure to timely seek internal review. The Board of Appeals properly dismissed Ms. Castillo's appeal after she failed to timely seek review of ALJ Manson's Initial Order of Dismissal. Ms. Castillo was not denied due process of law here. The Department's process of issuing, maintaining, and reviewing her founded findings in this case did not implicate Ms. Castillo's protected interests or unjustifiably elevate the risk of their erroneous deprivation. This is

¹ The Board of Appeals found, for example, that Ms. Castillo's petition for review by the Board of Appeals had been postmarked on January 17, 2016, and that the late filing was not the result of excusable neglect and a bona fide mistake. AR 4 ¶ 18.

especially true in light of the State’s compelling interest in protecting the health, welfare, and safety of children and in ensuring the finality of agency investigative findings. Finally, even if Ms. Castillo were to prevail in this matter, she would not be entitled to attorney fees because the Department’s actions in this case were substantially justified.

A. Ms. Castillo’s Request for Internal Review, Request for Administrative Review, and Request for Review by the Board of Appeals Were All Untimely

RCW 26.44.125 governs an alleged perpetrator’s right to challenge a founded finding of child abuse or neglect. It provides, “[w]ithin thirty calendar days after the department has notified the alleged perpetrator [of a founded finding] under RCW 26.44.100 . . . he or she may request that the department review the finding.” RCW 26.44.125(2). If that individual fails to properly submit his or her request for review, “the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding, unless he or she can show that the department did not comply with the notice requirements of RCW 26.44.100.” RCW 26.44.125(3).

RCW 26.44.100 requires the Department to notify the subject of a report of child abuse or neglect of its investigative findings. RCW 26.44.100(2). Such notice must also advise the subject that: (a) he or she may submit a written response to the findings, which the

Department will file in its record upon receipt; (b) information in the Department's record may be considered in subsequent investigations or proceedings related to child protection or child custody; (c) founded findings may be considered in determining whether the subject is disqualified from being licensed to provide child care, employed by a licensed child care agency, or authorized by the Department to care for children; and (d) he or she has the right to seek review of the finding as provided in chapter 26.44 RCW. RCW 26.44.100(2)(a)-(d).

In addition, the Department must send the notice to the subject via certified mail, return receipt requested, to the subject's last known address. RCW 26.44.100(3). The Department's duty of notification under RCW 26.44.100 is "subject to the ability of the department to ascertain the location of the person to be notified." RCW 26.44.100(4). The Department is required to "exercise reasonable, good-faith efforts to ascertain the location of persons entitled to notification under this section." *Id.*

If an alleged perpetrator properly submits a written request for review of a founded finding, then the Department must review the finding and notify the alleged perpetrator in writing of its decision to reverse or uphold it. RCW 26.44.125(4). That notice must be sent via certified mail, return receipt requested, to the person's last known address. *Id.* If the

Department decides to uphold the finding, the alleged perpetrator may request an adjudicative hearing to contest it as long as he or she submits such a request within 30 calendar days after notice of the Department's review determination. RCW 26.44.125(5). If a request for an adjudicative proceeding is not properly submitted, "the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding." *Id.*

Here, Ms. Castillo's request for internal review of her founded finding was one day late. Pursuant to RCW 26.44.100, the Department notified Ms. Castillo of the founded finding issued as to her on September 9, 2013. AR 57 ¶ 5; AR 69. Ms. Castillo's deadline to request internal review of the founded finding was October 9, 2013; however, it was not until October 10, 2013, that the Department received a request from Ms. Castillo's to review the founded finding. AR 70-72.

Ms. Castillo's request for review was late despite the Department's compliance with RCW 26.44.100. Pursuant to RCW 26.44.100(2)(a), the Department's notice states, "You have the right to send CPS a written response about the allegation and finding(s). If you send a written response, it will be put in your CPS file." AR 64. Pursuant to RCW 26.44.100(2)(b)-(c), it states that information in the Department's computer system may be used in subsequent investigations or proceedings

and to determine whether Ms. Castillo is disqualified from being licensed to provide child care, employed by a licensed child care agency, or authorized by the Department to care for children. AR 63. Pursuant to RCW 26.44.100(2)(d), it advises Ms. Castillo of her right to review of the founded finding and how she should submit her written request for review. AR 64. Finally, it references and provides weblinks to the applicable statutes and regulations governing review of Department investigative findings. AR 64; AR 65.

Despite her receipt of the Department's legally sufficient notice, and despite her untimely request for internal review, Ms. Castillo still submitted a request for an administrative hearing to further challenge the finding. Her request to the Office of Administrative Hearings was several months late. The Department sent her notice of its decision to uphold the founded finding on October 16, 2013. AR 73. Ms. Castillo did not seek an administrative hearing until over four months later, on February 4, 2014. AR 82.

Finally, Ms. Castillo's request for review by the Board of Appeals was one day late. ALJ Manson issued his Initial Order of Dismissal, which included a sample form and explicit and detailed information on Ms. Castillo's appeal rights, on December 31, 2014. AR 33, AR 36-38. Ms. Castillo's deadline for submitting her Petition for Review of Initial

Decision was 21 days later, or January 21, 2015. *Id.* However, Ms. Castillo, acting through an attorney, used the form provided by ALJ Manson but did not submit her petition until January 22, 2015. AR 32.

The record clearly shows that Ms. Castillo's request for internal review, request for an administrative hearing, and petition to the Board of Appeals were all untimely. The record also shows that the Department complied with its notice requirements under RCW 26.44.100. Therefore, Ms. Castillo had no right to further challenge the founded finding after she failed to submit a timely request for review by October 9, 2013. Further, Ms. Castillo fails to address her subsequent untimely requests for review by the Office of Administrative Hearings and the Board of Appeals. As such, she either argues that these subsequent untimely requests are excused or ignores them and implies such an argument. However, the law does not support that position. Thus, the Board of Appeals' Review Decision and Final Order dismissing her appeal should be upheld.

B. The Department Properly Declined To Review Ms. Castillo's Founded Finding After It Lawfully Notified Her and She Failed To Timely Seek Internal Review

Ms. Castillo argues that the Department committed an error of law when it declined to review Ms. Castillo's finding. Brief of Appellant ("Br. Appellant") at 21. Specifically, she asserts, without citing any applicable legal authority, that the Department has general "authority to

review a neglect finding at any time.” Br. Appellant at 19-21. However, Ms. Castillo’s argument fails here, as the Department’s authority to review founded findings is outlined in and limited under RCW 26.44.125.

First, her reliance on RCW 26.44.010 is inapposite because that statute, which lays out the purpose of chapter 26.44 RCW, does not mention a subject’s right to challenge a founded finding or the Department’s authority to review a founded finding after a subject has failed to timely request it. Instead, it states, in pertinent part, “Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions.” RCW 26.44.010. The Department does not dispute that it has a duty to maintain and disseminate reports of child abuse and neglect in a manner consistent with this purpose. However, reports of child abuse and neglect are distinct from founded findings issued as a result of an investigation. *See* RCW 26.44.020(21); *see also* 26.44.030(11). RCW 26.44.010 does not confer general, unfettered authority to the Department to review founded findings at any time.

Second, Ms. Castillo improperly equates the Department’s obligation to maintain accurate records with the question of whether Ms. Castillo’s founded finding should be upheld under a preponderance of

the evidence standard of review. *See* Br. Appellant at 19. Whether Ms. Castillo’s founded finding should be upheld under such review is not properly before this Court, as an issue not raised below cannot, as a general matter, be raised for the first time on appeal. RAP 2.5(a); *see, e.g. Washington Federal Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013).

Third, Ms. Castillo’s arguments regarding “subject matter jurisdiction” do not apply here, as no reference to “subject matter jurisdiction” is present in the Department’s October 16, 2013, notice. *See* AR 73.

Fourth, Ms. Castillo’s characterization of the statutory 30-day time limit under RCW 26.44.100 as a “statute of limitations” is misplaced, as a request for internal review of an agency’s decision is different from a claim that may be brought against an agency. In the context of civil litigation, a “statute of limitations” is a “law that bars *claims* after a specified period; specif., a statute establishing a time limit *for suing in a civil case*, based on the date when the claim accrued (as when the injury occurred or was discovered).” *Black’s Law Dictionary*, 1636 (10th ed. 2014) (emphasis added); *see also United States v. Kwai Fun Wong*, ___ U.S. ___, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015) (addressing whether the statutory deadline for initiating a claim against the

United States under the Federal Tort Claims Act was jurisdictional or a statute of limitations subject to equitable tolling).

Here, the Department made a general determination that it “lacked authority” under RCW 26.44.125 to review Ms. Castillo’s founded finding, *see* AR 73, and such a determination was correct in this case. The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein. *Stewart v. Dep’t of Soc. & Health Servs.*, 162 Wn. App. 266, 270-71, 252 P.3d 920 (2011) (“A rule exceeds the department’s statutory authority . . . does not authorize the rule either ‘expressly or by necessary implication’”); *Id.* at 271; *Comway*, 131 Wn. App. at 419 (holding that the ALJ exceeded her authority in imposing a remedy for which the Legislature had only delegated to DSHS); *McGuire v. State*, 58 Wn. App. 195, 198-99, 791 P.2d 929 (1990) (holding that any attempt of the State to confer rights from which an individual is statutorily exempt would be ultra vires and void as a matter of law).

RCW 26.44.125 states, “Within thirty calendar days after the department has notified the alleged perpetrator . . . he or she may request that the department review the finding.” RCW 26.44.125(2). However, “[i]f a request for review is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and *shall have no*

right to agency review . . . unless he or she can show that the department did not comply with the notice requirements of RCW 26.44.100.” RCW 26.44.125(3) (emphasis added). If “the meaning of the statute is clear, [courts] must accept the plain and unambiguous language.” *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992). Generally speaking, when both “may” and “shall” are contained in the same provision, it is presumed that “may” is permissive and “shall” is mandatory. *Carrick v. Locke*, 125 Wn.2d 129, 142, 882 P.2d 173 (1994).

The phrase “shall have no right to agency review” clearly indicates a legislative intent to limit reviews of founded findings in circumstances under which the Department complies with the notice requirements of RCW 26.44.100. Here, the Department complied with the notice requirements under RCW 26.44.100 by: (1) including all information plus weblinks to the applicable laws and regulations, in plain language, in writing to Ms. Castillo as required under RCW 26.44.100(2)(a)-(d); (2) sending its written notice with the requisite information to Ms. Castillo at her last known address, which was her actual address; and (3) sending the notice via certified mail, return receipt requested. Therefore, when Ms. Castillo submitted a late request for internal review, it was incumbent upon the Department to act in a manner consistent with the intent and the authority delegated to the Department by the Legislature in

RCW 26.44.125 and decline to accept Ms. Castillo's request. The Department's decision not to review Ms. Castillo's finding was therefore proper, and the Board of Appeals' Review Decision and Final Order should thus be upheld.

C. ALJ Manson Properly Dismissed Ms. Castillo's Administrative Appeal For Her Failure To Timely Seek Internal Review

Ms. Castillo further argues that the Initial Order of dismissal is arbitrary and capricious because the "ALJ's failure to review the allegedly untimely request for review was not based on any law or rule, and was instead based on the incorrect assumption that the ALJ lacked 'jurisdiction' to review the request." Br. Appellant at 22-23. This argument fails. ALJ Manson's Initial Order of Dismissal does not mention the terms "jurisdiction" or "subject matter jurisdiction." *See* AR 33-36. Instead, ALJ Manson dismissed Ms. Castillo's appeal because he determined that she did not have a right to a hearing under RCW 26.44.125 and WAC 388-15-085(1), and thus dismissal of her appeal was required pursuant to WAC 388-02-0085(6). AR 35.

WAC 388-02-0085 provides, "You have a right to a hearing only if a law or DSHS rule gives you that right," and "[i]f the ALJ decides you do not have a right to a hearing, your request is dismissed." ALJ Manson found that the Department complied with the notice requirements under

RCW 26.44.100, and therefore Ms. Castillo did not have a right to an administrative hearing. ALJ Manson's decision was correct in light of the plain language of RCW 26.44.125. Thus, ALJ Manson's Initial Order of Dismissal was not arbitrary or capricious, and the Board of Appeals' Review Decision and Final Order should be upheld.

Ms. Castillo also argues that ALJ Manson's Initial Order of Dismissal was arbitrary and capricious because it dismisses her appeal without addressing whether she showed "good cause" for her untimeliness under WAC 388-02-0020. Br. Appellant at 21. This argument also fails because there is no good cause exception for failing to timely seek review of a founded finding. *See Semenenko v. State Dep't of Soc. & Health Servs.*, 182 Wn. App. 1052 (2014) (unpublished), *review denied*, *Semenenko v. Dep't of Soc. & Health Servs.*, 182 Wn.2d 1006, 342 P.3d 327 (2015) ("[WAC 388-02-0020] does not provide general substantive authority to invoke good cause as an excuse whenever a party fails to meet a statutory deadline. Here, the statute establishing the deadline, former RCW 26.44.125(2), does not provide substantive authority permitting the Department to waive the 20-day deadline when good cause is shown.").

To the extent the ALJ should have discussed and applied the requirements of WAC 388-02-0020, his failure to do so was harmless

error given that Ms. Castillo does not meet the threshold for a good cause finding under WAC 388-02-0020. Further, he properly applied RCW 26.44.125, WAC 388-15-085, and WAC 388-02-0085 in determining that Ms. Castillo's appeal should be dismissed because of her untimely request for review. Therefore, his decision was not arbitrary or capricious and should be upheld.

Good cause means:

- (1) Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.
- (2) Good cause may include, but is not limited to, the following examples.
 - (a) You ignored a notice because you were in the hospital or were otherwise prevented from responding; or
 - (b) You could not respond to the notice because it was written in a language that you did not understand.

WAC 388-02-0020.

Interpreting WAC 388-02-0020 to apply to administrative hearings on founded findings would be contrary to the clear intent of the Legislature to limit review of founded findings, and it would also be contrary to specific hearing rules applicable to the child protective services

program. Chapter 388-02 WAC describes the general procedures that apply to the resolution of disputes between individuals and the various programs within the Department. WAC 388-02-0005. However, specific program hearing rules prevail over the rules of that chapter. WAC 388-02-0005(3). Chapter 388-15 WAC applies to the child protective service program and contains hearing rules specific to that program. Those hearing rules provide, “In the event of a conflict between the provisions of [chapter 388-15] and chapter 388-02 WAC, the provisions of [chapter 388-15 WAC] must prevail.” WAC 388-15-109. Chapter 388-15 WAC is consistent with RCW 26.44.125 and provides that if the subject of a founded finding does not submit a written request for review within 30 calendar days, “no further review or challenge of the finding may occur.” WAC 388-15-089. Both RCW 26.44.125 and WAC 388-15-089 promote the preference for finality of the Department’s decisions and order and do not provide for a good cause exception to an untimely request for review. Therefore, ALJ Manson’s conclusion that “there is no good cause exception for a late appeal” submitted under RCW 26.44.125 was correct.

Alternatively, the record does not show that Ms. Castillo had “good cause” for her untimeliness, and to the extent that ALJ Manson should have applied WAC 388-02-0020, such an error is harmless in this

case. To be grounds for reversal, error must be prejudicial and affect the outcome of the case. *Qwest Corp. v. Wash. Utilities & Transp. Comm'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007).

The Washington State Supreme Court has clearly articulated the following guiding principles when considering a default or, by extension, an untimely petition for review:

[T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. **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 the outcome.**

Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (citations omitted) (emphasis added).

Here, Ms. Castillo has failed to show how dismissal of her appeal was unjust under these circumstances. Once the Department determined that it was more likely than not that Ms. Castillo had neglected her children, the Department properly notified her of its investigative findings as required by RCW 26.44.100(3) and (4). AR 62-69. The Department sent written notice of the founded findings to Ms. Castillo at her last known address, which was her actual address. *Id.* It sent the letter via certified mail, return receipt requested. AR 69. The letter was signed for and delivered on September 9, 2013. AR 69. The record shows that ALJ

Manson provided Ms. Castillo with a fair opportunity to explain to the court why she was untimely, and upon duly considering such an explanation, ALJ Manson concluded that it “even if credible, was not reasonable under the circumstances.” AR 35. As discussed in further detail below, RCW 26.44.125 does not require personal service. Instead, it requires notice by certified mail, subject to the Department’s ability to locate the subject. This necessarily implies that when the notice is delivered to the subject’s residence, notice is complete. In light of what RCW 26.44.125 requires, it is not reasonable for Ms. Castillo to now claim that notice was not completed until her husband handed the certified letter to her the day after it was delivered to her family home. Therefore, ALJ Manson did not err in declining to apply WAC 388-02-0020, but to the extent that he did err, such an error is harmless in this case because Ms. Castillo has failed to show good cause for her untimeliness.

D. The BOA Properly Dismissed Ms. Castillo’s Appeal After She Failed To Seek Timely Review of ALJ Manson’s Initial Order

Board of Appeals Review Judge Marjorie R. Gray upheld ALJ Manson’s Initial Order of Dismissal for two reasons: (1) Ms. Castillo’s Petition for Review of Initial Decision was untimely, and Ms. Castillo failed to show good cause or her untimeliness; and (2) Ms. Castillo’s request for internal review to the Department was untimely. AR 12-13.

Review Judge Gray's Review Decision and Final Order was neither arbitrary nor capricious. Ms. Castillo, acting through her attorney, used the Petition for Review of Initial Decision form provided by ALJ Manson but did not submit her request to the Board of Appeals until January 22, 2015. AR 32. In response, the Board of Appeals afforded Ms. Castillo a fair opportunity to explain her reason for her untimeliness. AR 31. The only explanation that Ms. Castillo's attorney offered was that he thought the request for review would arrive by the deadline if mailed instead of faxed on January 16, 2015. AR 23 ¶ 5. January 17, 18, and 19, 2015, was a three-day weekend in honor of the Reverend Doctor Martin Luther King, Jr. AR 4. It was not reasonable for Ms. Castillo's attorney to assume that mailing Ms. Castillo's request, via regular United States Mail, on a Friday before a long weekend would ensure that the request would arrive by the following Tuesday. Review Judge Gray's statements below are an accurate summation of the record before her:

It was not reasonable to rely on timely delivery of an appeal mailed on that date, unless overnight mail, or second day mail, or some other form of guaranteed delivery was used. Or the Appellant's representative could have filed the one page appeal by telefax, the technology he used to file every other document he filed in this case. The late filing was not the result of excusable neglect and a bona fide mistake.

Id.

Thus, the record shows that Review Judge Gray duly considered the specific facts and circumstances of this case before ruling on whether to grant further review of the Initial Order of Dismissal, and the Review Decision and Final Order was therefore not arbitrary or capricious and should be upheld.

E. Ms. Castillo Was Not Denied Due Process of Law

Ms. Castillo argues, “If this Court finds that Ms. Castillo’s request was late and that the Department lacks authority to review a late request under RCW 26.44.125, then the Department’s process is unconstitutional as applied to Ms. Castillo, under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution.” Br. Appellant at 27. Ms. Castillo fails to articulate with specificity what she means by “the Department’s process.” However, her argument fails here, as the record shows that the Department did not deny her due process of law when it notified her in writing of the founded finding issued against her, pursuant to RCW 26.44.100, and afforded her an opportunity to challenge that finding pursuant to RCW 26.44.125.

If a party alleges that a rule is unconstitutional, the party must prove unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep’t of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998)

(citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a State from depriving any person of “life, liberty, or property” without due process of law. U.S. Const. amend. XIV, § 1. Washington’s constitutional provision is similar and does not provide broader protections than its federal counterpart. *Greenhalgh v. Dep’t of Corrections*, 180 Wn. App. 876, 890, 324 P.3d 771 (2014), citing Wash. Const. art. I, § 3; *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000).

At a minimum, due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Notice must be “‘reasonably calculated to inform the affected party of the pending action and of the opportunity to object.’” *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003), citing *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). The opportunity to be heard must be meaningful in time and manner. *Morrison v. Dep’t of Labor & Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675, review denied, 175 Wn.2d 1012, 287 P.3d 594 (2012) (quoting *Downey v. Pierce Cty.*, 165 Wn. App. 152, 165, 267 P.3d 445 (2011)).

Due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Instead, it “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* Generally speaking, the nature of the procedures required under the Due Process Clause is dictated by considering those factors specified in *Mathews*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Courts examine alleged due process violations in two steps: first, by determining whether there exists a liberty or property interest which has been interfered with by the State; and second, by determining whether the procedures attendant upon that deprivation were constitutionally sufficient. *Kentucky Dep’t. of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

In *Humphries*, the Ninth Circuit Court of Appeals found that California had not afforded due process because it did not provide a

meaningful process for individuals to challenge the listing of their names in California's Child Abuse Central Index (CACI). *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1200 (9th Cir. 2009). However, the Ninth Circuit did not deem it necessary to spell out what kind of procedure California should create. *Id.* at 1201. It held:

The state has a great deal of flexibility in fashioning its procedures, and it should have the full range of options open to it. We do not hold that California must necessarily create some hearing prior to listing individuals on CACI. At the very least, however, California must promptly notify a suspected child abuser that his name is on the CACI and provide 'some kind of hearing' by which he can challenge his inclusion.

*Id.*² (citations omitted).

When weighing the *Mathews* factors, this Court should conclude that Ms. Castillo received the due process to which she was entitled for three reasons: first, Ms. Castillo has failed to establish that she has a protected interest that has been implicated by the dismissal of her appeal. Second, the record shows that the Department afforded Ms. Castillo meaningful notice and an opportunity to challenge the founded finding issued as to her. Third, the Department's process of issuing and maintaining founded findings passes constitutional muster when balanced

² The U.S. Supreme Court reversed the Ninth Circuit on other grounds. *Los Angeles County v. Humphries*, 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010).

with the its compelling interest in ensuring the safety of children and in finality of investigative outcomes.

1. Ms. Castillo Has Failed To Establish That She Has a Protected Interest That Has Been Implicated By the Dismissal of Her Appeal

Due Process procedural protections “apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). When “protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.” *Id.* These interests must be initially recognized and protected by state law, and due process requirements will apply when the State seeks to remove or significantly alter the protected status of those interests. *Paul v. Davis*, 424 U.S. 693, 710-11, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

In 1972, the U.S. Supreme Court held that a government employee’s protected interest would be implicated if he were terminated based on charges that imposed “on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.” *Roth*, 408 U.S. at 573. In that case, the individual asserting a claim against the State was a new professor, not tenured, who

was informed that he would not be rehired for the following academic year and was not afforded any reason for the decision or an opportunity to challenge it. *Id.* at 566. The Court found that the State’s decision not to rehire him did not interfere with his private employment interest because it did not involve any charge against him that might seriously damage his standing and associations in his community. *Id.* at 573.

A few years later, the Court clarified that damage to one’s reputation alone is not “by itself sufficient to invoke the procedural protection of the Due Process Clause.” *Paul*, 424 U.S. at 701. Instead, it held that loss of reputation must be coupled with some other tangible element in order to rise to the level of a protected interest. *Id.* In that case, the State action at issue was law enforcement’s decision to send fliers to local merchants listing the names and photographs of possible shoplifters who may be operating during the Christmas season. *Id.* at 694-95. The individual who brought suit against the State was included on the fliers, and though his employer reprimanded him, he was not fired as a result. *Id.* at 696.

This has since been referred to as the “stigma plus” standard that establishes when an interest rises to the level of a protected interest, triggering procedural protection of the Due Process Clause. *See, e.g. Valmonte v. Bane*, 18 F.3d 992, 999 (1994).

This issue was addressed by the Washington State Court of Appeals in *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 287 P.3d 629 (2012), which is distinguishable from the present case. The court in *Ryan* addressed a Department rule under chapter 388-71 WAC, applicable to its adult protective services program, that required the Department to maintain a registry of all final findings of abuse, abandonment, neglect and financial exploitation of a vulnerable adult. *Id.* at 462. That rule also authorized the Department to disclose the identity of a person with a final finding “upon request of any person.” *Id.* In that case, the subject of the finding was an individual who had worked as a caregiver for nine years and who never received notice of the finding until her employer learned of her inclusion on the registry and suspended her as a result. *Id.* Additionally, the court found that the Department had sent notice of the founded finding to an address at which the Department knew that she did not live. *Id.* at 475. The court’s determination of the due process required in that case was strongly influenced by the fact that the finding was available on a public registry, as it found, “For someone like Ms. Ryan, . . . inclusion in the registry can result in the loss of employment and ineligibility for future employment” *Id.* at 462.

However, the Department does not maintain a central registry for founded findings of child abuse or neglect or otherwise publish its

investigative findings regarding child abuse or neglect. Once issued, the Department maintains internal records of the founded findings and records pertaining to the investigation. That information is confidential pursuant to chapter 13.50 RCW and, as a general matter, is not disclosed absent a signed authorization or court order issued pursuant to chapter 13.50 RCW. *See* RCW 13.50.100. The Department's use of founded findings includes reviewing them in connection with: (1) investigations or proceedings related to subsequent allegations of child abuse or neglect or child custody; (2) determining if an individual is qualified to be licensed or approved to care for children or vulnerable adults; and (3) determining if an individual is qualified to be employed by the Department in a position having unsupervised access to children or vulnerable adults. RCW 26.44.125(2)(d)-(e).

Here, Ms. Castillo has failed to show that she has a protected interest that is implicated by the Department's decision not to consider her untimely request for review. The founded findings issued as to her do not, as she seems to imply, sever or reduce Ms. Castillo's parental rights. *See* Br. Appellant at 30. Ms. Castillo has not been denied employment with the Department or anyone else based upon her founded findings. She does not possess a professional license that has been impacted by the founded findings. This is not a case where Ms. Castillo is a licensed or certified

professional and the Department's action caused her to lose her job and prevented her from getting another job in the same field. *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011) ("For purposes of the *Mathews* analysis, the personal interest at stake in a proceeding is the property interest (i.e., the license) and not one's subjective desire to perform work in the job of one's choosing."); *see also Jamison v. Missouri Dep't of Soc. Servs.*, 218 S.W.3d 399, 402 (Mo. 2007) (Two nurses challenged the inclusion of their names on the Missouri Department of Social Services Central Registry).

In this case, Ms. Castillo characterizes her interest as "not being branded as a negligent parent in agency records, and in not having her role as a parent and her future employment possibilities severely limited by the finding." Br. Appellant at 30. This vague characterization does not rise to the level of "stigma plus" showing a tangible burden upon Ms. Castillo's protected private interest. Therefore, "the Department's practice" as applied to Ms. Castillo did not violate her due process rights, and the Board of Appeals' Review Decision and Final Order should thus be upheld.

2. Ms. Castillo Has Failed To Show That the Risk Of Erroneous Deprivation Of Her Protected Interests Is Unjustifiably High

The second *Mathews* factor concerns whether the State's procedures are sufficient to protect against erroneous deprivation of the individual's private interest. This determination is context dependent. *Hardee*, 172 Wn.2d at 16. In assessing the adequacy of the State's procedures, a court must "evaluate, not only the risk of erroneous deprivation, but also 'the probable value, *if any*, of additional or substitute procedural safeguards. . ..'" *Id.* While additional procedural safeguards will always decrease the likelihood of deprivation, that fact alone does not justify their adoption. *Id.* at 11. Rather, the current procedures must suffer from inadequacies that make erroneous deprivations readily foreseeable. *Id.*

In *Valmonte*, for example, the Second Circuit found that the risk of erroneous deprivation created by New York's procedures was unjustifiably high. *Valmonte*, 18 F.3d at 1005. New York's procedures included a three step review process: (1) an initial, internal agency review to determine if the founded finding was supported by "some credible evidence;" (2) a fair hearing where the State had to prove its allegations by "some credible evidence;" and (3) only after an individual was denied employment based on his or her placement on the Central Registry, a fair

hearing at which the State had to prove its allegations by a preponderance of the evidence. *Id.* at 1002-03. It was only after prevailing at this third stage that the State would reverse the finding and expunge it from the Central Register. *Id.* The difference in standards of proof led to nearly 75 percent of those seeking expungement to be ultimately successful, indicating that roughly one third of those initially placed on the Central Registry would not have been so placed had the State been held to a more fair standard of proof. Finally, roughly two million individuals – a large percentage of New York’s population – were named on the Central Registry. *Id.*

Here, the Department’s process for issuing and maintaining founded findings is very different. A report of child abuse and neglect will be founded only if the Department determines, after an investigation, that it is more likely than not that the abuse or neglect occurred. WAC 388-15-005. Therefore, the Department must determine based on a preponderance of the evidence standard that the child abuse or neglect occurred before a founded finding is entered into its records. This standard during the investigative phase reduces the risk of erroneous deprivation and is not necessarily violative of due process. *See In re Anonymous v. Peters*, 189 Misc.2d 203, 211, 730 N.Y.S.2d 689 (2001); *Winston v. Kansas Dep’t of Soc. & Rehab. Servs.*, 274 Kan. 396, 412, 49 P.3d 1274,

1285 (2002). In addition, if the subject of the founded finding timely seeks review of the founded finding, the founded finding will be upheld only if the administrative law judge finds by a preponderance of the evidence that the child abuse or neglect occurred. WAC 388-15-129. Therefore, the statutory procedures currently used to investigate allegations of child neglect and issue and maintain findings create a low risk of erroneous deprivation and their application in Ms. Castillo's case did not violate her due process rights.

In addition, the current requirement under RCW 26.44.100 that notice be completed via certified mail to a subject's last known address does not suffer from inadequacies that make erroneous deprivations of protected rights readily foreseeable. In Washington State, notice may be actual, statutory, or constructive. *State v. Vahl*, 56 Wn. App. 603, 608-09, 784 P.2d 1280 (1990). In the *City of Seattle v. Foley*, 56 Wn. App. 485, 784 P.2d 176 (1990), for example, the Court of Appeals determined that failure or refusal to claim a notice of revocation of license sent by certified mail as allowed by RCW 46.20.308(7) constituted sufficient evidence that Foley had received notice of his license revocation. Disagreeing with Foley's assertion that the Department had not satisfied notice requirements, the court held:

Although Foley did not acknowledge receipt, the post office attempted delivery as evidenced by the certified mail receipt. . . . [He] cannot now argue that notice was improper. Were we to conclude otherwise, we would permit a person to . . . avoid a mandatory license revocation by simply not claiming certified mail or moving to an unknown address

Foley, 56 Wn. App. at 489.

Washington courts have found mailed notice sufficient for due process purposes even where it is not actually received. The Washington State Supreme Court in the case of *In re Marriage of McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997), for example, that RCW 26.09.175 allows a party to be served in a child support modification case by personal service or any form of mailing requiring return receipt and that this allowance satisfies due process. In that case, the responding party, who had failed to claim his mail, argued that service by mail requiring a return receipt indicated legislative intent that a return receipt would be treated as evidence of actual delivery. *Id.* at 307. The Court disagreed, stating as follows:

[The] return receipt form of mail designated enables the court and the parties to track what happens to the mail after it is sent. This may be important where it is claimed the petitioner used an incorrect address, for example. Second, while there may not be evidence of actual receipt, there will be evidence that notice was sent as required by the statute.

Id. at 307-08. The Court further held:

[R]efusing to claim certified mail is analogous to refusing to accept in hand service, and . . . just as a person cannot defeat notice by refusing tendered process, a person cannot defeat mail by refusing to claim certified mail.

Id. at 311-12 (citations omitted).

The facts in this case do not show that Ms. Castillo refused to accept notice, but the above case law is instructive on what constitutes notice. Ms. Castillo argues that her husband signed for the notice on September 9, 2013, but that her husband did not give her the letter until September 10, 2013. Thus she argues that September 10, 2013, should be the date Ms. Castillo received “actual” notice for purposes of determining when the request for internal review is due. Br. Appellant at 4-5. Accepting this argument would allow individuals to self-determine when notice is complete and when a request for review is due. Any adult living at the residence can sign for the delivery of certified mail, but the date of the notice is not determined by the person who received the notice. Actual notice is not required by the statute or due process, and in this case, the signed certified receipt with the date of delivery is the date when Ms. Castillo received notice pursuant to RCW 26.44.100. AR 69.

Further, Ms. Castillo asserts that the notice the Department sent to her pursuant to RCW 26.44.100 was “confusing and unclear,” Br. Appellant at 39, in that it states, “if [the Department] does not receive

the request within 30 calendar days of the date you receive this letter, you will have no further right to challenge the CPS findings.” AR 64; Br. Appellant at 34. Ms. Castillo’s argument fails here. Ms. Castillo’s claim centers on the use of the word “you,” not upon any alleged failure by the Department to follow statutory requirements or cite appropriate legal authority. *Cf. Pal v. Dep’t of Soc. & Health Servs.*, 185 Wn. App. 775, 785, 342 P.3d 1190 (2015). The statute states what is required of notice. To the extent that the Department’s notice explicitly advised Ms. Castillo of the 30-day time limit for requesting review, it is not unclear or confusing. In light of the requirements of the statute, the use of the word “you” as opposed to the language suggested by Ms. Castillo does not render the Department’s notice insufficient or unconstitutional.

3. The State’s Interest in the Welfare of Children and in the Finality of Investigative Findings is Significant

There is no question that the state’s interest in protecting the health, welfare, and safety of children and vulnerable adults is significant and important. *See generally* RCW 26.44.010; *see also* RCW 74.34.005; *see also Hardee*, 172 Wn.2d at 12. The statutory procedures found in chapter 26.44 RCW provide for a timely investigation of an allegation of child abuse or neglect and requires the Department to notify the subject of

the results of the investigation. The individual who has been found to have abused or neglected a child has the ability to seek review by the Department and by the Office of Administrative Hearings to challenge the finding. However, the state is still responsible for ensuring the safety and well-being of children and vulnerable adults while the individual is challenging the founded finding. To require a pre-deprivation hearing prior to the findings being entered into a person's record would interfere with the state's interest to quickly respond to allegations of child abuse and take steps to protect the state's most vulnerable citizens. *See Watso v. Colorado Dep't of Soc. Servs.*, 841 P.2d 299, 309 (1992) ("In our view, the state's interest in protecting children from actual or potential abuse or neglect is sufficiently significant to justify the absence of any adversary proceeding prior to the filing of a confirmed report with the registry in view of all of the procedural safeguards contained in the Act.").

When Ms. Castillo's private interest of obtaining future employment possibilities is weighed with the low risk of erroneous deprivation given the current statutory scheme and the significant governmental interest here, the due process available to Ms. Castillo in this case (notice and an opportunity to be heard) passes constitutional muster.

In light of the above, it is clear that Ms. Castillo’s due process rights were not violated. The Board of Appeals’ Review Decision and Final Order should therefore be upheld.

F. Ms. Castillo’s Request for Attorney Fees Should Be Denied

A prevailing party in a judicial review of an agency action is statutorily entitled to attorney fees “unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” RCW 4.84.350. Here, the Department took steps that comported with RCW 26.44.125, which were reasonable and in good faith aimed at providing Ms. Castillo with notice of the founded finding. Ms. Castillo received notice of the finding pursuant to the statute. In light of the circumstances in this case, the Department’s actions are justified here, and Ms. Castillo should not be awarded attorney fees.

//

//

//

//

//

//

//

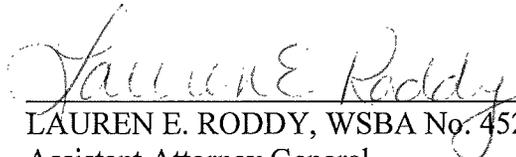
//

V. CONCLUSION

The Department's decision to dismiss Ms. Castillo's request for review of her founded findings for her failure to timely submit a request was not an error of law, unconstitutional, or arbitrary and capricious, and it should thus be upheld.

RESPECTFULLY SUBMITTED this 29th day of November, 2016.

ROBERT W. FERGUSON
Attorney General


LAUREN E. RODDY, WSBA No. 45297
Assistant Attorney General

Washington Attorney General's Office
Social and Health Services Division
Attorneys for Respondent, Department of
Social and Health Services

SHO Division, OID No. 91021
PO Box 40124
7141 Cleanwater Drive SW
Olympia, WA 98504-0124
(360) 586-6506
LaurenR1@atg.wa.gov

CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on November 29, 2016, I served a true and correct copy of this **RESPONDENT’S BRIEF** and this **CERTIFICATE OF SERVICE** for delivery to the persons indicated below as follows:

Counsel for Appellant
Scott Crain
Northwest Justice Project
401 Second Avenue South, Suite 407
Seattle, WA 98104

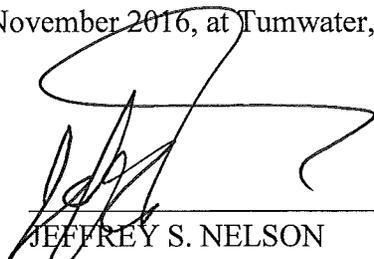
Counsel for Appellant
Luanne Serafin
Northwest Justice Project
711 Capitol Way South, Suite 704
Olympia, WA 98501

- By United States Mail**
- By Legal Messenger
- By Facsimile
- By E-Mail PDF -**
(ScottC@nwjustice.org)
- By Federal Express
- By Hand Delivery by: _____

- By United States Mail**
- By Legal Messenger
- By Facsimile
- By E-Mail PDF -**
(LuanneM@nwjustice.org)
- By Federal Express
- By Hand Delivery by: _____

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

Dated this 29th day of November 2016, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

November 29, 2016 - 4:18 PM

Transmittal Letter

Document Uploaded: 4-490633-Respondent's Brief.pdf

Case Name: Dayanara Castillo v. State of Washington DSHS

Court of Appeals Case Number: 49063-3

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: Respondent's

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:

No Comments were entered.

Sender Name: Jeff S Nelson - Email: JeffreyN2@atg.wa.gov

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

JeffreyN2@atg.wa.gov

LaurenR1@atg.wa.gov

CherylC1@atg.wa.gov