

FILED
Court of Appeals
Division II
State of Washington
3/10/2020 3:05 PM

No. 54083-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALL NATURAL HERBS, LLC,

Appellant,

v.

STATE OF WASHINGTON LIQUOR AND CANNIBIS BOARD,

Appellee.

AMENDED BRIEF OF APPELLANT

By:

Drew Mazzeo
Bauer Pitman Snyder Huff Lifetime Legal, PLLC
1235 4th Ave E #200
Olympia, WA 98506
(360) 754-1976
dpm@lifetime.legal

Attorney for Appellant

TABLE OF CONTENTS

	Page
1. INTRODUCTION.....	1
2. ASSIGNMENTS OF ERROR	1
3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..	6
4. STATEMENT OF THE CASE.....	8
5. STANDARDS OF REVIEW	14
6. ARGUMENT	15
6.1 The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was error because it erroneously interpreted and applied the law, including RCW 34.05.419 and RCW 34.05.413	18
6.1.1 The WSLCB expressly, in writing, accepted All Natural Herbs’ appeal on May 4, 2016.....	18
6.1.2 The WSLCB’s May 24, 2016, notice of priority determination did not “provide” All Natural Herbs “the ability to request a hearing.”	21
6.1.3 The WSLCB’s June 17, 2016, letter did not commence an adjudicative proceeding and did not notify All Natural Herbs of a stage of the adjudicative proceeding	24
6.1.4. The Administrative Law Judge’s Initial Order, dated January 4, 2016, did not err in granting summary judgment; however, the proper relief was to hold the WSLCB in default and prohibit it from opposing All Natural Herbs’ appeal	28
6.2 The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, erroneously adopted the WSLCB’s erroneously interpretation and application of Former RCW 69.51A.085 and Former WAC 314-55-020	32
6.3 The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was error because it was not supported by the evidence	35

6.4	The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, as well as the original statement of intent, were error because they were arbitrary and capricious	36
6.5	The WSLCB failing to notify All Natural Herbs within the 90-day statutory and constitutional time deadline mandated by RCW 34.05.419(1) violated All Natural Herbs due process rights	37
6.6	The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was an unlawful “do over,” an unlawful de facto dismissal of the action, and a gross due process violation	41
6.7	The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, would render RCW 34.05.419 and former WAC 314-55-20 unconstitutional as applied	43
6.8	The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was an unconstitutional prior restraint under the First Amendment	44
6.9	The WSLCB violated All Natural Herbs’ and its principal owner’s Equal Protection Rights	46
6.10	All of the findings of fact, conclusions of law, and orders from the administrative law judge’s Initial Order, dated May 31, 2018, are void	47
6.11	All of the findings of fact, conclusions of law, and orders from the Board’s Final Order, dated July 24, 2018, are void	48
7.	ATTORNEY FEES AND COSTS ON APPEAL	48
8.	CONCLUSION	50

TABLE OF AUTHORITIES

	Page
Cases	
<i>Anonymous</i> , 87 Eng. Rep. 791 (1703).....	30
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000).....	42
<i>Cannabis Action Coal. v. City of Kent</i> , 183 Wn.2d 219, 351 P.3d 151 (2015).....	34, 35, 41
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	44
<i>City of Seattle v. State</i> , 136 Wn.2d 693, 965 P.2d 619 (1998).....	21
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	15
<i>Crescent Convalescent Ctr. v. DSHS</i> , 87 Wn. App. 353, 942 P.2d 981 (1997).....	37
<i>Daniel Byrne v. Ken Madsen</i> , 2003 WL 1709722	29
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	15, 19
<i>Dep't of Labor & Indus. v. Cook</i> , 44 Wn.2d 671, 269 P.2d 962 (1954).....	29
<i>Ellis v. William Penn Life Assur. Co. of America</i> , 124 Wn.2d 1, 873 P.2d 1185 (1994).....	19, 29
<i>Erection Co. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	29

<i>Espinoza v. City of Everett</i> , 87 Wn. App. 857, 943 P.2d 387 (1997).....	29, 34, 44
<i>Flowers v. Mississippi</i> , 2019 U.S. LEXIS 4196, 2019 WL 2552489.....	48
<i>In re Forfeiture of Chevrolet Corvette</i> , 91 Wn. App. 320, 963 P.2d 187 (1997).....	29, 39
<i>Franklin Cy. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982), <i>cert. denied</i> , 459 U.S. 1106, 74 L. Ed. 2d 954, 103 S. Ct. 730 (1983).....	15
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....	43
<i>Hart v. Hawtin</i> , 2019 Wash. App. LEXIS 842, 2019 WL 1549103.....	38, 43, 48
<i>HomeStreet, Inc. v. Dep't of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009).....	25
<i>Hous. Auth. of City of Seattle v. Bin</i> , 163 Wn. App. 367, 260 P.3d 900 (2011).....	30
<i>Hutmacher v. State Board of Nursing</i> , 81 Wn. App 768, 915 P.2d 1178 (1986).....	22, 24, 25
<i>Hutton v. State</i> , 25 Wn.2d 402, 171 P.2d 248 (1946).....	30
<i>In re Marriage of Maxfield</i> , 47 Wash. App. 699, 737 P.2d 671 (1987).....	43
<i>In re Marriage of Meredith</i> , 148 Wn. App. 887, 201 P.3d 1056 (2009).....	44, 45
<i>In re Marriage of Suggs</i> , 152 Wn.2d 74, 93 P.3d 161 (2004).....	45

<i>In re Vandervlugt</i> , 120 Wn.2d 427, 842 P.2d 950 (1992).....	34
<i>JJR Inc. v. City of Seattle</i> , 126 Wn.2d 1, 891 P.2d 720 (1995).....	45
<i>Judd v. Am. Tel. & Tel. Co.</i> , 152 Wn.2d 195, 95 P.3d 337 (2004).....	31
<i>Kramarevcky v. State, Dep't of Soc. & Health Servs.</i> , 64 Wn. App. 14, 822 P.2d 1227 (1992), <i>aff'd sub nom.</i> <i>Kramarevcky v. Dep't of Soc. & Health Servs.</i> , 122 Wn.2d 738, 863 P.2d 535 (1993).....	33
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	43
<i>Mohr v. Sun Life Assurance Co. of Can.</i> , 198 Wash. 602, 89 P.2d 504 (1939).....	19
<i>Mt. Hood Bev. Co. v. Constellation Brands, Inc.</i> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	49, 50
<i>O'Day v. King County</i> , 109 Wn.2d 796, 749 P.2d 142 (1988).....	45, 46
<i>Olympic Forest Prods. v. Chaussee Corp.</i> , 82 Wn.2d 418, 511 P.2d 1002 (1973).....	38, 43, 48
<i>Penick v. Employment Sec. Dep't</i> , 82 Wash.App. 30, 917 P.2d 136 (1996).....	41
<i>Petersen v. Pac. Am. Fisheries</i> , 108 Wash. 63, 183 P. 79 (1919).....	19
<i>Rhoades v. City of Battle Ground</i> , 115 Wn. App. 752, 63 P.3d 142 (2002).....	37, 38, 39
<i>Schoonover v. State</i> , 116 Wn.App. 171, 64 P.3d 677 (2003).....	19

<i>Seattle v. Dep't of Ecology</i> , 37 Wn. App. 819, 683 P.2d 244 (1984)	28
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80, 63 S. Ct. 454 (1943).....	34, 41
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194, 67 S. Ct. 1575 (1999).....	34, 41, 42
<i>Seymour v. Washington State Dep't of Health</i> , <i>Dental Quality Assur. Comm'n</i> , 152 Wash. App. 156, 216 P.3d 1039 (2009).....	37
<i>Skrivanich v. Davis</i> , 29 Wash.2d 150, 186 P.2d 364 (1947).....	41
<i>Spence v. Kaminski</i> , 103 Wash. App. 325, 335, 12 P.3d 1030 (2000), <i>publication ordered</i> (Nov. 21, 2000)	46
<i>Sprint Spectrum, LP v. Dep't of Revenue</i> , 156 Wn. App. 949, 235 P.3d 849 (2010)	30
<i>State ex rel. Eastvold v. Maybury</i> , 49 Wn.2d 533, 304 P.2d 663 (1956).....	29
<i>State v. Evans</i> , 164 Wn. App 629, 265 P.3d 179 (2011).....	26
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	15
<i>State v. Munson</i> , 23 Wn. App. 522, 597 P.2d 440 (1979).....	28
<i>State v. Simmons</i> , 152 Wn.2d 450, 98 P.3d 789 (2004).....	46
<i>State v. Veliz</i> , 176 Wn.2d 849, 298 P.3d 75 (2013).....	15

<i>Tellevik v. 31641 W. Rutherford St.</i> , 215 Wn.2d 364, 884 P.2d 1319 (1994).....	39
<i>Texas & Pac. Ry. v. Rigsby</i> , 241 U.S. 33, 60 L. Ed. 874, 36 S. Ct. 482 (1916).....	30, 50
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	19
<i>W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	41
<i>Walker v. Pacific Mobile Homes, Inc.</i> , 68 Wn.2d 347, 413 P.2d 3 (1966).....	19
<i>Wetherton v. Growers Farm Labor Ass'n</i> , 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969).....	30
Statutes	
Former RCW 69.51A.085.....	33
RCW 34.05.060	27
RCW 34.05.410	17, 18
RCW 34.05.413	<i>passim</i>
RCW 34.05.419	<i>passim</i>
RCW 34.05.440	16, 31
RCW 4.84.350	49, 50
Treatises	
<i>Sutherland Statutory Construction</i> § 65.02 (4th ed. C. Sands 1974).....	29
William R. Andersen, <i>The 1988 Washington Administrative Procedure Act—an Introduction</i> , 64 Wash. L. Rev. 781 (1989).....	18
Regulations	
Former WAC 314-55-020.....	13, 33
WAC 314-55-070.....	16
Constitutional Provisions	
U.S. Const. amend. XIV, § 1	44

1. INTRODUCTION

Administrative agencies are creatures of statute that *serve residents*. The only authority they possess must be granted by statute, for the benefit of such residents. Agencies may not come up with after the fact reasons to justify their actions against residents. When they violate time deadlines, they are “estopped from proceeding” however “inadequate may be the result” from their perspective because they are in the “better position to assure that future errors . . . d[o] not occur again. . . .”

In this case, ‘what is good for the goose is good for the gander.’ If a party misses his or her 20-day statutory deadline to file an appeal under the administrative procedures act, he or she are held in default and may no longer argue his or her case. The same is true when an agency misses its 90-day statutory deadline—based on constitutional due process—to notify a party that it has commenced an administrative adjudication. This because there is no statute that authorizes the agency to do so after 90 days elapsed.

Unsurprisingly, when an agency violates one constitutional provision, it often violates others. Below, All Natural Herbs details how its statutory/constitutional rights were violated. The proper result is that the Washington State Liquor and Cannabis Board be held in default.

2. ASSIGNMENTS OF ERROR

2.1. Finding of Fact No. 1(ii), from Final Order of the Board, dated

March 21, 2017: “It was found by Licensing staff that the Applicant reported to Business Licensing Services that their collective was not open for business nor would have any product until the State came up with laws on Medical Cannabis.” (AR at 1341).

2.2. Finding of Fact No. 1(iii), from Final Order of the Board, dated March 21, 2017: “It was determined by Licensing staff that the Applicant is a Priority 3.” (AR at 1341).

2.3. Finding of Fact No. 2, from Final Order of the Board, dated March 21, 2017: “The Applicant submitted a timely request for a hearing on June 15, 2017.” (AR at 1341).

2.4. Finding of Fact No. 3, from Final Order of the Board, dated March 21, 2017: “On June 17, 2016, the Board notified the applicant that it received the applicant’s hearing request, and the case was being referred to the Attorney General’s Office.” (AR at 1342).

2.5. Conclusion of Law No. 4.2, from Final Order of the Board, dated March 21, 2017: “In this case, RCW 34.05.419(1) applies to action at issue. Licensing notified the Applicant by letter sent on June 17, 2016 that it was referring the case to the attorney General’s Office, which begins the preparation for hearing.” (AR at 1345).

2.6. Conclusion of Law No. 4.3, from Final Order of the Board, dated March 21, 2017: “Licensing set in place the process to provide applicant the ability to request a hearing when it mailed the Notice of Priority Determination and Request for Hearing form on May 24, 2016.” (AR at 1346).

2.7. Conclusion of Law No. 4.4, from Final Order of the Board, dated March 21, 2017: “The prior communications about the priority determination were informal. Licensing properly did not consider those communications as a request for hearing by the Licensee that begins the hearing process. Those communications did provide notice to Licensing that the applicant *wanted* an appeal, resulting in the preparation of the Statement of Intent for Priority Determination. [(Emphasis in original).] The Statement of Intent was mailed on May 24, 2016 along with the Request for Hearing form and the cover letter that advised the applicant of the timelines for requesting a hearing.” (AR at 1346).

2.8. Conclusion of Law No. 4.5, from Final Order of the Board, dated March 21, 2017: “By requiring that the Applicant submit a hearing request on a form in response to the formal notice of Board action ensures that cases will not be lost or misplaced in the process because an individual may indicate that a hearing will be held, without the authority to make that commitment.” (AR at 1346).

2.9. Conclusion of Law No. 4.6, from Final Order of the Board, dated March 21, 2017: “Applicant requested an adjudicative proceeding when it filed the Request for Hearing with the Board on June 15, 2016. Licensing’s June 17, 2016 letter notified the applicant that the Request for Hearing had been received, and commenced the hearing process.” (AR at 1346).

2.10. Conclusion of Law No. 4.7, from Final Order of the Board, dated March 21, 2017: “The notification on June 17 from Licensing “commenced” the adjudication proceeding pursuant to RCW 34.05.413(5): An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. (Emphasis [in original]). (AR at 1346-47).

2.11. Conclusion of Law No. 4.8, from Final Order of the Board, dated March 21, 2017: “The ALJ erred when she found that “the Board lost subject matter jurisdiction over this dispute and could not confer the jurisdiction to OAH” *Order at ¶5.26 on p. 10*. A tribunal has subject matter jurisdiction when it has authority to adjudicate the type of controversy involved in the action. The tribunal does not lack subject matter jurisdiction solely because it may lack authority to enter a given order, such as that requested by the Applicant here. A mere procedural defect, if there was one, would not deprive the Board of subject matter jurisdiction over the case. The ALJ is correct that she lacks authority to designate the Applicant as a Priority 1, or to grant the Applicant a license, as those powers are reserved to the Board, as its discretionary actions.” (AR at 1347).

2.12. Conclusion of Law No. 4.9, from Final Order of the Board, dated March 21, 2017: “The ALJ determined that because the Board did not, in her opinion, institute adjudicative proceedings in a timely manner, that the Office of Administrative Hearings (OAH) (and the Board) have lost jurisdiction over the appeal. If that were the case, the proper remedy would be to direct the Board to issue a new notice to the applicant, and then

commence a hearing in a timely manner. However, the alleged failure to timely commence the adjudicative process, if it were true, would not deprive OAH or the Board of Jurisdiction over the appeal.” (AR at 1347).

2.13. Conclusion of Law No. 4.10, from Final Order of the Board, dated March 21, 2017: “‘Jurisdiction’ is perhaps the word most often misused by attorneys, including here. OAH’s jurisdiction depends only on issuance of a Notice of some sort by the agency, and a timely filed appeal by the applicant. The timing of the request for hearing does not divest the Board of jurisdiction to hold hearings on the appeal. To hold otherwise would effectively treat RCW 34.05.419 as a statute of limitations, but that is not how it reads. Its requirements are mandatory, but the remedy for an agency not following them is to require the agency to commence proceedings. Several authorities support the limited nature of which errors are jurisdictional such that an agency’s action can be invalidated. *See Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994); *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn2d 310, 317, 76 P.3d 1183 (2003); *Singleton v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782-83, 271 P.3d 356 (2012); *Magee v. Rite Aid*, 167 Wn. App.60, 27, 277 P.3d 1 (2012); *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 208, 258 P.3d 70 (2011).” (AR at 1348).

2.14. Conclusion of Law No. 4.11, from Final Order of the Board, dated March 21, 2017: “Applicant’s attorney faults Licensing for citing to *Hutmacher v. State Board of Nursing*, 81 Wn. App 768, 915 P.2d 1178 (1986) in its Response to the Applicant’s Motion for Summary Judgment, and attempts to distinguish the case. *Hutmacher* held that the Statement of Charges commenced the adjudicative proceeding, citing RCW 34.05.413. The court held, therefore, the settlement negotiations that preceded the actual setting of a hearing date in that case, more than 90 days after the date of Ms. Hutmacher’s Answer to the Statement of Charges, did not deprive the tribunal of the ability to hold a hearing on the charges. Here, the Licensing Division prepared the Statement of Intent for Priority Determination on May 24, 2016, which was its charging document.” (AR at 1348).

2.15. Conclusion of Law No. 4.12, from Final Order of the Board, dated March 21, 2017: “When Applicant returned the enclosed form and requested a hearing, they were notified by the Board’s Adjudicative Proceedings Coordinator on June 17, 2016, that the Request had been received and that the file was being sent to the Office of the Attorney

General, and copied the Senior Counsel assigned to represent the Board staff in adjudicative proceedings. Thus, the proceedings were “commenced” at that time. Asking OAH to appoint an ALJ, or the ALJ’s issuance of a Notice of Prehearing Conference does not commence the proceedings; the Board’s acceptance of the Licensee’s request is “any other stage of the adjudicative proceeding” and commences the hearing process for purposes of RCW 34.05.413(5).” (AR at 1349).

2.16. Conclusion of Law No. 4.13, from Final Order of the Board, dated March 21, 2017: “The Board did not lose subject matter jurisdiction over this case by not holding a hearing within 90 days of the request, because RCW 34.05.413 does not confer, or revoke, subject matter the jurisdiction. As pointed out by Licensing, if that were the case, the only order ALJ could enter would be one stating that she lacked subject matter jurisdiction and that she could make no determinations in the case.” (AR at 1349).

2.17. Conclusion of Law No. 4.14, from Final Order of the Board, dated March 21, 2017: “The ALJ acknowledged at ¶ 5.18 of the Initial Order that she concluded, in the alternative, that the Applicant requested an adjudicative proceeding when it filed the Request for Hearing with the Board on June 15, 2016. The Board regards the receipt of the Request for Hearing, on the form provided to the Applicant with Licensing’s Statement of Intent for Priority Determination to be the document which constituted Applicant’s Request for Hearing. The Board requires a Request for Hearing to be filed after service of the document notifying the Applicant of the action that is subject to review in an adjudicative proceeding, so that it can properly track the request, and the action of the Board that is being contested.” (AR at 1349).

2.18. Conclusion of Law No. 4.15, from Final Order of the Board, dated March 21, 2017: “Assistant Attorney General Rose Weston requested on August 31, 2016, that an ALJ be assigned to the case. This action is well within 90 days of the Board’s June 17, 2016 letter. However, this calculation is not necessary, in the Board’s view, as the June 17, 2016 letter itself served to notify the Applicant that a hearing would be conducted, and constitutes “another stage of the proceeding” per RCW 34.05.413. *In re Forfeiture of One 1988 Black Chevrolet Corvette Automobile*, 91 Wash. App. 320, 324, 963 P.2d 187 (1997), adopting the balancing test from *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983). In other words, the

hearing “commences” when the agency or hearing officer notifies a claimant that some stage of the hearing will be conducted. *Black Corvette*, 91 Wash. App. at 323, 963 P.2d 187; *Valerio v. Lacey Police Dept.*,] 111 Wn. App. 332, 39 P.3d 163 (2002). (AR at 1350).

2.19. Conclusion of Law No. 4.16, from Final Order of the Board, dated March 21, 2017: “Because this case decided by the ALJ on procedural grounds, the Board cannot determine from the voluminous material submitted by the Applicant, as exhibits to the Motion for Summary Judgment, Reply in Support of Summary Judgment, and Response to Licensing’s Petition for Review, what documents Licensing had before it at the time the priority determination was made. Therefore, the Board finds it appropriate to remand this matter to Licensing Division for consideration of the documents by the Applicant, as potentially supplemented during the hearing process, for a new priority determination and notice of hearing rights, if appropriate. (AR at 1350-51).

2.20. Section V. ORDER, from Final Order of the Board, dated March 21, 2017: “IT IS HEREBY ORDERED that the Marijuana License Application Priority 3 determination for All Natural Herbs LLC d/b/a All Natural Herbs LLC is remanded to the Licensing Division for consideration of any additional documentation that the Applicant submitted in the course of the administrative hearing process, and to issue a new Statement of Intent for Priority Determination, with the Applicant being given an opportunity to again request a hearing if so desired.” (AR at 1351).

2.21. All of the findings of fact, conclusions of law, and orders from the administrative law judge’s Initial Order, dated May 31, 2018.

2.22. All of the findings of fact, conclusions of law, and orders from the Board Final Order, dated July 24, 2018.

3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

3.1. Whether the March 21, 2017, Final Order of the Board, Reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was error because it erroneously interpreted and applied the law, including RCW 34.05.419 and RCW 34.05.413? Yes.

3.2. Whether the March 21, 2017, Final Order of the Board, Reversing the January 4, 2017, Administrative Law Judge’s Initial Order,

erroneously adopted the WSLCB's erroneously Interpretation and application of Former RCW 69.51A.085 and Former WAC 314-55-020? Yes.

3.3. Whether the March 21, 2017, Final Order of the Board, Reversing the January 4, 2017, Administrative Law Judge's Initial Order, was error because it was not supported by the evidence? Yes.

3.4. Whether the March 21, 2017, Final Order of the Board, Reversing the January 4, 2017, Administrative Law Judge's Initial Order, as well as the original statement of intent, were error because they were arbitrary and capricious? Yes.

3.5. Whether the WSLCB failing to notify All Natural Herbs within the 90-day statutory and constitutional time deadline mandated by RCW 34.05.419(1) violated All Natural Herbs due process rights? Yes.

3.6. Whether March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge's Initial Order, was an unlawful "do over," an unlawful de facto dismissal of the action, and a gross due process violation? Yes.

3.7. Whether the March 21, 2017, Final Order of the Board, Reversing the January 4, 2017, Administrative Law Judge's Initial Order, would render RCW 34.05.419 and Former WAC 314-55-20 unconstitutional as applied? Yes.

3.8. Whether the March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge's Initial Order, was an unconstitutional prior restraint under the First Amendment? Yes.

3.9. Whether the WSLCB violated All Natural Herbs and its principal owner's Equal Protection Rights? Yes.

3.10. Whether all of the findings of fact, conclusions of law, and orders from the administrative law judge's Initial Order, dated May 31, 2018, are void? Yes.

3.11. Whether all of the findings of fact, conclusions of law, and orders from the Board's Final Order, dated July 24, 2018, are void? Yes.

4. STATEMENT OF THE CASE

4.1. In 2011, Mr. Yi, majority owner of All Natural Herbs, worked at the collective garden known as The Healing Center of Tacoma. (*e.g.*, AR at 851, 928-39). In 2012, Mr. Yi started and operated his own collective garden access point, Natural 7, LLC, (“Natural 7”) until the denial of his Priority 1 determination and retail license by the WSLCB shut his family business down in July of 2016. (AR at 929-30).

4.2. In April of 2016, Mr. Yi, doing business as All Natural Herbs applied for a retail cannabis license. (AR at 884-85). The basis of his application was The Healing Center of Tacoma and Natural 7. (AR at 884-85). All Natural Herbs’ Priority 1 determination and license was denied on April 21, 2016. (AR at 910). The Deputy Director of Licensing and Regulation WSLCB expressly accepted All Natural Herbs appeal and request for administrative adjudication, in writing, on May 4, 2016. (AR at 912-16, 2261-67).

4.3. On May 24, 2016, the WSLCB sent All Natural Herbs a “Statement of Intent.” (AR at 918-20). The Statement of Intent, expressly in writing again, acknowledged receiving All Natural Herbs’ previous “[a]ppel request.”¹ (AR at 920). The sole reason espoused by the WSLCB

¹ The Statement of Intent had a typo that stated it received the appeal request on “5/12/16” not May 4, 2016.

for denying All Natural Herbs Priority 1 determination and license was that The Healing Center of Tacoma was not operating its collective garden as a business in 2012. (AR at 918).

4.4. In early June of 2016, despite already acknowledging receipt of All Natural Herbs' appeal and request for administrative adjudication on May 4, 2016, and later again in the Statement of Intent, the WSLCB sent All Natural Herbs a form titled "Request for Hearing." (AR at 961-62).

4.5. On June 17, 2016, All Natural Herbs received a letter from the WSLCB. (AR at 964). The letter stated, "This letter is being sent to you to acknowledge receipt of a request for a hearing." (AR at 964).

4.6. On July 12, 2016, because Mr. Yi's family business, Natural 7, was on the verge of closing, counsel for All Natural Herbs contacted the assistant attorney general for the WSLCB and inquired whether there was any administrative hearing set. (AR at 959). The assistant attorney general responded, "No. . . ." (AR at 959).

4.7. During the summer of 2016, instead of doing anything to commence an administrative adjudication for All Natural Herbs, the WSLCB licensed four new retail I-502 stores in the immediate vicinity of All Natural Herbs' proposed store location (the same location as Mr. Yi's operating collective garden Natural 7). (AR at 931-32). All of these store's owners were Caucasian (as opposed to Mr. Yi's Korean ethnic descent) and

none had any prior experience with cannabis. (AR at 931-32). During the same time, Mr. Yi was placed under increased scrutiny from the State. (AR at 931-32). The Department of Revenue essentially audited Natural 7's tax filings only to find that Mr. Yi substantially overpaid his taxes and was entitled to a refund. (AR at 931-32).

4.8. On August 31, 2016, an Assistant Attorney General for the WSLCB sent the case over the Office of Administrative Hearings ("OAH"). (AR at 976-77). On September 9, 2016, All Natural Herbs received notice that a cause number had been created at the Office of Administrative Hearings and that a prehearing conference was scheduled for October 25, 2016. (AR at 790-92). This September 9, 2016, notice was All Natural Herbs first notification that an adjudicative proceeding was commencing under RCW 34.04.419(1). (AR at 790-92).

4.9. At the prehearing conference, All Natural Herbs objected to the WSLCB's ability to argue its case and argued that the WSLCB was in "default," based on the fact it violated the law by not commencing a hearing with OAH within the constitutional and statutorily prescribed time period of 90 days. (AR at 6). All Natural Herbs informed OAH that it would be moving for summary judgment on the issue. (AR at 6). In the preconference hearing order, "the parties' agreed" that the sole issue regarding the summary judgment motion and hearing was "whether the Office of

Administration Hearings and/or Liquor and Cannabis Board has Jurisdiction over this matter.” (AR at 795). Further, the order expressly stated that “The hearing in this matter will be limited to these issues, unless they are modified at a later prehearing conference.” (AR at 795). No subsequent prehearing conference occurred, and this sole issue at summary judgment never changed.

4.10. At the end of October 2016, All Natural Herbs filed its motion for summary judgment. (AR at 820-941). On December 22, 2016, oral argument was heard. (AR at 794). On January 4, 2017, the administrative law judge made her ruling largely, but not completely, in favor of All Natural Herbs. (AR at 996-1008). She ruled in pertinent part:

- The WSLCB explicitly accepted All Natural Herbs’ appeal on May 4, 2016. The Statement of Intent sent to All Natural Herbs on May 24, 2016, did not initiate an adjudicative proceeding. The assistant attorney general for the WSLCB explicitly conceded, at oral argument, that the Statement of Intent did not utilize RCW 34.05.419(2) or (3). That it was a “mystery” why the WSLCB sent All Natural Herbs the Statement of Intent on May 24, 2016, given it had already in writing, explicitly, accepted All Natural Herbs’ appeal.
- The WSLCB’s (couple sentence) letter to All Natural Herbs on June 17, 2016, did not commence an adjudicative proceeding before the OAH.

The WSLCB's argument that it did was "not supported by law and grossly misplaced and unsupported by any statute, rule or case law. . . ."

- The July correspondence between undersigned counsel and the attorney for the WSLCB did not commence an adjudicative proceeding before the OAH. The WSLCB's argument that this correspondence did commence an adjudicative proceeding before the OAH could not "be rationally sustained."

- Various caselaw cited by the WSLCB supported All Natural Herbs' position on appeal. The WSLCB's arguments otherwise were "mystifying" and not tenable.

- The [WSLCB] lost subject matter jurisdiction over this dispute. . . . And, as a remedy, the administrative law judge remanded the case back to the WSLCB to determine "whether [All Natural Herbs, LLC] meets statutory criteria for a license. . . ."

4.11. Both parties requested Board review of the administrative law judge's initial order and decision, and on March 21, 2017, the Board's Final Order reversed the initial order. It further mandated that the case was not to proceed to a hearing on the merits of the original statement of intent. Rather, the case was to be remanded back to the WSLCB to issue a *brand-new* statement of intent. (AR at 1341-54). The order barred All Natural Herbs from presenting any new evidence rebutting the new statement of intent.

(AR at 1341-54).

4.12. In the spring of 2017, a brand-new cause number and brand-new statement of intent with new purported reasons² for denying All Natural Herbs Priority 1 determination and license was issued. (AR at 1358-61). All Natural Herbs appealed *again*. As a direct result, All Natural Herbs was denied any adjudicative hearing on the merits for 516 days. It took the WSLCB over 700 days to complete an adjudicative hearing.

4.13. All Natural Herbs filed a petition for review in August of 2018. (CP at 1-87). The WSLCB subsequently only produced and only filed with the superior court an administrative record for the second administrative cause number. (CP at 219-20). Not until All Natural Herbs moved to compel and moved for sanctions did the WSLCB produce the record for the first administrative cause number. (CP at 221-25, 228-495). The WSLCB then included filings from both cause numbers but it completely redacted some of the most pertinent documents such as Mr. Yi's W-2 and tax documents. (CP at 505-06). A court hearing was required to

² The new reason for denial was that The Healing Center of Tacoma, Mr. Yi's former employer, was not up to date on a few hundred dollars in taxes. Mr. Yi was unlawfully barred from paying those back taxes by the Department of Revenue—when there was/is zero legal bar from him doing so and when other I-502 applicants were allowed to do just that in order to qualify; one of the main underlying purposes of Former WAC 314-55-020 was to resolve the issue of whether prescription cannabis was taxable. (*e.g.*, AR at 928-29, 934, 938-39). By getting priority and license applicants to voluntarily pay back taxes, the WAC and priority licensing scheme resolved that issue.

sort that issue out. (CP at 651-52). The WSLCB also refused to accept thousands of dollars' worth of transcripts that All Natural Herbs had a court reporter produce, and both parties utilized, during the course of the administrative litigation. (CP at 103-09). Instead, the WSLCB insisted that the same court reporter re-create the exact same transcripts. (CP at 183-84). The WSLCB then, without any authority to do so, submitted a new administrative record after all briefing was submitted. This resulted in the superior court ordering new briefing and a new record, further delaying resolution of this case, and costing Mr. Yi thousands dollars. (CP at 672-74, 675, 676, 678, 679).

4.14. In October of 2019, the superior court denied the petition for review with unclear reasoning. (CP at 731-39; CP at 744; CP at 745-52).

5. STANDARDS OF REVIEW

Under RCW 34.05.570(3), courts determine whether an administrative order is unconstitutional or outside the agency's statutory authority, the agency has erroneously applied the law, or the decision is arbitrary and capricious. Under the error of law standard, courts are charged with independently determining the purpose and meaning of the statutes and administrative regulations as applied to the facts of this case. *See Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106, 74 L. Ed. 2d 954, 103 S. Ct. 730 (1983). Cases in

which statutes are interpreted are reviewed de novo. *State v. Veliz*, 176 Wn.2d 849, 853-54, 298 P.3d 75 (2013). The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). There is no deference to an agency's interpretation of an unambiguous statute. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549, 557 (1992). Constitutional issues are questions of law and are reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

6. ARGUMENT

6.1. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge's Initial Order, was error because it erroneously interpreted and applied the law, including RCW 34.05.419 and RCW 34.05.413.

When the WSLCB denies an application for retail I-502 license/priority determination:

[T]he applicants may:

(1) Request an administrative hearing per chapter 34.05 RCW, the Administrative Procedure Act.

WAC 314-55-070. The applicant then has twenty-days from the date it

receives its denial letter to appeal and request an adjudicative proceeding. RCW 34.05.413(3). “Failure of a party to file an application for an adjudicative proceeding within the time limit . . . established by statute . . . constitutes a default and results in the loss of that party's right to an adjudicative proceeding.” RCW 34.05.440.

In pertinent part, RCW 34.05.413 provides the following:

RCW 34.05.413. Commencement--When required

(2) When required by law or constitutional right, and upon the timely application of any person, an agency *shall commence an adjudicative proceeding.*

(5) *An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.*

RCW 34.05.413 (emphasis added). Notably, the word “Agency” is statutorily, and specifically, defined as *not* including an “attorney general”:

any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, *except* those in the legislative or judicial branches, the governor, or *the attorney general. . . .*

RCW 34.05.410(2) (emphasis added). RCW 34.05.419 states:

After receipt of an application for an adjudicative proceeding . . . an agency shall proceed as follows:

(1) . . . *within ninety days* after receipt of the application or of the response to a timely request made by the agency under subsection (2) of this section, the agency shall do one of the

following:

(b) *Commence an adjudicative proceeding* in accordance with this chapter. . . .

(2) *Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application.* . . .

(emphasis added). Stated simply, the plain reading of RCW 34.05.419 and RCW 34.05.410(2) demonstrates that an agency—and not any assistant attorney general—has two important deadlines. The first deadline is that “Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions . . . and notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application.” RCW 34.05.419(2). The second deadline is that “within ninety days after receipt of the application . . . the agency shall . . . [c]ommence an adjudicative proceeding. . . .” RCW 34.05.419(1). RCW 34.05.419(2) notifies the applicant that the agency has received an application, whereas RCW 34.05.419(1), “resembles what a court does,” *e.g.*, the commencement of an adjudicative proceeding that “determine[s] legal rights, duties, or privileges of specific persons.” *See* William R. Andersen, *The 1988 Washington*

Administrative Procedure Act—an Introduction, 64 Wash. L. Rev. 781, 789, (1989). Thus, the agency notifying the applicant of the receipt of an appeal application within 30 days is exclusive of, and nothing to do with, the agency commencing an adjudication within 90 days. RCW §§ 34.05.419(2), 419(1); RCW 34.05.410(2).

6.1.1. The WSLCB expressly, in writing, accepted All Natural Herbs’ appeal on May 4, 2016.

Under RCW 34.05.413(3), “An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding.” It “*may* require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits.” RCW 34.05.413(3) (emphasis added). But the WSLCB has no such rules nor any such requirements. Thus, the only requirement for an appeal is that the WSLCB timely “rece[ive] an application for an adjudicative proceeding.” RCW 34.05.419. The elements of estoppel are (1) a statement or act inconsistent with a claim afterward asserted, (2) reasonable reliance, and (3) injury to the party who relied on the statement or act. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 20; *Schoonover v. State*, 116 Wn.App. 171, 179–80, 64 P.3d 677 (2003). Where estoppel protects the public interest, it should be applied. *Ellis v. William Penn Life Assur. Co. of America*, 124 Wn.2d 1, 873 P.2d 1185 (1994).

Furthermore, agents with actual and/or apparent authority to act, bind their principals. *See e.g., Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351, 413 P.2d 3 (1966); *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882, 888 (2007); *Mohr v. Sun Life Assurance Co. of Can.*, 198 Wash. 602, 603-04, 89 P.2d 504 (1939); *Petersen v. Pac. Am. Fisheries*, 108 Wash. 63, 68, 183 P. 79, 80 (1919).

Here, the Deputy Director of Licensing and Regulation for the WSLCB unequivocally, and expressly in writing, accepted All Natural Herbs, LLC's appeal on May 4, 2016:

We will consider [your letter] a public records request and a request for appeal. . . . Thank you.

Jeanne McShane
Deputy Director of Licensing and Regulation

(AR at 912-16, 2261-67). The plain language of RCW 34.05.413(3) and RCW 34.05.419, the fact that the WSLCB has zero requirement to fill out any form to request an appeal, and the doctrines of estoppel and actual and apparent authority massacre all arguments that the 90-day mandatory deadline under RCW 34.05.419(1) did not begin to run on May 4, 2016. However, the Board's Final Order, dated March 21, 2017, frivolously twisted the law and the above reality to find and rule otherwise.

In Finding of Fact No. 2, the Board's order states:

The Applicant submitted a timely request for a hearing on

June 15, 2016.

(AR at 1341). But this was just the *second time* All Natural Herbs' requested an appeal. The repeated attempt to get an appeal going in no way diminishes the fact its appeal had already been requested and expressly accepted.

In Conclusion of Law No. 4.4, the Board concluded:

[All Natural Herbs' and the Deputy Director of Licensing and Regulation's] communications did provide notice to Licensing that the applicant *wanted* an appeal. . . . [But those] communications about the priority determination were informal, [so] Licensing properly did not consider those communication as a request for hearing that begins the hearing process.

(AR at 1346) (emphasis in original). This conclusion of law goes beyond the absurd when applied to reality and the law; "Licensing" expressly the appeal in writing on May 4, 2016. Next, the Board concluded in Conclusion of Law No. 4.5, that:

By requiring that the Applicant submit a hearing request on a form in response to the formal notice of Board action ensures that cases will not be lost or misplaced in the process because an individual may indicate that a hearing will be held, without the authority to make that commitment.

(AR at 1346). But this reasoning is nothing more than a possible reason why the WSLCB could, in the future, adopt formal rules for appealing decisions. To date the WLSCB has still not adopted any such rules.

Finally, in Conclusion of Law 4.14, the Board ruled that it:

regards the receipt of the Request for Hearing, on the form provided to the Applicant with Licensing's Statement of

Intent for Priority Determination to be the document which constituted Applicant's Request for Hearing

(AR at 1349). This is perhaps the most disturbing conclusion by the Board. The Board literally believed it could ignore reality; ignore that its Deputy Director of Licensing expressly accepted All Natural Herbs' appeal on May 4, 2016.

6.1.2. The WSLCB's May 24, 2016, notice of priority determination did not "provide" All Natural Herbs "the ability to request a hearing."

"[S]tatutes must be interpreted and construed so that *all* the language used is given effect, with no portion rendered meaningless or superfluous." *City of Seattle v. State*, 136 Wn.2d 693, 701, 965 P.2d 619, 623 (1998) (emphasis in original). Here, on April 21, 2016, the WSLCB formally notified All Natural Herbs that that it "received" its "application for a Retailer Marijuana License" and that the "WSLCB . . . identified [his] application to be a Priority 3." (AR at 910). This letter unambiguously put All Natural Herbs on notice to file an appeal. All Natural Herbs then received a (redundant) notice on May 24, 2016, which also acknowledged its "Priority Assignment" from April 21, 2016, as well as that his "Appeal request – 1 page" had already been received.³ (AR at 920). At oral argument

³ The State of Intent had a typo that the appeal request was "dated 5/12/16" instead of May 4, 2016, when it was in fact acknowledged in writing as received. (AR at 910).

before the first administrative law judge, the assistant attorney general representing the WSLCB expressly conceded May 24, 2016, Statement of Intent did not utilize RCW 34.05.419(2) or (3). (AR 1002 fn. 3).

Nevertheless, the Board concluded otherwise in Conclusions of Law No. 4.4 and No. 4.11, ruling that “the Statement of Intent for Priority Determination on May 24, 2016” commenced an adjudicative proceeding under RCW 34.05.419(1). (AR at 1346-48). The Board reasoned that the Statement of Intent was the WSLCB’s “charging document,” just like the charging document in *Hutmacher v. State Board of Nursing*, 81 Wn. App 768, 915 P.2d 1178 (1986).⁴ (AR at 1346-48).

The main problem for the WSLCB is that *Hutmacher* applies to disciplinary hearings of license holders, *initiated by an agency, not to cases where an applicant appeals agency action on their own*.⁵ There, a nurse stole medicine from an emergency room. The Board of Nursing served the

⁴ Tellingly, the WSLCB abandoned all of its arguments under *Hutmacher* when responding to the petition for review before the superior court. (*Compare* Response(s) to the Petition for Review, CP at 709-18, *with* its administrative Response to the Motion for Summary Judgment: AR at 948-49). In other words, the WSLCB is unable to stick to a coherent theory as to when it believes “commencement” of the adjudicative proceeding began. Its latest erroneous theory, at the superior court, was that WSLCB’s June 17, 2016, letter, or that a July 2016 email from an assistant attorney general, commenced the proceeding. Both such arguments have no legal basis, are frivolous, and are disposed of herein.

⁵ The distinction is that RCW 34.05.419 *only applies* “After receipt of an application for an adjudicative proceeding. . . .”, while RCW 34.05.413 *broadly defines when* “An adjudicative proceeding commences”—whether it be in a case where an agency decides to begin adjudicative proceeding on its own initiative, such as in *Hutmacher*, *or* in a case where a party submits “an application for an adjudicative proceeding.”

nurse a “Statement of Charges” similar to a criminal or civil complaint. (AR at 1120-22). The nurse answered the charges. (AR at 1124-27). No other notice or substantive communication occurred for months. The nurse then argued to the trial court that the Board of Nursing did not commence an administrative adjudication within 90 days and thus lost jurisdiction over the matter.

The superior court agreed with the nurse. It ruled that serving the Statement of Charges did not commence an adjudicative action and that the Board lost jurisdiction by failing to commence an adjudication within 90 days. *Hutmacher*, 81 Wn. App. at 771. On appeal, the Board of Nursing argued that RCW 34.05.419 did not apply to the case because *the Board had initiated an administrative adjudication under RCW 34.05.413, e.g., a “disciplinary proceeding,”* on its own by serving the Statement of Charges. (AR at 1129) (Board of Nursing’s Reply Brief stating “RCW 34.05.419 simply has no application when an agency has invoked its authority under RCW 34.05.413(1). . . .”). In the alternative, the Board of Nursing argued if RCW 34.05.419 applied, the nurse waived the 90-day requirement by answering the Statement of Charges. (AR at 1131 (Board of Nursing’s Reply Brief stating “the Board contends that RCW 34.04.419(1) is not applicable to this case. . . . However, assuming for the sake of argument that [the nurse] is correct [that RCW 34.04.419(1) applies], her voluntary

conduct [of answering the Statement of Charges] indicates an intent to waive any time limit allegedly imposed. . . .”). In other words, *Hutmacher* avoided a discussion of RCW 34.05.419 and agreed with the Board that “RCW 34.05.419 [wa]s inapplicable.” *Hutmacher*, 81 Wn. App. at 772.

Consequently, in this case, the Board’s reliance on *Hutmacher* to support Conclusions of Law No. 4.4 and No. 4.11 was severely misplaced; *Hutmacher* interpreted a different statute than the one at issue here. Furthermore, when interpreting the correct statute, and applying the pertinent language in RCW 34.05.419 to the facts at hand, the May 24, 2016, Statement of Intent could not both satisfy the WSLCB’s 30-day requirement imposed by RCW 34.05.419(2) and satisfy the WSLCB’s 90-day requirement imposed by RCW 34.04.419(1). Otherwise, RCW 34.04.419(1)’s 90-day language requirement would be rendered unlawfully superfluous. *See City of Seattle*, 136 Wn.2d at 698.

In sum, while *Hutmacher* ruled that the Statement of Charges issued against the nurse commenced an administrative adjudication (*Hutmacher*, 81 Wn. App. at 772), *Hutmacher* provides no support for the Board’s conclusions of law that the May 24, 2016, Statement of Intent commenced an adjudicative proceeding. Rather, the WSLCB’s April 21, 2016, letter formally established All Natural Herbs’ erroneous priority determination and license denial. (AR at 910). Thereafter, All Natural Herbs’ appeal was

received and accepted in writing on May 4, 2016. (AR at 912-16, 2261-67). The first time any notice of commencement of an adjudication was received was September 9, 2016. (AR at 790-92).

6.1.3. The WSLCB's June 17, 2016, letter did not commence an adjudicative proceeding and did not notify All Natural Herbs of a stage of the adjudicative proceeding.

An agency may not add nor “delete . . . words from . . . statute[s] to suit the meaning it wishes it to convey. . . .” *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 454-55, 210 P.3d 297, 302 (2009). Here, Finding of Fact No. 3, from Final Order of the Board, states:

On June 17, 2016, the Board notified the applicant that it received the applicant's hearing request, and the case was being referred to the Attorney General's Office.

(AR at 1342). Additionally, in Conclusion of Law No. 4.2, the Board ruled:

In this case, RCW 34.05.419(1) applies to action at issue. Licensing notified the Applicant by letter sent on June 17, 2016 that it was referring the case to the attorney General's Office, which begins the preparation for hearing.

(AR at 1345). Furthermore, in Conclusion of Law No. 4.15, the Board ruled:

the June 17, 2016 letter itself served to notify the Applicant that a hearing would be conducted, and constitutes “another stage of the proceeding” per RCW 34.05.413.

(AR at 1350). These findings and conclusions are unsupportable, and erroneous, unless the WSLCB is allowed to unlawfully add or remove words in statutes to its liking. Understanding this, when before the superior

court, the WSLCB abandoned the Board's ruling that the May 24, 2016, Statement of Intent (somehow) commenced an adjudicative proceeding under RCW 34.05.419(1); the WSLCB *only* argued to the superior court that the June 17, 2016, letter commenced the adjudicative proceeding under RCW 34.05.413.⁶ (CP at 714).

The problem for the WSLCB is that the June 17, 2016, letter did not notify All Natural Herbs “that a prehearing conference, hearing, or other stage of an adjudicative proceeding” w[ould] be conducted.” *See* RCW 34.05.413(5); AR at 964. That was not even its intent at the time. Rather, it was not until litigation ensued did the WSLCB erroneously claim that June 17, 2016, letter somehow commenced an adjudicative proceeding.⁷

⁶ If it's not obvious why the WSLCB abandoned the Board's conclusion/ruling that the May 24, 2016, Statement of Intent (somehow) commenced an adjudicative proceeding—it's because the purported timeline fails miserably; the WSLCB realized the Board's error(s) in the Final Order, and that it makes no sense to maintain that All Natural Herbs filed his appeal on June 15, 2016 (AR at 946, 957, 962) *after* the WSLCB somehow commenced an adjudicative proceeding (on May 24, 2016). Filing an appeal must come before commencement, so the WSLCB hung its hat on the June 17, 2016, letter somehow commencing the adjudicative proceeding. Notably, the superior court judge found this proposition dubious. Instead, it reasoned that an email exchange between an assistant attorney general and All Natural Herbs' attorney commenced the administrative adjudication. (CP at 731-32; AR at 922). The main problem with the superior court's (alternative) reasoning is that RCW 34.05.19 requires the “agency” *itself to notify a party* that a stage of the adjudicative proceeding has been commenced; the definition of “agency” excludes an attorney general, assistant or otherwise, from notifying the party. RCW 34.05.410(2); *State v. Evans*, 164 Wn. App 629, 634, 265 P.3d 179 (2011) (holding “statutory definition of a term controls its interpretation); CP at 733-34. Moreover, the email from the assistant attorney general did not in any way notify All Natural Herbs “when” anything was happening at all, let alone a stage of the adjudication. (AR at 922).

⁷ The WSLCB has spent the equivalent in six figures or more of taxpayer paid legal fees and expenses, in this case, trying to come up with after the facts reasons to prevent a Korean-American from transitioning his collective garden to I-502 as well as to justify its

Regardless, the June 17, 2016, letter had two sentences, the first of which plainly stated its purpose: “This letter is being sent to you to *acknowledge receipt of a request for a hearing.*” (AR at 964) (emphasis added). The letter in no way resembled any pleading filed in court. It did not resemble what a court does. It did not commence an adjudication and did not inform All Natural Herbs of any stage of an administrative adjudication.

For comparison purposes, *a cursory look at the Statement of Charges in Hutmacher compared to the letter informing All Natural Herbs that the WSLCB had received his second, repeated, appeal/request for an adjudicative hearing reveals that the two documents are nothing alike.* (Compare AR at 1120-22 with AR at 1395-97). The Statement of Charges “resembles what a court does,” *e.g.*, the Statement of Charges is indicative of court filings at the commencement of an adjudicative proceeding that

decision to essentially shut his minority business down so four Caucasian owned business could operate where Mr. Yi previously did. Granting Mr. Yi a license would harm no one. It would only result in him paying the state thousands in taxes and getting his family business back. The lack of settlement in this case is an extraordinary circumstance. It is contrary to the express policy dictated to the WSLCB by the legislature. *See* RCW 34.05.060 (stating “informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged.”). The WSLCB should not be rewarded for pressing its terribly weak case and after facts reasons justifying its statutory and constitutional violations. The agency’s main—and unfortunately so far successful—strategy before the superior court was to run up the costs of the appeal, attempt to bankrupt Mr. Yi, and *literally make a mess of the administrative record* so as to confuse the judge hearing the matter. To any reasonable person, the Board’s reasoning in its Final Order was essentially that the government cannot be wrong. Challenge its erroneous decisions at your own peril. That attitude is why trust and respect for governmental is at historic lows.

“determine[s] legal rights, duties, or privileges of specific persons.” *See* Andersen, 64 Wash. L. Rev. at 789. The letters from the WSCLB only informed All Natural Herbs that the WSCLB had received his appeal request for adjudicative hearing, perhaps belatedly attempting to comply with RCW 34.05.419(2).

6.1.4. The Administrative Law Judge’s Initial Order, dated January 4, 2016, did not err in granting summary judgment; however, the proper relief was to hold the WSCLB in default and prohibit it from opposing All Natural Herbs’ appeal.

Administrative agencies are creatures of statute, did not exist in the common law, and the only jurisdiction and/or authority they possess—to do anything at all—must be granted by statute. *Seattle v. Dep’t of Ecology*, 37 Wn. App. 819, 823, 683 P.2d 244, 246 (1984); *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440, 442 (1979) (holding “Administrative [actions] which have the effect of extending or conflicting in any manner with the agency’s enabling act do not represent a valid exercise of authorized power, but constitute an attempt by the administrative body to legislate.”); *Sutherland Statutory Construction* § 65.02 (4th ed. C. Sands 1974). “[W]here a person or board is charged by law with a specific duty, *and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed, however inadequate may be the result*” from the agency’s perspective. *State ex rel.*

Eastvold v. Maybury, 49 Wn.2d 533, 539, 304 P.2d 663, 667 (1956) (emphasis in original). “The court cannot read into a statute anything which it may conceive that the legislature has unintentionally left out.” *Dep’t of Labor & Indus. v. Cook*, 44 Wn.2d 671, 677, 269 P.2d 962, 966 (1954).

Some Supreme Court cases hold agencies lack jurisdiction to act when missing statutory time-deadlines. *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288, 291 (1993). Some courts agree. *Daniel Byrne v. Ken Madsen*, 2003 WL 1709722, at *5; *Espinoza v. City of Everett*, 87 Wn. App. 857, 869, 943 P.2d 387, 393 (1997); *In re Forfeiture of Chevrolet Corvette*, 91 Wn. App. 320, 323, 963 P.2d 187, 188 (1997). Moreover, “when statutory procedures are not followed, the government is estopped from proceeding.” *Espinoza*, 87 Wn. App. at 866 (“[W]hen statutory procedures are not followed, the government is estopped from proceeding.”); *Ellis*, 124 Wn.2d 1 (holding “Where estoppel protects the public interest, it should be applied. . . .”). Other cases hold non-compliance with statutory time deadlines, deprive parties the authority or right to argue their case at all. *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 966, 235 P.3d 849, 857 (2010); *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 375, 260 P.3d 900, 904 (2011).

“A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the

statute was enacted, the right to recover the damages from the party in default is implied. . . .” *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916). This principle can be traced back to 1703. In *Anonymous*, 87 Eng. Rep. 791 (1703), it was declared:

for where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy. . .

See also Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 174, 79 Cal. Rptr. 543 (1969) (holding “Violation of a statute embodying a public policy is generally actionable even though no specific remedy is provided in the statute. . . .”).

“[T]he government is in the same position as a private litigant” when it comes to statutory time-deadlines. *Hutton v. State*, 25 Wn.2d 402, 406, 171 P.2d 248, 250 (1946) (holding “The [government’s statutory right/authority] here in question may not be invoked outside of the period during which it is conferred by the statute. This is not because of a statute of limitations . . . but *because, outside of the terms of the statute creating the [the government’s right/authority], no [government right/authority] exists.*”) (emphasis added).

Statutes and chapters are not read in isolation; rather, they are read

in context so that they are in harmony. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004). “Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice. . . .” RCW 34.05.440.

Here, *what is good for the goose is good for the gander*. The Board’s March 21, 2017, Final Order, expressly held the 90-day deadline imposed by RCW 34.05.419(1) is mandatory. (AR at 1348). If an agency misses a mandatory time deadline, it is in default, just the same as a party missing its reciprocal duty to file an appeal within 20-days under RCW 34.05.413 and RCW 34.05.440. It does not matter whether this prohibition on the WSLCB’s ability to oppose All Natural Herbs’ appeal stems from jurisdictional requirements, statutory requirements, or estoppel grounds—because the result is the same. The agency no longer has any statutory grant of authority or jurisdiction, or the ability or right, to oppose the appeal because it missed the statutory and constitutional time deadline to do so.

The Board/WSLCB ruled/argued that “If subject matter jurisdiction actually had been lost . . . the only order the ALJ could have entered would have been dismissing the case for lack of subject matter jurisdiction.” (AR at 1347-48; CP at 717-18). But All Natural Herbs has never argued that the

administrative law judge could not hear this matter. It argued that the WSLCB was in default, was estopped, and/or lost subject matter jurisdiction or authority or any right to oppose the appeal because the WSLCB was in non-compliance with RCW 34.05.419(1).⁸ (*See* AR at 6, 820-21, 832-43).

More to the point, and dispositively, “The [WSLCB] seeks stringent rules for [Mr. Yi and All Natural Herbs], and lenient rules for [itself].” *See Espinoza*, 87 Wn. App. at 871. It seeks this Court find that All Natural Herbs appeal was not expressly accepted in writing on May 4, 2016. It seeks All Natural Herbs’ appeal be dismissed based on an inequitable and unlawful rewrite of RCW 34.05.419 and RCW 34.05.413 while at the same time acknowledging the 90-day time deadline is mandatory. “This equation is hardly in balance.” *See Espinoza*, 87 Wn. App. at 871. No statute provides that the WSLCB can notify a party of the commencement of a stage the adjudication proceeding after ninety days. The WSLCB was in default for failing to do so. It had no authority and/or jurisdiction to oppose All Natural Herbs’ appeal or requested relief, the same as any private party that misses

⁸ The Board’s Final Order states, “‘Jurisdiction’ is perhaps the word most often misused by attorneys, including here.” (AR at 1348). Mr. Yi, nor his attorney, was confused. Neither has ever attempted to distinguish jurisdiction from authority from estoppel in any meaningful way because it just didn’t matter. These issues frequently pop up in Mr. Yi’s attorney’s probate and landlord-tenant practice and he is familiar with them. The argument maintained over the last four years by Mr. Yi has been the same: Agencies cannot do anything not specified by statute. Since the WSLCB missed the 90-day deadline it is in default, estopped, and/or lacked jurisdiction or authority to oppose the appeal.

its statutory time deadline to appeal in the first place. This is the result that the law requires, and it is the result mandated by sound public policy. *See Kramarevcky v. State, Dep't of Soc. & Health Servs.*, 64 Wn. App. 14, 25, 822 P.2d 1227, 1234 (1992), *aff'd sub nom. Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 863 P.2d 535 (1993) (holding state agency was estopped on public policy grounds because “regulatory scheme . . . place[d] . . . burden” on state agency to do its job and agency was in “better position to assure that future errors of [by agency] d[id] not occur [again].”).

6.2. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, erroneously adopted the WSLCB’s erroneous interpretation and application of Former RCW 69.51A.085 and Former WAC 314-55-020.

Former WAC 314-55-020 required applicants show they were employed by a collective garden. Former RCW 69.51A.085⁹ governs the definition of a collective garden. These “collective” gardens were just a place where people grew cannabis and shared resources to do so.

A fundamental rule of statutory construction is that once a statute has been construed by the highest court of the state, that construction

⁹ [Q]ualifying patients shar[e] responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

operates as if it were originally written into the statute. *See e.g., In re Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992); *Espinoza*, 87 Wn. App. at 869. Commercially or non-commercially, collective gardens were legally allowed to produce, process, transport, or deliver cannabis for medical use. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 230, 351 P.3d 151, 156 (2015). The argument that collective gardens must be commercial in nature or operate as a business has been explicitly rejected by the Washington Supreme Court. *Id.*

Administrative agencies may not come up new reasons, after the fact, justifying their previous actions. *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577 (1999) (holding grounds upon which an administrative action must be judged are those upon which the record discloses that its action was based); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443, 462 (1983) (holding “***It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself***”).

Here, the ***only reason*** that All Natural Herbs was denied a priority 1 determination and license was because the WSLCB erroneously determined that Mr. Yi had to show commercial/business activity for the Healing Center of Tacoma. (AR at 918-20). The Board’s Final Order found

this to be true too in Finding of Fact No. 1(ii), which states:

It was found by Licensing staff that the Applicant reported to Business Licensing Services that their collective was not open for business nor would have any product until the State came up with laws on Medical Cannabis.

(AR at 1341). But this reason for denial stated in the WSLCB's original Statement of Intent and the Board's finding in its Final Order was clear error. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d at 230.

Indeed, the WSLCB previously took the view—just a month or so prior to the Board's Final Order—that it was not necessary for collective gardens to operate commercially or as a business. (Transcript from Healing Center of Tacoma Hearing: AR at 2178) (stating “Q[uestion by Applicant’s attorney] . . . *collective gardens could be businesses, but they don’t have to be businesses, is that at fair statement?* A[nsWER by Jodi Murphy WSLCB licensing Specialist Supervisor]: *Yes.*”); Transcript from Healing Center of Tacoma Hearing: AR at 2164-2165 (Jodi Murphy WSLCB licensing Specialist Supervisor stating, *a collecting garden is “a group of individuals who come together to grow marijuana for the members of the group.”*) (emphasis added).

Thus, WSLCB's only articulated reason for denying All Natural Herbs' license and priority 1 determination—*i.e.*, that Mr. Yi had to demonstrate that the Healing Center of Tacoma was operating

commercially as a business—was both erroneous and arbitrary and capricious. All Natural Herbs should have never had to appeal. Mr. Yi should have been granted priority 1 determination and license before four other stores were licensed in his collective garden’s vicinity (AR at 928-32) were licensed. The WSLCB did not follow the law.

6.3. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was error because it was not supported by the evidence.

Here, the notion that the WSLCB did not accept All Natural Herbs’ appeal on May 4, 2016, is absurd and not supported by the evidence. Without question, the Deputy Director of Licensing and Regulation accepted All Natural Herbs’ appeal on May 4, 2016. (AR at 912-16, 2261-67). Further, the notion that a letter from WSLCB informing All Natural Herbs that its appeal was received, and was being forwarded to an attorney, could simultaneously fulfill the requirements of RCW 34.05.419(1) and RCW 34.05.419(2) is not supported by the law or the evidence. In fact, the Board’s Findings and Conclusions and the WSLCB’s entire purported time line, regarding when All Natural Herbs appealed and when statutory deadlines were fulfilled, makes no sense.

Finally, the Board’s Final Order’s findings, and WSLCB’s reason for denying All Natural Herbs’ license and priority 1 determination in the first place, was not supported by the evidence. *Cannabis Action Coal.*, 183

Wn.2d at 230. The WSLCB itself previously rejected such position. (Compare AP at 918-20, 2302-04 with AR at 2178).

6.4. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge's Initial Order, as well as the original statement of intent, were error because they were arbitrary and capricious.

Agency “action is arbitrary and capricious if it is made without consideration of and in disregard of the facts and circumstances.” *Seymour v. Washington State Dep't of Health, Dental Quality Assur. Comm'n*, 152 Wash. App. 156, 172, 216 P.3d 1039, 1047 (2009).

Here, for the same reasons stated in Section 6.3, the Board’s findings and conclusions and order, as well as the WSLCB’s denial of All Natural Herbs priority 1 determination and license, were arbitrary and capricious.

6.5. The WSLCB failing to notify All Natural Herbs within the 90-day statutory and constitutional time deadline mandated by RCW 34.05.419(1) violated All Natural Herbs due process rights.

Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the due process clause. *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 765, 63 P.3d 142, 149 (2002). “Protected property interests include all benefits to which there is a legitimate claim of entitlement.” *Crescent Convalescent Ctr. v. DSHS*, 87 Wn. App. 353, 358-59, 942 P.2d 981, 983 (1997). “Statutes and regulations create protected interests when they

contain ‘substantive predicates’ or particularized standards or criteria that guide the discretion of official decision makers and specific directives that mandate a specific outcome if the substantive predicates are present.” *Id.*

Due process requires meaningful opportunity to be heard. *Rhoades*, 115 Wn. App. at 765. “A meaningful opportunity to be heard means at a meaningful time and in a meaningful manner.” *Id.* (internal punctuation omitted). Determining what process is due in a given situation requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved. *Id.* at 766. Once a due process violation has occurred it cannot be undone. *Olympic Forest Prods. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002, 1005 (1973) (Supreme Court of Washington rejecting the argument that a due process “wrong may be done if it can be undone”). Not following “procedures in any applicable statute” is a denial of “meaningful opportunity to be heard,” a due process violation, and has the “potential to undermine the integrity of the legal system.” *Hart v. Hawtin*, 2019 Wash. App. LEXIS 842, *12-32, 2019 WL 1549103 (unpublished opinion).

“The APA, as do decisions of this court, requires the agency to commence the proceeding within 90 days.” *Forfeiture of Chevrolet Corvette*, 91 Wn. App. at 323. The 90-day time deadline is based on the due

process clause of the constitution. *Espinoza*, 87 Wn. App. at 865 (stating the Supreme Court held that due process entitles parties to a full adversarial hearing within 90 days); *Tellevik v. 31641 W. Rutherford St.*, 125 Wn.2d 364, 374, 884 P.2d 1319 (1994).

Here, the WSLCB losing the authority and/or jurisdiction to oppose All Natural Herbs' appeal is mandated by due process guarantees in RCW §§ 34.05.413(2), 419(1)(b) designed to protect against substantial harm done to All Natural Herbs/Natural 7, its owners and their livelihoods, its property, and its patients. *See Tellevik*, 125 Wn.2d at 374; *Rhoades*, 115 Wn. App. at 766. First, as to the private interest involved, All Natural Herbs and its application for a priority 1 determination and license were not fungible. Natural 7 was shut down without licensing under I-502. Mr. Yi lost his family business. Applying again was not an option and getting a Priority 1 determination quickly was the only way to ensure licensing; therefore, the property interest at stake was "great." *See Rhoades*, 115 Wn. App. at 766.

Second, as to the risk that the procedures used erroneously deprived a party of the private interest involved: For all practical purposes, while appeal was pending, All Natural Herbs' and Natural 7's property rights were effectively seized, more so than by a *lis pendens*. *See Tellevik*, 125 Wn.2d at 371. Furthermore, the numerical limits imposed on retail stores in

geographic locations, and the WSLCB licensing of four new stores in the immediate vicinity of All Natural Herbs demonstrated that violating the 90-day time-deadline “procedures . . . erroneously deprive[d its and Natural 7’s] interest” in transitioning to I-502. *See Rhoades*, 115 Wn. App. at 766; *see also* AR at 1037-42 (Retail Store Locations and Allotments by County). The longer All Natural Herbs or Natural 7 did not operate the more likely they were going to be either evicted, could not afford the rent, or lost alternative retail locations. (AR at 928-32, 2133-37; AR at 1037-42). Patients of Natural 7 were unable to obtain medicine through the successor company, All Natural Herbs, because the transition in licensing was delayed and denied. (AR at 928-32, 2133-37). Mr. Yi’s livelihood, and his family’s income, was put out business as he was barred from operating. (AR at 928-32, 2133-37).

Third, the countervailing government interest here was slight. All Natural Herbs/Natural 7 was not requesting money or anything that the WSLCB could not do with the stroke of a pen; that is, to issue a priority 1 determination and license, or to have timely commenced an administrative hearing. Instead of licensing All Natural Herbs, or adjudicating its appeal, the WSLCB ignored an Korean-American’s appeal. While doing so, it spent its time licensing four retail stores—all to Caucasian owners—in the immediate vicinity of Mr. Yi’s collective garden’s location. (AR at 928-32,

2133-37). What made this situation all the more appalling was that the sole—and erroneous—purported reason for denying All Natural Herbs priority 1 and retail license was that Mr. Yi did not work¹⁰ for a collective garden operating commercially. *See Cannabis Action Coal.*, 183 Wn.2d at 230; AR at 918-20.

6.6. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was an unlawful “do over,” an unlawful de facto dismissal of the action, and a gross due process violation.

Here, in Conclusion of Law No. 4.16 and Section V ORDER, the Board directed that All Natural Herbs’

License Application . . . [be] remanded to the [WSLCB] for consideration of any additional documentation that the Applicant submitted in the course of the administrative hearing process, and [directed the WSLCB] to issue a new Statement of Intent for Priority Determination, with [All Natural Herbs] being given an opportunity to again request a hearing if so desired.

(AR at 1351). Thus, the Board ordered a “do over”—including a brand-new statement of intent from the WSLCB. The Board cited no authority that

¹⁰ Employment is defined as "personal service, of whatever nature . . . performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied. *W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 451, 41 P.3d 510, 516 (2002). “[E]mployment exists if (1) the worker performs personal services for the alleged employer, and (2) if the employer pays wages for those services (or pays under any contract calling for personal services). *Id.*(citing *Penick v. Employment Sec. Dep't*, 82 Wash.App. 30, 39, 917 P.2d 136 (1996); *Skrivanich v. Davis*, 29 Wash.2d 150, 157, 186 P.2d 364 (1947)). It is not debatable that Mr. Yi was employed by The Healing Center of Tacoma, LLC, at a time that qualified for him for a priority 1 determination and license. (AR at 851, 928-39).

allowed it to bar All Natural Herbs from proceeding to a hearing on the merits based on the original statement of intent. (AR at 1390-1354). What the Board did do was extraordinary and prejudicial. It went well beyond the narrow summary judgment issue it was reviewing. (AR at 6, AR at 795). It mandated the WSLCB literally create a new case, complete with a new cause number. It treated the original appeal as if it never happened. This “post hoc rationalization” for agency action violated the law. *See Chenery Corp.*, 332 U.S. at 196; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597, 13 P.3d 1076 (2000) (holding “New issues may not be raised for the first time on appeal” and “RCW 34.05.554 precludes appellate review of issues that were not raised before the agency.”). Under the circumstances the Board’s Final Order was a gross due process violation causing an administrative adjudication on the merits not occur for over 500 days after the appeal was filed. A final order was not entered for over 700 days. When the Board its Final Order denying summary judgment, there was zero reason All Natural Herbs should not have proceeded to an immediate hearing on the merits based on the original statement of intent. Granting a “do over” to the WSLCB was violation of the law and a gross due process violation.

The WSLCB has argued otherwise. But a tribunal’s order constituting a due process violation cannot be corrected later. *Chaussee*

Corp., 82 Wn.2d at 430 (Supreme Court of Washington holding the law “has not embraced the general proposition that a wrong may be done if it can be undone.”); *Hart*, 2019 Wash. App. LEXIS 842, *12-32. This is because the order is void. *In re Marriage of Maxfield*, 47 Wash. App. 699, 704, 737 P.2d 671, 674 (1987); *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185, 1188 (2006); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Chaussee Corp.*, 82 Wn.2d at 422, *Hart*, 2019 Wash. App. LEXIS 842, *12-32.

6.7. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, would render RCW 34.05.419 and former WAC 314-55-20 unconstitutional as applied.

A statute that is found unconstitutional as applied remains good law except in similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Here, if this Court held that the WSLCB could notify a party of the commencement of an administrative adjudication after the time allowed by RCW 34.05.419(1), *i.e.*, 90 days, then such statute, and Former WAC 314-55-20, would violate the due process clause of the Washington and United States constitutions. This is because the statute and WAC are based on due process protections of having a meaningful opportunity to be heard at meaningful time and manner. *See e.g., Espinoza*, 87 Wn. App. at 865. Agencies not timely commencing adjudications

destroy society, faith in government, businesses, and families and livelihoods without ever having to defend their erroneous actions because the delay in time makes issues present moot. This intentional tactic, and/or sheer incompetence, cannot be tolerated.

6.8. The March 21, 2017, Final Order of the Board, reversing the January 4, 2017, Administrative Law Judge’s Initial Order, was an unconstitutional prior restraint under the First Amendment.

The First Amendment prohibits the government from interfering with a person's “freedom of speech” and “right ... to petition the Government for a redress of grievances.” *In re Marriage of Meredith*, 148 Wn. App. 887, 896, 201 P.3d 1056, 1061 (2009); U.S. Const. amend. XIV, § 1. “Although the right to free speech and the right to petition are separate guaranties, they are related and generally subject to the same constitutional analysis.” *Id.* The United States Supreme Court defines prior restraints on free speech as “[a]dministrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.” *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161, 164 (2004) (emphasis in original and citations and punctuation omitted); *Marriage of Meredith*, 148 Wn. App. at 896. Federally, prior restraints carry a heavy presumption of unconstitutionality. *Suggs*, 152 Wn.2d at 81; *Meredith*, 148 Wn. App. at 896. The Washington Supreme

Court has held that “prior restraint of constitutionally protected expression is per se unconstitutional.” *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 6, 891 P.2d 720, 722 (1995); *O’Day v. King County*, 109 Wn.2d 796, 802, 749 P.2d 142, 146 (1988) (holding prior restraints are per se violations and that Washington State’s First Amendment protections are greater than the federal counterpart).

Here, the March 21, 2017, Final Order of the Board, was an unconstitutional prior restraint under either the Washington State or United States Constitutions. The order unlawfully dismissed All Natural Herbs’ appeal, granting the WSLCB a “do over.” (AR at 1390-1354). A new cause number was issued. A new statement of intent was ordered. All Natural Herbs was barred by court order from petitioning the government for a grievance, *i.e.*, barred from having a hearing on the merits, regarding the original statement of intent and appeal. (AR at 1390-1354). All Natural Herbs was ordered to not be able to present evidence rebutting the second statement of intent. (AR at 1390-54). The Board’s order was an unconstitutional prior restraint of speech and All Natural Herbs/Mr. Yi’s ability to petition the government for a grievance. *See O’Day*, 109 Wn.2d at 802. The WSLCB has argued otherwise. But it cannot get around black letter law that orders constituting due process violations, or prior restraints on speech, are void; the damage is done by the order itself and cannot be

undone later. *Chaussee Corp.*, 82 Wn.2d at 430.

6.9. The WSLCB violated All Natural Herbs' and its principal owner's Equal Protection Rights.

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Spence v. Kaminski*, 103 Wash. App. 325, 335, 12 P.3d 1030, 1036 (2000), *publication ordered* (Nov. 21, 2000). In other words, equal protection is intended to provide equal application of the law. *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789, 793 (2004).

Here, All Natural Herbs/Mr. Yi has not received like treatment compared to any other I-502 applicant. The WSLCB erroneously denied his license and priority determination, erroneously stating collective gardens must have operated as a business *for one for its former employees* to qualify for a license and priority determination. All Natural Herbs and its principal owner Mr. Yi—clearly a Korean-American—was not notified of the commencement of, nor granted an administrative hearing, within 90 days. Egregiously, instead, the WSLCB spent its time licensing four retail stores—all to Caucasian owners with zero experience in the industry¹¹—in

¹¹ Licensing those with experience in the industry was mandated by the legislature. Laws of 2015, ch. 70, § 6(1)(a) - RCW 69.50.331(1)(a) (The state liquor and cannabis board must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana

the immediate vicinity of his collective garden's location. (AR at 928-32, 2133-37).

Stated very simply, the WSLCB shut a minority's business and livelihood down, did not give preference to experience in the industry, violated the law and constitution, *all the while giving a protected minority's business and deserved license to neighboring Caucasian owned businesses with no experience*. The Korean-American community in Thurston County has taken notice of this continued discrimination against them. They request that this Court end blatant, systemic and unapologetic, discriminatory practices.¹² "We cannot ignore that history" and "We cannot take that history out of the case" and we cannot ignore that discrimination. *See Flowers v. Mississippi*, 2019 U.S. LEXIS 4196, *38, 2019 WL 2552489.

6.10. All of the findings of fact, conclusions of law, and orders from the administrative law judge's Initial Order, dated May 31, 2018, are void.

industry) (available at <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/2015/7-15SuppBody.pdf>).

¹² Mr. Yi is Korean. In that area of the world, petitioning for a grievance against the government is a dangerous prospect that rarely, if ever, succeeds. In this case, when Mr. Yi first appealed the WSLCB's priority determination, he was "placed under increased scrutiny from the state . . . only to find that my business substantially overpaid its taxes." (AR at 931 ¶ 17). The time to review Mr. Yi's taxes in this case was *before the original statement of intent was issued, not after*; this shows what the WSLCB was doing; unlawful post hoc rationalization for its erroneous decision. The tragic effect of the WSLCB's actions was that many Koreans in Thurston County were then afraid to even come to Thurston County Superior Courthouse and support Mr. Yi because they feared state retaliation for doing so.

Once a due process violation has occurred it cannot be undone. *Chaussee Corp.*, 82 Wn.2d at 422. Not following “procedures in any applicable statute” is a denial of “meaningful opportunity to be heard,” a due process violation, and has the “potential to undermine the integrity of the legal system.” *Hart*, 2019 Wash. App. LEXIS 842, *12-32. Subsequent orders are void. *Id.* at 34 fn. 9 (holding “The record on appeal contains no orders for protection following the [void] April 14, 2017 order, which expired in 2018. If there are any orders extending or renewing the April 14 order, they are void.”).

Here, All Natural Herbs’ statutory, due process, First Amendment, and equal protection rights were violated by the WSLCB’s actions and the Board’s March 21, 2017, Final Order. That order is void. All subsequent administrative orders are void as well.

6.11. All of the findings of fact, conclusions of law, and orders from the Board’s Final Order, dated July 24, 2018, are void.

Here, All Natural Herbs’ statutory, due process, First Amendment, and equal protection rights were violated by the WSLCB’s actions and the Board’s March 21, 2017, Final Order. That order is void. All subsequent administrative orders are void as well.

7. ATTORNEY FEES AND COSTS ON APPEAL

Under RCW 4.84.350, “a court shall award a qualified party that

prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees. . . .” A qualified party is one that whose net worth does not exceed one million dollars, if a person, and whose net worth does not exceed five million dollars if a corporation. RCW 4.84.030. “A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.” RCW 4.84.350(1). Additionally, a court may grant attorney fees and costs when its appeal is based on “arguing [a] statute is unconstitutional” as applied. *See Mt. Hood Bev. Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 122, 63 P.3d 779, 792 (2003).

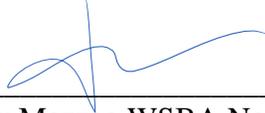
Here, All Natural Herbs is not worth over five million dollars. It has not been allowed to operate since its creation, and has not been allowed to take over Mr. Yi’s prior collective garden, Natural 7, at the same location. Neither All Natural Herbs nor any of its owners are worth anywhere remotely close to one million dollars. Since All Natural Herbs is entitled to relief on significant issues and will receive some benefit with such relief, it is entitled to attorney fees and costs. *See* RCW 4.84.350. Moreover, since upholding the March 21, 2017, Final Order of the Board, would render applicable statutes unconstitutional as applied—something a Court cannot do—All Natural Herbs is entitled to attorney fees and costs on that basis as well. *See Mt. Hood Bev. Co.*, 149 Wn.2d at 122.

8. CONCLUSION

All Natural Herbs respectfully requests this Court void all Final Orders of the Board in this case. The only reason the WSLCB did not grant All Natural Herbs a priority 1 determination and retail license was unlawful, contrary to Washington Supreme Court precedent, and contradicted the agency's own interpretation of the applicable statute and WAC.

The passage of time has severely prejudiced All Natural Herbs. In order to make All Natural Herbs relief more than illusory or nominal, it requests for relief what the WSLCB could have done—at no cost to it—nearly four years ago. All Natural Herbs respectfully requests this Court order the WSLCB issue it a priority 1 determination and retail cannabis license at a (qualified) location of its choosing. *See e.g., Rigsby*, 241 U.S. at 39. The location All Natural Herbs has maintained may not be commercially viable because of the damages incurred over the passage of time and because four other stores were licensed during this appeal, and operate in the immediate vicinity. The WSLCB has granted, or been ordered to grant, this relief in other cases regarding cannabis licenses.

Respectfully submitted this 10th day of March, 2020,



Drew Mazzeo WSBA No. 46506
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on March 10, 2020, I caused to be served:

1. Brief of Appellant

On and at:

Rose Weston
Office of Attorney General
PO BOX 40100
Olympia, WA 98504-0100
rose.weston@atg.wa.gov

Signed this 10th day of March, 2020, at Olympia, Washington.



Stacia Smith

LIFETIME LEGAL, PLLC

March 10, 2020 - 3:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54083-5
Appellate Court Case Title: All Natural Herbs, LLC, Appellant v. State Liquor and Cannabis Board,
Respondent
Superior Court Case Number: 18-2-04182-9

The following documents have been uploaded:

- 540835_Briefs_20200310150241D2648491_8155.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was YI IL amended opening brief FINAL to be FILED.pdf

A copy of the uploaded files will be sent to:

- Heather.Wulf@atg.wa.gov
- Rose.Weston@atg.wa.gov

Comments:

Sender Name: Andrew Mazzeo - Email: dpm@lifetime.legal
Address:
1235 4TH AVE E STE 200
OLYMPIA, WA, 98506-4278
Phone: 360-754-1976

Note: The Filing Id is 20200310150241D2648491