

NO. 304582-III
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KATHRYN RYAN

Appellant

v.

**STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

Respondent

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal involves whether the Board of Appeals (BOA) and Administrative Law Judge (ALJ) erroneously interpreted WAC 388-71-01210 which sets out how the Department of Social and Health Services, Adult Protection Services (the Department), must provide notice of an initial substantiated finding of abuse or neglect of a vulnerable adult to the alleged perpetrator. It also questions whether there is substantial evidence to support the BOA and ALJ findings that the Department exercised reasonable good faith in attempting to ascertain the address of Appellant Kathryn Ryan's last known residence, whether the notice provisions of WAC 388-71-01210, as applied to Ms. Ryan, violates due process, and whether the BOA and ALJ erred when they failed to consider Ms. Ryan's good cause argument and subsequently failed to find good cause for the late hearing request.

Ms. Ryan, asks this court to find: (1) the Department was required to provide notice by delivery or personal service when it was unable to ascertain a residential address to send notice by mail; (2) the Department failed to exercise good faith in attempting to locate the address of her last known place of residence;

(3) WAC 388-71-01210 as applied herein, violates due process because given the unique circumstances of Ms. Ryan's case, the method used to deliver notice was not reasonably calculated to inform her of the finding; and (4) the BOA and ALJ erred when they failed to rule on Ms. Ryan's good cause argument and further erred in failing to find good cause for a late hearing. Ms. Ryan also requests that this court award attorney fees and costs under RCW 4.84.350 and RAP 18.1.

II. ASSIGNMENTS OF ERROR

The trial court erred when it concluded that the Department complied with the notice provisions of WAC 388-71-01210 and that the Department exercised good faith in attempting to find the address of Ms. Ryan's last known place of residence.

The trial court erred when it failed to find that due process was violated or that there was good cause for Ms. Ryan's late hearing request.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

- A. The BOA and ALJ erroneously interpreted WAC 388-71-01210 when it found that the Department complied with the notice provision by sending notice by certified and regular

mail to an address where it knew Ms. Ryan did not live. (BOA Review Decision and Final Order – Conclusions of Law Nos. 7, 8. Administrative Hearing Initial Order to Dismiss Proceedings – Conclusions of Law Nos. 7, 8.)

- B. There is not substantial evidence to support the BOA' and ALJ's finding that the Department exercised reasonable good faith in locating the address of Ms. Ryan's last known place of residence. (BOA Review Decision and Final Order – Conclusions of Law Nos. 8, 9. Administrative Hearing Initial Order to Dismiss Proceedings – Conclusions of Law No. 7.)
- C. The BOA and ALJ erred when they failed to address Ms. Ryan's argument for good cause and erred when they failed to find good cause for the late hearing request. (BOA Review Decision and Final Order – Conclusions of Law No. 9. Administrative Hearing Initial Order to Dismiss Proceedings – Conclusions of Law Nos. 9, 11, 12.)
- D. WAC 388-71-01210, as applied to Ms. Ryan, violated due process because the method used to deliver notice was not reasonably calculated to inform her. (BOA Review Decision and Final Order – Conclusions of Law Nos. 7, 8, 9.

Administrative Hearing Initial Order to Dismiss Proceedings
– Conclusions of Law Nos. 7, 8.)

- E. Ms. Ryan is entitled to attorney fees and costs pursuant to RCW 4.84.350 and RAP 18.1.

IV. STATEMENT OF THE CASE

On August 6, 2010, Kathryn Ryan, was suspended from her job of nine years as a care provider, when a routine background check discovered a November 24, 2009, finding of abuse and neglect against Ms. Ryan on the Department's abuse registry. AR 62. On August 20, 2010, Ms. Ryan contacted the Department to request a copy of the finding. AR 70-71. The Department mailed a copy of the initial finding to Ms. Ryan, and on August 23, 2010, Ms. Ryan requested a hearing on the merits. AR 71, 86.

The notice of the initial finding stated that the Department had made the finding based on a report that Ms. Ryan called her elderly mother a "bitch" and said, "I'm going to cause trouble for you." AR 82. The alleged victim reported that she felt harassed by Ms. Ryan and that Ms. Ryan had called her names in the past. AR 82.

The Department filed a motion to dismiss arguing that the ALJ lacked subject matter jurisdiction to grant a hearing because

Ms. Ryan failed to timely request a hearing. AR 63-66. The Department further argued that it had complied with the notice provision because it sent notice to Ms. Ryan by certified and regular mail. AR 65.

Ms. Ryan responded to the motion to dismiss alleging that the Department failed to exercise reasonable good faith in attempting to ascertain her location, and that she overcame any presumption that notice was received. AR 45-49. In support of her argument, Ms. Ryan filed a declaration stating that she never mentally abused her mother and that she never received the APS finding of abuse until she was suspended from her job. AR 72. She also stated that she had spent most of her life living with her mother and providing for her care, and that she had worked as a caregiver for people other than her mother for nine years without incident. AR 72-73. Ms. Ryan also stated that at the time of the alleged incident, she and her mother were fighting about Ms. Ryan's new dog. AR 73. Ms. Ryan's mother's case manager instructed Ms. Ryan to either get rid of the dog or move out. AR 73. Ms. Ryan moved out. AR 73. Ms. Ryan stated that she did not reside with her mother at the time the notice was sent. AR 73. Finally, Ms. Ryan stated that mail in her trailer park had always

been problematic and that she would often not receive her mail, including checks. AR 73. She stated that sometimes the mail was placed in another mailbox and when this occurred sometimes it would get redirected to her and sometimes it would not. AR 73.

In addition, Ms. Ryan attached a letter from Robert Hill, another resident at the trailer park that was addressed to the post office. AR 75. He stated that he was having problems with getting mail that belonged to other residents in the trailer park. AR 75. Mr. Hill asked the post office to bring this issue to the letter carrier's attention so important documents would not be delivered to the wrong mailbox. AR 75.

Prior to hearing, Ms. Ryan provided additional documentation including a letter from her mother, stating, "Kathi and I just had a family disagreement over her dog. This should not have been part of her record. It was all just verbal." AR 59. The documents also included two statements from Ms. Ryan again stating that she did not know about the allegations or the findings until she was suspended from her job on August 6, 2009, and that she did not receive the notice in the mail. AR 60, 62.

In turn, the Department filed the HCS Adult Protective Services Case Recording and Outcome Report pertaining to the

investigation. AR 68-71. The case notes revealed that at the time the allegation was made, Ms. Ryan had moved from her mother's home. AR 68. The alleged victim told the APS investigator that she did not know where Ms. Ryan was living. AR 68. Two days later, the alleged victim again told the APS investigator that she did not know where Ms. Ryan was living and had no contact with her. AR 70. However, she did inform the investigator that Ms. Ryan worked for Addus. AR 70.

The APS investigator then contacted the alleged victim's COPES case manager to find out if she knew where Ms. Ryan was living. AR 70. The COPES case manager stated that she did not know where Ms. Ryan lived or how to reach her. AR 70.

The APS investigator then called Addus and asked for Ms. Ryan's phone number. AR 70. Addus did not have a number for Ms. Ryan, but said they would contact her at the client's home where she was working and have her call APS. AR 70. Later that day, someone from Addus called the APS investigator and gave her a message number for Ms. Ryan. AR 70. The APS investigator left a voicemail on the message number asking Ms. Ryan to call her back. AR 70.

On November 24, 2009, APS entered an initial substantiated finding of abuse against Ms. Ryan, and mailed notice of the finding to Ms. Ryan's mother's address by certified and regular mail. AR 70. On December 18, 2009, the certified letter was returned as "unclaimed" and "unable to forward." AR 70. On December 29, 2009, Ms. Ryan was placed on the abuse registry. AR 70.

At the hearing on the motion to dismiss, the Department again argued that the ALJ lacked subject matter jurisdiction because Ms. Ryan failed to timely request a hearing. CP 10. The Department argued that it exercised reasonable good faith to locate Ms. Ryan's place of residence when it asked the alleged victim, alleged victim's COPES case manager, and Ms. Ryan's employer where Ms. Ryan was living and left a message on a message number provided by someone at Ms. Ryan's employer. CP 11, 21. The Department also argued that it provided adequate notice because it sent the notice by certified and regular mail. CP 10-11.

Ms. Ryan testified that she did not receive the notice despite the fact that she continued to receive mail from her mother's mailbox. CP 12. Ms. Ryan testified that she shares this mailbox with her mother, and they are the only two people who have keys to the mailbox, although her mother's care provider, Ms. Ryan's

nephew, often gets the mail for her mother. CP 14, 24. Ms. Ryan stated that she did not change her mailing address because she had been living with her mother for 29 years and did not want to have to change the address with her doctor, employer, and friends. CP 12. Ms. Ryan testified that she did not need to see her mother to get the mail because the mailbox was located near the road. CP 14. Ms. Ryan also testified that she had a history of difficulty receiving mail at that address, including getting mail for other residents, not receiving her tax return on time, and not getting her checks on time due to problems with mail delivery. CP 12.

Paul Wood also testified on behalf of Ms. Ryan. CP 18-19. Mr. Wood testified that the reason Ms. Ryan did not change her mailing address was because over the past 30 years this was probably the 30th or 40th time Ms. Ryan and her mother have argued to the point that Ms. Ryan moved out of her mother's home. CP 19. He stated that during each of these arguments Ms. Ryan would come and stay at his house for three to four weeks before patching things back up and moving back home with her mother. CP 19. Mr. Wood said that given this history he had been talking with Ms. Ryan over the past two or three years about leaving her mother's nest. AR 19.

In response to Ms. Ryan's testimony, the Department's attorney told the court that ". . . there is no good cause exception if that's what Ms. Ryan is attempting to argue for failing to adhere to the time limit." CP 17. The Department's attorney again argued that because Ms. Ryan failed to respond, the ALJ lacked jurisdiction to hear the matter. CP 17.

The ALJ granted the Department's motion to dismiss finding that it had "fulfilled its duty to make a reasonable, good faith effort to determine the address of the last known place of residence of the Appellant" and complied with the notice provision by sending the notice by certified and regular mail to Ms. Ryan's mother's address. AR 36. The ALJ found the Department had exercised reasonable good faith in locating Ms. Ryan by asking the alleged victim, COPES case manager, and employer for Ms. Ryan's new address and leaving a message on a message number for Ms. Ryan. AR 36-37.

Ms. Ryan timely appealed. AR 24-29. The BOA affirmed the ALJ's decision stating that "[t]he relevant regulation provides: 'APS shall make a reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator.'" AR 12. The BOA found that the Department

exercised reasonable good faith efforts to locate Ms. Ryan and complied with the notice provision when it mailed the notice to Ms. Ryan's mother's home. AR 12-13. The BOA also found that the ALJ and BOA lacked jurisdiction to hear the case on its merits and only had the authority to dismiss due to the Appellant's failure to timely request a hearing. AR 13.

Ms. Ryan filed a Petition for Judicial Review in Spokane County Superior Court. The court denied her petition upholding the finding that the Department gave her adequate notice of the finding.

Ms. Ryan then timely filed this notice of appeal.

V. ARGUMENT

Judicial review of administrative agency orders are governed by the Administrative Procedure Act (APA). *Hardee v. State of Washington, Dep't of Soc. & Health Serv.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011). The APA provides nine grounds for challenging an agency decision. RCW 34.05.570(3). Under the APA, "the court shall grant relief from any agency order . . . only if it determines that [in relevant part]:"

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- ...
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; and
- (f) The agency has not decided all issues requiring resolution by the agency;
- ...

RCW 34.05.570. "The party challenging an agency decision has the burden of demonstrating the invalidity of the agency's action." *Hardee*, 172 Wn.2d at 6. This court stands in the same position as the Superior Court when reviewing an administrative decision. *Id.*

A. THE BOA AND ALJ ERRONEOUSLY INTERPRETED WAC 388-71-01210 WHEN THEY FOUND THAT THE DEPARTMENT COMPLIED WITH THE NOTICE REGULATION.

The Department was required to provide Ms. Ryan with notice by delivery or personal service because it was unable to ascertain the address of her last known place of residence. As such, the BOA and ALJ erroneously interpreted

WAC 388-71-01210 when they found that the Department met its notice obligation when it sent the notice by certified and regular mail to a location it knew Ms. Ryan did not reside.

Issues of statutory interpretation are reviewed *de novo*. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Regulations are interpreted in the same manner as statutes and the rules of statutory construction apply. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). Rules of statutory construction mandate that “. . . regulations are to be given a rational, sensible interpretation.” *State v. Thomas*, 121 Wn.2d 504, 512, 851 P.2d 673 (1993).

A regulation is unambiguous when its meaning can be determined from its plain language and meaning alone. *Mader*, 149 Wn.2d at 473. However, where there is more than one reasonable interpretation of the regulation, then the regulation is ambiguous and principles of statutory construction apply in determining its interpretation. *Campbell*, 146 Wn.2d at 12.

“When engaging in statutory construction, our primary objective is to ascertain and give effect to the legislature’s intent and purpose in creating the statute.” *Hegwine v. Longview Fibre Co., Inc.* 132 Wn. App. 546, 560, 132 P.3d 789 (2006).

Regulations shall not be interpreted in a manner “that renders any portion thereof meaningless or superfluous” and should be “interpreted consistently with its underlying policy.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001); *Sunnyside v. Fernandez*, 59 Wn. App. 578, 582, 799 P.2d 753 (1990).

1. The Regulation is Ambiguous Because There is More Than One Interpretation.

Under WAC 388-71-01210, APS may provide notice of an initial substantiated finding of abuse as follows:

- (1) APS shall notify the alleged perpetrator of a substantiated initial finding by sending a letter certified mail/return receipt requested and regular mail to the alleged perpetrator’s last known place of residence. The duty of notification created by this section is subject to the ability of the department to ascertain the location of the alleged perpetrator. APS shall make a reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator; or
- (2) APS shall have the written notice delivered or personally served upon the alleged perpetrator.

The BOA and ALJ have interpreted this provision to authorize notice by certified and regular mail if the Department has exercised reasonable good faith to determine the address of the

last known place of residence of the alleged perpetrator. AR 12, 36-37, 40-41.

On the other hand, Ms. Ryan interprets this provision differently. She contends that the sentence, “[t]he duty of notification created by this *section* is subject to the ability of the department to ascertain the location of the alleged perpetrator” applies to subsection one and two. WAC 388-71-01210(1) (emphasis added). Ms. Ryan argues that the notice provision requires the Department to select the method reasonably calculated to provide notice to the alleged perpetrator based on the information the Department has about the alleged perpetrator's location. Ms. Ryan contends that the reasonable good faith element only applies to a challenge of sufficient notice by certified and regular mail. If, during a challenge to notice, the Department can show that it exercised reasonable good faith and ascertained what it believed to be the location of the alleged perpetrator, even if the location turned out to be incorrect, notice by certified and regular mail is sufficient.

These two interpretations of the regulation make the regulation ambiguous and rules of statutory construction apply.

2. The Regulation Should be Interpreted to Require Delivery or Personal Service When the Department Cannot Comply With the Notice by Mail Provisions Because Any Other Interpretation Would Render Parts of the Regulation Meaningless and Superfluous.

Interpretation of a regulation requires that the court examine the regulation as a whole “giving effect to all of the language used.” *Mader*, 149 Wn.2d at 472. It also requires the court to render an interpretation that is consistent with its intended policy and does not render “any portion of the regulation meaningless or superfluous.” *Cockle*, 142 Wn. 2d at 809; *Sunnyside*, 59 Wn. App. at 582.

- a. The interpretation by the BOA and ALJ renders parts of WAC 388-71-01210(1) meaningless and superfluous.

The BOA found that the Department complied with WAC 388-71-01210(1) because it made a reasonable, good faith effort to determine Ms. Ryan's last known place of residence before mailing notice to a location it knew Ms. Ryan no longer resided. AR 12. Importantly, the only portion of WAC 388-71-01210(1) cited in the BOA' decision was the last sentence which states “APS shall make a reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator.” AR 12.

Similarly, the ALJ found that under WAC 388-71-01210(1) “the Department had a duty to make a reasonable, good faith effort

to determine the address of the last known place of residence of the Appellant.” AR 35. The ALJ concluded that the Department met its burden when it made five inquiries to locate Ms. Ryan’s place of residence, and when it could not find a new residential address, mailed it to an address at which it knew Ms. Ryan did not reside. AR 35-36.

Significantly, neither the BOA’ nor the ALJ’s decisions address the second sentence of WAC 388-71-01210(1) which states, “[t]he duty of notification created by this section is subject to the ability of the department to ascertain the location of the alleged perpetrator.” WAC 388-71-01210(1). Instead, both decisions read the “reasonable, good faith” section in isolation and failed to acknowledge the second sentence or view the regulation in its entirety.

When viewed in its entirety, it becomes clear that the regulation authorizes two methods in which the Department may provide notice. WAC 388-71-01210. First, it allows notice by certified and regular mail. WAC 388-71-01210(1). Second, it authorizes notice by delivery or personal service. WAC 388-71-01210(2).

Notice by certified and regular mail is subject to the Department's "ability to ascertain the location of the alleged perpetrator." WAC 388-71-01210(1). If the Department exercises reasonable good faith in ascertaining the address of the last known place of residence of the alleged perpetrator then service by certified and regular mail is authorized. WAC 388-71-01210(1). If the Department cannot "ascertain the location of the alleged perpetrator" then notice by certified and regular mail is not authorized. WAC 388-71-01210(1).

The effect of the administrative orders is to give no meaning to the second sentence of the notice provision. The orders simply read this sentence out of the provision, making it meaningless and superfluous.

In this case, even if the Department exercised reasonable good faith to find Ms. Ryan's last known residence, when it could not ascertain a residential address reasonably calculated to provide notice, it was required to provide notice by delivery or personal service. The provision did not authorize the Department to send notice to an address where it knew Ms. Ryan did not reside.

- b. The BOA' and ALJ's interpretation makes WAC 388-71-01210(2) superfluous.

The BOA' and ALJ's interpretation of WAC 388-71-01210(1) makes WAC 388-71-01210(2) superfluous. Personal service "is the classic form of notice always adequate in any type of proceeding." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950). By contrast, service by publication, and in turn, by mail is in derogation of common law and must strictly comply with its authorizing statute. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997); *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005).

Under WAC 388-71-01210(2), service may be made by delivery or personal service. "Deliver" is defined as "giving a document to someone in person." WAC 388-02-0010. Personal service, under the Department's hearing rules is also defined as "hand delivery." WAC 388-02-0050. By its definition, delivery or personal service requires more time and resources than service by mail. Except in the rare circumstance where the person receiving notice is easily and readily accessible to the person giving notice, notice by mail is easier.

As such, if, as interpreted by the BOA and the ALJ, WAC 388-71-01210(1) only requires the Department to exercise reasonable good faith in trying to ascertain the address of the alleged perpetrator's last known place of residence before sending it to an address where it knows the alleged perpetrator does not reside, there would be no need for a provision requiring notice by delivery or personal service. As illustrated in Ms. Ryan's case, under the BOA' a nd ALJ's interpretation, notice can always be effected by mail, even if notice is sent to a location where the Department knows the intended recipient is unlikely to receive it. As such, a provision requiring notice by delivery or personal service is superfluous.

- c. Delivery or personal service is consistent with the agency intent of the notice provisions where the agency intended to provide some form of due process for challenging substantiated findings.

The notice provisions of a substantiated finding are located in a subsection of WAC 388-71 entitled "Part B -- Notification and Administrative Appeal of a Substantiated Finding." WAC 388-71. This section provides when a notice of substantiated finding must be given (WAC 388-71-01205), how notice shall be given

(WAC 388-71-01210), when notice is complete (WAC 388-71-01215), content of the notice (WAC 388-71-01225), how to challenge the finding (WAC 388-71-01235), how to request an administrative hearing challenging the finding (WAC 388-71-01240), what rules apply in the administrative hearing (WAC 388-71-01245), how the decision will be communicated (WAC 388-71-01260), and how to challenge the administrative decision (WAC 388-71-01265). It is clear from this regulatory scheme that the administrative agency intended to provide some form of due process and an opportunity to challenge substantiated findings.

Interpreting the notice provision to allow the Department to send notice by certified and regular mail to an address at which it knew the alleged perpetrator did not reside frustrates this regulatory scheme, renders its due process elements meaningless, and violates the intent of the agency to provide a person accused of abuse and neglect with an opportunity to respond.

Because notice was not adequate, the final order should be void and the issue remanded for further hearing on the merits.

B. THE DEPARTMENT FAILED TO EXERCISE REASONABLE, GOOD FAITH IN LOCATING MS. RYAN WHERE EVIDENCE ESTABLISHES THAT THE DEPARTMENT'S "GOOD FAITH" WAS INADEQUATE.

Even if this court agreed with the Department's interpretation of WAC 388-71-01210, there is not substantial evidence to support a finding that the Department exercised reasonable, good faith to ascertain the address of Ms. Ryan's place of residence. Substantial evidence exists where there is a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

The Department is required to "make a reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator." WAC 388-71-01210. The terms "reasonable" and "good faith" are not defined in the Washington Administrative Code but Black's Law Dictionary defines "good faith," in part, as "[a] state of mind consisting in (1) honesty in belief or purpose, and (2) faithfulness to one's duty or obligation." BLACK'S LAW DICTIONARY 701 (7th ed. 1999). "Reasonable" is defined as "[f]air, proper, or moderate under the circumstances." BLACK'S LAW DICTIONARY 1272 (7th ed. 1999).

The Department failed to exercise reasonable, good faith to determine Ms. Ryan's last known place of residence. The Department contends that good faith was exercised when it contacted the alleged victim, the alleged victim's COPES manager, and Ms. Ryan's employer and left one message on a message number requesting a call back. AR 70. Then 28 days later, without doing anything else, the APS investigator sent the notification of substantiated finding to an address where she knew Ms. Ryan did not reside. AR 70.

It was not reasonable to ask the alleged victim and the COPES case manager about Ms. Ryan's location. The alleged victim had already told the Department that she did not know where Ms. Ryan was living. In addition, there was not a relationship between Ms. Ryan and the COPES case manager that would lead to a reasonable assumption that the case manager would know where Ms. Ryan was living. It was also not reasonable to leave one message on a message number. There was no indication that this number was Ms. Ryan's actual number or that the person who owned the phone passed the message on to Ms. Ryan.

The Department also failed to act in good faith when 28 days after leaving one message, it sent notice to an address where it

knew Ms. Ryan did not reside. It knew the notice was sent to the alleged victim's home, someone from whom it knew Ms. Ryan was estranged. It also knew that the alleged victim did not know where Ms. Ryan was living. Thus, to reasonably expect that the alleged victim could have even forwarded the letter, even if she was inclined to do so, was in error. This simply cannot be the definition of reasonable, good faith. The Department's actions to attempt to locate Ms. Ryan were inadequate.

The BOA and ALJ erred when they found that the Department has exercised reasonable good faith to ascertain the address of Ms. Ryan's last place of residence.

C. AS APPLIED TO MS. RYAN, WAC 388-71-01210 VIOLATES DUE PROCESS BECAUSE NOTICE WAS NOT REASONABLY CALCULATED, UNDER ALL THE CIRCUMSTANCES, TO REACH MS. RYAN.

Procedural due process imposes constraints on government decisions that deprive individuals of property interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). An elementary and fundamental requirement of due process in any proceeding is notice and an opportunity to be heard. *Robinson v. Hanrahan*, 409 U.S. 38, 39-40, 93 S. Ct. 30, 34 L. Ed.

2d 47 (1972). Issues of constitutional law are reviewed *de novo*. *In re Strand*, 167 Wn.2d 180, 185, 217 P.3d 1159 (2009).

Notice is adequate to meet due process standards if it is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Dusenbery v. U.S.*, 534 U.S. 161, 167-168, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002), quoting *Mullane*, 339 U.S. at 319. This standard requires the State to consider unique information about the intended recipient in determining whether notice is reasonably calculated to provide notice. *Robinson*, 409 U.S. at 40. Even where the statutorily prescribed method for notice meets constitutional muster, it is not adequate if the State had unique information indicating that delivery of notice in this manner is not reasonably calculated to inform the recipient. *Id.*

In such situations, the State must provide notice in a manner that “one desirous of actually informing the absentee might reasonably adopt to accomplish” notice. *Mullane*, 339 U.S. at 315. “The adequacy of a particular form of notice is assessed by balancing the State’s interest against ‘the individual interest sought to be protected by the Fourteenth Amendment.’” *Jones v. Flowers*,

547 U.S. 220, 221, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), quoting *Mullane*, 339 U.S. at 314. “[W]hen notice is a person’s due, process which is a mere gesture is not due process.” *Mullane*, 339 U.S. at 315.

The United States Supreme Court, on multiple occasions, found that notice was not adequate based on the unique information regarding the intended recipient known to the State, even where it found that the statutorily prescribed notice met constitutional muster. *Mullane*, 339 U.S. at 306; *Jones*, 547 U.S. at 220; *Robinson*, 409 U.S. at 38; *Covey v. Somers*, 351 U.S. 141, 146-147, 76 S. Ct. 724, 100 L. Ed. 1021 (1956). In *Mullane*, the court found that notice by publication to beneficiaries whose place of residence was known was insufficient to provide notice even though the statute authorized notice by publication. *Mullane*, 339 U.S. at 318. In *Jones*, the court found that taking the appellant’s property after notice by certified mail was returned was insufficient to provide notice even though the statute authorized notice by certified mail. *Jones*, 547 U.S. at 229. Similarly, notice of forfeiture to a person’s home address was not reasonably calculated to provide notice where the State knew the appellant was in jail. *Robinson*, 409 U.S. at 40. Finally, notice by mail, posting at the

post office, and publication in two newspapers was insufficient where the State knew the appellant was incompetent even though the statute authorized notice in this manner. *Covey*, 351 U.S. at 146-147.

In each of these cases, the Court found that someone “desirous of actually informing the absentee” would have done something more to provide notice when it knew or discovered that the statutorily prescribed method of notice was not reasonably calculated to reach the intended recipient. *Mullane*, 339 U.S. at 315. The state’s burden to provide notice is not unlimited and “if there are no reasonable additional steps the government could have taken . . . it cannot be faulted for doing nothing.” *Jones*, 547 U.S. at 234.

At the time the Department sent notice to Ms. Ryan, it knew some very important facts. First, it knew that Ms. Ryan did not reside at the address it sent the notice. AR 69-70. Second, it knew that the alleged victim did reside at the address, that Ms. Ryan was estranged from the alleged victim, and that the alleged victim did not know where Ms. Ryan was living. AR 69-70. Third, it knew that Ms. Ryan’s employer had access to Ms. Ryan at her current work location. AR 70. In addition, prior to placing Ms. Ryan on the

abuse registry, the Department knew that the certified letter had been returned as “unclaimed” and “unable to forward.” AR 70.

Given this unique information, someone desirous of actually informing her of the finding would have done more than simply send the notice to her mother’s address where it knew she did not reside. Sending notice in this manner was not reasonably calculated to inform Ms. Ryan of the finding since the alleged victim, Ms. Ryan’s estranged mother, was not reasonably likely to provide the notice to Ms. Ryan. As the Department knew, Ms. Ryan’s mother had no way to forward the notice to Ms. Ryan or contact her about it, even if she wanted to do so.

While the Department is not required to exhaust all means to give Ms. Ryan notice, it did nothing else once it discovered that the method it used to deliver notice was not reasonably calculated to inform Ms. Ryan of the finding. There were reasonable steps the Department might have taken to provide Ms. Ryan notice. Some reasonable steps could have included working with Ms. Ryan’s employer to ascertain her current work location or residential location to provide the delivery or personal service prescribed by WAC 388-71-01210. Because that regulation authorizes service by delivery or personal service, the Department has already

determined such efforts to be reasonable ones to take to deliver notice in a RCW 74.34 proceeding.

The Department also could have taken additional steps to contact Ms. Ryan by mailing notice to her in care of her employer. It could have called the message number again to ascertain whether the message reached Ms. Ryan. It could have called the phone company and inquired whether Ms. Ryan had a phone number listed in her name. These were reasonable steps for someone to take if they were truly desirous of providing Ms. Ryan notice.

Once the Department knew that the prescribed method for providing notice was not reasonably likely to notify Ms. Ryan of the finding it was required, under due process, to take additional reasonable steps to provide notice. As applied to Ms. Ryan, WAC 388-71-01210 violated due process. Because notice was not adequate the final order should be void and this case should be remanded for a hearing on the merits.

D. THE BOA AND ALJ ERRED WHEN THEY DID NOT FIND GOOD CAUSE TO ALLOW MS. RYAN A HEARING ON THE MERITS.

WAC 388-02-0020 provides for a late hearing where a person has a substantial reason or legal justification for failing to

timely respond. The BOA and ALJ erred when they failed to determine whether Ms. Ryan established good cause for a late hearing under WAC 388-02-0020. Based on the evidence in the record, the Court should find that she had good cause and should remand for a hearing on the merits.

WAC 388-02, et. seq., “describes the general procedures that apply to the resolution of disputes [related to] the various programs within the department of social and health services (DSHS).” WAC 388-02-0005. The provisions of WAC 388-02 apply to all administrative hearings regarding initial substantiated findings by APS. WAC 388-71-01245.

WAC 388-02-0020 expressly allows for an administrative fair hearing to persons who have failed to timely appear, act, or respond to an agency action. The basis for such relief is a finding that “good cause” exists for the person’s failure to appear, act, or respond to the action. WAC 388-02-0020 provides in full:

What does good cause mean?

- (1) Good cause is a substantial reason or legal justification for failing to appear, to act or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

- (2) Good cause may include, but is not limited to the following examples: (a) you ignored a notice because you were in the hospital or otherwise prevented from responding; or (b) you could not respond to the notice because it was written in a language you could not understand.

Circumstances that may constitute “good cause” are not limited to the examples set out in the regulation. WAC 388-02-0020(2); *Puget Sound Med. Supply v. Dep’t of Soc. & Health Serv.*, 156 Wn. App. 364, 373, 234 P.3d 246 (2010). In addition, the regulation mandates that Superior Court Civil Rule 60 be used as a guideline to analyze whether good cause exists. WAC 388-02-0020(1).

CR 60 allows relief from judgment, in part, based on excusable neglect, service by publication, or “any other reason justifying relief from operation of the judgment.” CR 60(b)(1),(7),(11). Here, good cause exists to grant Ms. Ryan a hearing as she has proved that her failure to respond constituted excusable neglect and she meets the lower threshold for setting aside a default where substitute service is used.

1. The BOA Erred in Failing to Decide the Issue of Whether Ms. Ryan Had Good Cause for Making a Late Hearing Request.

Under RCW 34.05.570(3)(f), a court may grant relief from an agency decision where it finds that the agency has not decided all issues requiring resolution by the agency. Here, the court erroneously failed to determine whether Ms. Ryan had good cause for making the late hearing request.

Ms. Ryan was not represented by counsel at the administrative hearing on the Department's motion to dismiss. CP 2. However, she presented a defense to the motion to dismiss sufficient to establish good cause for filing a late hearing request. CP 12-19, 22-25. Ms. Ryan's evidence included her non-receipt of the notice, facts providing a credible explanation of why she did not get the notice, flaws in the Department's notice procedure, her timely appeal upon learning of the hearing, and a prima facie defense to the allegations of mental abuse. CP 12-19, 22-25.

The record from the administrative hearing establishes that Ms. Ryan squarely raised the issue of good cause for late filing, even if she did not use that specific language. CP 12-19, 22-25. In fact, this issue was so squarely raised that the Department's attorney argued to the ALJ, "[t]here is no good cause exception if

that's what Ms. Ryan is attempting to argue for failing to adhere to the time limit." CP 17. Unfortunately, the Department's attorney's recitation of the law is in error. Even more unfortunately for Ms. Ryan, the ALJ and the BOA apparently accepted this erroneous statement of law and despite Ms. Ryan presenting facts establishing good cause, they failed to rule on whether she established good cause under WAC 388-02-0020. AR 1-14, 30-39.

Because they failed to rule on the issue of good cause, which was required in order to decide whether a hearing should be allowed, the BOA and ALJ erred when they found that they lacked jurisdiction to hear the case based on Ms. Ryan's late hearing request.

2. Washington Law Liberally Applies Rules Permitting Equity and Vacation of Default Judgments.

The BOA should have used CR 60 as a guideline for determining whether Ms. Ryan should be granted a late-requested hearing. In this case, the failure of Ms. Ryan to appeal within 30 days of mailing resulted in the initial abuse finding becoming "final," depriving Ms. Ryan of any opportunity to be heard prior to entry of this lifelong designation. This is in essence an entry of a quasi-judicial determination by default. Defaults have always been

disliked by courts. *Morin v. Burriss*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). In *Morin*, the Supreme Court set aside a default judgment for lack of notice of the intent to seek default, noting: “[t]his court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.” *Id.*

Because of this preference, abuse of discretion is more likely to be found on review when a motion to set aside a default is denied, rather than when one is granted. *Colacurcio v. Burger*, 110 Wn. App. 488, 494-495, 41 P.3d 506 (2002), *recon. denied, rev. denied*, 148 Wn.2d 1003 (2003); *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004).

3. Ms. Ryan’s Failure to Timely Respond Constituted Excusable Neglect, Allowing a Good Cause Finding Under CR 60(b)(1).

The order falls under the purview CR 60(b)(1) because there was excusable neglect for Ms. Ryan’s late hearing request. A default judgment may be set aside under CR 60(b)(1) under a four-part test: (1) that there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the

action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Morin*, 160 Wn.2d at 775.

The first two factors are primary; and the factors are interdependent, with the requisite proof that needs to be shown on any one depending on the strength of proof on each of the others. *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 186, 19 P.3d 1081 (2001).

- a. Ms. Ryan has presented a strong defense to the abuse allegation.

A defendant demonstrates a prima facie defense where a defense would be valid if the defendant's factual assertions are taken as true. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834-835, 14 P.3d 837 (2000). A court must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant when deciding whether the movant has presented "substantial evidence" of a "prima facie" defense. *Id.* at 834, citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Here, Ms. Ryan has presented a strong prima facie defense to the abuse finding to the Department, denying calling her mother a profane name or taking any action that constituted abuse. AR 73. She describes instead a series of disagreements over a dog, ending in an argument in which both she and her mother used harsh language but she did not call her mother a profane name. AR 73. She maintains that her conduct did not constitute abuse.

Other evidence in the record supports that she committed no abuse. Ms. Ryan's mother states that she and her daughter "just had a family disagreement over her dog" that should not have been put on her daughter's record. AR 59. Ms. Ryan presented third party testimony that the two parties' lifelong relationship involved living together, and each year having a verbal argument that resulted in Ms. Ryan moving out for several weeks, then moving back in again after the argument blew over. CP 19.

Such context demonstrates Ms. Ryan's words did not constitute abuse as defined by RCW 74.34. "Abuse" is defined as willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. RCW 74.34.020(2). Indeed, Ms. Ryan was the one who moved out, as she did after each annual argument between the two. CP

18. Nothing in APS' report indicates that Ms. Ryan's mother was intimidated or punished by Ms. Ryan's words, and APS itself rated the case as a "low" priority. AR 68-71.

When the moving party demonstrates a strong defense, the reason for the default is less important provided that the failure to appear was not willful and the application is timely made. *TMT Bear Creek Shopping Center v. Petco*, 140 Wn. App. 191, 201, 165 P.3d 1271 (2007). Ms. Ryan's defense is sufficiently strong in light of the scant factual findings made by the Department and lack of any evidence that Ms. Ryan's words caused her mother intimidation, punishment, unreasonable confinement or injury, as required by RCW 74.34.020(2), that the court should vacate the judgment without further inquiry.

- b. Inadvertence or excusable neglect should be found where Ms. Ryan did not receive actual notice.

Where a nonparty's failure to act deprives the party seeking to set aside the judgment of notice and opportunity to respond, excusable neglect or inadvertence occurs. *Topliff v. Chicago Ins. Co.* 130 Wn. App. 301, 307-308, 122 P.3d 922 (2005) *rev. denied*, 157 Wn.2d 1018 (2006). In *Topliff*, the appellate court upheld setting aside a default judgment where substitute service upon a

designated state agency did not constitute effective service because the agency failed to notify the defendant of the lawsuit. Similarly, excusable neglect was found where the defendant reasonably relied on her husband to defend litigation. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581-582, 599 P.2d 1289 (1979). Appellate courts have sometimes found no excusable neglect in a company's failure to respond to a complaint due to a breakdown of internal office procedure. *TMT*, 140 Wn. App. at 212-213. But even internal mistakes in a company or between client and attorney may be deemed excusable neglect. See, e.g., *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004) (excusable neglect in defendant's failure to appear due to a misunderstanding within company about where summons and complaint should have been sent).

Ms. Ryan's failure to timely appeal was inadvertent and excusable because she lacked knowledge of or actual notice of the order, presumably either because the letter was collected from the mailbox and not given to her by her mother or her nephew, or because it was misdelivered by the postal service. Her failure to respond was due to the actions of non-parties who were decidedly

not under her control or direction, and was not willful. Thus, excusable neglect or inadvertence should be found.

- c. Ms. Ryan acted with due diligence after receiving notice of the “mental abuse” finding.

Ms. Ryan first became aware of the “mental abuse” finding when her employer reported that it turned up on a background check on August 6, 2010. AR 60. She sought to discover the source of the finding, and spoke with APS on August 20, 2010. AR 70. APS sent her a copy of the notice on August 20, 2010. AR 71. Her appeal was received by Office of Administrative hearings on August 23, 2010. AR 86. Thus, Ms. Ryan acted promptly upon receiving notice.

- d. No substantial hardship will result to the Department by allowing Ms. Ryan a hearing.

Finally, there is no substantial hardship to APS as a result of providing Ms. Ryan with a hearing on the merits of the finding. While significant time has lapsed since the initial finding was made, the lapse is occasioned in substantial part by delays at the agency's own Board of Appeals. There is no indication from the record that the documents or witnesses are no longer available if a hearing on the merits was ordered. Based on the above factors, the BOA erred when it did not find that Ms. Ryan's failure to appeal

was excusable neglect under CR 60(b)(1), resulting in good cause for a late appeal.

4. Notice in Ms. Ryan's Case Was Analogous to Service by Publication or Mail, Resulting in a Low Threshold to Vacate a Default.

CR 60(b)(7) and RCW 4.28.200 authorize a low threshold for setting aside a default where, as here, substitute service rather than personal service is employed. The Department did not serve Ms. Ryan personally, but instead utilized notice by regular and certified mail to her last known address where it knew she no longer resided. This delivery of notice most closely resembles service by mail under CR 4(d)(4), which allows service by mail when service by publication is allowed, with the same jurisdictional effect. CR 60(b)(7) provides for relief from default where service is by publication pursuant to RCW 4.28.200. RCW 4.28.200 directs that a defendant served by publication, on "sufficient cause shown," "shall be allowed to defend the action" (emphasis added), either before or after judgment, within a year of entry of the judgment. Thus, where service is by publication rather than personal service, CR 60(b)(7) and RCW 4.28.200 give the court greater discretion to vacate a default judgment. *Caouette*, 71 Wn. App. at 75-76.

No reported case addresses whether the lowered threshold applies equally to service by mail under CR 4(d)(4). However, as CR 4(d)(4) service by mail has the same jurisdictional effect as service by publication, may only be used under the same circumstances, and presents similar risks of failure of actual notice, it follows that the lowered threshold under 60(b)(7) for vacating a judgment by default applies equally to service by mail. *Chai v. Kong*, 122 Wn. App. 247, 253, 93 P.3d 936 (2004).

Here, the Department did not personally serve Ms. Ryan, but instead mailed notice to the last known address, where it knew she no longer lived. AR 85. She did not receive actual notice within the time period to respond. Further, as described above, she has presented a prima facie defense to the allegation of "mental abuse," which facts together satisfy the "sufficient cause shown" for finding good cause. CP 12-20; 22-25; AR 59-60, 62, 72-75. Finally, she appealed the November 24, 2009, order on August 23, 2010, within the one-year timeline required by RCW 4.28.200. AR 86. Thus, she has presented "sufficient cause shown" and the default should be set aside as directed by CR 60(b)(7).

5. Equitable Considerations Strongly Favor Setting Aside the Default Order Entered Against Ms. Ryan.

A proceeding to set aside a default judgment is equitable in character. *Morin*, 160 Wn.2d at 754. “The trial court should exercise its authority ‘liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done,’” *Griggs*, 92 Wn.2d at 582, *citing White*, 73 Wn.2d at 348.

Equitable factors overwhelmingly favor allowing Ms. Ryan a hearing. She received no actual notice of the abuse finding until well after the appeal period had passed. Ms. Ryan’s testimony is uncontradicted that she never received a copy of the notice nor learned of the abuse investigation until shortly before she appealed. CP 16-18. AR 60, 62, 72. This testimony is consistent with her prompt response upon learning from her employer of the “mental abuse” finding, after which she immediately contacted the Department and requested a copy of the finding. AR 70-71. Three days after learning about the finding, and upon receiving a copy of the finding, Ms. Ryan immediately requested a hearing. AR 86.

In addition, Ms. Ryan’s evidence credibly explains why she did not receive the APS notice. The mailbox she used was her

mother's, the alleged victim. CP 13-16. APS sent the notice to her mother's mailbox soon after the two women had an argument that resulted in Ms. Ryan moving out of her mother's home and a cessation of contact between them. AR 69, 73. Her nephew, a witness against Ms. Ryan in the complaint, also likely retrieved mail from her mother's mailbox. AR 24; CP 24-25. Her mother did not know where Ms. Ryan was, so could not have forwarded mail to her. AR 69. Ms. Ryan also presented evidence that mail was frequently incorrectly delivered among the bank of mailboxes serving the 60 units at the trailer park. CP 12, 18; AR 72-75.

Justice would also be served by allowing a hearing due to the risk of an erroneous determination where APS staff did not interview Ms. Ryan prior to issuing its default order. AR 68-71. Ms. Ryan had moved out before APS first was contacted, and APS' investigation record reflects no conversation or written communication between APS staff and Ms. Ryan until nine months after the order issued. AR 69-71.

Finally, equity favors vacation of the default order because the consequences of this finding of "mental abuse" for Ms. Ryan are significant, and lifelong in duration. An "abuse" finding not only disqualifies Ms. Ryan from work as a home health aide, it

disqualifies her from work or volunteering in any setting where she would have unsupervised access to vulnerable adults, including the elderly or developmentally disabled, or children under the age of 16. See, Table of Disqualifications Created by Finding of “Abuse” under RCW 74.34. (Appendix A.) This acts to disqualify her from work or volunteering in all of the following settings: private home care, group homes, nursing homes, daycare centers, and Head Start centers. *Id.*

Unlike a financial default judgment, the harm caused by the Department’s “abuse” finding cannot be ameliorated or removed by bankruptcy or any other means. It is lifelong. There is no provision in the statutes or regulations governing a finding of “abuse” of a vulnerable adult to review or extinguish the finding after a period of time, nor any provision to demonstrate rehabilitation. See, RCW 74.34.063 et. seq., WAC 388-71-0010 et. seq., especially WAC 388-71-01275 and WAC 388-71-01280.

Alternatively, the lack of actual notice resulting from APS mailing notice to an address shared with a party then estranged from Ms. Ryan, and Ms. Ryan’s presentation of a strong defense based on APS’s inadequate factual findings for determining “mental abuse” should be found to allow relief under CR 60(b)(11), for

"[a]ny other reason justifying relief from the operation of the judgment." [T]hat portion of the rule supports vacation of a default order and judgment that is based upon incomplete, incorrect or conclusory factual information." *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993).

Because of the gravity of an "abuse" finding and the policy in favor of decisions on the merits, equity strongly favors finding good cause under WAC 388-02-0020 and setting aside the order entered against Ms. Ryan.

E. IF SUCCESSFUL, MS. RYAN IS ENTITLED TO ATTORNEY FEES PURSUANT TO RCW 4.84.350 AND RAP 18.1.

Pursuant to RAP 18.1, Ms. Ryan respectfully requests an award of attorney fees and costs in accordance with RCW 4.84.350. Under RCW 4.84.350(a), "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, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." A qualified party is a party that has obtained relief on a significant issue that achieves some benefit to the qualified party. RCW 4.84.350(a). Attorney fees shall be set by the court and not exceed \$25,000.00. RCW 4.84.350(b).

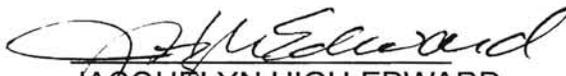
If granted, Ms. Ryan will submit a cost bill within ten days of the decision in compliance with RAP 18.1(d).

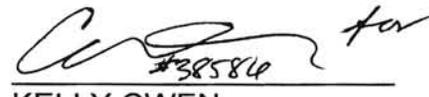
IV. CONCLUSION

Ms. Ryan respectfully asks this court to find the following: (1) that the Department did not comply with the notice provisions when it sent notice by certified and regular mail to an address where it knew she did not reside and was, instead, required to provide notice by delivery or personal service; (2) that the Department did not exercise reasonable, good faith in attempting to locate her but instead made inadequate attempts to find her; (3) that, as applied, the notice provision of WAC 388-71-01210 violates due process; (4) Ms. Ryan had good cause for requesting a late hearing and the BOA and ALJ erred by failing to either address her good cause argument and/or failed to find good cause for a late hearing; and (5) that she is entitled to attorney fees and costs.

Respectfully submitted this 23rd day of February, 2012.

NORTHWEST JUSTICE PROJECT:


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WSBA #16599
Counsel for Appellant

APPENDIX A

TABLE OF DISQUALIFICATIONS CREATED BY FINDING OF "ABUSE" UNDER RCW 74.34

A finding of "abuse" under RCW 74.34 disqualifies one from the following employment:

1. Long-term care worker, either as an individual provider or through a home care agency, WAC 388- 71-0540;
2. Caregiver, volunteer or resident manager in an adult family home, also may not reside in adult family home, WAC 388-76-10161(2);
3. Employment in boarding homes, WAC 388-78A-2465 *et seq.*, WAC 388-78A-2470;
4. Employment in nursing homes, WAC 388-97-1820;
5. Employment in private psychiatric and alcoholism hospitals, WAC 246-322-030(5)(d);
6. Employment in any child care agencies licensed by Department of Early Learning, WAC 170-06-0010, WAC 170-06-011;
7. Child care worker in any child care center, WAC 170-295 *et seq.*;
8. In-home child care provider through state-funded Working Connections Child Care, also may not reside with any person providing in-home care through that program, WAC 170-290-0143;
9. Worker in Head Start Programs, WAC 70-12-010.*et seq.*

A finding of "abuse" under RCW 74.34 is also reported in background checks required for:

Employment or volunteering with schools where the person will have unsupervised access to children under 16 years old or developmentally disabled persons, RCW 43.43.830(2)(a),(b);

Prospective adoptive parents, RCW 43.43.830(2)(c);

Prospective custodians in a nonparental custody proceeding, RCW 43.43.830(2)(d);

Prospective employment with any other state agency, business, or facility which provides care, services, or housing to vulnerable adults, developmentally disabled persons, or children under 16 years of age, RCW 43.43.830(3), RCW 43.43.834(2)(b).