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

Jonathan D. Durant,

Appellant,

v.

Department of Social and Health Services,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER STATEMENT OF THE CASE2

III. SUMMARY OF THE ARGUMENT5

IV. ARGUMENT5

 A. Standard of Review.....5

 B. Substantial Evidence Supports the Department’s
 Conclusion that A.F. Was Physically Abused When He
 Was Punished So Severely Bruises Remained After Five
 Days8

 C. The Court Should Disregard Mr. Durant’s Newly Raised
 Arguments and Reject His Attempt to Supplement the
 Record.15

V. CONCLUSION18

TABLE OF AUTHORITIES

Cases

<i>ARCO Products Co. v. Wash. Utilities & Transp. Comm'n</i> 125 Wn.2d 805, 888 P.2d 728 (1995).....	15
<i>Aviation West Corp. v. Wash. State Dep't of Labor and Indus.</i> 138 Wn.2d 413, 980 P.2d 701 (1999).....	17
<i>Franklin County v. Sellers</i> 97 Wn.2d 317, 646 P.2d 113 (1982)	9
<i>Goldsmith v. Department of Social and Health Services</i> 169 Wn. App. 573, 280 P.3d 1173 (2012).....	9
<i>Heinmiller v. Dept. of Health</i> 127 Wn.2d 595, 903 P.2d 433 (1995).....	6, 14
<i>Herman v. State of Wash. Shorelines Hr'gs Bd.</i> 149 Wn. App. 444, 204 P.3d 928 (2009).....	17
<i>In re Electric Lightwave, Inc.</i> 123 Wn.2d 530, 869 P.2d 1045 (1994).....	9, 10
<i>In re Mahaney</i> 146 Wn.2d 878, 51 P.3d 776 (2002).....	10
<i>Jensen v. Dep't of Ecology</i> 102 Wn.2d 109, 685 P.2d 1068 (1984).....	15
<i>Kraft v. Department of Social and Health Services</i> 145 Wn. App. 708, 187 P.2d 708 (2008).....	5
<i>Matter of Montell</i> 54 Wn. App. 711, 775 P.2d 976 (1989).....	16
<i>Neah Bay Chamber of Commerce v. Dep't of Fisheries</i> 119 Wn.2d 464, 832 P.2d 1310 (1992).....	17

<i>Pierce Cty. Sheriff v. Civil Service Comm'n of Pierce Cty.</i> 98 Wn.2d 690, 658 P.2d 648 (1983).....	14
<i>Safeco Ins. Co. v. Meyering</i> 102 Wn.2d 385, 687 P.2d 195 (1984).....	13
<i>Scheeler v. Dep't of Emp't Sec.</i> 122 Wn. App. 484, 93 P.3d 965 (2004).....	8
<i>State v. Schlichtmann</i> 114 Wn. App. 162, 58 P.3d 901, 905 (2002).....	11, 12
<i>State v. Scott</i> 110 Wn.2d 682, 757 P.2d 492 (1988).....	16
<i>State v. Singleton</i> 41 Wn. App. 721, 705 P.2d 835 (1985).....	12
<i>Tapper v. Emp't. Sec. Dep't</i> 122 Wn.2d 397, 858 P.2d 494 (1993).....	8
<i>Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health</i> 164 Wn.2d 95, 187 P.3d 243 (2008).....	13
<i>Wash. Indep. Tel. Ass'n v. Wash. Utilities & Transp. Comm'n</i> 148 Wn.2d 887, 64 P.3d 606 (2003).....	14

Statutes

RCW 26.44.020	10
RCW 26.44.020(1).....	10
RCW 26.44.125	6
RCW 34.05	1
RCW 34.05.464(2).....	6
RCW 34.05.464(7).....	6

RCW 34.05.510, 570	5
RCW 34.05.526	16
RCW 34.05.558	16
RCW 34.05.562	16
RCW 34.05.562(1).....	17
RCW 34.05.570(1)(a)	5
RCW 34.05.570(1)(a)(d).....	6
RCW 34.05.570(2)(c)	17
RCW 34.05.570(3).....	7, 8
RCW 34.05.570(3)(e)	5, 8, 9, 10
RCW 9A.16.100.....	5, 10, 11

Other Authorities

WAC 388-02-0530.....	6
WAC 388-02-0575.....	6
WAC 388-15-009.....	5
WAC 388-15-009(1)(a-f).....	11
WAC 388-15-009(2).....	11
WAC 388-15-135.....	6

Rules

RAP 10.3(h)	10
RAP 2.5(a)	16

I. INTRODUCTION

This appeal involves a child, A.F., who was 8 years old at the time he was physically abused by his mother's boyfriend, Jonathan Durant. Mr. Durant punished A.F. for lying and stealing gum by hitting him twelve to thirteen times with a "generational board," also described as a cutting board. This spanking lead to bruising on A.F.'s buttocks so severe it was seen five days later. A.F's. biological father reported the abuse to Child Protective Services (CPS), law enforcement, and took A.F. to the emergency room the day after the punishment occurred. CPS investigated and determined Mr. Durant physically abused A.F. Mr. Durant has appealed this finding.

The appeal by Jonathan Durant arises under the Administrative Procedures Act (APA), RCW 34.05. The Department of Social and Health Services (Department) prevailed before the Department Board of Appeals (Board) and Spokane County Superior Court and is now the answering party in this appeal.

Mr. Durant challenges the validity of the Department's action in issuing a founded finding of physical abuse of A.F. The Department requests this Court affirm the Board's review decision and final order, and the superior court order that affirmed the founded finding of abuse.

II. COUNTER STATEMENT OF THE CASE

Jonathan Durant was engaged to Ms. Nicole Alexander (now Durant) at the time the abusive incidents occurred. CP 106, 288. Ms. Durant is the mother of A.F., the child involved in this case. CP at 106. A.F. was eight years old at the time of the incident. CP 106, 176. Mr. Andrew Foskett is A.F.'s father. CP 176.

On May 15, 2015, Mr. Foskett took A.F. to the emergency room after he observed "severe bruising from his upper hip down to his lower thigh." CP 177. Deputy Scott Kenoyer observed, and noted in a report, that A.F. had a large grey bruise covering his right buttocks, with some grey also covering his left buttocks. CP 107, 168. A.F. reported to Deputy Kenoyer that Mr. Durant spanked him ten times with a cutting board. CP 171. Although Deputy Kenoyer noted that A.F. did not appear to be in discomfort at the time, A.F. did report that "he was very sore last night; sore enough that when he rolled over on it he woke up." CP 168. Photographs were taken of the bruising. CP 168. No charges were referred because of this investigation. CP 171.

Child Protective Services received the referral from the father on May 7, 2015. CP 220-221. Jennifer Erickson, Child Protective Services social worker, investigated the allegations. CP 218-219. CP 107, 168. On May 12, 2015 Ms. Erickson interviewed A.F. CP 246. A.F. stated Mr. Durant spanked him with a paddle. CP 249. A.F. described the paddle by drawing it. CP 249-250. A.F. drew what looked like cutting board with a handle and a crack in it. CP 250. A.F. reported that Mr. Durant spanked him for stealing and lying

at school. CP 250. A.F. reported to Ms. Erickson that Mr. Durant spanked him 32 times; however, he had reported to law enforcement being spanked 10-12 times the day following the incident. CP 171, 250. The Administrative Law Judge found the statements made contemporaneous with the incident to be more credible. CP 110-111.

Ms. Erickson interviewed A.F.'s mother on May 11, 2015. CP 239. Ms. Durant reported that A.F. had been in trouble at school. CP 240. She waited until Mr. Durant got home from work to discuss punishment. CP 240. Ms. Durant observed the spankings. CP 242. A.F. received five spankings for stealing and five for lying. CP 240. However, A.F. continued to lie and received additional spankings, for a total of twelve to thirteen spankings. CP 244. Ms. Durant described the paddle as about half the size of a standard telephone book. CP 244.

Ms. Erickson also talked with Mr. Durant. Mr. Durant admitted to spanking A.F. with a cutting board. CP 244. Mr. Durant admitted to spanking A.F. ten times with a cutting board and adding additional spankings about a half hour later. CP 244. Based upon her investigation, Ms. Erickson recommended a founded finding of physical abuse against Mr. Durant. CP 112.

At the administrative hearing regarding this founded finding, Ms. Durant testified, according to A.F.'s school, gum had gone frequently missing from his teacher's desk. CP 292. Ms. Durant testified she was concerned A.F.'s negative behaviors had increased over the last month or

two. CP 295. Ms. Durant also stated that she and Mr. Durant were not angry at the time of the spanking and talked with A.F. about why he was receiving a spanking. CP 296. A.F. went to his father's house the next day. CP 301. Ms. Durant did not see A.F. again until two days later. CP 302. Ms. Durant took photos of A.F. buttocks upon his return home. The photo taken five days later still showed bruising. CP 303-304, 110.

On July 29, 2015, the Department mailed a letter notifying Mr. Durant of its decision to issue a founded finding of physical abuse as to him. CP 51-56. On August 25, 2015, Mr. Durant requested an internal review of the finding, and on September 29, 2015, the Department sent a letter upholding the finding of physical abuse. CP 60, 62. Mr. Durant then requested an administrative hearing, which was held on August 31, 2016. CP 142-337. On October 5, 2016, the Office of Administrative Hearings issued an initial decision upholding the Department's finding. CP 64-81. Mr. Durant requested review to the Board of Appeals, and by a decision issued on December 2, 2016, the Board upheld the Department's founded finding of physical abuse. CP 105-124. Mr. Durant then filed a Petition for Judicial Review. By letter decision (issued June 15, 2017) and an order issued August 30, 2017, Superior Court Judge Tompkins upheld the Department's founded finding of physical abuse. CP 345-348.

III. SUMMARY OF THE ARGUMENT

Mr. Durant contends that “the decisions of the lower courts should be overruled, and the founded finding of negligent child abuse against Mr. Durant should be vacated.” App. Br. at 12. Although Mr. Durant alleges that these prior decisions incorrectly applied WAC 388-15-009 and RCW 9A.16.100, App. Br. at 3, it is unclear under which standard provided by the Administrative Procedures Act (APA) he believes error was made. Mr. Durant appears to argue the founded finding at issue here is not supported by substantial evidence. See RCW 34.05.570(3)(e). However, the record shows that the Board of Appeals’ findings and conclusions are well supported and correct. Further, the agency did not erroneously apply or interpret the law or act in an arbitrary or capricious manner. This Court should therefore affirm its Review Decision and Final Order.

IV. ARGUMENT

A. Standard of Review

The Administrative Procedures Act (APA) standard of review governs this appeal. RCW 34.05.510, 570; *Kraft v. Department of Social and Health Services*, 145 Wn. App. 708, 187 P.2d 708 (2008). The burden is on Mr. Durant to show that the final agency action is invalid. See RCW 34.05.570(1)(a). This Court directly reviews the final agency decision, giving deference to agency findings of fact, affirming the findings where

there is substantial evidence, and applying de novo review to questions of law. *E.g. Heinmiller v. Dept. of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995).

The final agency decision properly before this Court is the Board of Appeals' Review Decision and Final Order dated December 2, 2016. *See Heinmiller*, 127 Wn.2d at 601 (where there are changes in an administrative law judge's (ALJ's) findings and conclusions, "the review judge's findings and conclusions are relevant on appeal."); *see also* RCW 34.05.464(2) and (7) (authorizing "final orders" by reviewing officers). Founded findings of child abuse and neglect are subject to review pursuant to RCW 26.44.125. If an ALJ determines that a preponderance of the evidence supports the founded finding, he or she is required to issue an initial order upholding it. WAC 388-15-129. Such initial orders are subject to review by the Department's Board of Appeals, which issues the agency's final decision. WAC 388-15-135; WAC 388-02-0530; WAC 388-02-0575.

Relief under the APA may be granted "only if [the court] determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(a)(d). The Court may grant relief from an agency's final decision issued in an adjudicative proceeding only if it determines that:

- a) The order, or the statute or rule the order is based on, is in

violation of constitutional provisions on its face or as applied;

- b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- c) The agency has engaged in an unlawful procedure or decision-making process or has failed to follow a prescribed procedure;
- d) The agency has interpreted or applied the law erroneously;
- 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 Chapter 34.05 RCW;
- f) The agency has not decided all issues requiring resolution by the agency;
- g) A motion for disqualification under RCW 34.05.425 or RCW 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency, or
- i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Washington courts have interpreted the requirements for judicial review of adjudicative agency proceedings to mean that a reviewing court may reverse an agency decision when “(1) the administrative decision is

based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious.” *Scheeler v. Dep’t of Emp’t Sec.*, 122 Wn. App. 484, 488, 93 P.3d 965 (2004) (citing *Tapper v. Emp’t. Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (citing RCW 34.05.570(3))).

Here, it is unclear under which standard Mr. Durant is challenging the agency decision, but it appears he may be challenging it under RCW 34.05.570(3)(e)—by claiming that the decision is not supported by substantial evidence. App. Br. at 9. However, the record shows, the Department’s decision is legally correct, is based upon substantial evidence, and is neither arbitrary nor capricious. This Court should therefore affirm the Review Decision and Final Order.

B. Substantial Evidence Supports the Department’s Conclusion that A.F. Was Physically Abused When He Was Punished So Severely Bruises Remained After Five Days

The unchallenged findings of fact show Mr. Durant hit A.F. ten to thirteen times with a paddle described as a cutting board. CP 107-108, 111-112. A physician who observed the child the next day noted “multiple contusions.” CP 106. Bruising was observed on A.F. five days later. CP 110. A.F. stated he was “very sore the night of the spanking, sore enough when he rolled over on it he woke up.” CP 107. At the time of this incident, A.F. was four foot six inches tall, weighed 80 pounds, and was described as having a slight build. CP 106. Using a cutting board to hit a child with

enough force to cause “sub-dermal sheering of the blood vessels,” which leave visible bruises five days after the incident, cannot be described as either reasonable or moderate discipline. CP 120. Sufficient evidence supports the founded finding of physical abuse perpetrated by Mr. Durant.

Review of findings of fact is confined to whether they are supported by substantial evidence. RCW 34.05.570(3)(e). “[Appellate courts] will sustain findings of fact if substantial evidence supports them, i.e. evidence sufficient to persuade a fair-minded person the finding is true.” *Goldsmith v. Department of Social and Health Services*, 169 Wn. App. 573, 280 P.3d 1173 (2012). The statute does direct the court, however, to make its assessment of substantiality based on the “whole record” - i.e., to ask the question simply of whether there are sufficient facts in the record from which a reasonable person could make the same finding as the agency. RCW 34.05.570(3)(e). The court may not "engage in re-weighting evidence of credibility and demeanor." *Franklin County v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982). “[Appellate courts] do not weigh witness credibility or substitute [their] judgment for the agency’s findings of fact.” *Goldsmith*, 169 Wn. App. at 584. .

Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994). The question

is whether there are sufficient facts in the record from which a reasonable person could make the same finding as the agency. *Id.* Under the “substantial evidence” standard, an agency finding of fact will be upheld if supported by “evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e).

Mr. Durant, on appeal, assigns no error to any Findings of Fact. App. Br at 1. These unchallenged findings are therefore verities on appeal. *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002). Mr. Durant also fails to identify any challenged findings of fact, in violation of RAP 10.3(h). The unchallenged findings of fact clearly support the agency’s founded finding of physical abuse. Therefore, this Court should affirm the Board of Appeals’ Review Decision and Final Order.

RCW 26.44.020(1) defines abuse or neglect as “sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.” RCW 26.44.020. RCW 9A.16.100 provides that “the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child.”

Certain actions are presumed unreasonable when used to discipline a child, including: throwing, kicking, burning or cutting a child; striking a child with a closed fist; shaking a child under age three; interfering with a child breathing; threatening a child with a deadly weapon; or *doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks*. RCW 9A.16.100 (*emphasis added*).

Washington Administrative Code 388-15-009 further defines physical abuse as ‘the nonaccidental infliction of physical injury or physical mistreatment on a child.’ That section’s definition of abuse includes the acts described in RCW 9A.16.100 as presumed unreasonable. WAC 388-15-009(1)(a-f). That section also states that, “[a] parent’s belief that it is necessary to punish a child does not justify or permit the use of excessive, immoderate or unreasonable force against the child.” WAC 388-15-009(2).

The Washington Court of Appeals has indicated that “[w]here...the punishment was inflicted with a belt with force great enough to cause bruising, it went beyond the bounds of reasonableness and moderation.” *State v. Schlichtmann*, 114 Wn. App. 162, 168, 58 P.3d 901, 905 (2002). In *Schlichtmann*, David Schlichtmann was convicted of one count of second degree assault and one count of third degree assault based on an “overzealous spanking of his girlfriend’s two sons who were seven and six years old at the

time of trial” *Schlichtmann* at 164. Mr. Schlichtmann spanked the boys with a belt up to four swats. *Id.*

In that case, the court upheld that the appellant’s convictions of second and third degree assault of a child and found that the court did not violate his right to discipline his girlfriend’s minor children. The court determined that striking a child with a belt hard enough to leave a bruise was not reasonable corporal punishment and constituted physical abuse. This court held that “the focus must be on the children’s welfare, not the parent’s liberty to inflict punishment. Where, as here, the punishment was inflicted with a belt with force great enough to cause bruising, it went beyond the bounds or reasonableness and moderation.” *Id.* at 166.

In *State v. Singleton*, 41 Wn. App. 721, 705 P.2d 835 (1985) Mr. Singleton was convicted of simple assault when he spanked his girlfriend’s children with a heavy leather glove and allegedly with a piece of kindling. The appellate court noted that “[t]he focus is on the welfare of the child and not on the parent’s liberty of action.” *Id.* at 723. The court also noted, “[t]he prevalent approach in modern case law is to determine, ‘whether, in light of all the circumstances, the parental conduct itself viewed objectively, would be considered excessive, immoderate, or unreasonable’.” *Id.* at 723.

Here, Mr. Durant’s conduct was clearly excessive and unreasonable. Using a blunt object, he hit 8 year-old A.F. hard enough to leave bruises

that lasted for five days. The founded finding of physical abuse should be upheld.

Further, the agency did not erroneously apply or interpret the law. Conclusions of law are reviewed under the error of law standard. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). This standard calls for “de novo” judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded the agency's view. *Id.* A reviewing court accords substantial deference to an agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise. *Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103.

The Board of Appeals decision contains a very detailed and extensive analysis of the law as it applies in this case, summarized above. CP 117-123. The BOA noted that it has never adopted a general legal conclusion, “bruise, you abuse.” CP 123. “However, striking a child with enough force and with enough repetitions to cause noticeable contusions over a large part of his buttocks and observable days later, has never been held to be ‘minor temporary marks.’”. CP 123. Finding that bruises by their

nature are temporary, as argued by appellant, “ignores the adjective ‘minor’” and “would lead to the untenable situation that abuse could only be found when there has been laceration of the skin so severe as to cause permanent scarring.” CP 123. Clearly, the agency appropriately interpreted the law as it applied to the very specific facts of this case and came to the correct conclusion, Mr. Durant physically abuse A.F.

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

125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quoting *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984)).

Clearly, there was not a willful or unreasonable disregard of the facts or circumstances of this case. The Board of Appeals even noted,

There are those who believe the striking of a child, in any manner, is criminal assault and should not be accepted under any circumstances. There are also those who feel just as strongly that a parent has a fundamental right to physically discipline a child as that parent sees fit without any interference, or the fear of interference, from the government. The Legislature, in adopting the cited statutes, has rejected both extreme positions. The undersigned acknowledges that Mr. Durant has the right to discipline his fiance's child through the use of reasonable and moderate force.

CP 122-123.

The Review Judge methodically applied the facts to the law and concluded Mr. Durant's actions were neither reasonable or moderate. The actions of the agency were not arbitrary or capricious.

C. The Court Should Disregard Mr. Durant's Newly Raised Arguments and Reject His Attempt to Supplement the Record.

Mr. Durant asserts claims that he failed to raise before the administrative tribunal and the superior court. Namely, Mr. Durant argues bruising that "moderate to severe takes four to six weeks to heal and minor contusions take considerably less time." App. Br. at 11. In support of this argument, Mr. Durant attempts to submit evidence that was not before the

agency at the time it issued its decision, nor was it ever submitted to the superior court. App. Br. at Attachment A.

Appellate review of any final judgment of the superior court under the APA shall be secured in the same manner as other civil cases. RCW 34.05.526. Under RAP 2.5(a), “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a) lists several bases for an appellant to raise claimed errors for the first time in the appellate court, none of which apply or were argued by Mr. Durant in this case. The Court should decline to consider these arguments because Mr. Durant did not properly raise them as required by RAP 2.5(a).

RAP 2.5(a) “reflects a policy of encouraging the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court agreed that failing to raise claimed errors at the lower court is grounds to not review these claims on appeal stating that, “The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Id.*

Judicial review of administrative decisions is on the record of the administrative tribunal itself. *Matter of Montell*, 54 Wn. App. 711, 775 P.2d 976 (1989). A court considering a petition for judicial review may not generally admit new evidence. RCW 34.05.558; RCW 34.05.562. To the

extent that Mr. Durant seeks to supplement the agency record here, this Court should deny his request. RCW 34.05.562(1) sets the parameters for consideration of additional evidence. *Herman v. State of Wash. Shorelines Hr'gs Bd.*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009). Supplementation of the record is allowed only for evidence of an agency's reasoning and background material that it relied upon and only if it explains the agency's decision at the time it was made. *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 474-75, 832 P.2d 1310 (1992) (superseded by adoption of "arbitrary and capricious" standard of RCW 34.05.570(2)(c)); *Aviation West Corp. v. Wash. State Dep't of Labor and Indus.*, 138 Wn.2d 413, 419-23, 980 P.2d 701 (1999).

Here, Mr. Durant proffers no legal argument or reason for why this Court should consider the document he included as Attachment A to his Opening Brief as evidence supporting his newly raised arguments. This document was not before the Department when it issued Mr. Durant's founded finding. Mr. Durant failed to present it to the ALJ as evidence during the administrative hearing on August 31, 2016. Instead, he attempts to introduce it over a year after the Department issued its final decision. No one has authenticated this document. No one has introduced it through any expert or lay witness with knowledge of its contents. There has been no opportunity for cross-examination regarding its contents. Mr. Durant has

failed to show that it is a reliable source of information, that it was before the agency at the time of its decision, and has provided no legal basis for its admission. This Court should therefore decline to consider it.

V. CONCLUSION

For the foregoing reasons, the Department requests this Court affirm the Board's review decision and final order, which affirmed the founded finding of physical abuse of a child against Mr. Durant.

Respectfully Submitted this 20 day of March, 2018.

ROBERT W. FERGUSON
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A handwritten signature in cursive script, reading "Lisa Lydon", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Social and Health Services' Brief of Respondent to the following addresses:

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- Legal Messenger
- Hand delivered
- E-mail:

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

DATED this 20 day of March, 2018, at Spokane, Washington.



Kahren S. McCrow
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SPOKANE DIVISION - SHS / AGO

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