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No. 37507-2

**COURT OF APPEALS, DIVISION NO. III
OF THE STATE OF WASHINGTON**

TOMAS RIOS-GARCIA,
Appellant

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH
SERVICES,
Appellee.

APPELLANT'S BRIEF

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A. INTRODUCTION

COMES NOW Appellant Tomas Rios-Garcia and seeks Judicial Review of an Agency Action.

This matter presents an interesting question: When a person requests internal agency review by following directions and mailing the request form to CPS, is he deprived of agency and judicial review because the Department did not receive his mailing?

When Child Protective Services (CPS) makes a “founded” finding of child abuse or neglect, CPS must provide a person an opportunity to challenge the finding via administrative process. To inform a person of this important right, CPS sends a Notice Letter stating that they may request review by filling out a Review Request form that “must be received by Children’s Administration” within thirty days.

But the RCW that provides for this procedure simply states that the person “may request... review... made in writing.” The WAC promulgated thereunder states that the request must “be provided to the same CPS office that sent the CPS finding notice.”

This matter thus presents the question of which language controls, and what attendant duty this imposes upon a parent responding to a CPS finding. However, based on the facts of this case, the Court may not need to reach this issue where the unchallenged findings from the Administrative

Court state that Mr. Rios-Garcia timely mailed the Review Request form – the issue is that the Department never received the mailing.

B. ISSUES FOR REVIEW

On appeal, the Court of Appeals reviews “only the [Board of Appeals’] decision, not the ALJ’s decision or the superior Court’s ruling.” *Marcum v. DSHS*, 172 Wn.App. 546, 559, 290 P.3d 1045 (2012). Thus, the assignments of error and issues herein relate to the Board of Appeal’s final order (*CP* at 43-49), not the Superior Court’s order (*CP* at 18-21). *See also* RAP 10.3(h).

Assignments of Error:

- (1) The Board of Appeals’ finding that the Appellant “alleges” he faxed the request for internal review is not supported by substantial evidence¹.
- (2) The Board of Appeals erred in concluding that the Appellant “requested review of the Department’s founded finding” eighty-six days after receipt of the notice letter (Conclusion 9). This is a mixed error of fact and law because the Board of Appeals correctly found

¹ This assignment of error is expressly limited to finding 4, and therein, specifically regarding the use of “alleges” in reference to the sending of the fax. *See CP* at 25 (FN 14 – specifically challenging this finding and raising this issue). However, because mailing, rather than fax, has legal effect in regards to service of process, the issue of the fax is likely moot or unnecessary to pass upon.

that the Request for Internal review was “mailed” on May 4, 2018. The finding that Mr. Rios-Garcia “requested review” eighty-six days after notice is not supported by substantial evidence in the record and is in fact contradicted by undisputed findings.

- (3) The Board of Appeals erred in concluding that Mr. Rios-Garcia did not timely request review of the founded finding (Conclusion 9).
- (4) The Board of Appeals erred in concluding that the founded finding became final because the request for review was not received within the timeline specified in RCW 26.44.125 (Conclusion 9).
- (5) The Board of Appeals erred in concluding that the ALJ lacked jurisdiction because Mr. Rios-Garcia failed to timely request internal review (Decision/Order 2).
- (6) The Superior Court erred in dismissing Mr. Rios-Garcia’s Petition and failing to award fees (Order – *CP* at 21).

Issues Pertaining Thereto:

- (1) Whether a person’s duty in requesting a review hearing under RCW 26.44.125 is fulfilled by mailing said request to the Department; and whether it is of import that this constitutes “service” under RCW 34.05.010(19);
- (2) Whether the language of WAC 110-30-0230 and the Department’s Notice Letter is consistent with RCW 26.44.125;

- (3) Whether WAC 110-30-0230 and the Department's Notice Letter exceed the Department's rulemaking authority by imposing requirements not found in RCW 26.44.125;
- (4) Whether Mr. Rios-Garcia timely requested review where the undisputed findings of the Administrative Law Proceeding state that he mailed his request within the time limits;
- (5) Whether the Department's received-by rule violates the Department's statutory authority under RCW 26.44.125 (*see* RCW 34.05.570(2)(c));
- (6) Whether the Board of Appeals erroneously interpreted or applied the law (RCW 34.05.570(3)(d));
- (7) Whether Mr. Rios-Garcia should have prevailed below and been awarded fees; and whether he should be awarded fees on appeal.

C. STATEMENT OF THE CASE

If a parent requests internal review of a finding of abuse by placing the Review Request in the mail, as directed in the Department's Notice Letter, is he deprived of a hearing because the Department did not receive the mailing? Mr. Rios-Garcia argues in this case that the answer is a resounding *no*, and that the unique facts of this case demand that he be allowed internal agency review of the CPS finding.

This case is not about overturning a finding of abuse. Rather, what Mr. Rios-Garcia fights for here is his chance to *challenge* this finding. The reason the merits of this case so strongly demand that he have his day in Court is that the Department knows, and has known since the summer of 2018, that the allegations the finding was based on were recanted and admitted as lies. The story of this case begins with a criminal charge in the Fall of 2017.

In August of 2017, based on a report from his minor stepdaughter, the State opened co-pending CPS and criminal investigations into Mr. Rios-Garcia; these investigations resulted in criminal charges and a “founded” finding of abuse or neglect. *CP* at 104 *et seq.* (CPS); 131 *et seq.*, (Criminal). In the criminal matter, Mr. Rios-Garcia was charged with five counts of Child Molestation in the Second Degree, RCW 9A.44.086; five counts of Incest in the Second Degree, RCW 9A.64.020(2)(a), and one count of Communicating with a Minor for Immoral Purposes, RCW 9.68A.090. *Id.* at 132 (referencing Okanogan County Superior Court Cause No. 17-1-00290-7).

On February 21, 2018, Prosecuting Attorney Branden Platter met with the alleged victim in preparation for trial; at that meeting, she indicated that she had lied about what occurred. *Id.* When pressed, she stated that “she

was mad at [Mr. Rios-Garcia] for taking her cell phone away and that nothing she said happened had actually happened.” *Id.*

This created obvious and grievous uncertainty in the State’s ability to prosecute; based thereon, the State moved to dismiss the criminal case. *CP* at 131-33. This Motion was granted, and the criminal matter was disposed of by dismissal without prejudice on February 26, 2018. *Id.* at 134.

Two months later, on April 23, 2018, to Mr. Rios-Garcia’s surprise, he received a letter from CPS stating that CPS/DSHS had “found that the alleged abuse or neglect **occurred.**” *Id.* at 104 (em. added). The letter included a Review Request Form, which included the direction to complete the form, sign it, and mail it to the CPS office in Wenatchee. *Id.* at 109.

Mr. Rios-Garcia signed the Review Request form on May 4, 2018. *Id.* at 110. The Review Request form was placed into the mail on May 4, 2018 as well. *Id.* at 96. This was done well within the thirty-day window to respond provided in the CPS letter. *Id.* at 109.

Through this case, one critical finding has remained unchanged. The Initial Order from the Administrative Hearing found: “The Appellant through his attorney mailed a request for internal review on May 4, 2018.” *Id.* at 58 (¶4.3). The Board of Appeals agreed. *Id.* at 45 (¶4). The Superior Court adopted this finding. *Id.* at 2 (¶1.1.4). Similarly, the Initial Order found that that “He also sent a fax to the Department the same day.” *Id.* at

58. For some unknown reason, the Board of Appeals inserted “alleges” into this finding on review (*Id.* at 45), an error² which Mr. Rios-Garcia has preserved through the Superior Court process to this Court.

Having heard nothing from the May 4 mailing, Mr. Rios-Garcia followed up with the Department in June of 2018³; on June 29, the Department sent a Consent Form to allow communication with Counsel on Mr. Rios-Garcia’s behalf. *Id.* at 81. Following receipt of this Form, along with supporting documentation, CPS issued another letter, stating that Mr. Rios-Garcia was ineligible for review due to untimely appeal. *Id.* at 114. Mr. Rios-Garcia challenged this determination, which hearings have resulted in this appeal.

The central question in this case revolves around language from three sources: RCW 26.44.125; WAC 110-30-0230 and the Review Request Form (*CP* at 110). These each state:

² As indicated, the fax issue may be moot. Nevertheless, the reason Counsel was unable to provide a fax transmission journal is explained in *great detail* in the Initial Hearing pleadings. *See CP* at 68-69 (and referenced exhibits therein). In short, the machine that sent the fax was old and failing; by the time that the issue of whether a fax had been sent arose, the machine had been discarded. *Id.*

³ The precise date communication was opened does not seem to be in the record. However, what is important is, as discussed in further detail herein, that the communication was opened within the 60-day timeframe for the Department to respond.

RCW 26.44.125⁴:

(2) Within thirty calendar days after the department has notified the alleged perpetrator under RCW 26.44.100 that the person is named as an alleged perpetrator in a founded report of child abuse or neglect, he or she may request that the department review the finding. The request must be made in writing. [...]

(3) If a request for review is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding, unless he or she can show that the department did not comply with the notice requirements of RCW 26.44.100.

WAC 110-30-0230:

(1) In order to challenge a founded CPS finding, the alleged perpetrator must make a written request for CPS to review the founded CPS finding of child abuse or neglect. The CPS finding notice must provide the information regarding all steps necessary to request a review.

(2) The request must be provided to the same CPS office that sent the CPS finding notice within thirty calendar days from the date the alleged perpetrator receives the CPS finding notice (RCW 26.44.125).

Review Request Form:

The form must be received by Children’s Administration office within 30 calendar days. If it is not received within 30 calendar days, you will have no further right to challenge the CPS findings.

⁴ The wording of RCW 26.44.125(3) (“as provided in this subsection” (em. added)) does no favors to the analysis. We construe and argue that “this subsection” means “subsection (2)” because that is the only subsection containing requirements related to requesting review. It is also possible that the language means “this section” (i.e. 26.44.125(1)-(7), excepting, likely, (5)).

When this matter began before the Administrative Law Court, the Department moved to dismiss for lack of jurisdiction, claiming that Mr. Rios-Garcia had not timely made his request for review. The Administrative Law Court concluded that the Department Rule indicated that the request must be received by the Department within the 30-day window to respond. *CP* at 58. However, in the landscape of the Administrative Proceeding, the ALJ must apply the Department's rules as the primary source of law and may not refer to the RCWs or other law unless there is no rule in place. *Id.* (at Conclusion 5.2). The ALJ was powerless to consider the underlying legal issue presented here. But the ALJ did make three important conclusions:

There was much discussion whether the statutes provide something different from the WAC. After reading the various statutes, it is possible that the Administrative Procedures Act in RCW 34.05 intends a different requirement. In addition, a reading of RCW 26.44.125 does not seem to require actual receipt.

However, the WAC appears clearly to require receipt. The Appellant has no documentation that the Department received it.

If the Department exceeded their authority under the RCW by requiring actual receipt in the WAC is for the Courts to decide.

Id. at 85-59 (Conclusions 5.6-5.8). Despite this, the Superior Court concluded that "WAC 110-30-0230 does not conflict with RCW 26.44.125

because the rule clarifies the statute and does not amend or change it.” *Id.* at 20 (¶2.3).

The procedure for requesting review is on the Review Request Form (*CP* at 110). It directs: “Sign this form **and mail it to:**” the CAPTA Appeal office in Wenatchee. *Id.* (em. added). Unlike the Department, which must ensure receipt of its CAPTA letters by sending them “certified mail, return receipt requested” (RCW 26.44.100(3)), there is no such burden placed on the person requesting review of this decision by the RCW, the WAC, the Department’s Letter; or the Request for Review Form. *CP* at 104-110.

Mr. Rios-Garcia followed directions and mailed the request form to the Department. Once deposited into the mail, he no longer has control over whether the Department receives the mailing. But here, the Department has injected that very *sub rosa* requirement into RCW 26.44.125. The Department may lawfully *effectuate* a statute by rulemaking, but the Department may not use the rulemaking process to *add to* the statute.

D. SUMMARY OF ARGUMENT

By placing the form in the United States mail, properly addressed, postage prepaid, Mr. Rios-Garcia served his request on the Department within the meaning of the Administrative Procedures Act. The Administrative Law Judge found that Mr. Rios-Garcia mailed his request on May 4, 2018, and this finding has been undisputed through the entirety

of this process. Where the request was not only “made,” but the Department was **served**, Mr. Rios-Garcia is entitled to internal agency review.

The Department exceeded its authority by imposing a requirement on a person requesting review under RCW 26.44.125 to ensure actual receipt of their request. This is particularly true where the Department’s instructions direct to return the Request by mail, exactly as Mr. Rios-Garcia did. Had the legislature intended to impose the requirement to ensure receipt, the legislature would have so directed, as it did the *Department* in RCW 26.44.100(3). Additionally, were “receipt” the requirement of the statute, the legislature would have so stated, as it did in several other statutes.

Mr. Rios-Garcia sought and seeks fees against the Department under RCW 4.84.350. Because he was not the “prevailing party” below, fees were not awarded. The central question here is whether the Department’s action was “substantially justified” with a “reasonable basis in law and fact.” In this case, not only is there an express legislative purpose in RCW 26.44.010 to “safeguard against arbitrary, malicious, or erroneous information or actions,” the legislature saw fit to insert *another* finding in RCW 26.44.100 to safeguard due process rights and protect the family unit from unnecessary disruption. The Department has information indicating that the “founded” allegation of abuse was a complete fabrication – specifically a *malicious*

fabrication. The Department's action in refusing Mr. Rios-Garcia a hearing was not substantially justified; to the contrary, the Department's action and lack of follow-up affronts and frustrates the purpose of Chapter 26.44.

E. ARGUMENT & AUTHORITY

Despite confronting a different central issue, Division I recently created a very thorough overview of the procedure in Child Abuse and Neglect Investigations. *Garcia v. DSHS*, 10 Wn.App.2d 885, 893 *et seq*, 451 P.3d 1107 (October, 2019).

Since 1997, when Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. §5106a (CAPTA), any person named as an alleged perpetrator of abuse or neglect has the right to request agency review within 30 days of notification of a founded finding. *Id.* at 894. If the person fails to request review, this terminates the right to both agency *and* judicial review of the finding. *Id.*

One of the purposes of CAPTA was to incentivize and require states to allow individuals to appeal a finding of child abuse or neglect. *Id.* at 894; *see also* 42 U.S.C. §5106a(b)(2)(B)(xv)(II). Federal funding for child welfare systems was also conditioned, *inter alia*, on “improving the evidentiary and investigatory standards applicable to child abuse and neglect findings.” *Garcia*, 10 Wn.App.2d at 894.

Our Legislature saw fit to include several express findings and declarations of purpose in Chapter 26.44, beginning with the “Declaration of Purpose” found in RCW 26.44.010. These determinations embody the philosophy that the safety of a child in danger is of the utmost interest to the State⁵. But the Legislature was also concerned about protecting the rights of parents and unnecessarily disrupting the family unit:

Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports **and so as to safeguard against arbitrary, malicious or erroneous information or actions.**

RCW 26.44.010 (in part; em. added).

The legislature finds parents and children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that **all citizens, including parents, shall be afforded due process**, that protection of children remains the priority of the legislature, and that this protection **includes protecting the family unit from unnecessary disruption.**

RCW 26.44.100(1) (in part; em. added).

If the department, upon investigation of a report that a child has been abused or neglected as defined in this chapter, determines that the child has been subject to negligent treatment or maltreatment, the department **may** offer

⁵ “When the child’s physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department’s paramount concern.” RCW 26.44.010 (in part).

services to the child's parents, guardians, or legal custodians to: (a) **Ameliorate the conditions that endangered the welfare of the child**; or (b) **address or treat the effects of mistreatment or neglect upon the child**.

RCW 26.44.195(1) (em. added).

A person named as a perpetrator in a founded report of child abuse or neglect has a right to seek review and amendment of that finding. RCW 26.44.125. To do so, “[w]ithin thirty calendar days after the department has notified the alleged perpetrator under RCW 26.44.100 that the person is named as an alleged perpetrator in a founded report of child abuse or neglect, he or she may request that the department review the finding. The request must be made in writing.” RCW 26.44.125(2).

In this case, Mr. Rios-Garcia did exactly that. He timely signed the Review Request Form provided by the Department and placed the same in the U.S. Mail, well within the thirty-day time limit. Moreover, this is exactly what the directions on the Review Request Form directed him to do.

Because the Department did not receive his mailing, the Department concluded that Mr. Rios-Garcia had lost the right to agency review as provided in RCW 26.44.125(3)⁶. However, this subsection states: “If a request for review is not **made as provided in this subsection**, the alleged

⁶ Whether the Department complied with the notice procedures in RCW 26.44.100 is not at issue. However, those same notice procedures are very important in determining the duties of a parent vs. those of the Department.

perpetrator...” loses the rights to agency and judicial review of the finding. *Id.* (em. added). As noted above, “this subsection” likely means “this section” or “subsection (2)” – there is no provision for how to request review in subsection (3) (unlike subsection (5)). However, it is not believed that the parties dispute the meaning – that RCW 26.44.125 provides the process for requesting internal agency review.

The problem, and the source of the parties’ disagreement, is that RCW 26.44.125 says very little about how to request review. It states that a person may make the request and that it must be in writing – nothing more. The parties’ disagreement is whether this allows the Department to require not only that the request be “made,” but that it also be “received” – something entirely beyond Mr. Rios-Garcia’s control and, as argued herein, beyond the Department’s rulemaking authority.

1. Timely Serving the Department with the Review Request Form Complied with RCW 26.44.125 and WAC 110-30-0230

Where the Statute merely directs that the request for review be made in writing, going above and beyond to actually **serve** the Department with the request surely fulfils this mandate. Under the Administrative Procedures Act, “service” means “posting in the United States mail, properly addressed, postage prepaid, or electronic service. Service by mail is complete upon deposit in the United States mail.” RCW 34.05.010(19). When Mr. Rios-

Garcia's mailing was deposited at the Post Office, service was complete, and the Department is deemed to have received his mailing three days later.

Below, the Department argued that sending the Review Request Form should be considered along the lines of "filing" rather than "service." *See CP* at 1-2; *see also* RCW 34.05.010(6). In short, the Department argued that the Review Request needed to be "filed" – i.e. "deliver[ed]... to a place designated by the agency by rule." RCW 34.05.010(6).

This argument is self-defeating, however. The Department's argument first assumes that the WAC and Review Request form are consistent with its rulemaking authority under RCW 26.44.125. Even if this were so, the means and location of delivery "designated by the agency by rule" is as directed in the Request for Review Form – mail the form to the Department. Not only this, but there is a clear difference in the statute – a request for agency review must be "made in writing." RCW 26.44.125(2). It is a request for an *adjudicative proceeding* that must be "filed." RCW 26.44.125(5).

And indeed, at the time of the Initial Order from the Office of Administrative Hearings, the Judge found that "[Mr. Rios-Garcia] through his attorney mailed a request for internal review on May 4, 2018." *CP* at 58. The Board of Appeals also made this same determination. *Id.* at 45.

This finding has persisted and become a verity. The parties do not dispute this finding – the request was mailed to the Department on May 4, 2018. This finding is controlling. If the request was timely made, and the record shows evidence of the writing (it does - *CP* at 96-97), the mandate of RCW 26.44.125 is fulfilled. If the Court agrees, the other issues need not be reached and this matter would be remanded to the Department for internal review.

This Court, like all of the courts below, should adopt the undisputed finding that Mr. Rios-Garcia mailed his request for review to the Department on May 4, 2018. The only conclusion that follows is that he is entitled to a hearing.

2. The Department’s Rules and Form Conflict with RCW 26.44.125; the Statute Controls.

a. Framing the Issue; Standard of Review

The second issue before the Court boils down to whether “to make” a request means the same thing as “to provide” a request and/or that the request “be received.” There is some element of pragmatism that must come into play, however. It seems clear that for the Department to perform agency review, it must be aware that a request has been made. The Parties agree that this issue is subject to *de novo* review. *See CP* at 5 (Department’s

argument RE *de novo review*); *Marcum v. DSHS*, 172 Wn.App. 546, 559-60, 290 P.3d 1045 (2012).

When reviewing a Superior Court’s final order on review of an administrative board’s decision, the Court of Appeals applies the APA directly to the record before the agency, sitting in the same position as the superior court. *Id.* at 559. The agency’s factual findings are reviewed under the substantial evidence standard. *Id.* at 560.

An agency’s interpretation of the law within its expertise (such as regulations administered by the agency) receives “substantial weight.” *Id.* But here, the Department is entitled to no such deference. The central issue here is whether Mr. Rios-Garcia “made” a written request for review within thirty days of notice of the founded finding. The Department’s subject matter expertise has nothing to do with determining timeliness of Mr. Rios-Garcia’s mailing. Moreover, deference to the agency’s interpretation is inappropriate where the interpretation conflicts with a statutory mandate. *State Department of Revenue v. Bi-Mor, Inc.*, 171 Wn.App. 197, 202, 286 P.3d 417 (2012).

Another reason that no deference should be afforded the Department’s interpretation here is that the Department has already received the benefit of this deference in Administrative Law Court, where the ALJ was required to apply agency rule, rather than the law, as the

primary source of authority. But even in doing so, the ALJ explicitly reserved the question of this conflict to the Courts. *CP* at 59.

b. The Legislature Imposed a Duty to Ensure Receipt upon the Department – not upon Mr. Rios-Garcia

RCW 26.44.125 and WAC 110-30-0230 *et seq* are silent as to what happens *immediately* after a request is made. The Department’s notice letters describe a thirty-day review process and indicate that the results will be sent in “about 60 days.” *CP* at 106; *See also* WAC 110-30-0250 & -0260. But nothing informs the person requesting review that their request has been received. When they place the request in the mail, it begins a process that, according to statute, administrative code, and the Department’s letter, can take from 30-60 days. If a mailing is lost or delayed, a person requesting review would likely not find out until following up with the Department after hearing nothing for *sixty* days – double the window to respond. With the right to agency *and* judicial review on the line, these provisions cannot be construed to impose a duty on a person requesting review to ensure the Department’s actual receipt of the mailing.

The Department is, of course, permitted to promulgate administrative rules to effectuate statutes. In this instance, RCW 26.44.125(7) explicitly states that the Department “may adopt rules to

implement this section.” But there are bounds on the Department’s rulemaking authority:

Rules that are inconsistent with the Statutes they implement are invalid. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007). Similarly, the Department cannot, by the rulemaking procedure, add words to or amend a statute. *Department of Revenue v. GameStop, Inc.*, 8 Wn.App.2d 74, 436 P.3d 435 (2019⁷). Those portions of a rule that violate the underlying, rule-authorizing, RCW are “*ultra vires* and void as a matter of law.” *Bi-Mor*, 171 Wn.App. at 206.

The question then, is whether the “provided to” and “received by” language promulgated by the Department complies with the language of the rule-authorizing RCW 26.44.125. Had the legislature intended to impose the duty to ensure receipt, the review request form would be required to be send by certified mail, return receipt requested. More telling, the legislature also knows how to impose a “received-by” requirement, as they did in RCW 23.95.200(1); RCW 82.70.025(1); RCW 82.45.180(1)(a); RCW 43.43.395(2)(b); RCW 7.68.060; RCW 29A.40.091(4); and RCW 74.20A.322(1) – for example.

⁷ Amended Opinion; *See* 5 Wn.App.2d 941 (2018). Original briefing cited the 2018 opinion, which was withdrawn and superseded during the pendency of this case.

The legislature certainly knows *how* to impose a duty to ensure receipt because this duty is imposed on the *Department* in Chapter 26.44⁸. Founded findings must be sent by “certified mail, return receipt requested.” RCW 26.44.100(3). Following agency review, the results must be sent by “certified mail, return receipt requested.” RCW 26.44.125(4). Even warnings given to persons filing false CPS reports must be sent by “certified mail” (though no return receipt). RCW 26.44.061.

c. The Received-By Requirement Unlawfully Shortens the Statutory Response Window

The Department claims that WAC 110-30-0230 merely establishes a procedure for implementing RCW 26.44.125(2) by directing where to send the request for review. *See CP* at 5. What the department ignores is that a **received-by** requirement does have the effect of modifying the statute.

The timeline is begun by notice from the Department: “**Within** thirty **calendar days** after the department **has notified**⁹ the alleged perpetrator...” RCW 26.44.125(2) (em. added). The statute does not say that the Department must receive the request within thirty days. Under the

⁸ Via a process this Court concluded in *Snyder* is all but assured to provide notice.

⁹ The date of “notice” under RCW 26.44.125 or .100 is not clear, but the Department’s instructions in the Notice Letter (*CP* at 106) state that it runs “from the date you receive this letter.”

statute, a request for review made by mailing the same on the 29th day following receipt of the Notice Letter is timely.

But such a request would not likely be received by the Department the next day. In fact, when documents are served by mail, the service is deemed complete on the third *non weekend or judicial holiday* date. See CR 5(2)(a). Imposing the requirement that the request be **received** by the Department within that thirty-day window requires that the request be made before that timeline expires – i.e. the Department’s interpretation and notice letter works to shorten the statutory window.

d. Snyder Militates Finding for Mr. Rios-Garcia

In *State v. Snyder*, 194 Wn.App. 292, 376 P.3d 466 (2016), this Court addressed the other side of this coin:

Ms. Snyder's argument however exposes the ambiguity created when the legislature specifies a method of written notice, later refers to “receipt” of the notice, and then fails to address the situation created when the person does not actually receive the notice.

Id. at 300. In *Snyder*, this Court held that the 30-day adjudicative hearing appeal window in RCW 26.44.125 commences on “actual *or constructive*” notice of DSHS’ determination. *Id.* at 294.

Ms. Snyder was alleged to have neglected children in her care; DSHS sent her a certified letter on March 21, 2011 stating that the allegations were founded. Ms. Snyder timely sent a request for internal

review, mailing it on April 6, 2011; it was received by the Department on April 8, 2011. *Id.* at 294.

Shortly after, Ms. Snyder moved, without informing DSHS of the change in address or completing a change of address form via USPS. *Id.* On April 12, 2011, DSHS mailed her a letter stating that the founded finding was correct and notifying Ms. Snyder she had 30 calendar days to file a request for adjudicative review with the Office of Administrative Hearings. *Id.* at 295. For this reason, the procedural posture is slightly different in *Snyder*, but the case is still exceptionally poignant.

USPS attempted to deliver the April 12 letter on April 14, 21, and 29, 2011. *Id.* On May 4, USPS returned the letter to DSHS stamped “return to sender.” *Id.* DSHS made no further attempt to contact Ms. Snyder. *Id.*

Two **years** later, Ms. Snyder applied for a nursing assistant internship; she was denied because of the DSHS finding. *Id.* She requested a copy of her file from DSHS and discovered that the founded finding had been upheld. *Id.* She then requested an administrative hearing on April 1, 2013. *Id.* Her request was dismissed for lack of jurisdiction because it was untimely. *Id.* at 295-96. At a hearing before the ALJ, Ms. Snyder admitted she did not follow up with DSHS concerning her request. *Id.* at 296.

This Court concluded that RCW 26.44.100 requires the Court to construe Chapter 26.44 to protect the due process rights of parents. *Id.* at

300. In *Snyder*, the *Department* argued that if the Legislature had intended actual notice, it would have explicitly stated that notice is ineffective unless received. *Id.* at 301. Now, the Department turns its own argument on its head to argue that, despite merely stating the request must be “made,” the legislature meant the request must be “received.”

This Court went on to adopt a *constructive notice* standard for the Department in RCW 26.44.125(5). The reasoning is important:

Here, the process RCW 26.44.125 outlines makes actual receipt of a properly addressed DSHS review determination all but assured, except in those situations where the recipient knowingly refuses to receive the certified mail. This is because DSHS completes its internal management review quickly and sends the review determination by certified mail to the address the alleged perpetrator has recently specified. If DSHS does not send notice of its review determination to the correct address, the requirement of constructive notice is not met.

Id. at 302.

The Court’s reasons for concluding that Ms. Snyder’s request for review was untimely are spelled out at the end of the opinion:

Ms. Snyder knew that the allegation that she had neglected children in her care was founded. She knew that DSHS would mail her its review determination within about 60 days of receiving her April 6, 2011 request for a review. She also knew DSHS would mail its review determination to her Longfellow address, given that she specifically instructed DSHS to mail it there. Finally, the woman who replaced Ms. Snyder in the Longfellow house told Ms. Snyder that mail had come for her, and the mail had been returned to sender. Having actual knowledge of all of this, it is equitable to

require Ms. Snyder to have called DSHS by mid-June 2011—about 60 days after she mailed her review request form—to inquire about her request, and to impute knowledge of what this inquiry would have elicited. For these reasons, Ms. Snyder had constructive notice around mid-June 2011 that DSHS had upheld its investigator's finding. Her April 2013 administrative hearing appeal was therefore untimely.

Id. at 302-03. But none of these reasons apply to Mr. Rios-Garcia. The allegation here was a malicious fabrication; it was a complete surprise that CPS somehow determined it was founded. Mr. Rios-Garcia was waiting a determination from DSHS and *contacted DSHS before the 60-day window for DSHS to respond had passed.*

The critical part of the *Snyder* holding is in this final paragraph of the opinion: Ms. Snyder should have called DSHS by mid-June – about 60 days after she mailed her request form to inquire about the request. *Id.* This is what imputed her knowledge of DSHS' determination. *Id.* But Mr. Rios-Garcia did exactly that – he contacted DSHS less than sixty days after his request was mailed.

Mr. Rios-Garcia argues that the rationale of *Snyder* should be a two-way street. The underpinning of the constructive notice holding is equity. *Id.* at 302 (“she had actual notice of matters to which the law may equitably add constructive notice of facts which would have been discovered upon reasonable inquiry.”).

Here, where Mr. Rios-Garcia followed the Department's instructions to mail his request for review within thirty days of receipt; *and* he followed this Court's direction in *Snyder* to follow-up with DSHS, equity and due process demand he be afforded his day in court to challenge CPS' erroneous finding.

3. Mr. Rios-Garcia Should Have Prevailed Below and is Entitled to Fees

To be clear, Mr. Rios-Garcia was the victim of a misdemeanor crime of false reporting. RCW 26.44.060(4)¹⁰. When provided with the information that the allegations against him were fabricated because the alleged victim was mad he took her cell phone, the Department did nothing. To the best of Appellant's knowledge, there has been no follow-up investigation whatsoever. The Department has known since Mr. Rios-Garcia sent them the declaration from the Prosecuting Attorney (*CP* at 132-33) in the summer of 2018 that the allegations were simply made up.

Instead of continuing their investigation and "safeguard[ing] against arbitrary, malicious, or erroneous information or actions," (*see* RCW 26.44.010) the Department doubled down and denied Mr. Rios-Garcia a

¹⁰ Here, there is some question as to whether there would be the *capacity* for criminal liability on *this* report because it comes from a child. But suppose the same information had been falsely and maliciously relayed by an adult; this would be no less false or malicious and still trigger the Legislature's concern in RCW 26.44.010.

hearing. This agency action was far from “substantially justified.” The substantially justified standard means “justified to a degree that could satisfy a reasonable person.” *See, e.g., Plum Creek Timber Co., L.P. v. WA State Forest Practices Appeals Bd.*, 99 Wn.App. 579, 595, 993 P.2d 287 (2000). A reasonable person could not be satisfied with the Department’s decision here. Reasonable persons would be horrified at this miscarriage of justice.

Mr. Rios-Garcia seeks fees and costs against the Department under RCW 4.84.350, providing that a prevailing qualified party¹¹ “shall” be awarded fees and other expenses:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. 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.

To “prevail,” and obtain fees under this statute, Mr. Rios-Garcia merely needs to be provided internal review. He need not go on to have the finding reversed. *See Arishi v. WA State University*, 196 Wn.App. 878, 385 P.3d 251 (2016) (party can “prevail” under Equal Access to Justice Act and

¹¹ There does not seem to be a dispute that Mr. Rios-Garcia is a qualified party (RCW 4.84.340(5)(a)).

obtain fees/expenses even where the Appellant may not ultimately prevail on the merits on remand). *Arishi* gives Mr. Rios-Garcia the right to recover fees and expenses for actions before the Court of Appeals; because remand of this matter would be to the agency itself (the opposing party here), Mr. Rios-Garcia requests that this Court determine the amount of fees or remand the same question to *Superior Court* (an independent entity) for determination. *See* RAP 18.1(a), (i).

If this Court gives Mr. Rios-Garcia the chance to challenge this CPS finding, the Court must also award him fees and costs because RCW 4.84.350 is, respectfully, non-discretionary. This “applicable law” *mandates* fees and expenses to Mr. Rios-Garcia if he prevails. RAP 18.1(a).

F. CONCLUSION

It is undisputed that Mr. Rios-Garcia mailed a request for agency review to the Department on May 4, 2018. The Department had the opportunity to cross-appeal this finding and did not. It is now a controlling verity before this Court. Whether the Department received this mailing is completely immaterial because RCW 26.44.125 does not require Mr. Rios-Garcia to ensure that the Department receives his mailing.

Moreover, not only did Mr. Rios-Garcia do exactly what he was supposed to do in mailing the Review Request Form to the Department per their instructions, he did exactly what this Court suggested in *Snyder* should

be his next step. He followed up with the Department within the 60-day window where he should expect a response.

Placing the Review Request Form into the mail was equivalent to serving the Department under the APA. This meets the requirements of RCW 26.44.125 and WAC 110-30-0230. Once the mailing is deposited at the Post Office, service is complete and the mailing is deemed to reach its destination. As a more practical matter, the Department's instruction to mail the form deprives a person in Mr. Rios-Garcia's position of the *ability* to ensure receipt – he cannot supervise the mail carrier in Wenatchee to observe delivery.

The Board of Appeals erred in this case. Even if there is no conflict between the RCW and the WAC, following the Department's instructions on *how* to provide the request (placing it in the mail) satisfies both the RCW and the WAC. It is the Department's interpretation and their Notice Letter stating that the request must be "received" that exceeds the Department's authority.

Moreover, RCW 26.44.125(3) only strips the right to agency and judicial review if the request is not "made" as provided by statute. There is nothing in the law that states that a person is deprived of agency or judicial review because the Department did not "receive" the request. The

Department has not challenged the verity that Mr. Rios-Garcia mailed his request to the Department on May 4, 2018 – a timely request.

The import of this situation cannot be understated. The Department uses founded allegations of child abuse or neglect to determine if a person is qualified to be licensed or approved to care for children or vulnerable adults or whether the person is qualified to be employed by the Department in a position having unsupervised access to children or vulnerable adults. RCW 26.44.125(2)(e). As noted in the *Garcia* opinion, as of February 2009, DSHS now maintains these records for *thirty five years*.

Mr. Rios-Garcia followed the Department's instructions and mailed his review request form well within the time limit. The Department is now using statutes passed by our Legislature to *protect* due process rights of parents to deprive Mr. Rios-Garcia of his opportunity to challenge a founded finding that the Department is well-aware is based on a complete fabrication. Worse, in the two years since the Department became aware of this, there has been no follow-up investigation.

The Department's interpretation of RCW 26.44.125 and WAC 110-30-0230 to require actual receipt of a request for review is patently erroneous. The request is "made" and "provided" by placing it in the mail. Had Mr. Rios-Garcia not followed up for two years like Ms. Snyder, this would be a different matter. But under these facts, the Department's acts

twist and pervade statutes meant to protect not only due process, but also the integrity and confidence in the Department's CPS determinations. For these reasons, the Department's acts cannot be justified.

Mr. Rios-Garcia respectfully requests that this matter be remanded to the Department for an internal agency review and that this Court assess fees and costs against the Department.

Respectfully submitted this 23rd of July, 2020.


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