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NO. 37507-2

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

TOMAS RIOS-GARCIA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH
SERVICES,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal concerns the authority and obligation of the Department of Children, Youth and Families¹ (Department) to review a founded finding of child abuse where the alleged perpetrator mailed a request for internal review that the Department never received. The Department found Tomas Rios-Garcia sexually abused the child victim. The Department notified Mr. Rios-Garcia by certified mail of the founded finding and how to make a request for internal review including that if the Department did not receive his request for review within thirty days, it would end his right to review.

The Department did not receive Mr. Rios-Garcia's request within thirty days. The Department declined to accept his subsequent untimely request for review. The Board of Appeals and the superior court dismissed on timeliness grounds.

The unchallenged findings of fact establish the Department did not receive Mr. Rios-Garcia's within the 30-day timeline to request review. Mr. Rios-Garcia's challenge to the Department's rule making authority fails because WAC 110-30-0230 is a valid rule promulgated consistent with the Department's express rule making powers. The rule did not materially change the statute and it is reasonably consistent with legislative intent. His

¹ The Department of Social and Health Services is now to the Department of Children, Youth and Families

failure to timely request internal review terminates his rights to further challenge the abuse finding.

II. RESTATEMENT OF THE ISSUES

1. When a timely request for review must be received by the Department within thirty days of receipt of the founded finding of abuse or neglect, was the appellant's request for internal review untimely when the Department received it 86 days after the deadline to request review had passed?
2. When the Board of Appeals determined under RCW 26.44.125 and WAC 110-30-0230 that it lacked jurisdiction to hold a hearing on the merits because of the appellant's untimely request for internal review, did the Board of Appeals commit error of law where it is required by the WAPA to first apply the Department rules to the facts?
3. When the alleged child victim, after disclosing Mr. Rios-Garcia's sexual abuse to law enforcement, the prosecution, and the Department, recants and says she made it up, and where the court dismisses without prejudice the criminal charges without a hearing on the merits, does her recantation excuse Mr. Rios-Garcia's untimely request?
4. Is Mr. Rios-Garcia entitled to attorney fees when the Department's actions are substantially justified, in light of the plain language of RCW 26.44.125, such that an award of attorney's fees would be unjust?

III. COUNTERSTATEMENT OF THE FACTS

The Department received a referral on August 14, 2017 alleging Mr. Rios-Garcia had sexually abused his child or a child in his care. CP 104. The Department investigated the case, interviewing the child, the mother and relatives and contacting law enforcement. CP 105. The Department

tried to interview Mr. Rios-Garcia but he retained an attorney and asked that the investigator contact his attorney to set up an interview. CP 105. The investigator attempted several times to call him directly but was unsuccessful in interviewing him. CP 105.

Mr. Rios-Garcia was criminally charged with five counts of Child Molestation in the Second Degree, five counts of Incest in the Second Degree, and one count of Communicating with a minor for immoral purpose. CP 74. These charges were dismissed in February of 2018 at the request of the prosecution. CP 73-75, 77. The prosecutor moved to dismiss charges because the alleged child victim recanted her allegations of sexual abuse saying she made it up because she was mad at Mr. Rios-Garcia. CP 74. The prosecutor declared that, prior to her recantation, the child had described to law enforcement five separate incidents of the defendant coming into her room and touching her on different private areas. CP 74. He also detailed that in his first interview with the child, she described three of the incidents and maintained the abuse happened five times. CP 74.

The Department concluded its separate investigation and found on a more probable than not basis that the alleged sexual abuse occurred against the child victim. CP 104.

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

The Department sent a written notice of the founded finding to Mr. Rios-Garcia on April 20, 2018 and he received it on April 23, 2018. CP 104. The letter told him the Department “has found that the alleged abuse or neglect occurred” and contained the following language:

What type of child abuse or neglect did you allegedly commit?

The allegation(s) are:

- Sexual abuse

Child abuse and neglect is defined in state law. CPS is required to use these definitions when investigation allegations of abuse and neglect.

What did CPS find?

The CPS investigation showed that the allegation(s) of:

1. **Sexual Abuse on Intake Number 3683107 involving victim Alexa ... is Founded.**

CP 104.

The Department’s April 20, 2018 notice informed Mr. Rios-Garcia of his “right to ask for a review by CA of the Founded finding(s) of child abuse or neglect against [him].” CP 106. It also gave detailed instructions on how to ask for a review of the founded finding including the following instruction:

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

CP 106. The notice further explained that the Area Administrator would review the case if Mr. Rios-Garcia submitted "a timely request for review."

CP 106. The review request form similarly stated "This 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." CP 109.

Mr. Rios-Garcia put his written request in the mail on May 4, 2018 but the Department did not receive it. CP 45, 114. The Department received his second request for internal review on July 18, 2018, 86 days after the deadline. CP 114. The Area Administrator notified Mr. Rios-Garcia that his request was denied because it was untimely. CP 114.

B. Mr. Rios-Garcia's Request for an Administrative Fair Hearing and Superior Court Review.

Mr. Rios-Garcia filed a request for a hearing with the Office of Administrative Hearings to challenge the Department's denial of his request for internal review. The administrative law judge (ALJ) dismissed his hearing request for lack of jurisdiction. CP 59. Mr. Rios-Garcia then filed a petition for review of the ALJ's initial decision. CP 43.

On review, the Board of Appeals affirmed the ALJ's initial order.

CP 49. The Board of Appeals' findings of fact pertinent to this appeal are:

1. On April 20, 2018, the Department sent a Founded Finding letter to the Appellant. This Founded Finding letter notified the Appellant that the Department had determined that he had committed sexual abuse of a child. The letter was sent certified mail and was received by the Appellant on April 23, 2018.
2. The Founded Finding letter notified the Appellant that he could request internal review of the finding by sending a request to the Department within thirty (30) days of his receipt of the letter.
3. The CPS Founded Letter contained the following advisory:

“ ... **What are your rights?**”

1. You have a right to know the results of the CPS investigation. This letter is provided for this purpose.
2. You have the right to send CPS a written response about the allegation and finding(s). If you send a written response, it will be put in your CPS file. Send written responses to the address printed on top of this letter.
3. You have a right to see your CPS file. You may ask for access to your file in writing or by calling the number listed above.
4. You have a right to ask for a review by CA of the Founded finding(s) of child abuse and neglect against you.

How do you ask for a review of the Founded findings?

1. You must send a written request for a review to CA. To do this you must:
 - Use the form attached to this letter to ask for a review, and

- Send our written request to the address identified on the attached form.
2. CA must receive your written request for a review within 30 calendar days from the date you receive this letter. If CA does not receive the request within 30 calendar days of the date you receive this letter, you will have no further right to challenge the CPS findings. ...”

The CPS Founded Letter also contained a Review Request Form. This form stated:

“This form must be received by Children’s Administration offices 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 Appellant’s attorney mailed a request for internal review to the Department on May 4, 2018. The Appellant alleges that his attorney also faxed the request for internal review to the Department the same day.

5. The Department did not receive either the May 4, 2018, mailed request for internal review, or the May 4, 2018, faxed request for internal review.

6. The Department received a request for internal review from the Appellant on July 18, 2018.

CP 44-45.

On January 23, 2019, Review Judge Thomas Sturges issued the Board’s final order that both affirmed the ALJ’s initial order and determined

[t]here was no jurisdiction for the Administrative Law Judge to hold a hearing on the merits of this matter, because the Appellant initially failed to timely request an internal review of the Department’s founded finding of sexual abuse of a child.

CP 49.

Mr. Rios-Garcia then filed a petition for judicial review in Okanogan County Superior Court, which dismissed his petition for failure to timely request Department internal review of the founded finding of abuse or neglect. CP 21.

IV. ARGUMENT

A. Standard of Review

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

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record

for judicial review, supplemented by any additional evidence received by the court under this chapter;

- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 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 a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

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

Conclusions of law are reviewed under the error of law standard. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

This standard calls for de novo judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded the agency's view. *Id.* A reviewing court accords substantial deference to an agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103.

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

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

erroneous. *Id.* Here, Mr. Rios-Garcia only challenges the Board of Appeals' finding that he allegedly faxed his internal request as unsupported by substantial evidence. Thus, the Board of Appeals' remaining findings of fact are verities on appeal. RAP 10.3(g); *In re Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002).

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)).

This Court is being asked to review Mr. Rios-Garcia's untimely request for an internal review of a founded finding of child sexual abuse. The unchallenged facts establish the Department did not receive Mr. Rios-Garcia's request for internal review within thirty days as required by statute and rule. And the Board of Appeals did not commit error of law when it dismissed his request for administrative review for lack of jurisdiction.

B. The Request For Internal Review Was Untimely And The Department Properly Denied it

Mr. Rios-Garcia's request for Department internal review was not received within thirty days and the Department denied it under RCW 26.44.125 and WAC 110-30-0230 because it was untimely.

RCW 26.44.100 requires the Department to notify the subject of a report of child abuse or neglect of its investigative findings. RCW 26.44.100(2). Such notice must also advise the subject that: (a) he or she may submit a written response to the findings, which the Department will file in its record upon receipt; (b) information in the Department's record may be considered in subsequent investigations or proceedings related to child protection or child custody; (c) founded findings may be considered in determining whether the subject is disqualified from being licensed to provide child care, employed by a licensed child care agency, or authorized by the Department to care for children; and (d) he or she has the right to

seek review of the finding as provided in chapter 26.44 RCW. RCW 26.44.100(2)(a)-(d). “‘Founded’ means the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur.” RCW 26.44.020(13). In addition, the Department must send the notice to the subject via certified mail, return receipt requested, to the subject’s last known address. RCW 26.44.100(3).

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

If an alleged perpetrator properly submits a written request for review of a founded finding, then the Department must review the finding and notify the alleged perpetrator in writing of its decision to reverse or uphold it. RCW 26.44.125(4). That decision must be sent via certified mail,

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

RCW 26.44.125 expressly allows the Department to "adopt rules to implement this section." RCW 26.44.125(7). The Department promulgated WAC 110-30-0230 to implement the statutory mandate. The rule specifies the request for internal review "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." WAC 110-30-0230(2). The failure to properly submit a written request for review terminates review. WAC 110-30-0240.

Here, the unchallenged findings of fact establish that Mr. Rios-Garcia received the Department's April 20, 2018 founded letter on April 23, 2018. CP 45 (Unchallenged Finding of Fact (FF) 1). He mailed a written request for internal review on May 4, 2018. CP 45 (Unchallenged FF 4).

The Department did not receive the May 4, 2018 mailed request. CP 45 (Unchallenged FF 5). The Department received a request for internal review on July 18, 2018. CP 45 (Unchallenged FF 6). The Board of Appeals unchallenged findings also establish the Department complied with the notice requirements under RCW 26.44.100. CP 44-45 (Unchallenged FF 1-3).

These findings establish Mr. Rios-Garcia's failed to timely request internal review. The Department received his request for review 86 days after Mr. Rios-Garcia was notified of the founded finding, well in excess of the 30-day deadline. The Board of Appeals properly determined it lacked jurisdiction to hold a hearing "because the Appellant initially failed to timely request an internal review of the Department's founded finding of sexual abuse of a child." CP 49.

C. The Board Of Appeals Did Not Commit Error of Law When It Decided Mr. Rios-Garcia's Request Was Time Barred

Review judges and ALJs "must first apply the department rules adopted in the Washington Administrative Code." WAC 388-02-0220(1). WAC 110-30-0230(2) states the request for internal review must be provided to the Department within 30 days of receipt of the notice of the founded finding. Mr. Rios-Garcia's notice was not received by the Department for 86 days. He failed to timely submit a written request for

review. Here, the Board of Appeals properly interpreted and applied WAC 110-30-0230 when it determined Mr. Rios-Garcia's appeal was time barred. The Board of Appeals properly dismissed Mr. Rios-Garcia's appeal .

D. WAC 110-30-0230 Is A Valid Rule Promulgated Consistent With the Department's Rule Making Powers

Mr. Rios-Garcia challenges the validity of WAC 110-30-0230 and in essence contends there is a conflict between RCW 26.44.125 and WAC 110-30-0230 because the statute does not expressly state the request for review must be received by the Department within thirty calendar days. As the person challenging the validity of a rule, he bears the burden of showing compelling reasons why the rule is in conflict with the intent and purpose of the legislation. *Green River College v. HEP Board*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980). Because the Department had express authority to engage in rulemaking and because the WAC effectuated the statutory timeline without changing or amending it, his rule challenge fails.

The *Green River College* Court recognized well settled principles that govern the scope of agency rule making: (1) an agency has only those powers either expressly granted or necessarily implied from statute; (2) an agency cannot by rule amend or change a statute; (3) agency rules may fill in the gaps in the statute if the rules are necessary to effectuate the statute; and (4) agency rules are presumed valid and should be upheld on judicial

review if the rule is reasonably consistent with the statute being implemented. *Green River College*, 95 Wn.2d at 112. The Department stayed well within the scope of these principles when it enacted WAC 110-30-0230.

1. **The Legislature Expressly Granted the Department the Power to Promulgate WAC 110-30-0230.**

RCW 26.44.125 expressly grants the Department the power to “adopt rules to implement this section.” RCW 26.44.125(7). The Department had express power to promulgate WAC 110-30-0230.

2. **The WAC did not amend or change the statute.**

WAC 110-30-0230 did not amend or change RCW 26.44.125. It clarified the process for requesting internal review consistent with the principles that govern the scope of agency rule making. RCW 26.44.125 requires the request for internal review be made in writing within 30-days of receiving notice of the Department’s finding. RCW 26.44.125(2). The WAC sets forth the specific details: how, where and when to make the request for review. WAC 110-30-0230. It provides:

How does an alleged perpetrator challenge a founded CPS finding?

(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).

WAC 110-30-0230 clarifies how and when and where to make the requests for internal review and nothing more. No period of time is enlarged or reduced. No part of the statute is materially changed. The rule is reasonably necessary to effectuate the legislative 30-day timeline for making the request.

Mr. Rios-Garcia argues that the Department exceeded its authority by adding the requirement that it receive the request for internal review and contends he perfected the request by placing it in the mail within the 30-day timeline. Appellant's Brief at 10-11. Mr. Rios-Garcia argues for applying the WAPA definition of service, rather than the more specific language of WAC 110-30-0230. But, the definition of service is not helpful as it is not mentioned in either RCW 26.44.125 or WAC 110-30-0230, and the WAC is specifically applicable to the requirements Mr. Rios-Garcia needed to fulfill. The Legislature left to the Department the authority for and obligation to pass a rule detailing what must be done with the written request – WAC 110-30-0230. Besides, when service on the Department is required, the WAPA does define it differently. For example, service of a petition for review on the agency requires delivery of a copy of the petition to specified

agency personnel. RCW 34.05.542. Nothing in RCW 26.44.125 can be read to imply that mailing alone is sufficient to preserve the right to review

The statute unequivocally requires that the alleged perpetrator make a written request within thirty calendar days after receiving notice. RCW 26.44.125(2). The fundamental objective of statutory interpretation is to figure out what the legislature intended and then implement the legislature's intent. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). Here, the plain language of the statute requires Mr. Rios-Garcia to make the request within thirty calendar days. Making a request implies receipt by the agency. Without an end point, receipt by the Department within thirty days, an alleged perpetrator's request could continue indefinitely without finality any time the alleged perpetrator mails in a request without the Department getting it. This interpretation would render meaningless the timeline imposed by the legislature. Mr. Rios-Garcia's argument that he served the Department by placing it in the mail is fraught with negative consequences for the protection of children. Alleged perpetrators would avoid the finality of abuse or neglect findings by simply claiming they put the request in the mail. Without WAC 110-30-0230, determinations of abuse and/or neglect would potentially never become final. The legislature could not have intended its 30-day timeline to work in such a manner.

3. **The WAC filled in the gaps in the statute consistent with legislative intent.**

Chapter 26.44 recognizes the paramount importance of the bond between children and their parents, custodians or guardians. RCW 26.44.010. However, the legislature further provides that a child's rights are of paramount concern when they conflict with a recognized legal caregiver's legal rights. *Id.* The statute thus serves a dual purpose: to protect the family unit provided it is not in conflict with the rights of a child to health and safety.

The legislature provided a thirty calendar day timeline for an alleged perpetrator to request internal review of a founded finding of child abuse or neglect. RCW 26.44.125(2). The legislature also expressly allowed the Department to adopt rules to implement the section. RCW 26.44.125(7). In order to implement the 30-day timeline, the Department promulgated WAC 110-30-0230 that filled in the gaps in the statute by specifying the manner and method in which an alleged perpetrator would perfect his or her request for internal review (in writing on a form provided by the Department to be received by the Department within thirty calendar days).

WAC 110-30-0230 is consistent with the legislative intent and purpose of protecting children while at the same time protecting the family from unreasonable interference. Without it, the statute's 30-day period to

request review would be meaningless as there would be no way to calculate the end of the 30-day period any time an alleged perpetrator, like Mr. Rios-Garcia, placed the form in the mail without regard to receipt by the Department.

4. **WAC 110-30-0230 is presumed valid because it is reasonably consistent with RCW 26.44.125.**

WAC 110-30-0230 provides Mr. Rios-Garcia with an accurate roadmap to follow in order to request a founded finding of abuse. It informs him that he must make the request in writing “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).” It is presumed valid.

All four *Green River College* principles are met and Mr. Rios-Garcia challenge to WAC 110-30-0230 fails. His untimely request for review is final and he is unable to further challenge the founded finding of abuse.

E. The Alleged Child Victim’s Recantation Is Not A Basis To Excuse Mr. Rios-Garcia’s Failure To Timely Request An Internal Review

Mr. Rios-Garcia argues that the underlying merits of his case demand “he have his day in court” and that the Department knows and has known that the sex abuse allegations were recanted and admitted as lies. Appellant’s Brief at 5. Mr. Rios-Garcia’s argument, while appealing to a

sense of sympathy, unfortunately ignores the finality of the Department's founded finding because of his untimely request for internal review. The alleged child victim's recantation and the dismissal of charges do not affect the finality of the Department's abuse determination, nor is a prosecutor deciding that charges could not be proved beyond a reasonable doubt equivalent to an exoneration for all civil purposes. Victim recantations are "inherently questionable." *State v. Macon*, 128 Wn.2d, 784, 801, 911 P.2d 1004 (1996). Even when a conviction is based solely on a victim's testimony that is later recanted that does not entitle the defendant to a new trial. *Id.* While a child victim's recantation may in fact be the truth, it is not difficult to envision potential motivations for children to recant an accusation unrelated to the alleged perpetrator's actual innocence. Perhaps the child does not want a parent to get into trouble and go to jail or prison. A child might be afraid of family pressure or repercussions if he or she testifies against a parent.

What the facts do establish is that the alleged child victim here disclosed sexual abuse to law enforcement, to the prosecutor, and to the Department investigator before she recanted. CP 105, 132. The founded finding was based on the investigator's interviews with the child and collateral contacts. *Id.* at 105. The allegations against Mr. Rios-Garcia do not disappear because the prosecutor did not feel he could prove the charges

beyond a reasonable doubt. Mr. Rios-Garcia was not exonerated of the charges. CP 74-75. Under these circumstances the prosecutor did not believe he could prove criminal conduct beyond a reasonable doubt. But that does not mean the Department's founded finding gets set aside or somehow diminished.

That a person may feel a result is "harsh" is not a basis to dispense with the meritorious purposes of final administrative determinations. For example, appellate courts have upheld determinations that affect a person's ability to obtain employment or necessary training for employment. *See, e.g., Heinmiller v. Dept of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (upholding agency's indefinite suspension of a therapist's license upon a finding of unprofessional conduct); *State v. Snyder*, 194 Wn. App. 292, 376 P.3d 466 (2016) (affirming a dismissal for lack of jurisdiction for failure to perfect a timely request for review). The serious consequences of a final determination do not excuse Mr. Rios-Garcia's failure to make a timely request for review.

F. Mr. Rios-Garcia Would Only Be Entitled To Attorney Fees And Expenses If He Prevails And If the Court Does Not Find The Agency Action Was Substantially Justified Or The Award Is Unjust Under The Circumstances

The Court shall award a qualified party that prevails in a judicial review of an agency action both fees and other expenses (including attorney

fees) “unless the court finds that the agency action was substantially justified or that circumstances make an award unjust” subject to a cap of \$25,000. RCW 4.84.350(1). This provision is part of the Equal Access To Justice Act, chapter 4.84 RCW that was enacted to ensure citizens a better opportunity to defend themselves from inappropriate state agency actions. *Costanich v. Dep’t of Social & Health Svcs.*, 164 Wn.2d 925, 929, 194 P.3d 988 (2008).

A qualified party prevails if he obtains relief on a significant issue that achieves some benefit that the qualified party sought. RCW 4.84.050(1). The agency bears the burden of demonstrating that its position had a reasonable basis in law and fact. *Aponte v. DSHS*, 92 Wn. App. 604, 623, 965 P.2d 626 (1998).

1. Mr. Rios-Garcia, even if he prevails, may not be a “prevailing party” under RCW 4.84.050(1).

Mr. Rios-Garcia is before this Court arguing that he timely made a request for internal review of a founded allegation of abuse and neglect. If Mr. Rios-Garcia prevails, he would get an internal review of the founded finding and, if aggrieved, an administrative hearing. The Department may leave the finding of abuse or neglect intact. The BOA may also affirm the Department finding. Under either scenario, Mr. Rios-Garcia would not

obtain what he wants, to be free of the founded allegation of abuse or neglect.

The Department agrees that *Arishi v. Washington State University*, 196 Wn. App. 878, 385 P.3d 251, 338 (2016), stands for the proposition that an appellant may be a prevailing party for purposes of appeal even if the appellant on remand does not prevail on the ultimate merits. *Arishi*, 196 Wn. App. at 909. *Arishi* is distinguishable because there the appellant prevailed on a significant issue when he obtained a remand for a full evidentiary hearing with counsel and witnesses and not an abbreviated hearing. *Id.* at 110. The *Arishi* court looked at other cases where appellants had been considered the prevailing party on remand because they had prevailed on a significant issue. Here, if Mr. Rios-Garcia prevails he will not obtain a different or expanded internal review. Rather, if he can successfully challenge the implementing WAC, the case would be remanded for internal review. Unlike the appellant in *Arishi*, he does not prevail on a significant issue such as getting an expanded review with additional rights. He only obtains a remand for internal review.

The Department contends in good faith he would not be a prevailing party under the procedural posture of this case.

2. **Attorney fees should not be awarded because the department was substantially justified in its action.**

The only issue before this Court is whether or not Mr. Rios-Garcia timely requested an internal review of the founded allegation of abuse or neglect. This Court cannot reach the merits of Mr. Rios-Garcia's complaint. In regards to timeliness, if Mr. Rios-Garcia prevails, the department submits it rejected Mr. Rios-Garcia's request for internal review in good faith relying on its own rule promulgated to fill out the gaps in the enacting statute. As argued above, the rule is a reasonable interpretation of the legislature's intent to establish a timeline for review of founded allegations of abuse or neglect. This rule has been in existence since 2002 without any legislative attempt to set it aside or to repudiate it. Because the Department reasonably relied on its own rule, this Court should not impose attorney fees. If this Court is inclined to award attorney fees, the department would ask the statutory cap on attorney fees be followed.

V. CONCLUSION

Mr. Rios-Garcia failed to timely request internal review of a founded finding of abuse. Although he mailed his request for review within the 30-day statutory timeline, the Department did not receive his request until after the timeline expired contrary to statute and rule.

Mr. Rios-Garcia's challenge to the Department's rule clarifying the request for internal review must be received within thirty days fails because

the Department has express rulemaking powers granted under the statute and the rule is reasonably consistent with the statute and does not materially alter it.

His failure to make a timely request for internal review makes the founded finding of abuse a final determination and he cannot challenge it. Although the founded finding of abuse has potentially serious consequences, that is not a basis to expand the legislative timeline. The Board of Appeals did not err when it correctly applied the law including the statute and the rule as required by the WAPA.

The Department requests the court affirm the Board of Appeals' final order that dismissed Mr. Rios-Garcia's request for an administrative hearing as time barred.

If Mr. Rios-Garcia prevails, the Department would ask the court not to grant attorney fees because the agency action was substantially justified and it would be unjust under the circumstances.

RESPECTFULLY SUBMITTED this 24th day of September, 2020.

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

TOMAS RIOS GARCIA,
Appellant,

vs.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,
Respondent.

CERTIFICATE OF
SERVICE BY EMAIL

I, Lynsey Seaford, certify that on the 24th day of September, 2020, I caused a true and correct copy of the Respondent's Brief to be served on the parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

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