

70749-3

70749-3

2017 JUL 24 PM 2:01

NO. 70749-3-I

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

JANET SAARELA,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

DIANE L. DORSEY
Assistant Attorney General
WSBA #21285
Attorney for Respondent

Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7045

OID 91016

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE.....	1
III.	COUNTERSTATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	5
	A. Standard Of Review.....	5
	1. Review Of Factual Matters.....	6
	2. Review Of Questions Of Law.....	7
	3. Review Of Order As Arbitrary And Capricious.....	7
	4. Relief Is Only Available Under The Requirements Of RCW 34.05.570(3).....	9
	B. The Department’s Decision Is Not Unconstitutional.....	11
	C. The Department Did Not Fail To Follow A Prescribed Procedure.....	12
	D. The Department Correctly Interpreted And Applied The Law.....	19
	E. The Department Decided All Issues Requiring Resolution By The Agency.....	20
	F. The DSHS Review Decision And Final Order Is Not Arbitrary Or Capricious.....	20
V.	CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>ARCO Products Co. v. Washington Util. & Transp. Comm'n</i> , 125 Wn.2d 805, 812, 888 P.2d 728 (1995).....	8
<i>Bond v. Department of Social & Health Servs.</i> , 111 Wn. App. 566, 572, 45 P.3d 1087 (2002).....	6, 7
<i>Brighton v. Washington State Dep't of Transp.</i> , 109 Wn. App. 855, 861-62, 38 P.3d 344 (2001).....	5
<i>Buechel v. Department of Ecology</i> , 125 Wn.2d 196, 202, 884 P.2d 910 (1994).....	5, 10
<i>Callecod v. Washington State Patrol</i> , 84 Wn. App. 663, 675-76 and n. 9, 929 P.2d 510, <i>review denied</i> , 132 Wn.2d 1004, 939 P.2d 215 (1997).....	7
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Bd.</i> , 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).....	6, 7
<i>City of Seattle v. Public Employment Relations Comm'n</i> , 116 Wn.2d 923, 929, 809 P.2d 1377 (1991).....	14
<i>Cornu-Labat, v. Hospital Dist. No. 2 Grant County</i> , 177 Wn.2d 221, 231, 298 P.3d 741 (2013).....	19
<i>Heinmiller v. Department of Health</i> , 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995), <i>opinion amended</i> , 909 P.2d 1294, <i>cert. denied</i> , 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996).....	8
<i>Hillis v. Department of Ecology</i> , 131 Wn.2d 373, 383, 932 P.2d 139 (1997).....	8
<i>Hutmacher v. Board of Nursing</i> , 81 Wn. App. 768, 915 P.2d 1178, <i>review denied</i> , 130 Wn.2d 1012, 928 P.2d 415 (1996).....	14

<i>In re Discipline of Brown,</i> 94 Wn. App. 7, 16-17, 972 P.2d 101 (1998), <i>review denied</i> , 138 Wn.2d 1010, 989 P.2d 1136 (1999).....	8
<i>In re Forfeiture of One 1988 Black Chevrolet Corvette Automobile,</i> 91 Wn. App. 320, 323, 963 P.2d 187 (1997).....	14
<i>In Re Griswold,</i> 102 Wn. App. 29, 15 P.3d 153 (2000).....	6
<i>Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.,</i> 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999), <i>review denied</i> , 141 Wn.2d 1007, 10 P.3d 1073 (2000).....	14, 19
<i>ITT Rayonier, Inc. v. Dalman,</i> 67 Wn. App. 504, 510, 837 P.2d 647 (1992), <i>aff'd</i> , 122 Wn.2d 801, 863 P.2d 64 (1993).....	9
<i>J.A. v. Department of Social & Health Servs.,</i> 120 Wn. App. 654, 657, 86 P.3d 202 (2004).....	13
<i>Pierce Cy. Sheriff v. Civil Serv. Comm'n,</i> 98 Wn.2d 690, 695, 658 P.2d 648 (1983).....	8
<i>Refai v. Central Washington University,</i> 49 Wn. App. 1, 6, 742 P.2d 137 (1987), <i>review denied</i> , 110 Wn.2d 1006 (1988).....	5, 10
<i>Riley v. Sturdevant,</i> 12 Wn. App. 808, 810, 532 P.2d 640 (1975).....	14
<i>State v. J.P.,</i> 149 Wn.2d 444, 450, 69 P.3d 318 (2003).....	19
<i>Sunderland Family Treatment Servs. v. City of Pasco,</i> 127 Wn.2d 782, 788, 903 P.2d 986 (1995).....	6
<i>Tapper v. Employment Sec. Dep't,</i> 122 Wn.2d 397, 402, 858 P.2d 494 (1993).....	5, 6

<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 411, 914 P.2d 750 (1996).....	6
--	---

Statutes

Chapter 34.12 RCW.....	13
Laws of 1993, ch. 483.....	5
RCW 34.05.416	17
RCW 34.05.419	16
RCW 34.05.419(1)(c)	17
RCW 34.05.419(2).....	16, 18, 19
RCW 34.05.437	17
RCW 34.05.440(1).....	11, 12, 18, 19
RCW 34.05.440(2).....	17
RCW 34.05.464(4).....	5
RCW 34.05.510 <i>et seq</i>	5
RCW 34.05.558	6, 10
RCW 34.05.570	9
RCW 34.05.570(1).....	10
RCW 34.05.570(1)(a)	5
RCW 34.05.570(1)(d).....	9
RCW 34.05.570(3).....	9, 10, 11, 21
RCW 34.05.570(3)(d).....	7, 20

RCW 34.05.570(3)(e)	6
RCW 34.05.570(3)(f).....	20
RCW 34.05.570(3)(i).....	7, 21
RCW 34.05.574	9
RCW 34.05.574(1).....	9, 10
RCW 34.12.010	13
RCW 74.34.005	11
RCW 74.34.035	11
RCW 74.34.063	11
RCW 74.34.067	11
RCW 74.34.068	11
RCW 74.34.165	11

Other Authorities

Chapter 388-71 WAC	11
WAC 388-02-0085.....	13, 15, 17, 19
<u>WAC 388-71-01240</u>	2
WAC 388-71-01240(1).....	11, 12

Rules

RAP 10.3(h).....	5
------------------	---

I. INTRODUCTION

The Respondent Department of Social and Health Services (“DSHS” or “Department”) requests that this court uphold the Review Decision and Final Order issued by the DSHS Board of Appeals on August 7, 2012. This order dismissed Janet’s Saarela’s appeal because her request for an adjudicative proceeding was untimely.

On October 21, 2011, DSHS Adult Protective Services notified Appellant Janet Saarela that it had made two separate findings that she had mentally abused a vulnerable adult. Ms. Saarela timely requested an adjudicative hearing regarding one finding (Case ID # 121829), but she failed to timely request a hearing regarding the second finding (Case ID # 150771).

The Department determined that Ms. Saarela did not have a right to an administrative hearing in Case ID # 150771, because her request for a hearing was late. Therefore, the Review Decision and Final Order, which dismissed Ms. Saarela’s appeal, must be affirmed.

II. ISSUE

Was Ms. Saarela’s appeal of DSHS Case ID # 150771 properly dismissed, because her request for hearing was untimely?

III. COUNTERSTATEMENT OF THE CASE

On October 21, 2011, the Respondent Department of Social and Health Services sent two separate letters to the Appellant Janet Saarela, notifying her that DSHS Adult Protective Services had made two separate findings that she had mentally abused a vulnerable adult. One letter referenced Case ID # 121829 and described an incident of abuse that occurred on June 6, 2011, where Ms. Saarela was heard yelling at her mother in an office and would not stop when asked. CAB 76-78.¹ The other letter referenced Case ID # 150771 and described an incident of abuse that occurred on August 24, 2011, when Ms. Saarela yelled at her mother and held a broken shower chair over her mother's head. CAB 79-81. Both letters provided information about how to request an administrative hearing and stated that "OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240." CAB 76-77, 80 (emphasis in original).

¹ The Certified Appeal Board Record does not have Clerk's Papers numbers assigned. Rather, it was sent to the Court of Appeals by the King County Superior Court Clerk's Office as Sub Nos. 5, 12, and 13. The Certified Appeal Board Record pages were Bates stamped, with Sub No. 5 consisting of pages 1 through 93; Sub No. 12 consisting of pages 94S through 99S; and Sub No. 13 consisting of pages 100S through 124S. Accordingly, citations to the Certified Appeal Board Record will be made as follows: "CAB" followed by the specific Bates stamped page number.

On November 2, 2011, Ms. Saarela's attorney sent one request for hearing to the Office of Administrative Hearings regarding Case ID # 121829. CAB 90. The Office of Administrative Hearings assigned Docket Number 11-2011-L-1379 to this appeal. *See* CAB 88.

On November 29, 2011, Ms. Saarela's attorney sent a letter and an amended request for hearing to the Office of Administrative Hearings. CAB 74-75. The letter stated that "[t]he Request for Hearing for Case ID No. 150771 was inadvertently left out of that fax" and requested that the Office of Administrative Hearings accept "this Amended Request for Adult Services Hearing, for both case numbers 121829 and 150771." CAB 74. This amended request was received by the Office of Administrative Hearings more than 30 days after the notice was mailed to Ms. Saarela. CAB 53; *see* CAB 17.

At some point, the Office of Administrative Hearings assigned a separate docket number (02-2012-L-0079) with regard to DSHS Case ID # 150771. *See* CAB 49.

DSHS moved for dismissal of Docket No. 02-2012-L-0079 (Case ID # 150771), because the request for hearing was untimely. *See* CAB 100S-106S. On April 6, 2012, Administrative Law Judge Jeffrey J. Manson issued an Initial Order which determined that Ms. Saarela did not have a right to an administrative hearing because she did not timely

request a hearing, so her appeal regarding Case ID # 150771 was dismissed. CAB 49, 54.

Ms. Saarela then petitioned for review of the Administrative Law Judge's Initial Order. CAB 35-40. On August 7, 2012, Review Judge Thomas L. Sturges issued a Review Decision and Final Order. CAB 14-18. The Review Judge held that Ms. Saarela failed to timely request an adjudicative hearing and affirmed the Initial Order. CAB 18.

Ms. Saarela subsequently sought reconsideration of the Review Decision. CAB 12-13. On August 30, 2012, Review Judge Sturges issued an Order on Reconsideration, which stated that Ms. Saarela's reasons for requesting reconsideration "were insufficient to require a change in the *Review Decision or Order.*" The Review Decision and Final Order remained the final administrative decision. CAB 1.

On September 24, 2012, Ms. Saarela timely filed a petition for judicial review in King County Superior Court. CP 1-5.² On July 15, 2013, King County Superior Court Judge Monica Benton entered an order, denying Ms. Saarela's petition for judicial review and affirming the DSHS Review Decision and Final Order dated August 7, 2012. CP 55-56.

Ms. Saarela then timely filed a Notice of Appeal to the Court of Appeals, Division I. CP 57-59.

² Citations to the Clerk's Papers will be listed as "CP" followed by the specific page number.

IV. ARGUMENT

A. Standard Of Review

Judicial review of DSHS's decision below is governed by Washington's Administrative Procedure Act ("WAPA" or "APA"). RCW 34.05.510 *et seq.* "In reviewing administrative actions, [the appellate] court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency." *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993), *superseded by statute on other grounds*, Laws of 1993, ch. 483, § 1; *see Brighton v. Washington State Dep't of Transp.*, 109 Wn. App. 855, 861-62, 38 P.3d 344 (2001). The appellate court applies its review directly to the final administrative decision of the agency, rather than the underlying initial order. *Tapper*, 122 Wn.2d at 404-06 (citing RCW 34.05.464(4)). *See Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *Refai v. Central Washington University*, 49 Wn. App. 1, 6, 742 P.2d 137 (1987), *review denied*, 110 Wn.2d 1006 (1988).

Janet Saarela has the burden of establishing the invalidity of agency action. RCW 34.05.570(1)(a). Under the Rules of Appellate Procedure, Ms. Saarela must set forth a separate concise statement of each error which she contends was made by DSHS in its final order dated August 7, 2012. RAP 10.3(h).

1. Review Of Factual Matters

Review of factual findings must be based solely on the administrative record. RCW 34.05.558. Unchallenged findings of fact are treated as verities on appeal. *Tapper*, 122 Wn.2d at 407. The Court will affirm challenged findings that are supported by “evidence that is substantial when viewed in light of the whole record before the court.” *Bond v. Department of Social & Health Servs.*, 111 Wn. App. 566, 572, 45 P.3d 1087 (2002); *see also* RCW 34.05.570(3)(e). Substantial evidence is that which is sufficient “to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citations omitted); *see also In Re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000).

The Court must give deference to the party who prevailed in the administrative proceeding below and must accept “the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

In other words, the court is to review the whole record and if there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld. This is so even if the reviewing court would make a different finding from its reading of the record. *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 675-76 and n. 9, 929 P.2d 510, *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

2. Review Of Questions Of Law

In reviewing a question of law, the reviewing court is restricted to the determination of whether the agency has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Issues of law are subject to *de novo* review by the Court. *Bond*, 111 Wn. App. at 572. The Court may substitute its judgment for that of the agency; however, where interpretation of law is in the agency's area of expertise, the Court accords substantial deference to the agency on review. *City of Redmond*, 136 Wn.2d at 46.

3. Review Of Order As Arbitrary And Capricious

Washington's APA allows a reviewing court to reverse an agency decision when the decision is arbitrary or capricious. *Bond*, 111 Wn. App. at 572; RCW 34.05.570(3)(i). This standard is highly deferential, and the Court "will not set aside a discretionary decision absent a clear showing of abuse." *ARCO Products Co. v. Washington Util. & Transp. Comm'n*, 125

Wn.2d 805, 812, 888 P.2d 728 (1995) (citations omitted). The arbitrary and capricious test is a very narrow standard and the one asserting it “must carry a heavy burden.” *Pierce Cy. Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Action by an agency is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Hillis v. Department of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Where there is room for two opinions, a decision reached after due consideration is not arbitrary and capricious even if the reviewing court believes it to be in error. *Hillis*, 131 Wn.2d at 383; *Heinmiller v. Department of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995), *opinion amended*, 909 P.2d 1294, *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *Pierce Cy. Sheriff*, 98 Wn.2d at 695.

Harshness is not the test for arbitrary and capricious action. *Heinmiller*, 127 Wn.2d at 609 (court upheld agency’s indefinite suspension of therapist’s license upon a finding of unprofessional conduct); *In re Discipline of Brown*, 94 Wn. App. 7, 16-17, 972 P.2d 101 (1998), *review denied*, 138 Wn.2d 1010, 989 P.2d 1136 (1999) (agency sanction that is challenged as harsh will be upheld if the sanction was imposed after party had an adequate opportunity to be heard). To be overturned, a discretionary agency decision must be manifestly

unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510, 837 P.2d 647 (1992), *aff'd*, 122 Wn.2d 801, 863 P.2d 64 (1993).

4. Relief Is Only Available Under The Requirements Of RCW 34.05.570(3).

When awarding relief, other than affirming the agency action, the restrictions of RCW 34.05.570(1)(d) must be applied. This provision requires that relief can be granted only if the party seeking relief has been “substantially prejudiced” by the action being reviewed. RCW 34.05.574 expressly sets forth the types of relief a court can award in a review conducted under RCW 34.05.570. RCW 34.05.574(1) provides:

In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

RCW 34.05.574(1).

RCW 34.05.570(3) provides in relevant part:

Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(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;

...

(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;

...

(f) The agency has not decided all issues requiring resolution by the agency;

... or

(i) The order is arbitrary or capricious.

RCW 34.05.570(3).³ Each will be addressed in turn below.

This court has the responsibility to review the administrative record and determine whether the agency's Review Decision and Final Order should be affirmed or whether some other action should be taken that is specifically authorized by RCW 34.05.574(1). See RCW 34.05.558; *Buechel*, 125 Wn.2d at 202; *Refai*, 49 Wn. App. at 6. This is not a *de novo* hearing.

The burden rests upon the Appellant Janet Saarela to prove that the agency's action was invalid and that she was substantially prejudiced by the agency's action. RCW 34.05.570(1). The Appellant has failed to meet this burden. In addition, she has failed to establish any of the grounds for

³ These were the bases for Ms. Saarela's request for judicial review before the Superior Court as set forth in her Request for Judicial Review of Administrative Hearing. CP 1-5.

relief under RCW 34.05.570(3). Accordingly, Ms. Saarela's appeal should be denied.

B. The Department's Decision Is Not Unconstitutional.

The Department of Social and Health Services is charged with receiving and investigating reports of abuse or neglect of vulnerable adults. *See, e.g.*, RCW 74.34.005; RCW 74.34.035; RCW 74.34.063; RCW 74.34.067; and RCW 74.34.068. The Department has authority to adopt rules relating to the reporting and investigation of allegations of abuse or neglect of a vulnerable adult. RCW 74.34.068; RCW 74.34.165. DSHS adopted such rules, which are codified at Chapter 388-71 WAC.

Under the Administrative Procedure Act, if a party fails to file an application for an adjudicative proceeding within the time limit established by statute or agency rule, that party loses the right to an adjudicative proceeding. RCW 34.05.440(1).

Furthermore, WAC 388-71-01240(1) provides:

To request an administrative hearing the alleged perpetrator must send, deliver, or fax a written request to the office of administrative hearings. OAH must receive the written request within thirty calendar days of the date the department's letter of notice is mailed or personally served upon the alleged perpetrator, whichever occurs first. If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day.

WAC 388-71-01240(1). Ms. Saarela failed to request an administrative hearing regarding the second founded finding (DSHS Case ID # 150771) within 30 days of when she received the Department's notice of that founded finding. Therefore, she lost her right to an administrative hearing to challenge that founded finding of abuse. RCW 34.05.440(1).

The DSHS Review Decision and Final Order is constitutional. Ms. Saarela was given notice of the finding of abuse of a vulnerable adult, and she was given the opportunity to request an administrative hearing to challenge that finding. CAB 79-81. However, her opportunity to request a hearing was not unlimited. Rather, it was time limited to 30 days, and she failed to meet this deadline when she submitted her request for an administrative hearing regarding DSHS Case ID # 150771. Therefore, she lost her right to a hearing, and her request for a hearing was properly dismissed. Ms. Saarela received due process as required by law.

C. The Department Did Not Fail To Follow A Prescribed Procedure.

Ms. Saarela argues that DSHS cannot commence an adjudicative proceeding and then seek dismissal because her request for hearing was untimely. *See* Appellant's Brief at pages 5-9. However, Ms. Saarela cites no persuasive authority for this proposition. Also, Ms. Saarela apparently fails to understand that the Office of Administrative Hearings and the

Department of Social and Health Services are separate and distinct state agencies. The Office of Administrative Hearings is “independent of state administrative agencies” and is “responsible for impartial administration of administrative hearings in accordance with the legislative intent” expressed in Chapter 34.12 RCW. RCW 34.12.010.

When Ms. Saarela submitted her amended and belated request for an administrative hearing regarding DSHS Case ID # 150771, the Office of Administrative Hearings commenced an administrative proceeding and assigned a docket number (02-2012-L-0079), as the Office of Administrative Hearings is required to do. *See* WAC 388-02-0085. The Office of Administrative Hearings’ act of opening a case and assigning a docket number did not cause DSHS, a separate state agency, to waive its right to challenge Ms. Saarela’s right to a hearing. Furthermore, it was the Office of Administrative Hearings, not DSHS, that sent out the Notice of Prehearing Conference. *See* CAB 88-89.

As the Review Judge noted, [subject matter] “[j]urisdiction cannot be waived and can be raised at any time.” CAB 17. “A party may challenge subject matter jurisdiction at any time, and a judgment entered by a court lacking jurisdiction is void.” *J.A. v. Department of Social & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004). If there is a question about jurisdiction, the court has a duty to raise the issue itself,

even if no party has done so. *Riley v. Sturdevant*, 12 Wn. App. 808, 810, 532 P.2d 640 (1975). “A tribunal’s lack of subject matter jurisdiction may be raised by a party or the court at any time in a legal proceeding. . . . Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal.” *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999), *review denied*, 141 Wn.2d 1007, 10 P.3d 1073 (2000).

Ms. Saarela may argue that she substantially complied with the time frame to request an administrative hearing when she belatedly submitted an amended request for hearing on November 29, 2011. However, “failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.” *City of Seattle v. Public Employment Relations Comm’n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991).

Ms. Saarela’s citations to *Hutmacher v. Board of Nursing*, 81 Wn. App. 768, 915 P.2d 1178, *review denied*, 130 Wn.2d 1012, 928 P.2d 415 (1996), and *In re Forfeiture of One 1988 Black Chevrolet Corvette Automobile*, 91 Wn. App. 320, 323, 963 P.2d 187 (1997), are misplaced. See Appellant’s Brief at pages 6-7. These cases discuss when an administrative hearing commences and what an adjudicative proceeding

includes. However, these cases do not stand for the proposition that a person is entitled to a full evidentiary hearing on the merits when his/her request for hearing is untimely and the tribunal therefore lacks subject matter jurisdiction.

The Administrative Law Judge has the authority to determine whether a person has a right to an administrative hearing in DSHS cases. WAC 388-02-0085 provides in relevant part:

(1) You have a right to a hearing only if a law or DSHS rule gives you that right. If you are not sure, you should request a hearing to protect your right.

...

(3) You have a limited time to request a hearing. The deadline for your request varies by the DSHS program involved. You should submit your request right away to protect your right to a hearing, even if you are also trying to resolve your dispute informally.

(4) If you request a hearing, one is scheduled.

(5) If DSHS or the ALJ questions your right to a hearing, the ALJ decides whether you have that right.

(6) If the ALJ decides you do not have a right to a hearing, your request is dismissed.

....

WAC 388-02-0085. In this case, DSHS questioned whether Ms. Saarela had a right to a hearing when it brought a motion for dismissal. CAB 100S-106S. The Administrative Law Judge properly found that Ms.

Saarela's request for hearing was untimely and dismissed the proceeding. CAB 51-54. The DSHS Review Judge affirmed the Administrative Law Judge's Initial Decision. CAB 14-18.

DSHS' actions in dismissing Ms. Saarela's appeal as untimely after the Office of Administrative Hearings had commenced an adjudicative proceeding is not inconsistent with RCW 34.05.419, which provides in relevant part:

After receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows:

(1) Except in situations governed by subsection (2) or (3) of this section, within ninety days after receipt of the application or of the response to a timely request made by the agency under subsection (2) of this section, the agency shall do one of the following:

(a) Approve or deny the application, in whole or in part, on the basis of brief or emergency adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter;

(b) Commence an adjudicative proceeding in accordance with this chapter; or

(c) Dispose of the application in accordance with RCW 34.05.416;

RCW 34.05.419. In the instant case, an adjudicative proceeding was commenced, in accordance with RCW 34.05.419(2). Although the agency has the option to decide not to conduct an adjudicative proceeding, per

RCW 34.05.419(1)(c) and RCW 34.05.416, there is nothing that prevents the agency from commencing an adjudicative proceeding and then dispensing with the matter short of a full evidentiary hearing. Ms. Saarela has cited no authority for her proposition that once an adjudicative proceeding is commenced, the Department “implicitly acknowledg[es] the application was timely” and is therefore prevented from asserting that the request for hearing was untimely. *See* Appellant’s Brief at 6.

In fact, the Administrative Procedure Act contemplates that an adjudicative proceeding can be concluded short of a full hearing. For example, if a party “fails to attend or participate in a hearing or other stage of an adjudicative proceeding, . . . the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.” RCW 34.05.440(2). In addition, all parties have full opportunity to submit motions, objections, and offers of settlement. RCW 34.05.437. In addition, the DSHS hearing rules provide that, although a hearing is scheduled if a person requests one, if DSHS questions the person’s right to a hearing, the ALJ will decide whether the person has that right. If the person does not have a right to a hearing, the person’s request is dismissed. WAC 388-02-0085. Thus, the procedures followed in the instant case were consistent with the APA and the applicable administrative regulations.

The Department did not have an obligation to inform Ms. Saarela that she failed to timely appeal the second founded finding of abuse. In her Appellant's Brief at pages 4-5, Ms. Saarela asserts that the Department had an obligation to inform her within 30 days that her request for hearing regarding Case ID # 150771 was untimely. Ms. Saarela then leaps to the conclusion that because DSHS did not do so, DSHS waived its right to challenge her untimely request for hearing. Ms. Saarela attempts to rely on RCW 34.05.419(2) in support of this remarkable assertion. RCW 34.05.419(2) provides in relevant part: "Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions" However, RCW 34.05.419(2) does not provide any authority for Ms. Saarela's leap of logic that DSHS's alleged failure to notify her of any "obvious errors or omissions" in her untimely request for hearing somehow excuses her failure to meet the required time frame for requesting a hearing. To give this interpretation to RCW 34.05.419(2) is entirely inconsistent with RCW 34.05.440(1), which provides that:

Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice to, or hearing for the benefit of, that party, except that any default or other

dispositive order affecting that party shall be served upon him or her or upon his or her attorney, if any.

RCW 34.05.440(1) (emphasis added). Ms. Saarela's interpretation of RCW 34.05.419(2) must be rejected, because one statute cannot be interpreted so as to render another statute meaningless. As the State Supreme Court held in the case of *Cornu-Labat, v. Hospital District No. 2 Grant County*, "We interpret statutes to give effect to all the language used so that no portion is rendered meaningless or unnecessary." *Cornu-Labat, v. Hospital Dist. No. 2 Grant County*, 177 Wn.2d 221, 231, 298 P.3d 741 (2013); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Furthermore, a timely request for an administrative hearing was required to secure Ms. Saarela's right to a hearing and to give the Administrative Law Judge subject matter jurisdiction to hear her case. See WAC 388-02-0085. "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry*, 98 Wn. App. at 123-24. Thus, Ms. Saarela's argument must fail. RCW 34.05.419(2) does not excuse her failure to meet the time frame for filing her request for an administrative hearing.

D. The Department Correctly Interpreted And Applied The Law.

For all of the reasons set forth above in sections IV.B and IV.C, the Department correctly interpreted and applied the law when it determined

that Ms. Saarela lost her right to an administrative hearing because her request for hearing was untimely. RCW 34.05.570(3)(d) does not afford Ms. Saarela a basis for relief.

E. The Department Decided All Issues Requiring Resolution By The Agency.

Ms. Saarela asserts that the Administrative Law Judge did not address the alleged failure of the Department to notify her within 30 days that her request for hearing was untimely. *See* Appellant's Brief at pages 4-5. However, as discussed above in section IV.C., the Department had no obligation to notify Ms. Saarela that her request for hearing was untimely. Moreover, this alleged failure by the Department did not absolve Ms. Saarela of her failure to timely request an administrative hearing. Ms. Saarela has not presented any compelling arguments that the agency has not decided all issues requiring resolution by the agency. Thus, RCW 34.05.570(3)(f) does not afford her a basis for relief.

F. The DSHS Review Decision And Final Order Is Not Arbitrary Or Capricious.

Ms. Saarela failed to timely appeal the founded finding in DSHS Case ID # 150771, and the fault belongs entirely to her and her counsel. DSHS had no obligation to inform Ms. Saarela that her request for an administrative hearing with regard to this case was untimely. Because there was no timely appeal of Case ID # 150771, the Administrative Law

Judge had no choice but to dismiss the appeal. The Review Judge properly affirmed the Administrative Law Judge's Initial Order. The DSHS Review Decision and Final Order is not arbitrary or capricious, and Ms. Saarela has not demonstrated otherwise. *See* section IV.A.3 *supra*. Therefore, Ms. Saarela is not entitled to relief pursuant to RCW 34.05.570(3)(i).

The Appellant Janet Saarela has failed to establish any basis for relief pursuant to RCW 34.05.570(3). The Review Decision and Final Order is constitutional and Ms. Saarela received due process; the Department did not fail to follow a prescribed procedure; the Department correctly interpreted and applied the law; the Department decided all issues requiring resolution; and the order is not arbitrary or capricious. Thus, Ms. Saarela cannot prevail on appeal. The Review Decision and Final Order issued by the DSHS Board of Appeals on August 7, 2012 should be affirmed by this court.

V. CONCLUSION

For the above stated reasons, the Department respectfully requests this court to affirm the Review Decision and Final Order issued by the DSHS Board of Appeals on August 7, 2012.

RESPECTFULLY SUBMITTED this 24th day of January, 2014.

ROBERT W. FERGUSON
Attorney General

By *Diane L Dorsey*
DIANE L. DORSEY
Assistant Attorney General
WSBA #21285