No. 42738-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CURTIS W. JOHNSON,

Respondent,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Appellant.

DEPARTMENT OF FISH AND WILDLIFE'S RESPONSE BRIEF

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I. INTRODUCTION

The Department of Fish and Wildlife (Department) denied Curtis Johnson's late-filed application for renewal of his 2007 Dungeness crab-coastal commercial fishing license. The statutorily established deadline for submission of a Dungeness crab-coastal commercial fishing license for 2007 was December 31, 2007. There is no dispute that Johnson filed his application for renewal of his 2007 license on March 3, 2008, over two months *after* the deadline. The Department is prohibited by statute from accepting late-filed commercial fishing renewal applications and therefore rejected Johnson's late-filed license renewal application. This Court should uphold the Department's Final Order denying Johnson's late-filed 2007 license renewal application, issued after an administrative appeal of the Department's action, because there is no dispute his application was untimely. The plain language of RCW 77.65.030 compels the Department to deny untimely license renewal applications.

Johnson's failure to timely renew his license for 2007 has significant consequences. Because the Dungeness crab-coastal fishery is a closed, limited-entry fishery, the Department is prohibited from renewing a Dungeness crab-coastal license in a given year if the person seeking renewal did not hold such a license in the previous year. Therefore, as a result of his failure to timely renew his 2007 license, the Department correctly concluded that because Johnson did not "hold" a license in 2007, he was legally foreclosed from being issued a renewed license for 2008 or any subsequent year. This conclusion is legally mandated by the plain,

unambiguous language of the applicable statute and should be affirmed by this Court.

II. COUNTERSTATEMENT OF THE ISSUES

(1) Where Johnson failed to renew his Dungeness crab-coastal license for 2007 by December 31, 2007, was the Department's Final Order (CP 113-25), denying his late-filed 2007 license renewal application consistent with RCW 77.65.030, which provides that the license application deadline is December 31 of the year for which the license is sought and further provides that the Department may not accept late-filed applications?

(2) Where Johnson failed to timely renew his Dungeness crab-coastal license for 2007, and so did not hold a license in that year, was the Department's conclusion that he was foreclosed from being issued a renewed license in 2008 and subsequent years consistent with the provisions of RCW 77.70.360, which specify that the Department shall only renew such a license where "the person held the license sought to be renewed during the previous year"?

III. COUNTERSTATEMENT OF THE CASE

A. Dungeness Crab-Coastal Commercial Fishing Licensure

The Department regulates commercial fishing in Washington State and, as part of that task, issues annual commercial fishing licenses. *See* RCW 77.65 and RCW 77.70. A valid, current commercial fishing license is required of anyone engaged in commercial fishing in Washington State.

RCW 77.65.010(1)(a). An individual engaged in commercial fishing for Dungeness crab within the coastal waters of Washington State must have a current "Dungeness crab-coastal" commercial fishing license. RCW 77.70.280(1); WAC 220-52-043.

The issuance of Dungeness crab-coastal commercial fishing licenses by the Department, and application for and renewal of such licenses by fishers, is governed by RCW 77.65 and RCW 77.70. As discussed in detail below, with exceptions not relevant to this case, the deadline for filing an application for renewal of a commercial fishing license is December 31 of the year for which the license is sought (e.g., the deadline for renewing a 2012 license is December 31, 2012) and the Department is prohibited from accepting late-filed license renewal applications. *See* RCW 77.65.030. And under RCW 77.70.360, the Department is prohibited from issuing new Dungeness crab-coastal licenses and may renew an existing license *only* if the person seeking renewal held such a license in the previous year.

B. Johnson Failed to Timely Renew His 2007 Dungeness Crab-Coastal License and His Late-Filed Renewal Application Was Denied

The facts of this case are generally not in dispute. The key fact is that Johnson failed to renew his 2007 Dungeness crab-coastal commercial fishing license by December 31, 2007, as required by RCW 77.65.030. CP 114, 118 (Findings of Fact, Conclusions of Law, and Final Order (Final Order)). When Johnson submitted his application for renewal of his 2007 license on March 3, 2008, over two months *after* the deadline, the

Department denied the application. *Id.* at 114. As a result of having failed to timely renew his license for 2007, Johnson did not "hold" a license in 2007, and was, therefore, foreclosed from being issued a renewed license for 2008 or subsequent years. That outcome is mandated by RCW 77.65.030.[1]

Johnson held Dungeness crab-coastal license no. 60669 each year from 1991 through 2006, timely renewing his license every year.[2] CP 114. The last year in which Johnson held that license was 2006, the last year for which he timely renewed his license. *Id.* In 2005 and 2006 (for the 2005-06 season), Johnson leased his license to another fisher, Kenneth Greenfield. CP 115. However, Johnson was unable to lease license no. 60669 to Greenfield for 2007 and neither Greenfield nor Johnson, nor anyone else, fished on the license during the 2006-07 season. *Id.*

Johnson sought to lease his license to another fisher and to designate another vessel for fishing under his license. *Id.* To that end, in the fall of 2007, Johnson contacted a representative of the Department to discuss transfer of his license to another fisher and designation of a new

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[1] Johnson did not apply for renewal of a license for 2008, or any year thereafter. Thus, the Department's Final Order directly addressed only his late-filed 2007 license renewal application.

[2] In 1995, Johnson received a letter from then-Department Director Robert Turner, dated May 30, 1995, in which the Director stated that Johnson would be granted a "permanent" Dungeness crab-coastal license. CP 111. As discussed further below, the Director's use of the term "permanent" in that letter was meant to indicate that Johnson was being issued a Dungeness crab-coastal license, which could be renewed each year, provided it was renewed in the previous year, as opposed to a Dungeness crab-coastal Class B license, which automatically expired by operation of statute on December 31, 1999, and could not be renewed thereafter. *See* RCW 77.70.280(4).

vessel. CP 115-16. Johnson was apparently told by the Department's representative that he *might* not be permitted to designate a new vessel for his license because there were limits on vessel re-designation, depending on the size of the vessel to be newly designated relative to the size of the currently designated vessel. *Id.*; RCW 77.70.350.

In fact, depending on the size of the vessel to be newly designated, Johnson actually *might* have been able to re-designate a new vessel, or Johnson actually *might* have qualified for an emergency vessel re-designation. RCW 77.70.350(1)(b), (c). Johnson claims he was not informed of these possibilities for re-designation and, therefore, believed that he would not be able to utilize his license in 2007. CP 115-16. During this conversation with the Department's representative, neither renewal of Johnson's 2007 license, nor the renewal deadline, nor the consequences of failing to timely renew were discussed. *Id.* Thus, the Department did not make any statement or otherwise provide any information to Johnson about whether or not he was required to submit his license renewal application by the December 31 deadline, or the consequences of failing to timely renew.

The Department sends license renewal information for the coming year, including a renewal reminder and license application, to holders of Dungeness crab-coastal licenses by mail in October of each year. CP 114. For example, information about renewal of 2012 commercial fishing licenses was sent in October 2011. In the administrative hearing, Johnson claimed there were problems with mail delivery in his neighborhood and

provided affidavits of neighbors in support of that claim. CP 114-15. Johnson claimed that he did not receive license renewal information in the fall of 2007, and argued that this was likely the result of problems with mail delivery. *Id.* However, the license renewal information sent in the fall of 2007 would have related to renewal of licenses for 2008 (information about renewal of 2007 licenses would have been sent in the fall of 2006).

Having realized his failure to timely renew his 2007 Dungeness crab-coastal license, Johnson submitted an application for renewal of that license on March 3, 2008. CP 114. The Department denied Johnson's application because it was submitted after the December 31, 2007, deadline for license renewal. *Id.* On March 14, 2008, the Department mailed Johnson a notice of denial. CP 55, 114.

C. Procedural History

After receiving the Department's notice of denial, Johnson timely requested an administrative hearing. CP 53, 114. The administrative hearing was held July 2, 2008. CP 113. Johnson was represented by counsel at the hearing and had the opportunity to testify and present other evidence. Following the hearing, the Department's Administrative Hearings Officer (AHO) issued her Findings of Fact, Conclusions of Law, and Final Order. CP 113-25. In the Final Order, the AHO affirmed the Department's denial of Johnson's late-filed application for renewal of his 2007 Dungeness crab-coastal license and concluded that as a consequence

of his failure to timely renew his license for 2007, the Department would be prohibited from issuing him a license in 2008 or subsequent years. CP 118-23. Johnson then filed a Petition for Judicial Review challenging the Final Order. CP 1-25.

Johnson's Petition for Judicial Review was heard by Grays Harbor County Superior Court Judge Gordon Godfrey. At the conclusion of the judicial review hearing, Judge Godfrey held that the applicable statutes were ambiguous and, therefore, ruled in favor of Johnson. Judge Godfrey later entered an order requiring the Department to renew Johnson's commercial crab license and "restore all rights and privileges that [Johnson] would have enjoyed as a Dungeness crab-coastal commercial license holder had [the Department] renewed his 2007 license and all subsequent renewals." CP 187. The Department timely appealed to this Court.

IV. ARGUMENT

There is no dispute that Johnson failed to timely renew his 2007 Dungeness crab-coastal commercial fishing license by December 31, 2007, as required by RCW 77.65.030. His application for renewal of his 2007 license was submitted March 3, 2008, *over two months after the December 31 deadline*. CP 114. Under the plain, unambiguous language of RCW 77.65.030, the Department is expressly *prohibited* from accepting a late-filed license renewal application. Thus, the Department's denial of Johnson's late-filed 2007 license renewal application was compelled by law.

As a consequence of Johnson's failure to timely renew his license for 2007, he did not hold a license in that year and is foreclosed from being issued a renewed license in any subsequent year. Johnson has never applied for a renewed license for 2008 or any subsequent year, and so the Department has never acted to deny such an application. However, the Department acknowledges that it would deny any such application, should it be filed. Because Johnson did not hold a license in 2007, and cannot obtain one belatedly, the plain, unambiguous language of RCW 77.70.360 bars the Department from issuing Johnson a renewed license for 2008 or any subsequent year.

A. Standard of Review

This is a judicial review action under the Washington Administrative Procedure Act (WAPA), RCW 34.05. In a WAPA judicial review of agency action, the party asserting the invalidity of an agency's action bears the burden of establishing the invalidity thereof. RCW 34.05.570(1)(a). When the agency action being challenged is an agency order issued in an adjudicative proceeding, a reviewing court may only invalidate the agency's order based on one or more of the specific grounds enumerated in RCW 34.05.570(3). *See* RCW 34.05.570(3); *Blueshield v. Office of Ins. Comm'r*, 131 Wn. App. 639, 644, 128 P.3d 640 (2006) (a party challenging an agency order must show "that the order is invalid for one of the reasons specifically set forth in the statute").

Judicial review of agency action is not a trial de novo; it is limited to review of the administrative record. RCW 34.05.558. Under the WAPA, "[j]udicial review of disputed issues of fact . . . must be confined to the agency record for judicial review as defined by [the WAPA], supplemented by additional evidence taken pursuant to [the WAPA]." *Id.* (emphasis added). "Agency record" is defined by RCW 34.05.476, which provides that "[e]xcept to the extent that [the WAPA] or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under [the WAPA] and for judicial review of adjudicative proceedings." RCW 34.05.476(3). A court reviewing an agency's decision may consider evidence not contained in the agency record only in the limited circumstances enumerated in the WAPA. *See* RCW 34.05.562.

"In reviewing administrative action, [the Court of Appeals or Supreme 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. State Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). An appellate court's review is based solely on the administrative record (i.e., the record created before the administrative tribunal); the appellate court does not generally consider proceedings before the superior court or the superior court's findings or conclusions. *See, e.g., Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). Thus, the proceedings before the superior court, and any findings or conclusions made by that court, are "superfluous" to the Court of Appeal's

review in this case. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352 (1995); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 100, n.10, 11 P.3d 726 (2000) ("Unless the superior court takes new evidence under RCW 34.05.562, its findings are not relevant in appellate review of an agency action.").[3]

A court reviewing an agency order must give substantial deference to the agency's findings of fact on which the order is based; agency findings of fact may be overturned only if they are "clearly erroneous," *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004), and the court is "'definitely and firmly convinced that a mistake has been made.'" *Id.* (quoting *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)); *see also R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 135, 969 P.2d 458 (1999) ("Agency findings on factual matters are entitled to great deference.").

Where a statutory or regulatory provision is ambiguous and the reviewing court must engage in statutory interpretation, it does so de novo. *Port of Seattle*, 151 Wn.2d at 587. "However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is 'accorded great weight, provided it does not conflict with the statute.'" *Id.* (quoting *Pub. Utils. Dist. No. 1 of Pend Oreille Cnty. v. Dep't of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002)). A court

[3] In this case, the superior court did not take additional evidence pursuant to RCW 34.05.562.

reviewing an agency order that includes mixed questions of law and fact gives the factual findings "the same level of deference [that] would be accorded [agency factual findings] under any circumstances," *id.* at 588 (quoting *Tapper*, 122 Wn.2d at 403) (i.e., substantial deference, *see Port of Seattle*, 151 Wn.2d at 588) and reviews de novo the application of the law to those facts. *Id.*

B. The Department's Denial of Johnson's Late-Filed 2007 License Renewal Application Was Dictated by the Plain, Unambiguous Language of RCW 77.65.030

The Department's action at issue in this case—the denial of Johnson's late-filed license renewal application for 2007—was dictated by the plain, unambiguous language of RCW 77.65.030. RCW 77.65.030 provides, in relevant part:

> The application deadline for a commercial license or permit established in this chapter is December 31st of the calendar year for which the license or permit is sought. *The department shall accept no license or permit applications after December 31st of the calendar year for which the license or permit is sought.*

(Emphasis added.)

The rules of statutory construction dictate that "where the language of the enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation." *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). In other words, "[i]f [a] statute is unambiguous, its meaning is [to] be derived from the plain language of the statute alone." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order*

of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). "'A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.'" *Id.* at 239-40 (quoting *State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001)). "Plain meaning of a statute is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 169 Wn.2d 516, 526, 229 P.3d 791 (2010) (citations omitted). Furthermore, a court is "obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh." *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

The meaning of RCW 77.65.030 is plain and unambiguous. Simply put, the statute requires commercial fishing license renewal applications to be submitted by December 31 of the year for which the license is sought and expressly prohibits the Department from accepting late-filed applications. So, for example, a commercial fishing license for 2012 may be renewed in late 2011, or anytime during 2012, up until December 31, 2012 (although the fisher could not legally fish for crab in 2012 until his or her 2012 license was renewed).[4] But a 2012 license

[4] Presumably, most fishers renew their licenses prior to January 1 of each year, so they are ready to engage in fishing at the beginning of the year (the Dungeness crab season runs from December 1 to mid-September, *see* WAC 220-52-046(6)). But the December 31 renewal deadline allows a fisher the opportunity to postpone renewal of his or her license, provided he or she will not be engaging in fishing prior to renewal for that year.

renewal application filed after December 31, 2012, may not be accepted by the Department. There is no other reasonable interpretation of RCW 77.65.030. Importantly, Johnson makes no argument to the contrary. Accordingly, the decision to deny Johnson's untimely 2007 application is precisely what was mandated by law.[5]

C. As a Consequence of Johnson's Failure to Timely Renew His License in 2007, the Department Was Prohibited From Issuing Him a Renewed License for 2008 and Subsequent Years

Because he failed to renew his license for 2007, Johnson did not "hold" a license in that year; as a result, the Department was prohibited from issuing him a license for 2008 or subsequent years.[6] This is so

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[5] In a case remarkably analogous to this one, the United States Supreme Court reached a similar conclusion in interpreting an end-of-year filing deadline contained in federal mining law. In that case, *U.S. v. Locke*, 471 U.S. 84, 105 S. Ct. 1785 (1984), the Court was construing a statute that required annual recording of mining claims by December 30 (as opposed to December 31) of each year. *Id.* at 87-88. Under the applicable law, the failure to record a claim was deemed to be an abandonment. *Id.*

The plaintiffs held valuable mining claims on federal land, the operation of which yielded annual revenues in excess of $1 million. *Id.* at 89. Relying in part on erroneous information from a Bureau of Land Management (BLM) employee, plaintiffs recorded their claim for the year 1980 on December 31, one day *after* the deadline established in the federal law. *Id.* at 89-90. As a result of the late filing, plaintiffs' mining claims were deemed abandoned, *id.* at 90, and as a result of another provision of law, plaintiffs were forever barred from reestablishing their claims. *Id.* at 91.

The *Locke* Court rejected plaintiffs' argument that the December 30 filing deadline established by Congress allowed filing *after* December 30, even one day after, and upheld BLM's rejection of plaintiffs' late-filed claim. *Id.* at 93-96. In so holding, the Court observed that a filing deadline must be read literally to mean exactly what it says: that a claim must be filed by the statutorily established deadline and not even one day later.

Here, as in *U.S. v. Locke*, the Department's denial of Johnson's late-filed 2007 license renewal application was dictated by the plain, unambiguous language of the statute establishing the filing deadline—RCW 77.65.030—and should, for that reason, be affirmed by this Court. According to RCW 77.65.030, the license renewal deadline for 2007 was December 31, 2007. The Department was *required* to deny Johnson's 2007 license renewal application because it was filed after that date.

[6] In fact, Johnson did not file an application for renewal of his license for 2008, or for any subsequent year; he only sought renewal of his license for 2007. The

because the plain, unambiguous language of RCW 77.70.360, especially when read in conjunction with related statutes and within the context of the statutory regime as a whole, creates a "renew-it-or-lose-it" scheme for a holder of an existing Dungeness crab-commercial license in which he or she has the opportunity to renew his or her licenses each year, but only if he or she possessed a renewed license in the previous year.

1. The Meaning of RCW 77.70.360 Is Clear and Unambiguous Based on the Statute's Plain Language; the Court Need Not Resort to Interpretative Aids to Determine Its Meaning

As previously discussed, a court is to derive the meaning of an unambiguous statute based on its plain language, read in conjunction with related statutes and the statutory scheme as a whole. *See, e.g., Thorne*, 129 Wn.2d at 762-63; *Fraternal Order of Eagles*, 148 Wn.2d at 239; *Lake*, 168 Wn.2d at 526. A court must give effect to the plain meaning of a statute, "even when its results may seem unduly harsh." *Geschwind*, 121 Wn.2d at 841. Here, the meaning of RCW 77.70.360 is clear and unambiguous based on the plain language of that statute, especially when read in conjunction with related statutes (namely RCW 77.65.010, RCW 77.70.070, and RCW 77.70.280) and in the context of the commercial fishing licensing regime as a whole. Under RCW 77.70.360,

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Department denied his 2007 license renewal application based on RCW 77.65.030 because it was not timely filed. The Department did not deny Johnson a license based on RCW 77.70.360. Thus, denial of a license renewal application filed by Johnson for 2008 or subsequent years based on RCW 77.70.360 has never occurred and is not before this Court. However, under the plain, unambiguous language of RCW 77.70.360, had Johnson filed an application for a Dungeness crab-coastal license in 2008 or any subsequent year, the Department would be compelled to deny such an application.

a person "held" an existing license in the previous year, and is eligible to renew the license in the following year, only if he or she timely renewed the license in the previous year.[7] There is no other reasonable construction. Thus, the Court need not engage in judicial interpretation of RCW 77.70.360, *Thorne*, 129 Wn.2d at 762-63, but should apply its plain meaning, even if the result is harsh to Johnson. *Geschwind*, 121 Wn.2d at 841.

As part of limitations the Legislature placed on the Dungeness crab-coastal commercial fishery, the Department is prohibited from issuing new Dungeness crab-coastal licenses. RCW 77.70.360. Furthermore, the Department may renew the existing license of a fisher in any given year *only* if he or she "held" such a license in the previous year. *Id*. RCW 77.70.360 provides:

> Except as provided under RCW 77.70.380, the director shall issue no new Dungeness crab-coastal fishery licenses after December 31, 1995. *A person may renew an existing license only if the person held the license sought to be renewed during the previous year or acquired the license by transfer from someone who held it during the previous year, and if the person has not subsequently transferred the license to another person.* Where the person failed to obtain the license during the previous year because of a license suspension, the person may qualify for a license by establishing that the person held such a license during the last year in which the license was not suspended.

(Emphasis added.)

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[7] "Existing" as used in this statute plainly means in existence on December 31, 1995, and is used to distinguish between "new" licenses, which the Director is prohibited from issuing after December 31, 1995. Use of the term "existing" does not mean that such a license never expires.

The Legislature placed limitations on the Dungeness crab-coastal commercial fishery—in particular, making the Dungeness crab-coastal fishery a closed, "limited entry" fishery—in order to protect the coastal crab resource and the economic viability of the coastal crab fishing industry. *See* Laws of 1994, ch. 260, § 1. In enacting statutory limits on the Dungeness crab-coastal fishery, the Legislature expressly found that it was necessary to both limit the entry of new fishers and to reduce the number of existing Dungeness crab-coastal fishers in order to protect the long-term health of the Dungeness crab resource and to protect the investment commercial crab fishers make in the boats and other equipment required for fishing. *Id.*

Under the Department's commercial fishing licensing regime, applicable to the Dungeness crab-coastal fishery, a person "must have a license or permit issued by the [Department] in order to engage in" commercial fishing. RCW 77.65.010. A person engaged in commercial fishing for Dungeness crab within the coastal waters of Washington State must possess a current "Dungeness crab-coastal" commercial fishing license. RCW 77.70.280; *see also* WAC 220-52-043(5). All commercial fishing licenses issued by the Department, including Dungeness crab-coastal licenses, are good only for one calendar year, expire on December 31 of the year for which they are issued, but may be renewed annually upon timely application. RCW 77.65.070. All together, RCW 77.65.010, RCW 77.70.280, and RCW 77.70.070 mean that a person must hold a valid, unexpired Dungeness crab-coastal license,

issued for that calendar year, to engage in commercial fishing for Dungeness crab in that year.

Given the language of RCW 77.70.360 (particularly the sentence that says that "[a] person may renew an existing license *only if the person held the license sought to be renewed during the previous year*"), especially when read in conjunction with the statutes discussed directly above, it is clear that the Legislature meant that only those fishers who in the previous year possessed a valid, unexpired Dungeness crab-coastal license, issued for that calendar year, are entitled to be issued a renewed license. It defies reason and common sense to assume that a person can be said to have "held" a license "in the previous year" if the person did not possess a valid, unexpired license in that year. After all, a person not possessing a valid, unexpired license would have been prohibited from commercially fishing in that year. It would be very strange, indeed, to say that a person "held" a license even though he or she was legally prohibited from engaging in the activity that the license is supposed to allow because they did not possess a current license.

This reading is consistent with the last sentence in RCW 77.70.360. That sentence provides: "Where the person failed to obtain the license during the previous year because of a license suspension, the person may qualify for a license by establishing that the person held such a license during the last year in which the license was not suspended." From this language, it is made clear that a fisher must obtain (i.e., renew) a license each and every year in order to retain eligibility for

future renewals, but that suspension in one year will not necessarily preclude a future renewal, if the applicant can establish the he or she held the license (i.e., possessed a valid, unexpired license) in the year prior to suspension.

In summary, the plain and unambiguous language of RCW 77.70.360, read in conjunction with related statutes, creates a "renew-it-or-lose-it" scheme whereby a person has the opportunity to renew an existing license each year, provided he or she was licensed (i.e., possessed a valid, unexpired license) in the previous year. This scheme effectuates the Legislature's express purpose in enacting Laws of 1994, ch. 260 (which contained what is now RCW 77.70.360): to reduce the number of persons fishing for Dungeness coastal crab in order to prevent overharvest of the crab resource and to protect the economic viability of the coastal crab fishing industry. Under the Legislature's renew-it-or-lose-it scheme, the number of existing licenses, and thus the number of fishers fishing for crab, is reduced over time through attrition as licensed fishers fail to renew their licenses and their opportunity to renew is extinguished.[8]

[8] Because the meaning of RCW 77.70.360 is plain on its face, especially when read in conjunction with related statutes and in context of the statutory scheme as a whole, the Court need not use tools of statutory interpretation to construe it. In particular, the Court need not consider the import, if any, of the Legislature's choice of different language in the statutes limiting renewal of commercial licenses for salmon (RCW 77.70.050), herring (RCW 77.70.120), and whiting (RCW 77.70.130), as suggested by Johnson. *See* Op. Br. at 18-19. Because RCW 77.70.360 is plain and unambiguous on its face, and not subject to any other construction other than the one discussed above, it is of no import that the Legislature chose to use additional language in RCW 77.70.050, .120, and .130 to clarify that a person who failed to renew his or her license in a given year would lose the opportunity to renew that license in future years, while not including that clarifying language in RCW 77.70.360. *See* Henry Campbell Black, M.A., Handbook on the Construction and Interpretation of the Laws 431 (2nd ed.

2. Johnson's Proffered Interpretation of RCW 77.70.360 Is Unreasonable, Contrary to the Plain Language of the Statute, and Contrary to the Legislature's Express Intent

Notwithstanding its plain language, Johnson argues that RCW 77.70.360 is ambiguous and must be interpreted such that a person who held a Dungeness crab-coastal license at any time in the past may renew that license at any time in the future (regardless of whether he or she renewed the license in the previous year) as long as he or she has not transferred the license to someone else. Op. Br. at 21-24. This argument is without merit. Johnson's proffered interpretation is contrary to the plain language of the statute, is contrary to the Legislature's express intent, and creates absurd results.

First, Johnson's interpretation of RCW 77.70.360 is based on the mistaken assumption that commercial fishing licenses can be considered "permanent," even if the license is expired and not timely renewed. *See, e.g.*, Op. Br. at 20. This assumption is directly at odds with RCW 77.65.070, which provides that commercial fishing licenses "expire at midnight on December 31 of the calendar year for which they are issued," but "may be renewed annually upon application and payment of the prescribed license fees." The Legislature could not have more clearly expressed that commercial fishing licenses are not permanent, but good only for one year and subject to annual renewal.

1911) ("A proviso may be introduced from excessive caution, and designed to prevent a possible misinterpretation of the statute by including therein something which was not meant to be included.").

Furthermore, RCW 77.70.360 itself reflects the Legislature's intent that Dungeness crab-commercial licenses be annual in duration and specific to a particular year. Renewal of such a license is made expressly contingent on having held it in the previous year, but failure to obtain the license in the previous year may be excused where such failure is because of license suspension, but only if the license was held in the last year prior to suspension. These limitations are nonsensical if licenses are "permanent." If licenses are permanent as Johnson argues, suspension in one year would have no affect on a person's ability to renew in a future year. Thus, the language of the applicable statutes forecloses any argument that commercial fishing licenses are permanent.

The May 30, 1995, letter from the Department Director to Johnson (CP 111), in which the Director stated that Johnson was being awarded a "permanent" license, does not override the plain language of RCW 77.65.070. The Director's use of the term "permanent" in that letter was meant to indicate that Johnson was being issued a Dungeness crab-coastal license, which could be renewed each year provided it was renewed in the previous year, as opposed to a Dungeness crab-coastal Class B license, which automatically expired by operation of statute on December 31, 1999, and could not be renewed thereafter. *See* RCW 77.70.280(4).

Second, Johnson's interpretation of RCW 77.70.360 would rewrite the key sentence of the statute. The key sentence of RCW 77.70.360 says that "[a] person may renew an existing license only if the person held the

license sought to be renewed *in the previous year* . . . and if the person has not subsequently transferred the license to another person." (Emphasis added.) Johnson's interpretation would rewrite the statute to allow a person to renew an existing license if the person held the license sought to be renewed *at any point in the past* (provided it was not transferred), regardless of whether he or she renewed the license the previous year. This interpretation renders superfluous the phrase "in the previous year."

Johnson's interpretation would, in effect, rewrite the statute to simply say that "a person who held an existing Dungeness crab-coastal license *in any year* may renew such a license at any time." But it is a well-know dictate of statutory construction that a court cannot rewrite a statute under the guise of interpreting it. *See, e.g., Devore v. Dep't of Soc. and Health Servs.*, 80 Wn. App. 177, 183, 906 P.2d 1016 (1995). And a court should not interpret a statute in a manner that renders any words meaningless or superfluous. *See, e.g., G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). If the Legislature had intended that a one-time Dungeness crab-coastal license holder could renew his or her license at any time, regardless of whether he or she held a valid, unexpired license in the previous year, it would have said so.

Finally, Johnson's contention that he "held" a license in 2007, even though his license expired on December 31, 2006, and was not renewed in 2007, is untenable. Under Johnson's interpretation of RCW 77.70.360, if

a person possessed a license at any point in the past, he or she would be considered to have "held" that license the previous year for purposes of seeking renewal, *even if the person's license had long-since expired.* His interpretation would permit a person to forgo annual license renewal and let his or her license lapse indefinitely, all the while maintaining his or her license, with the possibility of reentering the fishery at any time. A fisher could repeat this cycle over the years, entering and exiting the fishery at his or her convenience.

However, the purpose of the limited entry licensing program was to protect those with an ongoing, continuous interest in the fishery by reducing the number of licensees through attrition as former license holders fail to annually renew their licenses. *See* Laws of 1994, ch. 260, § 1. The only condition placed upon licensees is that they continually hold their license through annual renewals. Given the language used in the statute, it defies reason to assume the Legislature intended to allow a former license holder to forgo renewal of his or her Dungeness crab-commercial license for one or more years, and yet still be eligible to renew such a license in future years.

Contrary to Johnson's argument, the meaning of RCW 77.70.360 is plain and unambiguous. Johnson's arguments to the contrary go against the intent of the Legislature, as expressed in the plain language of the statute, and are based on a failure to understand the temporary nature of a commercial fishing license and the "renew-it-or-lose-it" scheme created by the Legislature.

D. The Statutes Governing Renewal of Dungeness Crab-Coastal Licenses Are Not Impermissibly Vague

Johnson argues that the statutes governing renewal of Dungeness crab-coastal licenses are unconstitutionally vague and therefore void and unenforceable. *See* Op. Br. at 24-32. Johnson argues in particular that RCW 77.70.360 did not provide him adequate notice that the failure to timely renew his Dungeness crab-coastal license in one year would preclude him from renewing that license in the next year, and each and every year thereafter, and so is impermissibly vague. Johnson further argues that because RCW 77.65.030, RCW 77.65.070, and RCW 77.70.360 must be read in conjunction with one another, an impossibly "opaque" scheme is created, which is impermissibly vague. These arguments lack merit.

According to the Supreme Court, "[a] statute is presumed to be constitutional. The party challenging a statute's constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt." *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (internal citations omitted).

"A vague statute offends due process," *id.*, because it fails to afford a citizen adequate notice of what is required of him or her, and fails to effectively "prevent the law from being arbitrarily enforced." *Id.* In *Pacific Topsoils, Inc. v. Wash. State Dep't of Ecology*, 157 Wn. App. 629, 646-47, 238 P.3d 1201 (2010), this Court summarized the test for unconstitutional vagueness as follows:

> ¶ 39 We consider a statute void for vagueness if its terms are "so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'." *Haley*, 117 Wn.2d at 739 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). But because "[s]ome measure of vagueness is inherent in the use of language," *Haley*, 117 Wn.2d at 740, we do not require "impossible standards of specificity or absolute agreement." *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Mere uncertainty does not establish unconstitutional vagueness. *Douglass*, 115 Wash.2d at 179. Given this, a statute meets a vagueness challenge "[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 Wn.2d at 179.
>
> ¶ 40 Furthermore, undefined terms in a statute do not automatically render it unconstitutionally vague. *Douglass*, 115 Wn.2d at 180. For clarification, citizens may need to resort to other statutes or court opinions, which we consider "'[p]resumptively available to all citizens'." *Douglass*, 115 Wn.2d at 180 (alternation in original) (quoting State v. Smith, 111 Wn.2d 1, 7, 759 P.2d 372 (1988)).

As discussed at length above, RCW 77.65.030 is plain and unambiguous on it face and not subject to more than one reasonable interpretation. RCW 77.70.360, too, is plain and unambiguous on its face, especially when read in conjunction with related statutes, specifically RCW 77.65.010, RCW 77.70.070, and RCW 77.70.280, and in the context of the statutory scheme as a whole. There is no reasonable alternate interpretation of RCW 77.70.360. Thus, both RCW 77.65.030 and RCW 77.70.360 are capable of being readily understood by a person of ordinary intelligence; they are, therefore, not void for vagueness. *Pacific Topsoils*, 157 Wn. App. at 647.

Furthermore, the fact that RCW 77.70.360 contains undefined terms, including the term "held" in the phrase "held the license sought to be renewed during the previous year," does not render the statute unconstitutionally vague. *Id.* In context, the plain meaning of that term is capable of being understood by a person of ordinary intelligence. And finally, the fact that a citizen might need to refer to multiple statutes in determining the meaning of the Dungeness crab-coastal license renewal requirements does not render the statutory scheme invalid. *Id.*

Johnson cannot meet his burden to establish, beyond a reasonable doubt, that the statutes governing renewal of Dungeness crab-coastal licenses are unconstitutionally vague. His challenge to the statutes and to the Department action based on this ground should be rejected by this Court.

E. Johnson Received Constitutionally Adequate Due Process in the Form of Notice and a Full Administrative Hearing; Therefore, the Department Did Not Violate Johnson's Procedural Due Process Rights

Contrary to Johnson's argument, the Department did not act to deprive him of a property interest in his commercial crab license, or his opportunity to annually renew that license, in violation of the federal or state constitutional due process guarantees. Johnson was afforded notice and an opportunity for hearing, and in fact received a full administrative hearing, and so was provided all the process he was due.

The due process clause of the Fourteenth Amendment requires that where the state seeks to deprive an individual of a legally protected liberty

or property interest, notice and an opportunity for a hearing must be provided.[9] *See, e.g., Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487 (1985).

In this case, the plain, unambiguous language of the applicable statutes provided adequate notice of the Dungeness crab-coastal licensing renewal requirements and the consequences of failing to timely renew. As discussed above, these statutes were not unconstitutionally vague because they could be understood by a person of ordinary intelligence. *Haley*, 117 Wn.2d at 739; *Pacific Topsoils*, 157 Wn. App. at 647. Because they were not unconstitutionally vague, the statutes provided notice adequate to satisfy due process requirements. Furthermore, Johnson was provided notice of the Department's action to deny his late-filed application for renewal of his 2007 license in the form of a letter that explained the legal basis for the action and informed him of his right to administratively appeal that action. *See* CP 080. Therefore, Johnson received adequate notice.

Johnson was afforded the opportunity for a full administrative hearing and, in fact, participated in the hearing where he was represented

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[9] The Fourteenth Amendment to the United States Constitution provides, in part, that "no state shall . . . deprive any person of life, liberty, or property, without due process of law." Article 1, § 3 of the Washington Constitution contains a nearly identical due process guarantee. That provision has been interpreted to afford no greater due process protections than that guaranteed by the Fourteenth Amendment due process clause. *See, e.g., In re Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Thus, the Washington Constitutional due process requirements are completely subsumed by the Fourteenth Amendment due process requirements.

by counsel who presented evidence, examined the Department's representative, and made argument. This fully provided all the process to which Johnson was entitled. In this respect, this case is analogous to *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998) (cited by Johnson in his opening brief), where the Ninth Circuit found that the notice provided and the opportunity for an administrative hearing were "constitutionally sufficient."

Even though he was provided notice and a full administrative hearing, Johnson argues that he was entitled to something more: a pre-deprivation hearing. *See*, *e.g.*, Op. Br. at 34. But a pre-deprivation hearing was not called for under these circumstances. In deciding what process is due in particular circumstances, courts apply the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). The three factors to be considered in applying this test are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. In applying this test in the licensing context, the U.S. Supreme Court has held that where the risk of erroneous deprivation is very low, and where a prompt post-deprivation hearing is available, a pre-deprivation evidentiary hearing is not required when suspending a driver's

license. *Mackey v. Montrym*, 443 U.S. 1, 12, 99 S. Ct. 2612 (1979). In *Mackey*, the Court found that the risk of erroneous deprivation was low in that case because "the predicates for a driver's suspension under the Massachusetts scheme are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him." *Id.* at 13.

In this case, the only factual predicate to the Department's denial of Johnson's 2007 license renewal application was whether he submitted the application on or before December 31, 2007, or after. This is an objective fact readily known by, or ascertainable to, Department officials. There is little, if any, risk of erroneous deprivation based on the denial of a late-filed license renewal application. In this case, as in *Foss*, "the risk of erroneous deprivation of the permit was virtually nil." *Foss*, 161 F.3d at 589. And even if the Department did err with respect to the submittal date of a license renewal application, that error could be easily and speedily rectified following a post-deprivation hearing.

For these reasons, no pre-deprivation hearing was required and the post-deprivation hearing provided Johnson all the process he was due. The Department did not violate Johnson's due process rights.

F. The Department Did Not Violate Johnson's Substantive Due Process Rights

Johnson claims that the Department's action to deny his late-filed application, and its conclusion that as a result of having failed to timely renew his license in 2007, he is precluded from renewing a license for

2008 and subsequent years, violated his substantive due process rights. Johnson is wrong. Because the Department's action was rationally related to a legitimate state purpose, it did not violate his substantive due process rights.

According to the Washington Supreme Court in *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006), "[s]ubstantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures."[10] The first task in any substantive due process analysis is to determine the level of scrutiny to be applied to the government action in question. *Id.* at 219. An individual's pursuit of employment in a trade or profession is a liberty interest protected by the Fourteenth Amendment. *Id.* However, as the Washington Supreme Court has observed, "courts have repeatedly held that the right to employment is a protected interest subject to rational basis review." *Id.* at 220. In other words, "[b]ecause the right to pursue a trade or profession is a protected right but not a fundamental right, [courts] apply a rational basis test." *Id.* at 222.

Under the rational basis test, the government action need only be "rationally related to a legitimate state interest." *Id.* According to the Washington Supreme Court, "[t]he rational basis test is the most relaxed

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[10] In the *Amunrud* case, the petitioner claimed that the Department of Licensing's suspension of his driver's license for non-payment of child support violated his substantive due process rights. *Amunrud,* 158 Wn.2d at 211. The Supreme Court, applying the rational basis test, disagreed. *Id.* at 223-25. The Court held that enforcement of child support obligations is a legitimate state interest and that the suspension of petitioner's driver's license was rationally related to that purpose. *Id.*

form of judicial scrutiny." *Id.* at 223. In applying the rational basis test, "a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *Id.* at 222.

In this case, Johnson's argument that the Department's denial of his late-filed license renewal application, and its conclusion that he is barred from receiving a renewed license in 2008 and subsequent years, violate his substantive due process rights is without merit. First, the licensing of commercial crab fishers, in order to protect the resource and the economic viability of the industry, *see* Laws of 1994, ch. 260, § 1, is clearly a legitimate state interest. Johnson admits as much in his brief. *See* Op. Br. at 40. And second, limitations on the issuance and renewal of commercial crab licenses, including the deadline for submittal of renewal applications and the prohibition on issuance of licenses, except renewal licenses to persons who held a license in the previous year, are rationally related to that interest.

Requiring that license renewal applications be submitted by December 31 of each year allows for efficient and effective administration of the licensing program by the Department. As the Ninth Circuit observed in *Foss*, "[a]n application deadline serves the twin goals of fairness and predictability. The importance of a fixed application period cannot be underestimated." *Foss*, 161 F.3d at 589. And limiting the number of commercial crab fishing licenses and issuing licenses only to

renewing license holders who held a license in the previous year limits the number of fishers, reducing pressure on the resource, and reducing the supply of crab on the market, thus ensuring price stability and protecting crab fisher's investment in their vessels and equipment. *See* Laws of 1994, ch. 260, § 1.

Moreover, the Department's action in this case was not arbitrary and capricious and in violation of substantive due process merely because the result was harsh. A harsh result does not render an agency action arbitrary and capricious. *See Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995). In *Heinmiller*, the appellant argued that the Department of Health's sanction for misconduct committed in the course of her work as a social worker, indefinite suspension of her license, was unduly harsh and, therefore, arbitrary and capricious. *Id.* at 597. The state Supreme Court flatly rejected this argument. *Id.* at 609. According to the Court in *Heinmiller*, "[h]arshness . . . is not the test for arbitrary and capricious action." *Id.* In this case, though Johnson may view the result of the Department's action as harsh, harshness does not render the action arbitrary and capricious.

Because the Department's action to deny Johnson's late-filed license renewal application, and its conclusion that he is, as a result of having failed to timely renew his license in 2007, precluded from renewing his license for 2008 and subsequent years, were both rationally related to a legitimate state interest, neither violated his substantive due process rights.

G. The Department Is Not Equitably Estopped From Denying Johnson's Late-Filed License Renewal Application

Johnson argues that the Department is equitably estopped from denying his late-filed license renewal application and from denying him the opportunity to renew his license in subsequent years. Johnson cannot meet his burden of establishing the elements of equitable estoppel; this argument, therefore, fails.

A party claiming equitable estoppel against the government bears a heavy burden as such claims against the government are not favored. *See Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). Generally, to succeed in a claim of equitable estoppel, three elements must be proved:

> (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Because equitable estoppel against the government is not favored, "when a party asserts the doctrine against the government, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel." *Id.* All five of these elements must be proved with clear, cogent, and convincing evidence. *Id.* at 744. Application of the doctrine of equitable estoppel against the government is relief "of an extraordinary nature" and should

"usually not be applied unless the equities are clearly balanced in favor of the party seeking relief." *Ruland v. Dep't of Soc. and Health Servs.*, 144 Wn. App. 263, 277, 182 P.3d 470 (2008). Johnson cannot satisfy his high burden to prove the elements of equitable estoppel in this case.

1. The Department Did Not Make Any Statement or Admission or Commit Any Act Inconsistent With Its Denial of Johnson's Late-Filed License Renewal Application

Johnson cannot establish by clear, cogent, and convincing evidence that there was any admission, statement, or act by the Department that is inconsistent with Department's later denial of his late-filed license renewal application and its conclusion that he is, as a result of having failed to timely renew his license in 2007, precluded from receiving a renewed license in 2008 and subsequent years.

Johnson first claims that the Department's denial of his late-filed license renewal application and its conclusion that he is, as a result of having failed to timely renew his license in 2007, precluded from receiving a renewed license in 2008 and subsequent years, is inconsistent with the May 30, 1995, letter from the Department's Director to Johnson (CP 111), in which the Director indicated Johnson was being awarded a "permanent" license. But, as discussed several times previously, the use of the term "permanent" in that letter was merely meant to indicate that Johnson was being issued a Dungeness crab-coastal license, which could be renewed each year in perpetuity, provided it was renewed in the previous year, as opposed to a Dungeness crab-coastal Class B license,

which automatically expired by operation of statute on December 31, 1999, and could not ever be renewed thereafter. *See* RCW 77.70.280(4).

Johnson next claims that the Department gave him incorrect information about whether he could transfer the vessel designation for his license. CP 115-16. The Department disputes that incorrect information was provided, but even if it had been, the undisputed facts are that the Department provided no information and made no statements, true or false, about whether or not Johnson was required to submit his license renewal application by the December 31 deadline, or about the consequences of failing to timely renew. *Id.* Johnson can point to no statement, admission, or act by the Department relating to the license renewal deadline or the consequences of failing to timely renew. So even if the information provided by the Department's representative about vessel designation transfer was erroneous, the information had nothing to do with whether Johnson was required to timely submit a license renewal application or the consequences of failing to timely renew.

Even if a statement had been made to Johnson by someone at the Department to the effect that he was being issued a permanent license, or that he was not required to submit his 2007 license renewal application by the December 31, 2007, deadline in order to be eligible to renew his license in future years, any such statements would have been contrary to law and, therefore, of no effect. No Department employee has the authority to alter the statutorily established rule that all commercial fishing licenses are good for only one year and expire at midnight on

December 31 of the year for which they were issued. And no Department employee has the legal authority to waive the statutorily established deadline for submission of a license renewal application. Any attempt to do so would have been ultra vires and void.

An unauthorized, ultra vires statement or act cannot be the basis for a claim of equitable estoppel. This is so because the State "cannot be estopped because of unauthorized admissions, conduct, or acts of its officers." *Dep't of Revenue v. Martin Air Conditioning & Fuel Co., Inc.*, 35 Wn. App. 678, 683, 668 P.2d 1286 (1983). Put another way, "when the acts of a governmental body are ultra vires and void, those acts cannot be asserted as working an estoppel against the government." *State v. Adams*, 107 Wn.2d 611, 615, 732 P.2d 149 (1987).

Alternatively, Johnson claims that the fact he did not receive the Department's license renewal information in the mail in 2007, when he had received such information in previous years and had come to rely on it, is the basis for his claim of equitable estoppel.[11] But the failure of Johnson to receive renewal information in the mail is not an admission, statement, or act by the Department inconsistent with its later denial of Johnson's late-filed license renewal application. First of all, the Department is not under any legal duty to provide license renewal

[11] The license renewal information sent by the Department in the fall of 2007 was for renewal of licenses for 2008. Information on renewal of 2007 licenses was sent in the fall of 2006. Johnson made no claim that he did not receive license renewal information in the fall of 2006.

information to license holders; instead the Department provides such information as a courtesy. CP 115.

Second, regardless of whether the Department is or is not under such a duty, there is no evidence that the Department did not carry out this task by mailing license renewal information to Johnson in the fall of 2006 and the fall of 2007. In fact, Johnson did not argue or present evidence that the Department failed to mail him license renewal information; instead, he argued and presented evidence that the mail delivery on his street was inconsistent, and, therefore, he did not receive the information mailed by the Department in the fall of 2007. *Id.* at 2-3. Contrary to Johnson's implication, the postal service's failure to properly deliver the information mailed to Johnson by the Department is not the result of any breach of duty by the Department.

Finally, even if the Department failed to act to mail the license renewal information to Johnson, such inaction could not be the basis for an equitable estoppel claim. This is so because "State inaction alone, even if a breach of duty, does not constitute an inconsistent admission, statement or act" for the purposes of establishing equitable estoppel. *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 761, 695 P.2d 996 (1985). In summary, there was no statement, admission, or act of the Department inconsistent with its later denial of Johnson's late-filed license renewal application.

2. Johnson Cannot Establish That He Reasonably Relied on Any Admission, Statement, or Act Made or Done by the Department

As discussed above, Johnson cannot show that he relied upon any inconsistent statement, admission, or act made or done by the Department (because there was no such statement, admission, or act) but even if he could make such a showing, he cannot establish that such reliance was *reasonable*. The Court of Appeals has noted that "[i]n addition to satisfying the elements of equitable estoppel, the party asserting the doctrine must show that the reliance was reasonable." *Concerned Land Owners of Union Hill v. King Cnty.*, 64 Wn. App. 768, 778, 827 P.2d 1017 (1992). "Reliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them." *Marashi v. Lannen*, 55 Wn. App. 820, 824-25, 780 P.2d 1341 (1989). In other words, to create an estoppel, a party must be "either destitute of knowledge of the true facts or without means of acquiring such facts." *Pub. Util. Dist. No. 1 of Lewis Cnty. v. WPPSS*, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985). Furthermore, a statement or admission concerning an issue of law (as opposed to a statement or admission concerning an issue of fact) cannot be the basis of a claim of equitable estoppel. *Concerned Land Owners*, 64 Wn. App. at 778 ("The doctrine of equitable estoppel also is inapplicable where the representations relied upon are questions of law rather than questions of fact.").

Here, even if the Department had made some statement to the effect that Johnson was issued a permanent license (which it did not) or

that he was not required to submit his license renewal application each year by December 31 in order to be eligible to renew his license in future years (which it did not), any reliance on such a statement would not have been reasonable or justified. This is so because Johnson had means to discover the true facts about the nature of the Dungeness crab-coastal licensing requirements, including the annual license renewal deadline and the consequence of failing to timely renew each year. The deadline was plainly set out in RCW 77.65.030 and, according to Johnson, he had received license renewal information in previous years and had timely renewed his license in those years. Furthermore, the renew-it-or-lose-it nature of Dungeness crab-coastal licenses was plainly set out in RCW 77.70.360. Thus, it is reasonable to expect that Johnson knew, or should have known, about the license renewal deadline and the consequences of failing to timely renew each year. Furthermore, any statement from the Department on these requirements would have concerned an issue of law (the statutorily established license renewal deadline and the consequences of failing to timely renew), not an issue of fact. Therefore, the doctrine of equitable estoppel would not apply.

In summary, Johnson cannot establish by clear, cogent, and convincing evidence the existence of a statement, admission, or act by the Department inconsistent with its later denial of his late-filed application for renewal of his license for 2007. Furthermore, even if Johnson could establish that such a statement, admission, or act was made by the Department, he cannot establish by clear, cogent, and convincing evidence

that he reasonably relied thereon. Therefore, Johnson's equitable estoppel claim fails.

V. CONCLUSION

The undisputed fact is that Johnson failed to submit his application for renewal of his Dungeness crab-coastal license for 2007 by the December 31, 2007, deadline established by RCW 77.65.030. Johnson did not submit his application until March 3, 2008, more than two months *after* the deadline had passed. According to RCW 77.65.030, the Department was *required* to reject Johnson's late filed application. Under the plain, unambiguous language of RCW 77.70.360, because he did not hold a Dungeness crab-coastal license in 2007, he was not eligible to be granted renewal of such a license in any subsequent year. Johnson cannot meet his burden to establish that the Department action to deny his late-filed license renewal application or its conclusion that he is, as a result of failing to timely renew his license in 2007, precluded from renewing his license for 2008 and subsequent years are invalid for any of the reasons set forth in RCW 34.05.570(3). The Department's action should, therefore, be affirmed.

RESPECTFULLY SUBMITTED this 15th day of June, 2012.

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DATED this 15th day of June, 2012, at Olympia, Washington.

/s/ Brandyn Brockmann
BRANDYN BROCKMANN
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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