NO. 90871-I

SUPREME COURT OF THE STATE OF WASHINGTON

YEVGENY SEMENENKO and NATALYA SEMENENKO,

Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

DSHS ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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The State of Washington, Department of Social and Health Services, Respondent, answers the Petition for Review (PFR).

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued an unpublished decision on August 11, 2014 upholding dismissal of the petitioners' hearing request at the Office of Administrative Hearings (OAH) as untimely. The opinion is attached as pages 1-14 of the Appendix to the PFR.

III. ISSUES PRESENTED FOR REVIEW

For the reasons discussed below, this case does not present any issue that warrants this Court's review. If review were granted, the only issues presented by the case are:

1. Whether the hearing requests by Mr. and Ms. Semenenko were properly dismissed as untimely.

2. Whether a definitional section of the DSHS hearing rules regarding "good cause" can be applied to substantive regulations that do not use or refer to the defined term.

3. Whether DSHS retains authority to issue a founded finding of child abuse/neglect more than 90 days after a report of suspected child abuse/neglect is received.

IV. STATEMENT OF THE CASE

On May 12, 2011, the Office of Administrative Hearings (OAH) received a request from Yevgeny and Natalya Semenenko challenging a founded finding of child abuse/neglect made against them in April of 2010 for events that occurred in late 2009. Administrative Record (AR) at 49. The Semenenkos had been denied review of the founded finding by the Department of Social and Health Services (DSHS) in March of 2011 because they had not filed their appeal within 20 days as instructed in the letters sent to them in April 2010. AR at 50. Under the version of RCW 6.44.125(3) applicable at the time, failure to timely request DSHS review precludes further administrative or judicial review. The Semenenkos claimed that they had not realized, due to DSHS employee statements, until November 2010 that the findings made against them were intact. They did not explain the four month delay between this "realization" and their actual hearing request three months into the next calendar year. AR at 18-20, 49.[1]

OAH found untimely and dismissed the Semenenkos' request for a hearing on the findings made against them some 11 months earlier. The dismissal of their appeal was upheld by the DSHS Board of Appeals, both

[1] The statute was amended in 2012 to allow for a 30 day appeal period and for untimely requests for review to be heard if there was a showing that DSHS did not properly serve the founded finding letter. Those amendments do not apply to the Semenenkos' 2010/2011 case, and there is no argument here of improper service.

initially and on reconsideration, as well as the King County Superior Court. AR at 1, 10-17, 21-27, Clerk's Papers (CP) at 1, 39.

The founded finding of child abuse arose after November 10, 2009, when DSHS received a referral alleging that Mr. and Ms. Semenenko had physically abused their teenaged daughter at a licensed drug/alcohol treatment facility. AR at 36-44. RCW 26.44.030 (2008) required DSHS to investigate reports of potential child abuse/neglect and to make findings as to whether child abuse/neglect occurred.[2] DSHS carried out this duty through its Division of Licensed Resources/Child Protective Services (DLR/CPS) section, because a licensed facility was the site of the alleged incident. WAC 388-15-005; AR at 36.

Around the same time, a DSHS social worker from the Division of Children and Family Services (DCFS) was also involved with the Semenenko family to resolve conflict between the parents and child. That DCFS social worker did not investigate the allegations of child abuse/neglect. AR at 19, 32. The DCFS social worker closed her file in December 2009, and sent a letter to the family to notify them of this fact. The letter, which clearly indicated that it involved "Family Voluntary Services" and not child protective services, did not address findings on

[2] This statute was amended in 2013 to allow for alternate responses to reports of child abuse/neglect, but those responses were not available at the time of the report in this case.

investigation for child abuse/neglect, nor did it provide an appeal period for any findings. AR at 32.

On April 5, 2010, DSHS's Division of Licensed Resources/Child Protective Services (DLR/CPS) sent two letters, one to Mr. Semenenko and one to Ms. Semenenko, advising each petitioner that there had been a founded finding against him/her for child abuse/neglect based on the November 10, 2009 incident. AR at 36-45. The Semenenkos were surprised and upset by these letters, and admit they understood that the findings were negative, unlike the closure letter from DCFS, which had not made any findings. AR at 30-31. They spoke to their daughter, Letitciya, and had her call DSHS to ask about the letters stating that abuse/neglect allegations were founded. *Id.*

Letitciya called DSHS and she was allegedly told that the founded findings letters were a mistake and that they could be disregarded. *Id.* There is no evidence in the record to indicate who Letitciya spoke to at DSHS. Reports that it was the DLR/CPS supervisor who wrote the letter are unsupported in the record, arising only in argument at the Court of Appeals and in the PFR at pages 3-4 and 16. Notably, earlier materials submitted by the Semenenkos, including briefing at Division I, do not claim anything in the record identifies the person at DSHS who was contacted. AR at 5-6, 30-31; Appellant's Corrected Opening Brief in

No. 70354-4-I at 9, 20-21. The Court, therefore, cannot assume that a particular DSHS employee spoke to Letitciya in April 2010. It is, however, uncontested that neither Mr. nor Ms. Semenenko spoke to the DSHS employee contacted by Letitciya. *Id.*[3]

Allegedly relying on their daughter's report of her conversation with a DSHS employee, Mr. and Ms. Semenenko chose to do nothing further in response to the April 5, 2010 letters from DLR/CPS. *Id.* The letters were explicit in their negative findings and included language informing the Semenenkos that if there was no review request to DSHS within 20 days, the findings would become final. AR at 36-45.

In November of 2010, Ms. Semenenko failed a background check for employment because of the founded finding made against her. AR at 6, 30-31. Despite this clear repercussion of the finding of abuse/neglect, neither Ms. Semenenko nor her husband took any action regarding the findings until March of 2011. AR at 5-6, 30-31, 50-51. As noted, the Sememenkos' hearing requests were dismissed as untimely at every level of review through Superior Court because they had failed to

[3] Petitioners assert in their PFR at page 20: "There is no evidence controverting the testimony that their daughter called the phone number on the finding letters and spoke with the person the letters identified as a 'CPS Supervisor'..." To the contrary, there was no testimony in this matter, which was decided by summary judgment. The pleadings submitted at OAH, where the motion was originally heard, indicate only that Letitciya spoke to a DSHS or CPS employee, with no further identifying information. AR at 6, 19, 30, 49. Accordingly, the matter is accurately described as a very limited allegation of fact by Letitciya that was deemed legally irrelevant.

follow the instructions on the letters of April 5, 2010, which required a review request within 20 days. AR at 1, 10-16, 21-27, CP at 1, 39.

Division I of the Court of Appeals affirmed dismissal of the Semenenkos' claims by unpublished decision on August 11, 2014. See Appendix to PFR at 1-14.

V. REASONS WHY REVIEW SHOULD BE DENIED

The Court's criteria for review are set forth in RAP 13.4(b). The Semenenkos do not claim that the case below presents a conflict with the holdings of other cases, or that a constitutional issue warrants this Court's review. Rather, RAP 13.4(b)(4) is the only criterion for review mentioned in the Petition for Review . PFR at 6. RAP 13.4(b)(4) allows review: "If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

As will be discussed in detail below, petitioners have not presented an issue of substantial public interest in this case. Their first issue involves clear statutes, regulations, and long-standing law that defines the time limit for review of a founded finding of child abuse/neglect and whether the good cause definition creates an exception. As such, the issue is not a matter of public interest that necessitates a decision from this Court. The Semenenkos' second issue asks whether the statutory direction that DSHS conclude child abuse/neglect investigations within 90 days

means that any finding more than 90 days after a referral is void. Because this second issue is based on a flawed view of the statutes and untenable interpretation of case law, it does not present an issue of public importance requiring this Court's attention.

A. Dismissal for Late Filing Is an Unremarkable Decision That Raises No Question of Substantial Public Interest

Mr. and Ms. Semenenko argue that the Court of Appeals decision raises issues of substantial public interest under RAP 13.4(b)(4) based largely on their own personal situation. They assert that they should not have been held to the 20 day time limit for requesting review of their founded findings of child abuse/neglect because they had good cause not to file timely. PFR at 15-16. To frame their issue, the Semenenkos distort the meaning and purpose of the definitional regulation they rely on, WAC 88-02-0020. But the statutes and regulations are unambiguous and do not provide a good cause exception for failure to meet the filing deadline set forth in RCW 26.44.125(2)(1998) and former WAC 388-15-085(2003).

Moreover, the Semenenkos' case is a poor vehicle to examine a theoretical good cause exception. First, there is no colorable basis for excusing the long delay between their discovery of the effects of a founded finding and their attempts to address the issue. Second, the

timing statutes and regulations have been amended since the events of this case. RCW 26.44.125(2) and RCW 26.44.125(3); WAC 388-15-0085. Since the statutes have been modified, there is no reason for this Court to explore if former statutes contained a covert good cause exception. See RCW 26.44.125(3) (Appellants who can show DSHS did not comply with notice requirements of RCW 26.44.100 are not required to file review request within 30 days). The Semenenkos' first issue, therefore, is limited to the case at hand and would not add to the understanding of existing regulations and statutes.

1. Good Cause as Defined in WAC 388-02-0020 Cannot Override the Requirements of RCW 26.44.125(2) and RCW 26.44.125(3)

The two sources of law describing the procedures for challenging a founded finding of child abuse/neglect, RCW 26.44.125 and WAC 388-15-0085, do not mention the term "good cause." This term, however, is defined in WAC 388-02-0020. That definition pertains to the conduct of DSHS hearings at OAH and has no application to the statute that defines the time limit for an appeal.

The proper use of this regulation depends on whether the term "good cause" appears in a substantive provision of WAC Chapter 388-02 and use of the definition must be limited to where "good cause" appears in that context. Petitioners, however, argue that the "good cause" defined in

WAC 388-02-0020 could justify their request for review some 11 months after the initial founded findings were made and some four months after, in their accounting, they understood that the findings were intact. PFR at 14-17. In substance, Petitioners claim they can import the good cause definition anywhere they like. PFR at 15-16.

There is no support in the law for such a reading. As a matter of plain language, the "good cause" definition in WAC 388-02-0020 has no applicability to the deadlines for appealing a founded finding to DSHS or OAH. It is contained in a different WAC Chapter, and "good cause" is not mentioned in any context related to review of a founded finding. WAC 388-15-0085(1998). The Court of Appeals properly recognized that Petitioners had no basis for applying good cause to the untimely appeal. *Semenenko v. DSHS*, No. 70354-4-I, slip op. at 12. Petitioners' argument, moreover, disregards the purpose and scope of WAC Chapter 388-02, spelled out in WAC 388-02-0005(2) as follows:

> Nothing in this chapter is intended to affect the constitutional rights of any person *or to limit or change additional requirements imposed by statute* or other rule. Other laws or rules determine if you have a hearing right, including the APA and DSHS program rules or laws. (Emphasis added).

In other words, Petitioners are asking this Court to accept review to address whether a definitional rule may be arbitrarily inserted into other

laws, and to address if such a definition may be used in a way contrary to the stated intent of the WAC Chapter containing the definition. The public interest is not served by addressing this type of untenable reading of regulations and statutes.

2. This Case Does Not Present an Issue of Significant Public Interest Because No Version of Good Cause Would Excuse the Petitioners' Untimely Appeal

The first issue also fails to present a significant question of broad public interest because petitioners would be unable to demonstrate "good cause" for their failure to timely file a request for review of the founded findings. As such, the Court could not provide any meaningful guidance on the topic of good cause.

There is no dispute that petitioners received notification of the founded findings in April 2010. In November 2010, Ms. Semenenko failed a background check because of the founded finding. Petitioners then waited until March 25, 2011 to request DSHS review of the founded findings made almost a year earlier. The request was denied as untimely and Petitioners then waited another six weeks to file a request for a hearing at OAH on May 12, 2011. AR at 49-51. There is no colorable good cause for these delays, where the original letter emphasized that review must be sought within 20 days.

The explanation that the petitioners' daughter contacted someone at DSHS who said they did not have to worry about the findings letter is, at best, vague. But even this slim rationalization for an untimely appeal was definitively eliminated in November 2010 with the background check. Despite the clear notice of the issue at that time, the Semenenkos still took no action for four more months. That delay cost them any tenable good cause argument they might once have possessed. See *Kingery v. Dep't. of Labor & Indus.*, 132 Wn.2d 162, 176, 937 P.2d 565 (1997) (equitable remedy for untimely appeal is not available if parties are not diligent about claiming their rights when the good cause ends).

Petitioners would not have succeeded in gaining a hearing below, even if good cause were an available excuse. The untimely appeal is, by the Petitioners' own admissions, largely their responsibility. And, these facts make this an inappropriate case in which to consider whether the good cause definition in regulations modifies the statutory time limits that the Petitioners' admittedly failed to meet.

B. There Is No Reason to Review Petitioners' Claim That Lack of Compliance With the 90 Day Investigation Period Makes a Founded Finding Completely Void

Faced with an unexcused failure to exhaust administrative remedies by appealing their founded findings, the Semenenkos raise an alternative issue under which the findings are void from their inception.

Their theory would automatically invalidate any finding of neglect or abuse if DSHS issued the finding more than 90 days from the beginning of an investigation. This approach would undermine an unknown number of cases because "If [an action] was truly void . . . it would be subject to challenge and invalidation at any time, perhaps years later." *South Tacoma Way LLC. v. State*, 169 Wn.2d 118, 124, ¶ 16, 233 P.3d 871 (2010). While this issue could affect numerous children and adults, it does not warrant review. It depends on overstating the statutory provisions and misreading case law. The staggering repercussions of the Semenenkos' argument, moreover, are so obviously harmful to children that it is implausible that the Legislature intended such results.

1. Petitioners Overstate the Statutory Time Directives, Which Do Not Include a Remedy of Negation for Any Finding Made Beyond 90 Days Past Referral

Petitioners claim the statute in question expresses a legislative intent that a late finding of neglect is automatically void. But read naturally according to its plain language, the statute does not suggest that child abuse or neglect findings are void if issued more than 90 days after an investigation begins. Rather, the statute simply directs that an "investigation" shall not "extend longer than ninety days form the date the report is received." RCW 26.44.030(12)(a). After this investigation, the statute provides that "findings" are to be issued: "At the completion of the

investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded." *Id.* DSHS recognizes the legislative intent that investigations be completed in 90 days with prompt findings. But nothing in the statutory text suggests that findings issued on the 91st day are void. There is no penalty, or expressed intent that an investigated person can rely on the 91st day as if it were a statute of limitations or repose.

2. Petitioners Misread Ultra Vires Case Law

To get to the extraordinary result of deeming their unappealed findings void, Petitioners ask the Court to use the ultra vires doctrine. PFR 10-11. The court of appeals, however, properly applied this Court's leading case of *South Tacoma Way LLC. v. State*, 169 Wn.2d at 118, and this Court's other ultra vires cases, to reject the Petitioners' theory.

a. *South Tacoma Way* Does Not Support a Finding That Delayed Findings Are Void Ab Initio

As recognized in *South Tacoma Way,* 169 Wn.2d at 118, past Washington "cases have drawn a distinction between government acts that are ultra vires and those acts that suffer from some procedural irregularity." *South Tacoma Way,* 169 Wn.2d at 122. While the words "ultra vires" are not always artfully used by courts, this Court made it clear that:

> Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed. Ultra vires acts cannot be validated by later ratification or events.

Id, 169 Wn.2d at 123, ¶11. Thus, for an action to be void from its beginning, the legal test is stringent. It requires "no legal authority" in a scenario where "no power to act existed, even where proper procedural requirements are followed." *Id.*

Petitioners cannot meet the standard to make their findings void when issued. Both parties agree that the statute unambiguously grants DSHS legal authority to issue findings. That is the express power to act granted in RCW 26.44.030(12)(a). In essence, Petitioners are asking this Court to review the very argument it recently rejected in *South Tacoma Way,* 169 Wn.2d at 118, where a party "fail[ed] to distinguish between substantive and procedural violations of law." *Id.*, 169 Wn.2d at 123, ¶ 14. Petitioners cannot simply label a late finding as a substantive violation. Doing so defies the Court's distinction between substance and procedure. Because Petitioners' primary ultra vires argument that the findings are void runs directly counter to the clear rule of law, it does not present a significant issue requiring this Court's review.

b. Petitioners Cannot Show That a Finding More Than 90 Days Out Is Voidable

Nor is there any reason for this Court to examine the alternative issue discussed in *South Tacoma Way*, where a court must evaluate "acts done without strict procedural or statutory compliance[.]" *Id.*, 169 Wn.2d at 123, ¶ 12. At the very most, such "acts *may or may not* be set aside *depending on the circumstances involved.*" *Id.* (emphasis added). The Petition, however, fails to distinguish this secondary approach discussed in *South Tacoma Way* from the narrow doctrine of ultra vires and void. But, to the extent Petitioners are trying to argue that the findings should be "set aside" under this secondary approach, the court of appeals properly addressed this issue. There is no need for this Court's review of that unpublished decision.

This case presents no basis for concluding that the statute reflects a legislative intent or policy where late findings are subject to being set aside *solely* for being later than 90 days. First, the statutory structure shows that there is no need for such a remedy. Any person who receives a so-called "late" finding of abuse or neglect has robust rights to appeal the finding. See RCW 26.44.125(2) and RCW 26.44.125(4); WAC 388-15-093; WAC 388-15-109. As a result, the remedy of "setting aside" findings solely for lateness would assist only two types of individuals: (1)

individuals who appealed but failed to obtain a change in findings; and (2) individuals like the Semenenkos, who failed to appeal the findings altogether and who mount an untimely collateral attack. Neither situation presents a reason for setting aside findings solely based on lateness.

Second, the direction to investigate within 90 days is not comparable to the State Environmental Policy Act (SEPA) violation reviewed in *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982), the other case relied upon by Petitioners. As this Court recognized in *South Tacoma Way*, the *Noel* case set aside a timber sale based upon a clear legislative intent and policy. Certain state actions, including the timber sale, had to be preceded by compliance with SEPA review of environmental impacts. *South Tacoma Way*, 169 Wn.2d at 126, ¶19. Unlike the DSHS non-compliance with the statutory directive on timing, the ruling in *Noel* depended on "one important distinction." *Id.* The clearly legislative policy required consideration of SEPA values *before* taking action—it was a legal prerequisite to the action. Perhaps if DSHS issued a founded finding of abuse/neglect without doing the prerequisite investigation, it could be analogous to *Noel.* But an untimely issuance of the finding after the requisite investigation does not defeat any legislative prerequisite to action.

c. Policy Goals Embodied by RCW Chapter 26.44 Are Not Advanced by Voiding Findings of Abuse and Neglect

Petitioners, nevertheless, argue that various policy goals of the legislature in enacting a 90 day limit should lead to a different result. PFR at 12-14. But their analysis of legislative policies is flawed and does not explain why the 90th day is a drop-dead date, beyond which a finding is void or subject to being set aside. There is no legislatively created prerequisite to founded findings missing from this case, in contrast to the SEPA compliance missing in *Noel.* RCW Chapter 26.44.

Moreover, Petitioners ask for a result that is contrary to the policy of the statutes. Under RCW 26.44.100(1), "[t]he legislature reaffirms . . . that protection of children remains the priority of the legislature[.]" This express priority—protection of children—is defeated if a DSHS finding of abuse or neglect is void, or subject to being set aside, *solely* because it was issued past the 90th day of an investigation.

Petitioners also rely on the other competing policies in the statutes, but those arguments also fail to show that the findings should be set aside. For example, the policy of conducting a prompt investigation protects children by avoiding a dangerous delay, and protects parents and children from the harm of a protracted investigation of unfounded reports of abuse or neglect. Neither of these policies implies that a finding of abuse is void

solely because it is issued more than 90 days after an investigation began. The Legislature expressly stated that a child's safety is the highest priority if there is tension with competing rights of parents, custodians and guardians.

> When the child's physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, *the health and safety interests of the child should prevail.*

RCW 26.44.010 (emphasis added). Contrary to arguments in the Petition, a parent's interest in avoiding a protracted investigation cannot outweigh a child's interest in being protected. Petitioners' view would lead to dangerous consequences for children and vulnerable adults because identified and known perpetrators would not be subject to a finding.

Nor does a finding beyond the 90 day timeline undermine the important legislative interest in providing due process. Due process is met because any person who is investigated and found to have committed abuse or neglect is entitled to notice and the opportunity to be heard. RCW 26.44.100 (describing notice rights) and RCW 26.44.125 (hearing rights). It is this meaningful notice and opportunity to be heard that provides due process. E.g. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). Petitioners cite no case that recognizes a substantive or procedural due process right to have an investigation of

child abuse end by the 90th day. That is because a finding made more than 90 days from referral is still subject to the full array of procedural due process rights, including internal agency review, followed by a hearing process with evidence, argument, and a decision, which is then subject to judicial review. RCW 26.44.125(2), RCW 26.44.125(4).

In summary, case law and a common sense view of RCW 26.44 shows that the timeline in RCW 26.44.030(12) is not a statute of limitations or repose for a person who abused or neglected a child. Petitioners' argument to the contrary frustrates the purpose of protecting children and vulnerable adults. The court of appeals properly applied *South Tacoma Way* to this issue of non-compliance with the statute.

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VI. CONCLUSION

The issues raised by Petitioners do not require review by this Court. The Respondent respectfully requests that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 4th day of November, 2014.

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No. 90871-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re: YEVGENY SEMENENKO and NATALYA SEMENENKO, Petitioners, v. STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	CERTIFICATE OF SERVICE

I, Sandra K. Kent, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On November 4, 2014, I sent a copy of: **DSHS Answer to Petition for Discretionary Review and Declaration of Service** via email to:

1. **Meagan MacKenzie,** Northwest Justice Project, 711 Capitol Way South, Suite 704, Olympia, Washington 98501-1237

   E-mail Address: meaganm@nwjustice.org; and

2. **Deborah Perluss,** Northwest Justice Project, 401 2nd Avenue South, Suite 407, Seattle, Washington 98104-3811 Suite 704, Olympia, Washington 98501

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I declare under penalty of perjury, under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of November, 2014, at Seattle, Washington.

SANDRA K. KENT
Legal Assistant
OID #91016

OFFICE RECEPTIONIST, CLERK

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Subject: Case Number 90871-I, YEVGENY and NATALYA SEMENENKO, Petitioners, v. State of Washington Department of Social and Health Services, Respondent.

Good Morning:

Attached please find copies of the following documents in connection with the above captioned case:

- DSHS Answer to Petition for Discretionary Review; and
- Certificate of Service.

Contact Name: Sandy Kent

Attorney Name: Patricia L. Allen
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Should you have any questions, please feel free to contact me at (206) 389-2096.

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"The greatest achievement of the human spirit is to live up to one's opportunities and make the most of one's resources."

Vauvenargues, Marquis de quotes

(French moralist and essayist, 1715-1747)

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