NO. 32758-2 III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HOLLY R. SNYDER,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. IDENTITY OF THE ANSWERING PARTY

The State of Washington, Department of Social and Health Services ("Department"), prevailed before the Department Board of Appeals ("Board") and the superior court below and is the answering party in this appeal.

II. STATEMENT OF RELIEF SOUGHT

The Department requests this Court affirm the Board's review decision and final order, which affirmed the founded finding of child abuse/neglect against Ms. Snyder.

III. COUNTER STATEMENT OF ISSUE ON REVIEW

1. **Whether the Board's review decision and final order should be reversed under one or more of the enumerated grounds for review listed in RCW 34.05.570(3).**
2. **Whether Ms. Snyder was effectively served with notice of the Board's review decision and final order when the Department mailed Ms. Snyder the decision to the address she had provided one week earlier.**

IV. COUNTER STATEMENT OF FACTS

On March 19, 2010, the Department received a report alleging that Ms. Snyder had abused or neglected a child. On March 21, 2011, the Department sent Ms. Snyder a letter advising her that the investigation into

the 2010 report was "Founded" for "negligent treatment or maltreatment" of a child. Administrative Record (AR) at 39-44. Ms. Snyder received the letter on March 31, 2011 at 9:09 a.m. through certified letter at her home address of 412 W. Longfellow, Spokane, WA 99205. AR at 45. Ms. Snyder requested an internal review of the finding on April 6, 2011 and listed her address on the review request form as 412 W. Longfellow, Spokane, WA 99205. AR at 46. The return address on the envelope Ms. Snyder used to mail the form to the Department was the same 412 W. Longfellow address and the envelope was postmarked April 7, 2011. AR at 47.

On April 12, 2011, the Department sent Ms. Snyder a letter indicating that the internal review upheld the founded finding. AR at 48. The letter was mailed to Ms. Snyder via certified mail on April 13, 2011 at the same 412 W. Longfellow address. AR at 49. The post office attempted delivery on April 14, 2011; April 21, 2011; and April 29, 2011. AR at 49. The letter was ultimately returned to the Department unclaimed on May 4, 2011. AR at 49.

The Office of Administrative Hearings received a request for hearing regarding the finding on April 4, 2013, nearly two years after the internal review. AR at 64.

On September 10, 2013, Administrative Law Judge (ALJ) Robert M. Murphy issued a decision granting the Department's motion to dismiss for lack of jurisdiction. AR at 15 and 35-57. The ALJ dismissed the appeal,

finding that it was reasonable for the Department to attempt to serve Ms. Snyder at the address she had provided to the Department shortly before the review letter was mailed. AR at 15-21.

Ms. Snyder petitioned for review of the initial decision on September 17, 2013. AR at 14. On November 5, 2013, Department Review Judge Thomas Sturges issued a decision denying the petition for review. AR at 10.

A petition for judicial review was filed on December 2, 2013. Oral argument was held on June 27, 2014. Ms. Snyder's petition was denied through superior court order entered on the same date.

Ms. Snyder now seeks review of the superior court order.

V. ARGUMENT

A. The Board's Review Decision and Final Order Does Not Violate Any Enumerated Ground For Review In RCW 34.05.570(3).

Review of an agency action is governed by the Administrative Procedure Act (APA), ch. 34.05 RCW. *Olympic Healthcare Servs. II LLC v. Dep't of Soc. & Health Servs.*, 175 Wn. App. 174, 180, 304 P.3d 491 (2013). The party seeking relief bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a). An appellate court may reverse an agency action based on one of the nine enumerated grounds in RCW 34.05.570(3). This Court reviews the Board's review decision and final order, not the ALJ's decision or the superior court's

order. *See Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

"An agency order is supported by substantial evidence if there is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011) (internal quotation marks omitted) (quoting *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008)).

Review is de novo of the Board's legal determinations under the APA's "error of law" standard, and this Court may substitute its own view of the law for that of the Board. *Marcum v. Dep't of Soc. & Health Servs.*, 172 Wn. App. 546, 559-60, 290 P.3d 1045 (2012); *Verizon Nw., Inc. v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *see* RCW 34.05.570(3)(d). Appellate courts give substantial weight to an agency's interpretation of the law within its expertise, such as regulations the agency administers. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 885, 154 P.3d 891 (2007).

Ms. Snyder does not claim any error under RCW 34.05.570(3) in her appeal, thus her appeal should be barred solely on that basis. Instead, Ms. Snyder argues for the first time on appeal that RCW 26.44.100 and

RCW 26.44.125 establish a heightened protection to due process rights for parents and children. Br. of Appellant at 7.

Generally, an appellate court may refuse to review any claim of error which was not raised below. RAP 2.5(a). Under RAP 2.5(a), a party may assert for the first time on appeal a lack of trial court jurisdiction, the failure to establish facts upon which relief can be granted or a manifest error affecting a constitutional right. Ms. Snyder's appeal, however, is not an issue of constitutional magnitude, nor does it come within either of the other exceptions listed in RAP 2.5(a). Even if the court was to address the due process issue that Ms. Snyder raises, her arguments lack merit as set forth below.

B. The Department Fulfilled Its Statutory Duty to Notify Ms. Snyder of the Review Decision and Final Order When it Mailed the Decision to her at the Address She had Provided One Week Earlier.

Chapter 26.44 RCW requires the Department to investigate reports of child abuse and neglect. RCW 26.44.030. The Department is required to notify the subject of the report of the Department's investigative findings. RCW 26.44.100(2).

The notification required under this section shall be provided by certified mail, return receipt requested, to the person's last known address. RCW 26.44.100(3). The duty of notification is "subject to the

ability of the Department to ascertain the location of the person to be notified. The Department shall exercise reasonable, good-faith efforts to ascertain the location of persons entitled to notification under this section." RCW 26.44.100(4).

Review of Child Protective Services ("CPS") "founded findings" of child abuse or neglect is governed by RCW 26.44.125, which provides as follows:

> (1) A person who is named as an alleged perpetrator after October 1, 1998, in a founded report of child abuse or neglect has the right to seek review and amendment of the finding as provided in this section.
>
> (2) Within thirty calendar days after the department has notified the alleged perpetrator under RCW 26.44.100 that the person is named as an alleged perpetrator in a founded report of child abuse or neglect, he or she may request that the department review the finding. The request must be made in writing. The written notice provided by the department must contain at least the following information in plain language:
>
> (a) Information about the department's investigative finding as it relates to the alleged perpetrator;
>
> (b) Sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded reports;
>
> (c) That the alleged perpetrator has the right to submit to child protective services a written response regarding the child protective services finding which, if received, shall be filed in the department's records;
>
> (d) That information in the department's records, including information about this founded report, may be considered

in a later investigation or proceeding related to a different allegation of child abuse or neglect or child custody;

(e) That founded allegations of child abuse or neglect may be used by the department in determining:

(i) If a perpetrator is qualified to be licensed or approved to care for children or vulnerable adults; or

(ii) If a perpetrator is qualified to be employed by the department in a position having unsupervised access to children or vulnerable adults;

(f) That the alleged perpetrator has a right to challenge a founded allegation of child abuse or neglect.

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

(4) Upon receipt of a written request for review, the department shall review and, if appropriate, may amend the finding. Management level staff within the children's administration designated by the secretary shall be responsible for the review. **The review must be completed within thirty days after receiving the written request for review.** The review must be conducted in accordance with procedures the department establishes by rule. **Upon completion of the review, the department shall notify the alleged perpetrator in writing of the agency's determination. The notification must be sent by certified mail, return receipt requested, to the person's last known address.**

(5) If, following agency review, the report remains founded, the person named as the alleged perpetrator in the report may request an adjudicative hearing to contest

> the finding. The adjudicative proceeding is governed by chapter 34.05 RCW and this section. **The request for an adjudicative proceeding must be filed within thirty calendar days after receiving notice of the agency review determination. If a request for an adjudicative proceeding is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding.**
>
> (6) Reviews and hearings conducted under this section are confidential and shall not be open to the public. Information about reports, reviews, and hearings may be disclosed only in accordance with federal and state laws pertaining to child welfare records and child protective services reports.
>
> (7) The department may adopt rules to implement this section.

RCW 26.44.125 (emphasis added).

RCW 26.44.125(7) gives the Department the authority to adopt rules to implement this section. Those rules are codified in chapter 388-15 WAC. WAC 388-15-097 provides that:

> CPS will notify the alleged perpetrator in writing of the results of the CPS management review. CPS will send this notice to the last known address of the alleged perpetrator by certified mail, return receipt requested. The notice of the CPS management review decision will also contain information regarding how to request a hearing.

The Department was required to notify Ms. Snyder of the outcome of the agency review pursuant to RCW 26.44.125. The notice is required to be mailed to the individual's last known address by certified mail,

return receipt requested. RCW 26.44.125(4). If the legislature wanted to require that the subject of the agency review receive actual notice, it could have drafted RCW 26.44.125 accordingly. It did not do so. "When the words in a statute are clear and unequivocal, [courts are] required to assume the Legislature meant exactly what it said and apply the statute as written." *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

The due process clause of the Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV. At a minimum, due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Notice must be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999).

Here, Ms. Snyder argues that the notice afforded by the applicable statute is not enough to meet due process requirements. However, Ms. Snyder received actual and legal notice of the original founded finding. In response to the finding, Ms. Snyder requested an agency review and provided an address where she could be reached regarding the review. One week later, the review decision was mailed to the address she provided. In that short time, Ms. Snyder had already vacated the

residence and did not notify the Department or the Post Office of her change of address. Sending certified mail to the address that Ms. Snyder provided was certainly a process that was reasonably calculated to inform her of the decision. In addition, Ms. Snyder already knew about the founded finding and the fact that a review decision was forthcoming, which would grant her an opportunity to object. In mailing the letter to Ms. Snyder's W. Longfellow address, the Department took reasonable steps to provide Ms. Snyder with notice of the founded finding, and those efforts pass constitutional muster.

In at least two published Washington appellate decisions, the courts have effectively concluded that a person who refuses to accept a notice sent by certified mail, return receipt requested, has constructively refused to accept that notice. In *City of Seattle v. Foley*, 56 Wn. App. 485, 784 P.2d 176 (1990), the court determined that failure or refusal to claim a notice of revocation of license sent by certified mail as allowed by RCW 46.20.308(7) constituted sufficient evidence that Foley had received notice of his license revocation which would support his conviction of driving without a valid operator's license. The court reasoned:

> [W]e disagree with Foley's assertion that certified mail, sent to a last known address, and returned unclaimed does not satisfy the notice requirements. The statute [RCW

> 46.20.308] simply requires the Department of Licensing to notify a person via personal service or certified mail. The Department complied with this by sending notice to the most recent address listed on papers in the Department's possession. *State v. Baker*, 49 Wash.App. 778, 782, 745 P.2d 1335 (1987). Thus, if the Department mailed the notice to an address which it knew or should have known was not the last known address of the person to be notified, the Department would not have complied with the statute.
>
> Although Foley did not acknowledge receipt, the post office attempted delivery as evidenced by the certified mail receipt. Nothing in the record indicates that Foley lived at a residence other than the one to which the Department of Licensing sent the order of revocation. The only reasonable conclusion to be reached is that the Department sent the notice to Foley's last known address and Foley refused to claim it. Foley cannot now argue that notice was improper. Were we to conclude otherwise, we would permit a person to refuse to submit to a breath test and thereafter avoid a mandatory license revocation by simply not claiming certified mail or moving to an unknown address . . . .

Foley, 56 Wn. App. at 489.

The Washington State Supreme Court found in the case of *In re Marriage of McLean,* 132 Wn.2d 301, 937 P.2d 602 (1997), that under RCW 26.09.175, a party may be served with a summons and copy of a petition in a child support modification by personal service or by form of mailing requiring a return receipt. The statute further states that a default shall result if the responding party does not file an answer within 60 days of service of the petition. In *McLean*, the responding party argued that

the service by mail requiring a return receipt was an indication that the Legislature intended more than a mere service by mailing. The argument was that if the responding party does not in fact sign the receipt, there would be no evidence of actual delivery. The court concluded that mailing the petition for modification by certified mail to a valid address, even if the mail is returned unclaimed or refused, satisfied the notice requirements. The court in that case held:

> In *State v. Vahl*, 56 Wash.App. 603, 784 P.2d 1280 (1990), the issue also concerned a statute providing for notice of a driver's license revocation by certified mail, former RCW 46.65.065(1). The defendant, an habitual traffic offender, claimed that notice sent by certified mail failed to satisfy due process where the mail was unclaimed. The court rejected the argument, and reasoned that refusing to claim certified mail is analogous to refusing to accept in hand service, and that just as a person cannot defeat notice by refusing tendered process, a person cannot defeat mail by refusing to claim certified mail. *Vahl*, 56 Wash.App. at 607, 784 P.2d 1280 (citing *United Pac. Ins. Co. v. Discount Co.*, 15 Wash.App. 559, 550 P.2d 699 (1976) and *Neilsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963)).

In re Marriage of McLean, 132 Wn.2d at 311-312.

The court in *McLean* also noted:

> [The] return receipt form of mail designated enables the court and the parties to track what happens to the mail after it is sent. This may be important where it is claimed the petitioner used an incorrect address, for example. Second, while there may not be evidence of actual receipt, there will be evidence that notice was sent as required by statute. As the Court of Appeals suggested with respect to the mechanics' lien statute which similarly provides that

> service may be sent by certified mail, return receipt requested, such a method protects the sender against a claim that notice was never mailed. *Baker v. Altmayer*, 70 Wash.App. 188, 190, 851 P.2d 1257, *review denied*, 122 Wash.2d 1024, 866 P.2d 39 (1993).
>
> [. . .]
>
> Where possible, statutes will be construed so as to avoid any unconstitutionality. *City of Seattle v. Montana*, 129 Wash.2d 583, 590, 919 P.2d 1218 (1996). The Fourteenth Amendment required that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard appropriate to the nature of the case. *Mullane [v. Central Hanover Bank & Trust Co.]*, 339 U.S. [306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)] at 313, 70 S.Ct. at 656-57. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314, 70 S.Ct. at 657.

In re Marriage of McLean, 132 Wn.2d at 307-308.

According to Washington case law, a person who refuses to accept a notice sent by certified mail, return receipt requested, has constructively refused to accept that notice. Ms. Snyder constructively refused to accept service when she did not claim the letter sent April 14, 21, and 29, 2011. *See* RCW 26.44.125(4) (permitting notification of the Department's review decision to occur by certified mail, return receipt requested).

This Court recently reviewed notice requirements related to findings made by the Department of Social and Health Services. In *Ryan*

v. Dep't of Soc. & Health Servs., 171 Wn. App. 454, 287 P.3d 629 (2012) this Court reviewed an Adult Protective Services ("APS") rule, WAC 388-71-01210. Although *Ryan* is distinguishable, it is helpful in that it provided three reasons for finding that the Department's efforts were insufficient, all of which are inapplicable here. First, in *Ryan* this Court focused attention on the fact that APS maintains a registry of findings of abuse that are accessible to the public. Here, there is no registry containing the names of individuals who have been found to have committed child abuse and neglect in Washington. A founded finding of child abuse and neglect is confidential information and is only disclosed if a petitioner authorizes a background check or a court orders the Department to disclose the information. RCW 26.44.031(1); RCW 26.44.125(6); RCW 74.04.060(1)(a); RCW 74.13.500; WAC 388-15-057. To be employed at a facility which serves children or vulnerable adults, and if that person will have access to children or vulnerable adults, that person must authorize a check of their background, including any CPS findings. WAC 388-06-0110. Ms. Snyder did apply for enrollment in an educational program that requires a CPS background check and was disqualified due to the founded finding. Her information is not available to the public.

Second, in *Ryan* this Court found that the Department knew that the alleged perpetrator did not live at the address that was used for service. Here, the Department had every reason to believe that the address was correct, especially since Ms. Snyder had successfully been served by certified mail there and then Ms. Snyder again provided the address herself with the knowledge that it would be used to deliver the results of the review. Third, in *Ryan* this Court found that the Department was aware of the alleged perpetrator's place of employment and had a working message phone number for her. Here, there is no indication in the record that the Department had access to any such information.

There is also a fourth reason that distinguishes *Ryan*: the fact that Ms. Snyder already knew about the founded finding and requested a review and therefore had notice that a review decision would be mailed to her within thirty days. She then immediately moved to a new residence. She easily could have contacted the Department or the Post Office to update her address, but she did not. Instead, she argues that the Department should have done something additional to determine that she had moved and to find her new address. She does not give any suggestion as to what methods the Department should have used to obtain this information or any reason why it was necessary to take action beyond

what is required in the statute. For these reasons, it is clear that the Department made appropriate efforts to serve Ms. Snyder, consistent with her due process rights.

VI. CONCLUSION

For the foregoing reasons, the Department requests this Court affirm the Board's review decision and final order, which affirmed the founded finding of child abuse/neglect against Ms. Snyder.

RESPECTFULLY SUBMITTED this 4 day of November, 2015.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Social and Health Services' Brief of Respondent to the following address:

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I certify 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 2015, at Spokane, Washington.

Kahren S. McCrow
Legal Assistant