

FILED
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STATE OF WASHINGTON
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No. 95666-9

SUPREME COURT OF THE STATE OF WASHINGTON

DALJIT DHALIWAL,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Respondent.

DSHS ANSWER IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

Mr. Dhaliwal failed to timely request review of the Department's founded findings of child abuse or neglect in compliance with the express requirements of RCW 26.44.125. When Mr. Dhaliwal failed to pursue and perfect his appeal in a timely fashion, the Department's founded findings of abuse and neglect became final. They are not subject to further appeal based on his allegations of new evidence, and Mr. Dhaliwal's argument for such relief does not present any issues that warrant this Court's review. Therefore, the petition for review should be denied.

Mr. Dhaliwal provides no legal authority whatsoever to support his claim that new evidence may be considered under RCW 34.05.562 in an untimely hearing, long after the appellant fails to perfect a timely appeal. Thus, Mr. Dhaliwal forfeited his hearing rights and cannot resurrect those rights through RCW 34.05.562(2) by offering recantation evidence.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Whether Mr. Dhaliwal lost his hearing rights due to his failure to timely request review of child abuse and neglect findings pursuant to RCW 26.44.125, such that he cannot seek a hearing years after the founded finding became final?
- B. Whether recantation evidence that seeks to challenge an otherwise final "founded finding" is allowed under RCW 34.05.562(2)?

III. COUNTERSTATEMENT OF THE CASE

This case arose from two founded findings of child abuse not challenged in a timely fashion. The first finding was made on December 20, 2011, when Daljit Dhaliwal received notice that DSHS made a founded finding in Intake No. 2535417 that he physically abused his child on November 29, 2011. CABR 94-99.¹ The notice stated that the allegation of physical abuse was founded against Mr. Dhaliwal based in part on allegations that on November 29, 2011, Mr. Dhaliwal became angry with his daughter when they were driving in a car and “he took off his silver bracelet (using it wrapped around his knuckles) and struck her several times with a closed fist.” CABR 95. *See also* CABR 79.

On January 5, 2012, Daljit Dhaliwal received a second notice that DSHS made a founded finding in Intake No. 2543461, determining that he engaged in negligent treatment or maltreatment of his child on December 12, 2011. CABR 88-89. The notice stated that the allegation of negligent treatment or mistreatment was founded against Mr. Dhaliwal based in part on allegations that on December 12, 2011, Mr. Dhaliwal locked his 16-year-old daughter in a bedroom at the parents’ home for about

¹ The Certified Appeal Board Record (CABR) does not have Clerk’s Papers numbers assigned. Rather, it was sent to the Court of Appeals by the King County Superior Court Clerk’s Office as Sub No. 6. The Certified Appeal Board Record pages were Bates stamped with Sub No. 6 consisting of pages 1 through 99. Hence, citations to the Certified Appeal Board Record will be made as follows: “CABR” followed by the specific Bates stamped page number(s).

30 minutes and attempted to coerce her to return to the care of her parents, when the parents were only allowed to have supervised visits with the daughter. CABR 89. *See also* CABR 59.

The Department's founded finding notices were written in Mr. Dhaliwal's native language and Mr. Dhaliwal acknowledges that he received the notices letters in December 2011 and January 2012.² CP 20;³ CABR 88-99; Pet. at 8-9. The notices included notice of how Mr. Dhaliwal could challenge the findings with administrative review. CABR 70-83, 88- 89, 94-99.

Mr. Dhaliwal also acknowledges that he did not respond to the Department's December 2011 and January 2012 notices of founded findings until August 2013. Pet. at 10. On August 16, 2013, more than eighteen months after receiving the notices of founded findings, Mr. Dhaliwal asked DSHS Children's Administration to review the notices that he received on December 20, 2011 and January 5, 2012. CABR 84-86.

In response, the DSHS Area Administrator informed Mr. Dhaliwal in a letter dated October 4, 2013 that his request for review "of the findings resulting from intake #2535417 and #2543461" was untimely and long past

² Although the CABR does not expressly state that the notices received by Mr. Dhaliwal on 12/20/11 and 01/05/12 are in the Punjabi language, the evidence indicates they are in Punjabi. The Department expressly stated that the notice it later gave to Mr. Dhaliwal on October 7, 2013 is in the Punjabi language. CABR 84-87.

³ Citations to the Clerk's Papers are listed as "CP" followed by the specific page number referenced in the Index to Clerk's Papers.

his allowed timeframe, but also added that she reviewed the investigative records and findings and determined that the founded findings will not be changed. CABR 84. The Department's October 4, 2013 letter was written in Mr. Dhaliwal's native language and hand delivered to him on October 7, 2013. CABR 84-87. Mr. Dhaliwal acknowledged receipt of the Department's October 4, 2013 letter. Pet. at 10.

Seven more months followed with no action. But on May 7, 2014, Mr. Dhaliwal delivered to the Office of Administrative Hearings (OAH) a hearing request to challenge the Department's letter dated October 4, 2013, which had declined to change the founded findings resulting from Intake Numbers 2535417 and 2543461. CABR 57.

In preparation for his administrative hearing, Mr. Dhaliwal submitted to the OAH an unsworn statement from his daughter dated April 21, 2015 (attached to his Pre-Hearing Statement), which references a CPS case in November 2011 and states that her father and mother did not do these crimes, didn't hit her and it was all a lie. CABR 40. This conclusory, unsworn statement does not specifically refute the allegations set forth in the DSHS notices relating to the founded findings in Intake Numbers 2535417 and 254346. CABR 40. Mr. Dhaliwal also submitted to the OAH a copy of an email sent by his daughter to Ragnar Bloom, dated January 10, 2012, which also does not specifically refute the founded

findings. CABR 39. There is also a letter in the Certified Appeal Board Record from a physician dated May 22, 2014, which states that “Daljit says that he has a CPS incident on his record from 3 years ago, when he hit his daughter on the arm because she was misbehaving . . . they had a fight (11/29/2011) and he slapped her on the arm, and she reported him to CPS.” CABR 53. None of these records were formally admitted during in the administrative proceeding and Mr. Dhaliwal did not present any other evidence to refute the Department’s founded findings.⁴ CABR 1-99; CP 67- 80.

On June 9, 2015, a prehearing conference was held and the Department made an oral motion to dismiss the appeal because Mr. Dhaliwal failed to timely request review of the Department’s founded findings in Intake Numbers 2535417 and 254346. CP 71. Mr. Dhaliwal’s attorney agreed on June 9, 2015 to proceed by addressing that dismissal motion. CP 71-73.

On June 30, 2015, the Administrative Law Judge issued an order dismissing Mr. Dhaliwal’s appeal because his request for review was

⁴ The Appellant makes factual allegations in his Petition for Review relating to his daughter that were not offered into evidence in the administrative proceeding. Pet. at 9, 10. Such allegations that are not based on findings or even admitted evidence should not be considered by this Court in evaluating whether the issues presented by this case should be reviewed.

untimely. CABR 16-21. Mr. Dhaliwal then timely petitioned for review to the DSHS Board of Appeals to challenge the Order of Dismissal. CABR 12.

On July 31, 2015, the DSHS Board of Appeals Review Judge issued the Review Decision and Final Order affirming the Administrative Law Judge's dismissal of Mr. Dhaliwal's appeal. CABR 1-8. The Review Judge found that Mr. Dhaliwal failed to timely request review of the Department's notices of founded findings received on December 20, 2011 and January 5, 2012, because he did not ask DSHS to review those findings until August 13, 2013. CABR 7-8. Further, the Review Judge found that Mr. Dhaliwal did not request administrative review of the Department's letter dated October 4, 2013 (that notified Mr. Dhaliwal that his hearing request was untimely and the found findings will not be changed) until May 7, 2014. CABR 8.

Next, Mr. Dhaliwal timely filed a petition for judicial review in King County Superior Court and the Court affirmed the DSHS Review Decision and Final Order. CP 1-4, 105-106. Mr. Dhaliwal then timely filed a Notice of Appeal. CP 109-110.

In an unpublished decision dated February 26, 2018, the Court of Appeals affirmed the Review Decision and Final Order dated July 31, 2015, which dismissed Mr. Dhaliwal's appeal. The Court of Appeals ruled that Mr. Dhaliwal's failure to timely request a hearing under former

RCW 26.44.125(2) (1998) resulted in the loss of his hearing rights under RCW 26.44.125. Further, the court ruled that the terms of RCW 34.05.562(2)(b), which allow a court to remand upon discovery of new evidence, do not allow the court to reopen a final order that was not timely appealed.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

The time bar to Mr. Dhaliwal's claim is based on well-established case law and statute. There is no need for a third level of judicial review.

A. Review Is Not Warranted Because Mr. Dhaliwal Lost His Hearing Rights Due To His Failure To Timely Request Review

Mr. Dhaliwal lost his hearing rights due to his failure to comply with the express requirements of former RCW 26.44.125 for timely requesting review of the Department's founded findings of child abuse or neglect. His attempt to seek untimely administrative review does not warrant this Court's review under any of the criteria set forth in RAP 13.4(b).

The Legislature created a right to review founded findings of abuse or neglect to the Department as follows:

Within twenty calendar days after receiving written notice from the department under RCW 26.44.100 that a 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. **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.

Former RCW 26.44.125(2) (emphasis added).

It is undisputed that Mr. Dhaliwal failed to timely request that the Department review the Department's founded findings of child abuse or neglect after receiving written notice of the findings from the Department, as required by former RCW 26.44.125(2).⁵ He made no request to DSHS Children's Administration to challenge the notices he received on December 20, 2011 and January 5, 2012, until 18 months later, on August 16, 2013. CABR 84-86. This failure to act waived his right to challenge the Department's findings and, therefore, he has "no right to agency review or to an adjudicative hearing or judicial review" of the findings. Former RCW 26.44.125(2).

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

⁵ The provisions of RCW 26.44.125(2) in effect at the time the Department made the founded reports against Mr. Dhaliwal in December of 2011 required that a request for review be made within twenty (20) days after receiving written notice. This statute was subsequently changed to extend the time period to request review to thirty (30) days and other provisions were also added. Given that Mr. Dhaliwal delayed for 18 months, he is barred by any version of the statute.

The Legislature can specify what conditions it wants an appellant to satisfy to perfect an administrative appeal and exhaust the mandatory administrative remedies, as it has in RCW 26.44.125. The administrative law tribunals and the superior court follow such standards because they are the law. Otherwise, there would be no deadlines for requesting review or filing appeals and no statutes of limitations.

Hence, when Mr. Dhaliwal failed to perfect his appeal, the Department's founded findings of abuse and neglect became final and not subject to further appeal. This finality is well-recognized in Washington law. "The doctrine of claim preclusion applies to a final judgment by the Department as it would to an appealed order of a trial court." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). A final order precludes relitigation or collateral attack. *Id.* at 538. The "failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Id.* Put another way, "[a]n unappealed Department order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order" *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997).

The Petition offers no reason for the Court to revisit these legal principles. He cites no cases that conflict with the decisions below.

Therefore, Mr. Dhaliwal's claim that his petition presents significant issues of law under the Constitutions of the United States and the State of Washington and an issue of substantial public interest is without merit. Pet. at 6, 14. Rather, the issues (and Mr. Dhaliwal's complaint) is a fact-specific problem unique to his failure to timely request review, which results in an unappealed, but final order. Therefore, the Court of Appeal's unpublished opinion that affirmed dismissal of his untimely appeal does not warrant review.

B. The Courts Below Properly Refused to Consider Recantation Evidence under RCW 34.05.562(2) Because Mr. Dhaliwal Had No Right to a Hearing to Review the Founded Findings

The Court of Appeals properly refused to consider Mr. Dhaliwal's recantation evidence under RCW 34.05.562(2), a provision of the APA governing new evidence during judicial review, because Mr. Dhaliwal had lost his hearing rights by failing to timely request and exhaust his administrative review procedures. Mr. Dhaliwal's reliance on that statute to support his request for an untimely hearing is not an issue that warrants review under RAP 13.4(b).

Once Mr. Dhaliwal forfeited his hearing rights by failing to perfect his appeal, he cannot resurrect those rights through RCW 34.05.562(2) by purporting to offer "new" recantation evidence. First, Mr. Dhaliwal fails to provide any legal authority to support his claim that new evidence may be

considered by the administrative law judge or by the judicial review judge under RCW 34.05.562, when the appellant failed to perfect his appeal.

Moreover, the plain language of that RCW 34.05.562(2)(b) addresses the power of a court to remand for additional evidence when reviewing an actual final adjudicative decision and hearing record. That statute provides:

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency; It does not authorize a court to , when hearing a judicial review in its appellate capacity, to evidence outside in an adjudicative hearing or other administrative hearing record.

Mr. Dhaliwal's case in superior court does not fit this statute. It concerned an agency decision *not* to conduct a hearing that was requested years after founded findings became final. In that setting, the only issue was whether the findings were indeed final. The courts were not reviewing an administrative record that had upheld founding findings, and they were not addressing if an adjudicative hearing order was supported by substantial

evidence. That is the context in which RCW 34.05.562(2)(b) might allow a court during the appellate process to remand. In contrast, Mr. Dhaliwal's argument would turn this statute into a perpetual exception to finality of unchallenged findings, and allow courts to order an agency to adjudicate otherwise final action months or years after the actions are final.

RCW 26.44.125 clearly does not give the court authority to alter the terms of perfection of an appeal. It does not contemplate that there would be another remedy or an analysis of whether there was prejudice or that RCW 34.05.562(2)(b) would provide this exception. Nor is RCW 26.44.125 like other statutory schemes where the Legislature specifically provides for a potential remedy for late service. *See, e.g.*, RCW 50.32.075.⁶

Hence, the Court of Appeals correctly ruled that the language in RCW 34.05.562(2)(b), which allows a court to remand upon discovery of new evidence in narrow circumstances, does not authorize the court to order an agency to conduct a hearing to address final findings where there was no timely request for review. Mr. Dhaliwal's arguments to the contrary are not based in any case law and contradict the statute. The issue, therefore, does not warrant review under RAP 13.4(b).

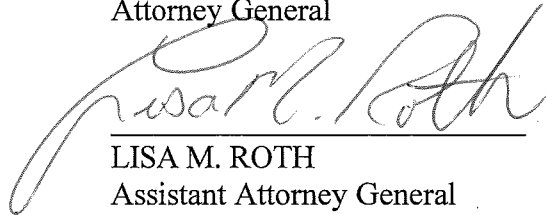
⁶ Under the unemployment compensation scheme, the Legislature provided for a waiver of the time for appeal if "good cause" was established. *See* RCW 50.32.075 ("For good cause shown the appeal tribunal or the commissioner may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title.") No such language exists under RCW 26.44.125.

V. CONCLUSION

Mr. Dhaliwal has failed to establish that the Court of Appeals' unpublished decision presents a significant question of law or an issue of substantial public interest. The Respondent therefore respectfully requests that the Supreme Court deny the petition for review.

Respectfully submitted this 16th day of May, 2018.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Lisa M. Roth", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Supreme Court of the State of Washington, under Case No. 95666-9, and a true copy was e-mailed or otherwise caused to be delivered to the following party of record at the e-mail addresses as listed below:

William Frick at william@fricklawfirm.info

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

DATED this 16th day of May, 2018 at Seattle, WA.



LEE ANN WILSON

Legal Assistant

Office Identification #91016

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

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