

67865-5

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NO. 67865-5

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

AARIN MORRIS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,

Respondent.

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I
SEATTLE, WA

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

 A. Under RCW 50.20.075, the Commissioner may waive the 30-day time limitation for administrative appeals only “[f]or good cause shown.” Did the Commissioner correctly conclude that Ms. Morris did not establish good cause for filing her appeal 49 days after she became aware of the Department’s determination and her right to appeal that decision when the Determination Notice unambiguously stated the need to appeal within 30 days, and Ms. Morris explained that she felt she “had no choice but to wait until” another hearing was completed to appeal the decision in the present case?.....2

 B. The Administrative Procedure Act limits the circumstances under which appellants may raise new issues on appeal. Where Ms. Morris did not raise procedural due process concerns regarding an investigatory interview or the deadline for appeal and instead merely expressed confusion at the administrative hearing and superior court appeal below about *where* to send her appeal letter, should this Court consider the issues that Ms. Morris raises for the first time?2

 C. Due process requires notice and an opportunity to be heard prior to final agency action. Even if this Court considers the issues Ms. Morris raises for the first time on appeal, has she established that she was denied procedural due process where the Department advised her of her appeal rights and gave her an administrative hearing prior to its final decision?2

III. STATEMENT OF THE CASE2

IV. STANDARD OF REVIEW.....8

 A. Review of factual matters9

| | | |
|-----|---|----|
| B. | Review of questions of law..... | 10 |
| C. | Review of mixed questions of law and fact..... | 10 |
| V. | ARGUMENT | 11 |
| A. | The Commissioner properly concluded that Ms. Morris did not establish good cause for the late filing of her appeal. | 12 |
| 1. | Ms. Morris’s appeal was untimely. | 12 |
| 2. | The Commissioner properly concluded Ms. Morris did not show good cause for the untimely filing of her appeal..... | 16 |
| B. | Under the APA, this Court should not consider the issues that Ms. Morris raises for the first time on appeal. | 23 |
| C. | The Department did not violate Ms. Morris’s right to procedural due process..... | 26 |
| 1. | The Department’s initial fact-finding process did not deprive Ms. Morris of notice and an opportunity to be heard prior to a final determination by the Department. | 26 |
| 2. | The Department gave Ms. Morris adequate notice of her right to appeal..... | 31 |
| VI. | CONCLUSION | 34 |

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>City of Redmond v. Arroyo-Murillo</i> , 149 Wn.2d 607, 70 P.3d 947 (2003)..... | 27 |
| <i>City of Redmond v. Bagby</i> , 155 Wn.2d 59, 117 P.3d 1126 (2005)..... | 29 |
| <i>Danielson v. City of Seattle</i> , 45 Wn. App. 235, 724 P.2d 1115 (1986)..... | 31 |
| <i>Devine v. Employment Security Department</i> , 26 Wn. App.778, 614 P.2d 231 (1980)..... | 18 |
| <i>Fertilizer Inst. v. U.S. Env'tl. Prot. Agency</i> , 935 F.2d 1303 (D.C. Cir. 1991)..... | 25 |
| <i>Hanratty v. Emp't Sec. Dep't</i> , 85 Wn. App. 503, 933 P.2d 428 (1997)..... | 17, 20 |
| <i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)..... | 10 |
| <i>King Cnty. v. Wash. State Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993)..... | 24, 25 |
| <i>Kustura v. Dep't of Labor & Indus.</i> , 142 Wn. App. 655, 175 P.3d 1117 (2008)..... | 31, 33 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..... | 26, 29 |
| <i>Motley-Motley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005)..... | 27, 28 |
| <i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)..... | 31 |

| | |
|--|------------------------|
| <i>Pub. Util. Dist. No. 1 v. Dep't of Ecology,</i> 146 Wn.2d 778, 51 P.3d 744 (2002)..... | 27 |
| <i>Rasmussen v. Emp't Sec. Dep't,</i> 98 Wn.2d 846, 658 P.2d 1240 (1983)..... | 10, 17, 18, 19, 22, 23 |
| <i>Scully v. Emp't Sec. Dep't,</i> 42 Wn. App. 596, 712 P.2d 870 (1986)..... | 13, 17, 20 |
| <i>Sherman v. State,</i> 128 Wn.2d 164, 905 P.2d 355 (1995)..... | 26 |
| <i>Smith v. Emp't Sec. Dep't,</i> 155 Wn. App. 24, 226 P.2d 263 (2010)..... | 8, 9 |
| <i>Speelman v. Bellingham/Whatcom Cnty. Hous. Auths.,</i> 167 Wn. App. 624, 273 P.3d 1035 (2012)..... | 31 |
| <i>State v. Storhoff,</i> 133 Wn.2d 523, 946 P.2d 783 (1997)..... | 27, 28 |
| <i>Tapper v. Emp't Sec. Dep't,</i> 122 Wn.2d 397, 858 P.2d 494 (1993)..... | 10, 12 |
| <i>Wells v. Emp't Sec. Dep't,</i> 61 Wn. App. 306, 809 P.2d 1386 (1991)..... | 17, 18 |
| <i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency,</i> 81 Wn. App. 403, 914 P.2d 750 (1996)..... | 9, 10 |

Statutes

| | |
|-----------------------|--------|
| RCW 34.05.461 | 29 |
| RCW 34.05.464 | 29 |
| RCW 34.05.510 | 8 |
| RCW 34.05.554 | 24, 27 |
| RCW 34.05.554(1)..... | 24, 25 |

| | |
|---------------------------|----------------|
| RCW 34.05.558 | 9 |
| RCW 34.05.570(1)(a) | 9 |
| RCW 34.05.570(1)(d) | 9 |
| RCW 34.05.570(3)..... | 12 |
| RCW 34.05.570(3)(d) | 9, 10 |
| RCW 34.05.570(3)(e) | 9 |
| RCW 34.05.570(3)(i)..... | 9 |
| RCW 50.20.075 | 2 |
| RCW 50.20.190(1)..... | 12, 28 |
| RCW 50.20.190(3)..... | 13 |
| RCW 50.32 | 12 |
| RCW 50.32.010 | 28 |
| RCW 50.32.020 | 13, 14, 28 |
| RCW 50.32.025 | 13 |
| RCW 50.32.040 | 28 |
| RCW 50.32.070 | 28, 29 |
| RCW 50.32.075 | 13, 16, 23, 33 |
| RCW 50.32.120 | 8, 28 |
| RCW 50.32.150 | 9 |

Rules

| | |
|-------------------|----|
| RAP 10.3(g) | 12 |
|-------------------|----|

RAP 2.2(a)(1)..... 28

Regulations

WAC 192-04-090(1)..... 17

WAC 192-120-001..... 4

WAC 192-120-010..... 4

WAC 192-220-010..... 30

WAC 192-220-010(1)(g) 28

I. INTRODUCTION

The Employment Security Department gave Ms. Morris the same notice and opportunity to be heard as it gives all other claimants when it makes a decision regarding the payment of benefits. The Department, having reason to believe that Ms. Morris had been overpaid benefits due to fraud, sent her notice of its determination to her correct address of record, which was the last address she had reported to the Department's claims unit. When Ms. Morris called the Department and expressed confusion about a collection notice she had received, Department representatives updated her address information on file, promptly sent a copy of the determination notice to her new address, and informed her of her right to appeal the decision. The determination notice gave unambiguous and detailed instructions on how Ms. Morris could exercise her right to appeal and explained the need to do so within 30 days. Department representatives reiterated her right to appeal in telephone conversations with Ms. Morris. Still, Ms. Morris waited 49 days to file an appeal after receiving notice of the Department's decision. Under the circumstances of this case, she did not establish good cause for her late appeal and has not shown that the Department deprived her of due process. This Court should affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

- A. **Under RCW 50.20.075, the Commissioner may waive the 30-day time limitation for administrative appeals only “[f]or good cause shown.” Did the Commissioner correctly conclude that Ms. Morris did not establish good cause for filing her appeal 49 days after she became aware of the Department’s determination and her right to appeal that decision when the Determination Notice unambiguously stated the need to appeal within 30 days, and Ms. Morris explained that she felt she “had no choice but to wait until” another hearing was completed to appeal the decision in the present case?**

- B. **The Administrative Procedure Act limits the circumstances under which appellants may raise new issues on appeal. Where Ms. Morris did not raise procedural due process concerns regarding an investigatory interview or the deadline for appeal and instead merely expressed confusion at the administrative hearing and superior court appeal below about *where* to send her appeal letter, should this Court consider the issues that Ms. Morris raises for the first time?**

- C. **Due process requires notice and an opportunity to be heard prior to final agency action. Even if this Court considers the issues Ms. Morris raises for the first time on appeal, has she established that she was denied procedural due process where the Department advised her of her appeal rights and gave her an administrative hearing prior to its final decision?**

III. STATEMENT OF THE CASE

Appellant Aarin Morris began receiving unemployment benefits in July 2009. Administrative Record (AR) at 41-42, 173. On March 23, 2010, the Department issued Ms. Morris an Overpayment Advice of Rights explaining that the Department’s records indicated that she had

been paid too much in unemployment benefits. AR at 46-47, 118. On April 7, 2010, the Department issued her a Determination Notice disqualifying her from receiving benefits because the Department had determined she did not meet the statutory definition of “unemployed” and that she had underreported or failed to report her earnings to the Department on her weekly benefits claims. AR at 41-46, 173. The Determination Notice indicated that Ms. Morris had 30 days, until May 7, 2010, to appeal the decision. AR at 43, 174.

Both of these notices were mailed to Ms. Morris’s address of record at the time, which was an address on 10th Avenue Northeast in Shoreline, Washington; however, Ms. Morris apparently did not receive these letters. AR at 23, 41, 46, 55-56, 174. Ms. Morris’s appeal letter indicated that the 10th Avenue address was her correct address as of April 7, 2010. AR at 55-56. Similarly, she confirmed at her administrative hearing:

[Administrative Law Judge]: . . . Ms. Morris, I would like to direct your attention to Exhibit 2, Page 1, the Department’s Determination Notice dated April the 7th, 2010. This was mailed to you at apartment LOWR 17911 10th Avenue Northeast, Shoreline, Washington 98155.

Was that your correct and current mailing address on April the 7th, 2010?

[Ms. Morris]: It was.

AR at 22-23. This was the same address Ms. Morris had reported to the Department on an application for emergency benefits in March 2010. AR at 82. The Department's records show that Ms. Morris did not update her mailing address with the Department at any time between March 2010 and July 16, 2010. AR at 148-50.¹

Around the same time as the April 7, 2010, Determination Notice at issue in this appeal, the Department issued an unrelated decision regarding Ms. Morris's eligibility for benefits based upon the nature of her separation from employment.² AR at 94. Ms. Morris appealed that decision to the Office of Administrative Hearings and prevailed. AR at 94-100. The full administrative record of that appeal process is not part of the administrative record in this case, and the underlying merits are not at issue here. While the administrative law judge (ALJ) in that unrelated appeal concluded that Ms. Morris had established good cause for failing to appear at a scheduled hearing due to a notice "mailed to the claimant's old

¹ Ms. Morris now asserts that she had moved and provided the Department with her new address on April 6, 2010. Br. of Appellant at 3-4. First, this is a question of fact that was not raised at the administrative hearing below. Second, this assertion conflicts with Ms. Morris's own testimony that the 10th Avenue address was correct as of April 7, 2010. AR at 22-23. Moreover, Ms. Morris's purported notification of her address change was merely the printing of her address on the top of her appeal letter regarding her "other" appeal. AR at 101. Ms. Morris did not follow the address change notification procedure that the Department had instructed her to use in its unemployment claims booklet mailed to her on July 14, 2009. AR at 119, 150. Claimants are responsible for following written instructions provided by the Department in the unemployment claims booklet. WAC 192-120-001, -010.

² That hearing admittedly involved the same employer but concerned the nature of her job separation, not her failure to report her hours and wages on her weekly claims.

address, in error,” the record in this appeal contains no additional information about the basis of that conclusion. AR at 94-95. The evidence of the “other” appeal that is in the record here shows, at most, that Ms. Morris moved sometime before May 3, 2010. AR at 94-95.

On July 12, 2010, the Department sent Ms. Morris a Notice of Past Due Account letter to the same address the previous notices were mailed. AR at 84. Ms. Morris received this letter. AR at 23, 174. Upon receipt, Ms. Morris called the Department for more information. AR at 23-24, 174. The Department representative who spoke with Ms. Morris on July 16 updated Ms. Morris’s address in the Department’s records to an address on Northeast 199th Street in Shoreline and instructed her to call the Department’s Fraud Investigations Unit (FIU). AR at 144, 148. It was almost 5:00 p.m., and the FIU was already closed, so Ms. Morris called the FIU on July 19. AR at 23-24, 117. An FIU staff member sent Ms. Morris a copy of the Overpayment Advice of Rights and the April 7, 2010, Determination Notice to her address on 199th Street and advised her to file a late appeal. AR at 24-25, 59, 93, 117, 148, 174.

Ms. Morris received copies of her Overpayment Advice of Rights and the Determination Notice on July 20, 2010. AR at 24-25, 41-47, 59-60, 93, 174, 194. The Determination Notice informed Ms. Morris of her

right to appeal the decision and described the process for doing so. AR at 43, 174, 194. Specifically, the Determination Notice stated:

YOUR RIGHT TO APPEAL: If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. You have **30** days to file your appeal. Your appeal must be received or postmarked by 05/07/2010. An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). If you miss the deadline to appeal, tell us why this appeal is late. The ALJ will decide if you have “good cause” for a late appeal. You can fax or mail your written appeal to the fax number or return address listed at the beginning of this decision. We will not accept appeals by e-mail or telephone.

AR at 43.

After receiving these letters, Ms. Morris again contacted the FIU on July 21, 2011, and she was again advised to file a late appeal. AR at 25-26, 29, 117, 147, 174. Despite the clear instruction to file an appeal within 30 days, Ms. Morris did not file her appeal until September 7, 2010, seven weeks after Ms. Morris received the Determination Notice. AR at 48, 50, 174, 194.

The Department forwarded the appeal to the Office of Administrative Hearings. AR at 48-49. An administrative law judge (ALJ) conducted a hearing, at which time Ms. Morris had an opportunity to testify and explain why her appeal was late. AR at 2-36. Ms. Morris expressed no confusion over the timing of when her appeal was required

to be filed. Instead, she explained that she waited until September to file her appeal because “I was going through the other case.” AR at 24; *see also* AR at 25. Ms. Morris expressed confusion about *where* to send the appeal, despite the clear instructions on the face of the Determination Notice: “It wasn’t clear on who to send the late appeal to or why.” AR at 26-27.

The ALJ dismissed Ms. Morris’s appeal as untimely, concluding that Ms. Morris did not establish good cause for waiting approximately two months to file her appeal once she became aware of the Determination Notice. AR at 173-76. Ms. Morris petitioned the Department’s Commissioner for review. AR at 180-91. She again argued that her appeal was late because she was waiting for the outcome of the other appeal. AR at 180-81. She argued that “at no time” was she told that there was a deadline for her late appeal. AR at 181-82. She further stated that stated she “had no choice but to wait until my first hearing was completed,” and “I felt justified to gather my evidence and wait until it was gathered before I filed my current appeal” AR at 180-81. The Commissioner’s delegate concluded that these reasons were not compelling in light of the fact that she had received her copy of the Determination Notice on July 20, 2010, which set forth her appeal rights and a statement of where to send the appeal. AR at 194. The

Commissioner's delegate affirmed the ALJ's decision and dismissed the appeal. AR at 194-96.

Ms. Morris appealed the Commissioner's decision to King County Superior Court, where she asserted that she was confused about the appeal procedure because she received multiple letters from the Department, but not that the Department had denied her due process. Clerk's Papers (CP) at 1-7, 9-23. The court affirmed the Commissioner's decision. CP at 44-46.

Ms. Morris now appeals to this Court.

IV. STANDARD OF REVIEW

Ms. Morris seeks judicial review of the Commissioner's Decision dated December 30, 2010. The standard of review is of particular importance in this case because Ms. Morris references events that are not findings of fact made by the Commissioner, which is what this Court is limited to reviewing on appeal.

Judicial review of Commissioner's decisions is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.510; RCW 50.32.120. The court of appeals sits in the same position as the superior court on review of the agency action under the APA and applies APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010). The court

may only reverse the Commissioner's decision if the Commissioner based his decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary and capricious. *Id.* (citing RCW 34.05.570(3)(d), (e), (i)).

The Commissioner's decisions must be deemed *prima facie* correct, and the burden of demonstrating its invalidity is on the appellant. RCW 34.05.570(1)(a); RCW 50.32.150; *Smith*, 155 Wn. App. at 32. The court should grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d). If the court determines that the Commissioner has acted within his power and has correctly construed the law, it must affirm the Commissioner's decision. RCW 50.32.150.

A. Review of factual matters

The Court must limit its review of disputed issues of fact to the agency record. RCW 34.05.558. This Court must uphold an agency's findings of fact that are supported by substantial evidence in the record. RCW 34.05.570(3)(e); *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d

147 (2004). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494, 500 (1993).

The reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below—here, the Department. *Wm. Dickson Co.*, 81 Wn. App. at 411. A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

B. Review of questions of law

The Court is to review questions of law *de novo*, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407.

C. Review of mixed questions of law and fact

Whether good cause exists to excuse untimely appeals in an individual case presents a mixed question of law and fact. *Rasmussen v. Emp't Sec. Dep't*, 98 Wn.2d 846, 850, 658 P.2d 1240 (1983). Under this standard, the reviewing court does not substitute its judgment of the facts for that of the agency but determines which factual findings below are supported by substantial evidence. *Tapper*, 122 Wn.2d at 403. Second, the court makes a *de novo* determination of the correct law, and third, it applies the law to the applicable facts. *Id.* The agency’s decision is given substantial weight. *Rasmussen*, 98 Wn.2d at 852.

V. ARGUMENT

This Court should affirm the Commissioner's decision because Ms. Morris filed her appeal 49 rather than 30 days after receiving the Determination Notice and did not establish good cause for doing so. The Department, following the statutory procedures for notifying claimants of its decisions, sent Ms. Morris a Determination Notice in the mail to her last known address. For reasons that are not apparent in the record, that notice did not reach Ms. Morris until the Department sent her another copy. Though Ms. Morris received the Determination Notice approximately three months after it had first been issued, the notice still informed Ms. Morris of the Department's action against her and of her opportunity to present her objections through an appeal process. When Ms. Morris spoke with Department representatives on the phone, they advised her that she could still file an appeal. Nevertheless, after receiving the Determination Notice, which gave detailed instructions for when and how to exercise her appeal rights, Ms. Morris waited 49 days to file her appeal. The Department's Commissioner correctly concluded that Ms. Morris did not establish good cause for waiting 49 days to file her appeal. Additionally, because the Department's notice was reasonably calculated to apprise her of the pending action and her opportunity to present her

objections, the Department did not violate Ms. Morris's procedural due process rights.

As an initial matter, Ms. Morris has not assigned error or otherwise expressly challenged any of the Commissioner's findings of fact. This Court should treat them as verities on appeal. *Tapper*, 122 Wn.2d at 407; RAP 10.3(g). Nevertheless, Ms. Morris's statement of facts to the Court is not consistent with the Commissioner's findings. This Court's role on judicial review is to review the Commissioner's factual findings and conclusions of law, not to interpret the facts anew. RCW 34.05.570(3); *Tapper*, 122 Wn.2d at 403. Here, because substantial evidence supports the Commissioner's decision, and it is free of error of law, the Court should affirm the Commissioner's decision.

A. The Commissioner properly concluded that Ms. Morris did not establish good cause for the late filing of her appeal.

1. Ms. Morris's appeal was untimely.

Chapter 50.32 RCW provides unemployment compensation claimants with a comprehensive administrative mechanism for challenging decisions regarding their benefits. *See* RCW 50.32. When an individual is paid benefits to which she is not entitled, the Department must issue an overpayment assessment that sets forth the reasons for and the amount of the individual's overpayment. RCW 50.20.190(1). Any such assessment

constitutes a “determination of liability” from which a claimant may appeal. RCW 50.20.190(3). A claimant may file an appeal from a determination made by the Department “within thirty days after the date of notification or mailing, whichever is earlier, of such determination or redetermination to his or her last known address.” RCW 50.32.020.

If a claimant does not appeal within 30 days, “the determination of liability shall be deemed conclusive and final.” RCW 50.20.190(3); *see also* RCW 50.32.020. To ameliorate the harshness of this rule, the Legislature has vested the Commissioner with authority to waive this time limitation for “good cause shown.” RCW 50.32.075; *Scully v. Emp’t Sec. Dep’t*, 42 Wn. App. 596, 601, 712 P.2d 870 (1986). Any appeal is deemed filed and received on the date it was mailed, as reflected by postmark. RCW 50.32.025.

Here, the Commissioner found that on April 7, 2010, “[t]he Determination Notice was sent to the claimant at her correct address of record.” AR at 173, 194. Substantial evidence supports this finding. At her administrative hearing and in her appeal letter, Ms. Morris stated that the 10th Avenue address indicated on the April 7, 2010, Determination Notice was her correct and current mailing address as of that date. AR at 22-23, 41, 55-56; *see also* AR at 16-17 (statements in Ms. Morris’s appeal letter were true and accurate). This was the same 10th Avenue address

Ms. Morris had reported to the Department on an application for emergency benefits in March 2010. AR at 82. The Department's records show that Ms. Morris did not update her mailing address with the Department at any time between March 2010 and July 16, 2010. AR at 148-50.³ Therefore, the Department met its statutory duty to mail the Determination Notice to "her last known address." RCW 50.32.020.

Even though the Department properly sent the Determination Notice to Ms. Morris's last known address, the Commissioner found that she did not receive the Determination Notice when it was first sent on April 7, 2010. AR at 174, 194. The record does not reflect why the notice did not reach Ms. Morris, only that it was returned to the Department sometime on or before July 13, 2010, marked as "UNABLE TO FWD." AR at 149. Instead, Ms. Morris "received her copy of the Determination Notice on July 20, 2010." AR at 194. These findings are supported by Ms. Morris's testimony, the statements in her appeal letter, the Department's "Claimant Information" form dated July 19, 2010, and a copy of the envelope sent by the Department and postmarked on July 19, 2010. AR at 23-25, 59-60, 93, 117.

Additionally, the Commissioner found that Ms. Morris waited until September 7, 2010, to appeal the Determination Notice she had received

³ See *supra* note 1.

on July 20, 2010. AR at 174, 194. This finding is supported by the Department's "Notice: Appeal Filed" document, which was admitted as exhibit 3 in the administrative record. That document states, "The claimant filed the attached appeal by mail postmarked 9/7/2010" AR at 48. The appeal letter itself was stamped as received by the Department's Fraud Management unit on September 8, 2010.⁴ AR at 50.

Based upon these factual findings, the Commissioner properly concluded that Ms. Morris's appeal was untimely. AR at 174, 194. Under RCW 50.32.020 and stated on the face of the Determination Notice, Ms. Morris had 30 days to appeal from the "after the date of notification or mailing, *whichever is earlier*, of such determination or redetermination to his or her last known address[.]" (Emphasis added.) In Ms. Morris's case, the earlier date was the date the determination was mailed to her last known address. The Department mailed a determination notice to Ms. Morris's last known address, which was her correct address, on April 7, 2010. AR at 173, 194. As that notice reflected, the 30-day deadline began on that date and Ms. Morris's appeal needed to be received by the Department or postmarked by May 7, 2010. AR at 43; RCW 50.32.020.

⁴ Though Ms. Morris's letter is dated September 3, 2010, AR at 61, she did not contest the September 7 filing date in her testimony or argument at the administrative hearing. AR at 25.

Ms. Morris filed her appeal on September 7, 2010, which was four months after the May 7 deadline to appeal had passed. AR 174, 194.

The Commissioner considered the excusability of Ms. Morris's late appeal in light of the day she actually received her copy of the Determination Notice, July 20, 2010. AR at 194. Ms. Morris waited 49 days (seven weeks) from *this* date to file her appeal. AR at 194. Even if the Court concludes that Ms. Morris's 30-day appeal deadline began to run on the date she received notice, July 20, 2010, her appeal was still 19 days late. In either circumstance, the Commissioner correctly concluded that Ms. Morris's appeal was untimely. AR at 194. Thus, in order for the Department to accept her appeal, Ms. Morris was required to show good cause for the untimely filing. RCW 50.32.075.

2. The Commissioner properly concluded Ms. Morris did not show good cause for the untimely filing of her appeal.

The Commissioner properly determined not to waive the 30-day appeal deadline because Ms. Morris's explanation for the delay—that she was busy preparing for her other hearing and filed as soon as she could—did not amount to good cause.

The Office of Administrative Hearings or the Commissioner may waive the 30-day time limitation for filing an appeal only for “good cause shown.” RCW 50.32.075. Whether good cause exists in an individual

case depends on the facts of that case. *Rasmussen*, 98 Wn.2d at 850. When making the good cause determination, the Commissioner considers the length of the delay, the excusability of the delay, and whether acceptance of the late-filed petition for review will result in prejudice to other interested parties, including the Department. WAC 192-04-090(1); *Wells v. Emp't Sec. Dep't*, 61 Wn. App. 306, 311, 809 P.2d 1386 (1991).

The evaluation of the three factors in the good cause analysis is based on a sliding scale in which a short delay requires a less compelling reason for the failure to timely file than does a longer delay. *Wells*, 61 Wn. App. at 314. Courts have recognized that “the length of the delay tolerable will be inextricably intertwined with the excusability of error.” *Hanratty v. Emp't Sec. Dep't*, 85 Wn. App. 503, 506, 933 P.2d 428 (1997) (quoting *Scully*, 42 Wn. App. at 603). In conducting the good cause analysis, courts have measured the length of the delay from the date the claimant became aware of the need to appeal. *See Scully*, 42 Wn. App. at 604; *Hanratty*, 85 Wn. App. at 507.

Here, Ms. Morris filed her appeal 49 days after receiving the determination notice that clearly informed her of her right to appeal and the process for doing so. AR at 41-43, 194. Even if the Court were to assume a new 30-day deadline after Ms. Morris received the notice, her appeal was 19 days late. Notably, Ms. Morris's delay was longer than in

other cases where courts have found that the petitioner had good cause for a late-filed appeal.

In *Devine v. Employment Security Department*, 26 Wn. App. 778, 780, 614 P.2d 231 (1980), the court excused the petitioner's one-day delay because she had contacted her union representatives for advice the same day she received the determination notice, but a representative did not respond until the day the appeal was due. *Devine*, 26 Wn. App. at 780. She then promptly appealed the next day. *Id.* It was thus the union representative's procrastination in returning her call which caused the one-day delay. *Id.* at 782.

In *Wells v. Employment Security Department*, 61 Wn. App. 306, 809 P.2d 1386 (1991), although the petitioner forgot there was an appeal deadline, the court excused his one-day delay because he wanted the president of his former employer to review his appeal letter to ensure that it did not contain any disclosures that violated any secrecy agreement. *Wells*, 61 Wn. App. at 314-15. The court concluded that such a short delay required a less compelling reason than did a longer one. *Id.* at 314.

In contrast, in the consolidated appeals in *Rasmussen v. Employment Security Department*, 98 Wn.2d 846, 658 P.2d 1240 (1983), the petitioners filed three and eight days late, explaining that they thought

they had 10⁵ *working* days to appeal rather than 10 *calendar* days and that they took time to investigate their right to appeal. *Rasmussen*, 98 Wn.2d at 848-49. Finding the petitioners' excuses insufficient and noting its limited task in determining whether an error of law has been made, the supreme court found no reason to substitute its judgment for the agency's and affirmed the orders of dismissal. *Id.* at 851-52.

This case is like *Rasmussen*, where the petitioners were simply mistaken about the length of time they had to file their petitions and they were investigating their right to appeal. *Id.* at 851. Ms. Morris argues that she was confused about how and when to file an appeal and took time to "gather evidence." However, the Determination Notice provides clear and unambiguous instructions about how, where, and by when to file an appeal. AR at 41-43. It even details all of the information an appellant should include in the appeal letter. AR at 43. Although the May 7 deadline stated in the notice had already passed, the notice clearly states that she had "30 days" to file an appeal. AR at 43. And a Department representative twice instructed her to file a late appeal "as soon as you can." AR at 24-26, 117, 147-48, 174, 182. Nevertheless, Ms. Morris waited almost seven weeks from the date she received the determination notice because she wanted to "gather evidence" and wait for the outcome

⁵ At the time of the appeals in *Rasmussen*, the Employment Security Act provided for a 10-day appeal period.

of her other appeal. AR at 180-82. Therefore, the delay in filing her appeal was the result of her own decisions and not caused by the Department.

Hanratty v. Employment Security Department, 85 Wn. App. 503, 933 P.2d 428 (1997) is also instructive. In that case, the court considered an employer's late petition for Commissioner's review where the ALJ had mailed a copy of the decision to the employer and the claimant, but not the employer's representative, in March 1993. *Id.* at 504-05. The employer's representative discovered that no appeal had been filed during a routine review of its files in November 1993. *Id.* at 505. It filed a notice of appeal in January 1994, almost nine months after the appeal deadline had passed. *Id.* Concluding that the employer did not establish good cause for filing a late appeal, the court first found that the employer's failure to contact its own representative was not excusable error. *Id.* at 507. The court then stated, "Even if we measure the delay in filing from late November 1993 (when [the employer's representative] became aware the appeal had not been filed) until January 4, 1994, six weeks is too lengthy a delay absent a compelling reason." *Id.*

Under *Hanratty*, Ms. Morris's delay requires a "compelling reason" to excuse the delay. *Hanratty*, 85 Wn. App. at 507; *see also Scully*, 42 Wn. App. at 602, 604 (though claimant's 17-day delay was

long, he filed appeal on the next working day after he became aware of the need to appeal, which was not unduly long). On appeal to this Court, Ms. Morris's stated reasons for her delay are the "defective determination notice and the subsequent behavior of the agency in refusing to apprise [her] of the deadline date for filing her appeal" ⁶ Br. of Appellant at 26. The Department did not err in either of these respects.

As discussed above, the Determination Notice given to Ms. Morris gave her clear notice of the steps she needed to take to file an appeal. The third page of the notice informed her:

YOUR RIGHT TO APPEAL: If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. You have **30** days to file your appeal. Your appeal must be received or postmarked by 05/07/2010. An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). If you miss the deadline to appeal, tell us why this appeal is late. The ALJ will decide if you have "good cause" for a late appeal. You can fax or mail your written appeal to the fax number or return address listed at the beginning of this decision. We will not accept appeals by e-mail or telephone.

⁶ Notably, this was not the focus of Ms. Morris's argument to the ALJ, the Commissioner, or the superior court. At each of those levels, she argued that it was reasonable to wait for the outcome of her other appeal and that she was confused about how and where to send her appeal. AR at 24-28, 180-82; CP at 9-23.

An appeal must include:

- You name
- Your social security number/ID number (claimant's)
- Your current address
- Your telephone number
- The decision you want to appeal
- The reason(s) you want to appeal
- Your signature (we will return if not signed)

AR at 43. The first page of the decision states the FIU's return address (labeled: "RETURN ADDRESS") and fax number. AR at 41.

Had Ms. Morris simply read the Determination Notice, she would have clearly understood the time limitation and where and how to file an appeal. The Department did not prevent or discourage her from filing an appeal. In fact, Department representatives repeatedly informed her that she could still file an appeal, albeit late. AR at 24-25, 117, 147-48, 174, 182. She chose to wait until she received a decision following another, unrelated hearing before filing her appeal. AR at 24-26, 181-83. Where the lateness of the appeal is the result of the claimant's own delay and not the result of having been misled by the Department, the delay is inexcusable. *Rasmussen*, 98 Wn.2d 851-52.

Moreover, the Court should not examine Ms. Morris's stated reasons for her delay in a vacuum. *See Rasmussen*, 98 Wn.2d at 850 (whether good cause exists in an individual case depends on the facts of that case). The Commissioner found that Ms. Morris became aware of the

overpayment and fraud issues when she received a Notice of Past Due Account on July 16, 2010. AR at 174. She does not dispute this fact. Br. of Appellant at 10. The July 16th notice informed Ms. Morris that her account was “three months past due” with a \$6,547.32 balance. AR at 84. It further warned her that she needed to send \$856.32 within 20 days of the date of the letter to avoid further collection action. AR at 84. Ms. Morris testified that she had “repeatedly received payment demand letters” during this time. AR at 27. Ms. Morris argues that the Department did not provide adequate information regarding the timeline within which she needed to appeal. But having already received the Notice of Past Due Account, she should have been even more acutely aware that any delay was imprudent.

Finally, the decision to waive the 30-day deadline for good cause is within the Commissioner’s discretion. RCW 50.32.075 states that the Commissioner *may* waive the time limitations for filing an appeal for good cause shown. Given the defects in filing and the reason for them, it cannot be said that the Commissioner’s exercise of discretion in dismissing Ms. Morris’s appeal was an error of law. *See Rasmussen*, 98 Wn.2d at 851-52.

B. Under the APA, this Court should not consider the issues that Ms. Morris raises for the first time on appeal.

For the first time on appeal to this Court, Ms. Morris argues that because she did not participate in an investigatory interview before the Department issued its Determination Notice, she was deprived of due process. Similarly, she argues for the first time on appeal that the Department's Determination Notice did not give her reasonable notice of the timeframe within which she should file her appeal. These arguments do not satisfy the exceptions to the APA's limitation on raising new issues on appeal, and this Court should not consider them.

The APA limits a claimant's ability to raise issues for the first time on appeal. Specifically, RCW 34.05.554(1) provides that on judicial review of administrative action, "[i]ssues not raised before the agency may not be raised on appeal," except in certain identified circumstances. RCW 34.05.554. Ms. Morris has neither argued nor demonstrated that any of those circumstances are present in her case.

Our supreme court has explained that the APA's limit on new issues "is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking." *King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). In fact, RCW 34.05.554 furthers such purposes as aiding judicial review by developing the facts during the administrative proceeding, promoting judicial

economy, and perhaps even obviating judicial involvement. *Id.* at 669 (quoting *Fertilizer Inst. v. U.S. Envtl. Prot. Agency*, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991)).

Ms. Morris asks this Court to reverse the Commissioner's decision because the Department "failed to afford Ms. Morris her right to tell her side of the story in an investigative interview prior to issuing its determination notice." Br. of Appellant at 16. She did not raise any issue at the administrative level regarding the availability or adequacy of the fact-finding process the Department performed before issuing its determination notice on April 7, 2010. Even if she had raised the issue, it would have been premature for the ALJ or Commissioner to rule on it because she failed to establish good cause for the late appeal. Thus, any review of this pre-determination fact-finding process by this Court on appeal would be improper under the plain language of RCW 34.05.554(1). Moreover, this Court's review would be improper because it would rely on facts that have not been developed or established in the administrative hearing process. The Court should decline to address the issues she raises with respect to the investigative interview.

Similarly, Ms. Morris argues for the first time that the Department's Determination Notice did not give her reasonable notice of the timeframe within which she should file her appeal. This was not the

basis of her good cause argument to the ALJ or the Department's Commissioner, and this Court should decline to address the issue. AR at 24-28, 50, 60, 180-82. Even so, if the Court considers the issues Ms. Morris raises for the first time on appeal, it should conclude that the Department did not deprive Ms. Morris of due process, as discussed below.

C. The Department did not violate Ms. Morris's right to procedural due process.

The Department gave Ms. Morris reasonable notice of its action, an opportunity to be heard, and a fundamentally fair process. "So long as the party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, this court will not disturb the administrative decision." *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). The Court should not disturb the Commissioner's decision here on due process grounds. *Id.*

1. The Department's initial fact-finding process did not deprive Ms. Morris of notice and an opportunity to be heard prior to a final determination by the Department.

Citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), Ms. Morris argues that the Department's failure to afford her an investigatory interview was a denial of her right to due process of

law. Br. of Appellant at 19-23. Should the Court accept review of this issue, it should conclude that there was no violation.

Procedural due process requires notice and an opportunity to be heard prior to final agency action. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (citing *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003)). An agency's tentative determination that a right has been revoked does not constitute final agency action. *Id.* (citing *Pub. Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 793-94, 51 P.3d 744 (2002)). To establish a procedural due process violation, the party must establish that he or she has been deprived of notice and opportunity to be heard prior to a final, not tentative, determination. *Id.* (citing *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997)).

Here, Ms. Morris alleges that she was denied due process because the Department deprived her of her right to an investigative interview, which was referenced in the Overpayment Advice of Rights document. AR at 46; Br. of Appellant at 16-23. Even accepting the facts alleged by Ms. Morris as true,⁷ she has not established a due process violation. An investigative interview and the advice of rights document are just initial steps in the Department's process when it has information suggesting that

⁷ Again, these facts have not been established by the administrative process because Ms. Morris is raising this issue for the first time on appeal. *See* RCW 34.05.554.

a potential overpayment exists. WAC 192-220-010(1)(g); AR at 46. As is reflected in regulation and on the advice of rights in Ms. Morris's administrative record, if a claimant does not submit information in response to an advice of rights within 10 days, the Department will make a decision about the overpayment based on available information. WAC 192-220-010(1)(g); AR at 46. In making that decision, if the Department concludes that it has overpaid benefits to a claimant, it "shall issue an overpayment assessment setting for the reasons for and the amount of the overpayment." RCW 50.20.190(1). Overpayment assessments may be appealed "in the same manner and to the same extent as provided for appeals relating to determinations in respect to claims for benefits." RCW 50.20.190(3). Thus, claimants who receive overpayment assessments may appeal first to the Office of Administrative Hearings, then may petition the Department's Commissioner for review of the resulting decision, and may further appeal as of right to superior court and the court of appeals. RCW 50.32.010, .020, .040, .070, .120; RAP 2.2(a)(1).

In alleging that she was not given an investigative interview, Ms. Morris has not established that she was deprived of notice and an opportunity to be heard prior to a *final* determination by the Department. *See Motley-Motley*, 127 Wn. App. at 81 (citing *Storhoff*, 133 Wn.2d at 528). Following the administrative hearing, the Office of Administrative

Hearings issues an *initial order*, which only becomes final if a party does not seek review by the Commissioner within 30 days or upon the issuance of the Commissioner's decision following further review. RCW 34.05.461, 34.05.464, 50.32.070. Because Ms. Morris had an administrative hearing before a final order was issued by the Department, the Department did not violate her right to due process.

In any event, Ms. Morris's argument also fails under a *Mathews* analysis. Due process is "flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334. Washington courts have used the *Mathews* test to determine whether a challenged process satisfies due process. *City of Redmond v. Bagby*, 155 Wn.2d 59, 63, 117 P.3d 1126 (2005). Under this test, what process is due in a given case depends on the balancing of (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of that interest, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Bagby*, 155 Wn.2d at 6; *Mathews*, 424 U.S. at 335.

Here, Ms. Morris has not claimed that the general appeals process for her determination notice was inadequate as a meaningful opportunity for her to contest the notice. Instead, she argues that an early step in the

determination process was inadequate, as applied to her, due to a mailing error of unknown origin. Significantly, the risk of erroneous deprivation is very low. As explained above, a claimant who does not participate in the Department's fact-finding process prior to its issuance of a determination notice still has the opportunity to appeal the determination and obtain a full hearing on the matter before a final determination is made. Ms. Morris did not exercise that right in a timely manner, and the Commissioner correctly determined that she did not have good cause for her delay. The Department did not deprive Ms. Morris of her right to due process.

For similar reasons, if the Court reaches this issue, it should not reverse the Commissioner's decision on the basis that the Department "fail[ed] to follow its own prescribed procedure," resulting in an unlawful decisionmaking process as Ms. Morris argues. Br. of Appellant at 18-19. Though the facts regarding this issue have not been fully developed, the applicable regulation does not require the Department *actually hold* an investigative interview; it merely requires the Department to give claimants an *opportunity* to submit information about possible overpayments within a specified time frame (10 days). See WAC 192-220-010; AR at 46. The Department mailed Ms. Morris an Overpayment Advice of Rights to her correct address of record. AR at 22-23, 46, 173.

Though, for whatever reason, the Advice of Rights apparently did not reach Ms. Morris in March 2010, the Department did not engage in unlawful decisionmaking when it issued a Determination Notice based upon the information it had on April 7, 2010. Moreover, an agency's failure to follow its own procedure does not necessarily amount to a due process violation. *Danielson v. City of Seattle*, 45 Wn. App. 235, 244, 724 P.2d 1115 (1986). Here, Ms. Morris was still afforded an administrative hearing prior to the Department's final determination. The Department did not violate Ms. Morris's right to due process.

2. The Department gave Ms. Morris adequate notice of her right to appeal.

"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.'" *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 675-76, 175 P.3d 1117 (2008) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). Due process does not require actual notice. *Speelman v. Bellingham/Whatcom Cnty. Hous. Auths.*, 167 Wn. App. 624, 631, 273 P.3d 1035 (2012).

The determination notice that the Department first mailed to Ms. Morris on April 7, 2010, and then again on July 19, 2010, stated:

YOUR RIGHT TO APPEAL: If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. You have **30** days to file your appeal. Your appeal must be received or postmarked by 05/07/2010. An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). If you miss the deadline to appeal, tell us why this appeal is late. The ALJ will decide if you have “good cause” for a late appeal. You can fax or mail your written appeal to the fax number or return address listed at the beginning of this decision. We will not accept appeals by e-mail or telephone.

AR at 43. Ms. Morris refers to this notice as “ambiguous” and “cryptic” given that she did not receive the notice until July. Br. of Appellant at 24. But the Determination states plainly that she had 30 days to appeal, and, if late, to explain why. AR at 43. There is nothing ambiguous or cryptic about the notice. At a minimum, the notice made clear that she had 30 days to appeal and that the Department would only accept appeals sent by mail or fax. The Department notified Ms. Morris of her opportunity to request an appeal, but she chose to wait significantly longer than 30 days to attempt to avail herself of that opportunity.

Ms. Morris was also unsatisfied with the responses she received from Department staff when she called to inquire about the appeal process. The Commissioner found that when Ms. Morris contacted the Department, “representatives instructed [her] to file a late appeal.” AR at 174. Indeed, Ms. Morris testified that a Department representative told her “to file for a

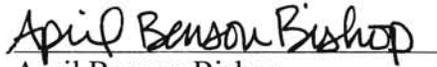
late appeal” on July 19, but she waited until September to file because she “was going through the other case.” AR at 24. Indications of these phone calls also appear in various exhibits in the administrative record. AR at 117, 147-48. In her petition for review to the Department’s Commissioner, Ms. Morris said that the representative’s exact words were that Ms. Morris should file her appeal “as soon as you can.” AR at 182.

The Department, through its written and oral communications, gave Ms. Morris notice that was reasonably calculated, under all the circumstances, to apprise her of the pendency of the Department’s action and give her an opportunity to present her objections. *Kustura*, 142 Wn. App. at 675-76. Department staff could not inform her of a more specific date range within which she needed to file her appeal because, per the Department’s records, her appeal deadline had expired on May 7. AR at 41, 117. The Legislature has vested the Department’s Commissioner—not the Department’s staff—with authority to waive time limitations on appeals. RCW 50.32.075. The Department’s staff members acted reasonably and in accordance with law in telling Ms. Morris that she still had the opportunity to file a late appeal, but that she should do it “as soon as” she could. The Department’s notice was not defective and did not violate Ms. Morris’s right to due process.

VI. CONCLUSION

After receiving notice of the Department's decision, Ms. Morris failed to timely act upon her right to appeal. The Commissioner correctly concluded that she did not establish good cause for the delay. Additionally, the Department provided Ms. Morris with notice that was reasonably calculated to apprise her of its actions against her and her opportunity to appeal. Finally, this Court should decline to address those issues Ms. Morris raises for the first time on appeal. For these reasons, the Department respectfully requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 28th day of November,
2012.


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PROOF OF SERVICE

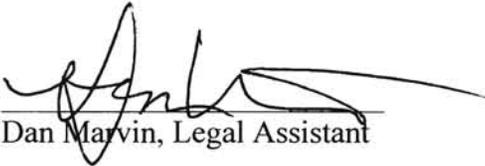
I, Dan Marvin, certify that I served a copy of this **Respondent's**
Brief on all parties or their counsel of record on the date below as follows:

ABC/Legal Messenger:

Brian Keith Fresonke
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Seattle, WA 98154-1003

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

DATED this 28th day of November, 2012, at Seattle, WA.


Dan Marvin, Legal Assistant