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NO. 40159-2 BY RONALD R. CARPENTER

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALICIA GREEN, on behalf of herself and all others similarly situated,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

Joseph Christy
Assistant Attorney General
WSBA #30894
7141 Cleanwater Drive
P.O. Box 40124
Olympia, WA 98504-0124
(360)586-6565

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I. INTRODUCTION

This appeal challenges three superior court orders and essentially presents three questions: (1) Did the superior court, acting in its appellate capacity, erroneously interpret Department of Social and Health Services' food stamp rules, when it failed to harmonize the rules with federal law? (2) Did the superior court err in certifying a class of individuals in an Administrative Procedures Act (APA) appeal, by failing to apply APA standards and by permitting the class to include persons who lacked standing to seek review on their own? and (3) To the extent that the superior court erred in interpreting the Department's rules and certifying the class, should the superior court's award of attorney's fees be reversed?

Each question should be answered in the affirmative. As shown below, the superior court failed to apply the correct legal standards to the facts before it with respect to each of these questions. Accordingly, its orders should be reversed.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering its December 4, 2009 Findings of Fact, Conclusions of Law, and Declaratory Judgment Order ("Final Order"),¹ in which it: (a) reversed an Administrative Law Judge's (ALJ) final order affirming the Department's decision that Respondent

¹ Attached as Appendix 1.

Alicia Green was entitled to receive \$10 in Basic Food benefits during May and June 2008; and (b) directed the Department to recalculate and distribute additional food assistance benefits to not only Ms. Green, but all persons who concurrently received Basic Food, general assistance, and earned income between March 27, 2007 and June 30, 2008.

2. Under the Final Order, the superior court erred in entering Finding of Fact 1 (insofar as it found that the facts of this case are not in dispute); Finding of Fact 4 (insofar as it found that Ms. Green's legal counsel sent a letter to the Secretary of the Department on March 26, 2008); Conclusions of Law 4, 13, 15, 16, 18, 19, 20, 21, 22, 23, and 24; and Paragraphs 1, 2, 3, 4, and 7 of its Declaratory Judgment and Relief.

3. The superior court erred when it granted Ms. Green's motion for class certification and entered the July 11, 2009 Order Allowing Matter to Proceed as Class Action ("Class Certification Order").²

4. Under the Class Certification Order, the superior court erred in entering Findings of Fact 1, 2, 3, 4, 7 (except for the finding that Ms. Green exhausted her administrative remedies), and 8 (except for the finding that the Court had subject matter jurisdiction to consider Ms. Green's individual claim for relief); and Paragraphs 1, 2, and 3 of the

² Attached as Appendix 2.

relief ordered therein.

5. Insofar as it erred as described in Assignments of Error 1, 2, 3, and 4, the superior court erred by entering its December 11, 2009 Amended Order Awarding Reasonable Attorney's Fees under RCW 74.08.080.³

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the ALJ's final order⁴ correctly conclude that the Department's Basic Food (food stamp) regulations must be interpreted consistent with the Federal Food Stamp Act and is its interpretation consistent with federal law? (Assignments of Error 1, 2)

2. Is the superior court's Class Certification Order contrary to law because:

(a) The superior court failed to apply CR 23 consistent with the requirements of the Administrative Procedure Act, as required by RCW 34.05.510(2)? (Assignments of Error 1, 2, 3, 4)

(b) The superior court found the class to be so numerous as to make joinder impractical despite the fact that no individual class member could independently invoke the superior court's subject matter jurisdiction to review agency action under RCW 34.05.570(3)? (Assignments of Error 1, 2, 3, 4)

(c) The superior court abused its discretion when it found that Ms. Green's claim for review of an agency order under RCW 34.05.570(3) was typical of claims she asserted on behalf of a class of persons, where those persons did not, in fact, similarly hold agency orders subject to judicial review under the APA?

³ Attached as Appendix 3.

⁴ Attached as Appendix 4.

(Assignments of Error 1, 2, 3, 4)

(d) The superior court erroneously tolled a jurisdictional time limit governing the claims of individual class members or, alternatively, in calculating the applicable tolling period when it defined the class? (Assignments of Error 1, 2, 3, 4)

3. Did the superior court misapply the law when it ordered the Department to recalculate class members' food benefits back to March 26, 2007? (Assignments of Error 1, 2, 3, 4)

4. Insofar as the superior court erred when it interpreted the Department's Basic Food regulations, certified the class, and entered the relief described under the Final Order, should this Court reverse the superior court's award of attorney's fees? (Assignment of Error 5)

IV. STATEMENT OF THE CASE

A. The Legal Framework Governing Food Assistance

Authorized by the Federal Food Stamp Act of 1977, 7 U.S.C. § 2011 *et seq.*, the Supplemental Nutrition Assistance Program (SNAP) is a federal public assistance program designed “to safeguard the health and well-being of the Nation’s population . . . by increasing food purchasing power” 7 U.S.C. § 2011. Subject to Congressional appropriation, the United States Department of Agriculture, Food and Nutrition Service (FNS), oversees the administration of SNAP. 7 U.S.C. §§ 2013(a), 2020(a), 2025(a). The individual states administer SNAP, subject to

federal regulations and oversight. 7 U.S.C. § 2020. The federal government funds 100 percent of states' food benefits programs and, additionally, reimburses states 50 percent of the cost of administering the program. 7 U.S.C. § 2025.

The Federal Food Stamp Act imposes rigorous requirements on states participating in SNAP. These include uniform standards for eligibility, requirements for benefit use, calculation of benefit allotments, and administration of food programs, including cost-sharing and quality control. 7 U.S.C. §§ 2014–2017, 2020, 2025; 7 C.F.R. § 273.

For example, federal law requires that the value of the food stamp benefit (the “allotment”) be “the maximum food stamp allotment for the household’s size reduced by 30 percent of the household’s *net monthly income*.” 7 C.F.R. § 273.10(e)(2)(ii)(A) (emphasis added); *see also* 7 U.S.C. § 2017(a). To establish a household’s net monthly income, the state must first determine the household’s gross monthly income (income from all sources, excluding statutorily listed exceptions). 7 U.S.C. § 2017(a); 7 C.F.R. § 273.10(e)(2)(ii)(A). It then deducts: (a) a standard deduction; (b) 20 percent of the household’s monthly earned income; and (c) any available deduction for allowable medical costs, dependent care expenses, child support payments, or shelter costs. 7 U.S.C. §§ 2014(e)(1)–(6), 2017; 7 C.F.R. § 273.10(e)(1)(i)(B)–(I).

It has been Washington's longstanding policy to participate in federal public assistance programs such as SNAP. RCW 74.04.055. The Department implements these programs and promulgates rules to administer this state's public assistance programs consistent with federal requirements. RCW 74.04.050, .057. To ensure the state's ability to receive federal funds, the Legislature has assented to all "provisions of the federal law under which federal grants or funds . . . are extended to the state for the support of programs administered by the department" RCW 74.04.050. Where any public assistance provision is susceptible to more than one construction, it must be "interpreted in favor of the construction most likely to satisfy federal laws entitling this state to receive federal . . . funds for . . . public assistance." RCW 74.04.055.

The Department is specifically required to establish a food stamp program under the federal food stamp act of 1977, and to adopt conforming rules. RCW 74.04.500, .510. Accordingly, the Department has formally agreed with FNS to administer a federally-funded food stamp program in accordance with the Food Stamp Act of 1977. AR 000717. To that end, the Department created its Basic Food program.

The Basic Food regulations mirror federal food stamp program requirements. Thus, under Basic Food, a household's food stamp allotment is determined by multiplying the net monthly income by

30 percent and subtracting the result from the maximum allotment provided for the household's size (as listed under WAC 388-478-0060). WAC 388-412-0015(4), 388-450-0162(4)(c); 7 U.S.C. § 2017(a); 7 C.F.R. § 273.10(e)(2)(ii)(A). Like federal law, Washington's rules set the minimum allotment at \$10 for households consisting of one or two members. WAC 388-412-0015(8); 7 U.S.C. § 2017(a).

As required by federal law, net monthly income is determined by first establishing the household's gross income (all income excepting federally mandated income exclusions) and then deducting: (a) a standard deduction; (b) 20 percent of the household's monthly earned income; and (c) any allowable dependent care, medical, child support, and shelter deductions. WAC 388-400-0040(7), 388-450-0015, 388-450-0162(1)(a), (b), 388-450-0185(1)–(6). *See also* 7 U.S.C. § 2014(d), (e)(1)–(6), § 2017; 7 C.F.R. § 273.10(e)(1)(i)(A)–(I).

B. Washington's General Assistance Program

Unlike the federally subsidized Basic Food program, "General Assistance" is a solely state-funded program that provides cash and medical benefits to eligible persons who are physically or mentally incapacitated and unemployable for 90 days or more. General Assistance is intended to encourage employment among recipients by considering

only a portion of their earned income when calculating benefits.
See WAC 388-450-0175.

During the period relevant to this appeal, the General Assistance benefit calculation excluded from gross income (a) \$85 plus one-half of the remainder of clients' earned income, and (b) an additional 20 percent of the clients' earned income in order to provide funds to cover work expenses. Former WAC 388-450-0175 (2006). In May 2006, the Department amended the rule — removing language explaining that these deductions applied exclusively to the General Assistance program. The purpose of the amendment was to eliminate a perceived redundancy.⁵ AR 000499 – 585. At all times prior and subsequent to the amendment, the Department has consistently interpreted WAC 388-450-0175 to apply

⁵ On May 1, 2006, WAC 388-450-0175 was changed to read: “**Does the department offer an income deduction as an incentive for GA-U clients to work?** The department gives special deductions to people who receive income from work while receiving General Assistance-Unemployable (GA-U). We allow the following deductions before using your earnings to determine your eligibility and monthly benefits. (1) We subtract eighty-five dollars plus one half of the remainder of your monthly gross earned income as an incentive to employment. (2) We also subtract an amount equal to twenty percent of your gross earned income to allow for work expenses.”

The rule was changed again on July 1, 2008, WAC 388-450-0175, to further clarify the limits imposed by the rule. It currently reads: “**Does the department offer income deduction for the general assistance program as an incentive for clients to work?** The department gives special deductions to people who receive income from work while receiving general assistance. *The deductions apply to general assistance cash benefits only.* We allow the following deductions when we determine the amount of your benefits: (1) We subtract eighty-five dollars plus one half of the remainder of your monthly gross earned income as an incentive to employment. (2) We also subtract an amount equal to twenty percent of your gross earned income to allow for work expenses.” (Emphasis added.)

exclusively to the General Assistance program. OAH VRP 12 – 19 (Jan. 6, 2009).

C. Procedural And Factual Background

1. Actions Prior To Ms. Green’s Request For Judicial Review

a. Columbia Legal Services Threatens To File A Class Action

On March 26, 2008, Columbia Legal Services (CLS) wrote a letter to the Department, threatening to file a class action lawsuit on behalf of an unidentified male client if the Department did not immediately apply the General Assistance deductions of WAC 388-450-0175 to its Basic Food calculations.⁶ AR 000108 – 109. CLS claimed that when the Department established net income to calculate clients’ food benefits, it should exclude not only the deductions listed under the Basic Food program rule — WAC 388-450-0185 (a standard deduction; 20 percent earned income deduction; and medical, dependent care, child support, and shelter cost deductions) — but also apply the General Assistance program rule deductions under WAC 388-450-0175 (\$85 plus one-half of the remainder of the client’s earned income, plus an additional 20 percent of the client’s earned income). AR 000108 – 109. The Department refused, explaining to CLS that its demand conflicted with the requirements of the Food

⁶ When the letter was written, Ms. Green was not yet represented by CLS.

Stamp Act, the federal regulations governing the Food Stamp Program, and state law requiring the Department to administer the Food Stamp Program in a manner consistent with federal requirements. AR 000110 – 111.

b. Department Client James Davis Files A Petition For Judicial Review, Which Is Dismissed

On April 7, 2008, approximately two weeks after it sent its demand letter and threat of a class action to the Department, CLS filed a petition for judicial review under the APA on behalf of James Davis, a Basic Food recipient. In addition to seeking judicial review of an agency action regarding his benefits, Mr. Davis purported to represent a class of persons who would have received more food benefits had the Department included the additional earned income deductions under General Assistance program rules, set forth in WAC 388-450-0175, in its calculation of food benefits. AR 000112 – 124. Ms. Green joined the lawsuit five weeks later via amended petition. AR 000142 – 155. No class was ever certified; the lawsuit was ultimately dismissed, on June 13, 2008, for lack of subject matter jurisdiction due to petitioners' failure to exhaust administrative remedies and lack of compliance with jurisdictional time requirements. AR 000193 – 195.

c. The Department Notifies Ms. Green Of A Reduction In Her Food Benefits

Meanwhile, on June 6 and 9, 2008, Ms. Green learned that her May and June 2008 Basic Food benefits (implementing the federally controlled SNAP program) would be reduced to \$10 per month. The reduction was a result of an increase to \$795.81 in her gross monthly income (\$591.85 of this amount was earned income). AR 000077 – 79; 000198 – 205. In calculating her Basic Food benefit, the Department applied the deductions of the Basic Food program rule. Former WAC 388-450-0185. Accordingly, it subtracted from Ms. Green's gross income (1) a standard deduction of \$134.00, and (2) 20 percent of her earned income (\$118.37). This resulted in a net income determination of \$543.00. AR 000077 – 79.

Applying Basic Food program rules, the Department then subtracted 30 percent of her net income of \$543 (\$163) from the \$162 maximum available food benefit amount listed under former WAC 388-478-0060, resulting in a sum less than zero. AR 000077 – 79. Accordingly, the Department determined that Ms. Green was entitled to receive a minimum \$10 monthly federal food stamp allotment through the Basic Food program. AR 000077 – 79.

2. Ms. Green Challenges The Department's Calculation Of Her Basic Food Benefit Through The Administrative Process

On July 17, 2008, Ms. Green timely requested an administrative hearing to contest the Department's calculation of her May and June 2008 Basic Food benefit. AR 000077, 000197. Her sole contention was a legal argument – she claimed that the Department should have added the General Assistance deductions under former WAC 388-450-0175 to the Basic Food deductions under WAC 388-450-0185 when it calculated her Basic Food benefits. AR 000079, 000197. More specifically, she claimed the Department should have reduced her net income by an additional: (1) \$85 plus one-half the remainder of her earned income (\$338.43) and (2) 20 percent of her earned income (\$118.37). AR 000079. Had the Department included the General Assistance deductions when it calculated Ms. Green's Basic Food benefits, her net monthly income would have been \$86.00, entitling her to receive \$136 in monthly food assistance during May and June 2008. AR 000077, 000079.

Following a hearing, the ALJ issued a final order, affirming the Department's calculation of Ms. Green's Basic Food benefit for May and June 2008. AR 000001 – 11. In short, the ALJ concluded that the legislative scheme governing administration of the Basic Food program, as well as additional evidence, required an interpretation that the General

Assistance program deductions under WAC 388-450-0175 did *not* apply to the calculation of Basic Food benefits. AR 000008 – 9. Specifically, the ALJ concluded that application of the state General Assistance program deductions to the federally regulated Basic Food program was not allowed under the Food Stamp Act and, thus, would contravene state law. AR 000008. The ALJ noted that RCW 74.04.050, .500 and .510 express the Legislature’s “clear intent to comply with the federal Food Stamp Act.” AR 000004 – 5. The ALJ found this intent to be similarly reflected in WAC 388-400-0040, which requires that all regulations related to Basic Food eligibility be construed consistent with Food Stamp Act requirements. AR 000004 – 000006.

This conclusion was further supported by extraneous evidence. For instance, the ALJ observed that, as a condition of receiving federal funds for its Basic Food program, Washington signed a “Food Stamp Program Federal/State Agreement,” agreeing, in part to “[a]dminister the program in accordance with the provisions contained in the Food Stamp Act of 1977, as amended, and in the manner prescribed by regulations issued pursuant to the Act.” AR 000003, 000717.

The ALJ also found that the consolidated rule-making file for the May 2006 amendment of WAC 388-450-0175 (which included the amendment of Basic Food regulations) contained express statements to the

effect that amendments contained therein were intended to comply with the Federal Food Stamp Act and Washington State statutes requiring as much. AR 000004, 000008, 000499 – 585. For instance, the rulemaking file stated that 7 C.F.R. § 273.9 required the Department to change its Basic Food program regulations related to countable income and that “RCW 74.04.510 requires the department to adopt rules consistent with Federal requirements for administration of the Food Stamp Program.” AR 000004. The ALJ noted that the purpose behind the 2006 amendment of WAC 388-450-0175 was *not* to expand applications of the deductions contained therein to the Basic Food program, but to eliminate an “actual expense deduction” from the calculation of General Assistance cash grants. AR 000004.

The ALJ found no indication of any intent to expand application of the General Assistance program rules, under WAC 388-450-0175, to the Basic Food program. AR 000004. Rather, the ALJ determined that the elimination of a phrase explicitly limiting the application of WAC 388-450-0175 to General Assistance was simply intended to address a perceived redundancy. AR 000004.

Accordingly, the ALJ concluded that the General Assistance program deductions did *not* apply to Basic Food program benefit calculations, and the ALJ affirmed the Department’s calculation of

Ms. Green's May and June 2008 Basic Food benefits. AR 000009.

3. Ms. Green Files A Petition For Judicial Review

On March 25, 2009, Ms. Green sought judicial review of the ALJ's decision under RCW 34.05.570(3),⁷ alleging that the ALJ's order erroneously interpreted or applied the law in calculating her benefits. CP 5 – 20.

a. The Request For Class Certification

In addition to seeking review of the ALJ decision, Ms. Green alleged that, pursuant to CR 23,⁸ she represented a class of similarly situated Basic Food benefit recipients who received General Assistance while earning income from working prior to the Department's July 1, 2008 amendment of WAC 388-450-0175 (which clarified that General Assistance benefit deductions do not apply to calculations for benefits under the Basic Food program). CP 5 – 20, 49 – 81. Ms. Green maintained that she brought the class members' claims solely under RCW 34.05.570(3) (review of agency orders), not under

⁷ RCW 34.05.570(3) provides, "The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: . . . (d) The agency has erroneously interpreted or applied the law; . . . (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (i) The order is arbitrary or capricious."

⁸ CR 23(a) provides that, "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

RCW 34.05.570(4) (other agency action). VRP 18 – 25 (June 9, 2009). To overcome the patent untimeliness of reviewing orders related to the other class members, Ms. Green requested that the superior court find that the APA’s 30-day limitation under RCW 34.05.542(2) had “tolled” for class members since March 25, 2007. VRP 18–25 (June 9, 2009).

The Department contended that class certification was not justified because: (1) Ms. Green could not properly invoke the reviewing court’s jurisdiction to consider the claims of class members’ claims under RCW 34.05.570(3) because no class member had appealed a Department order calculating Basic Food benefits, as required by RCW 34.05.542(2); (2) Ms. Green’s claim was not typical of the claims asserted on behalf of the class, because unlike Ms. Green’s claim, the claims asserted on behalf of class members did not challenge agency orders, but, instead, challenged the Department’s action in distributing food stamp benefits prior to July 1, 2008; (3) certification of the class under CR 23, as suggested by Ms. Green, was prohibited by RCW 34.05.510(2)⁹ because it would be inconsistent with the requirements of the APA; and (4) since no class member independently maintained a viable claim under RCW 34.05.570(3), the purported class was not so numerous as to make

⁹ RCW 34.05.510(2) provides that “[a]ncillary procedural matters before the reviewing court, including . . . class actions . . . are governed, to the extent not inconsistent with this chapter, by court rule.”

joinder impractical. CP 83 – 97, 101 – 102.

The superior court granted class certification, finding the class to be so numerous that joinder of all members would be impractical. Notwithstanding the fact that no class member independently sought review of an agency order (much less, requested a hearing), the court concluded that the claims asserted in Ms. Green’s petition for judicial review of the ALJ’s order in her case were typical of the claims asserted on behalf of the class. CP 108 – 109.

To bypass RCW 34.05.542(2)’s 30-day time limitation for filing a petition for judicial review of an agency order, the court concluded that “equitable tolling” would be consistent with the purpose of judicial review. CP 109 – 110. The court concluded that the limitation period under RCW 34.05.542(2), which facially barred class members’ claims, had tolled since March 26, 2007 (one-year prior to the CLS letter threatening the Department with a class action). It then defined the class as:

All persons who between March 26, 2007 and June 30, 2008 received income from work while receiving General Assistance who received fewer or no Basic Food benefits because the Department did not apply former WAC 388-450-0162 and former WAC 388-450-0175 when determining their eligibility for the Basic Food program or when calculating their Basic Food benefits.

CP 110.

b. The Hearing On The Merits

Ms. Green asked the court to rule that the ALJ erroneously interpreted or applied the law by not requiring the General Assistance program deductions to apply to the Department's Food Benefit program calculations. CP 112 – 134. Ms. Green asked the court to reverse the ALJ's order and direct the Department to provide additional Food Benefits to her and to other members of the class. CP 112 – 134. She argued that CLS's March 26, 2008 letter to the Department was a "client request" under WAC 388-410-0040(3)(a), triggering an obligation to restore benefits to class members for 12 months prior to the letter. CP 132 – 133.

In response, the Department maintained that it lacked the authority to adopt or implement a rule applying the General Assistance deductions of WAC 388-450-0175 to Basic Food, insofar as those deductions were inconsistent with state and federal law. CP 136 – 160, 173 – 177. Accordingly, the agency order was legally correct. The Department also argued that CLS did not represent any class member at the time it sent its March 26, 2008 letter; thus, it did not trigger the 12-month "look-back" provisions of WAC 388-410-0040 for class members' claims. CP 284; VRP 39 (Aug. 28, 2009); VRP 11 – 13 (Dec. 4, 2009).

The superior court concluded that the Department had erroneously interpreted or applied the law by excluding the General Assistance

deductions of former WAC 388-450-0175 from its Basic Food benefit calculations. CP 178 – 182, 384 – 402. The court directed the Department to provide an additional \$354 in Basic Food benefits to Ms. Green. CP 384 – 402. The superior court also concluded that the Department erroneously interpreted and applied the law by not including the General Assistance program deductions of WAC 388-450-0175 when it calculated the Basic Food program benefits of class members. CP 384 – 402. It directed the Department to re-calculate class members' Basic Food benefits for the period March 26, 2007 through June 30, 2008. CP 384 – 402.

V. ARGUMENT

A. **The ALJ's Order Affirming The Department's Calculation Of Basic Food Benefits Is A Correct Interpretation Of The Law And Should Be Affirmed**

1. **Standard Of Review**

The primary question before this Court is whether the ALJ's order correctly concluded that the General Assistance program deductions, provided under former WAC 388-450-0175, did *not* apply to the Department's calculation of Ms. Green's Basic Food benefits.

When reviewing an agency's decision under an adjudicative order, the Court of Appeals sits in the same position as the trial court, applying the appropriate standard of review directly to the agency record. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993);

ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm'n, 151 Wn. App. 788, 805, 214 P.3d 938 (2009). The party challenging the agency's action — Ms. Green — bears the burden of demonstrating invalidity. RCW 34.05.570(1)(a); *ZDI Gaming*, 151 Wn. App. at 805. *See also* this Court's General Order 2010-1.

Under RCW 34.05.570(3), a party may challenge an agency order on any of nine bases. *ZDI Gaming*, 151 Wn. App. at 805; *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Only two of the nine bases are relevant to Ms. Green's claims:

(d) The agency has erroneously interpreted or applied the law;

...

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency

RCW 34.05.570(3)(d) and (h).

The error of law standard applies when the Court considers whether an agency has erroneously interpreted or applied the law. RCW 34.05.570(3); *see also ZDI Gaming*, 151 Wn. App. at 806. The reviewing court is to review those issues *de novo*, but grant substantial weight and deference to an agency's interpretation of its own regulations. *Tapper*, 122 Wn.2d at 403; *ZDI Gaming*, 151 Wn. App. at 806. *Seatoma Convalescent Center, v. Dep't of Soc. & Health Servs.*,

82 Wn. App. 495, 518, 919 P.2d 602 (1996) (“Substantial weight and deference should be given to an agency’s interpretation of the statutes and regulations it administers.”)(citations omitted). As a result, if there is ambiguous regulatory language, the Court should uphold an agency’s interpretation where it is plausible and consistent with the legislative intent. *ZDI Gaming*, 151 Wn. App. at 806; *Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999).

Moreover, if a legislative provision regarding public assistance is susceptible to more than one construction, then it must be interpreted in favor of the construction most likely to satisfy federal laws entitling the state to receive federal matching or other funds for the various programs of public assistance. RCW 74.04.055.

2. The Department’s Basic Food Benefit Calculation Is The Only Calculation Allowed By State And Federal Law

The ALJ correctly determined that the Department’s interpretation of its rules is the only one allowed under state and federal law.

When interpreting an administrative rule, the court’s primary objective is to ascertain and give effect to “legislative” intent and purpose. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003) (citing *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001)). While a court should not speculate regarding legislative intent or add words to an unambiguous regulation, it must discern intent from the underlying statutory authority. *Mader*, 149 Wn.2d at 473;

ZDI Gaming, 151 Wn. App. at 806. Statutes and regulations are implemented as a whole, not in parts, and are animated by a singular general purpose and intent. Accordingly, regulations must be construed as a whole, each part connected with every other, giving effect to all provisions whenever possible. *Wash. Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *see also Odyssey Healthcare Operating BLP v. Dep't of Health*, 145 Wn. App. 131, 141-142, 185 P.3d 652 (2008); *Boeing Co. v. Gelman*, 102 Wn. App. 862, 869, 10 P.3d 475 (2000). This includes “all that the Legislature has said in . . . related statutes which disclose legislative intent about the provision in question.” *Mader*, 149 Wn.2d at 473 (citations omitted); *see also Odyssey Healthcare*, 145 Wn. App. at 142 (to ascertain plain meaning, terms in a regulation should not be read in isolation, but within context of entire regulatory and statutory scheme); *State v. Walter*, 66 Wn. App. 862, 870, 833 P.2d 440 (1992) (subsections may not be reviewed in a vacuum, but must be considered and harmonized with all statutory and regulatory provisions that deal with the same general subject matter).

Ultimately, the reviewing court must “achieve a harmonious total statutory scheme and avoid conflicts between different provisions.” *Dep't of Lab. & Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 582, 178 P.3d 1070 (2008). Moreover, courts must avoid interpretations that are “unlikely or absurd.” *Odyssey Healthcare*, 145 Wn. App. at 143. For instance, a legislative provision that is inconsistent with its statutory purpose is absurd. *In re Det. of Martin*, 163 Wn.2d 501, 509-13,

182 P.3d 951 (2008). If a literal interpretation is absurd, the legislation is ambiguous and the court should move on to examine legislative history and use judicial canons of statutory interpretation. *See In re Martin*, 163 Wn.2d at 509-13; *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004); *State v. Taylor*, 97 Wn.2d 724, 729-30, 649 P.2d 633 (1982).

a. State Law Requires The Department To Administer Its Basic Food Program Consistent With The Federal Food Stamp Act

As a statutorily created agency of the State of Washington, the Department has only the authority granted it under its enabling statutes. RCW chapter 43.20A, RCW chapter 43.20B, and RCW Title 74. With respect to the issue in this case, the Legislature has authorized the Department to establish two food assistance programs. Relevant here, the Department is authorized “to establish a food stamp or benefit program under the federal food stamp act of 1977, as amended” and to adopt conforming regulations. RCW 74.04.500; *see also* RCW 74.04.050, .510.¹⁰

As described above, this means that Basic Food benefits must be calculated based on an amount “equal to the maximum allotment for the

¹⁰ Not relevant to this case, the Department is also authorized to establish a solely state-funded food assistance program for legal immigrants who are ineligible for the federal food stamp program. RCW 74.08A.120. For this program the Department is required to adopt rules that “follow exactly the rules of the federal food stamp program except for the provisions pertaining to immigrant status.” RCW 74.08A.120(2). Notably, the Department is required to administer both of these programs consistent with federal Food Stamp Act requirements (subject to the limited exception for immigrants).

household's size reduced by 30 percent of the household's net monthly income." 7 U.S.C. § 2017(a); *see also* 7 C.F.R. § 273.10(e)(2)(ii)(A). Net monthly income must be calculated by first determining the household's gross income, which includes income from all sources, excluding statutory exceptions. 7 U.S.C. § 2017(a); 7 C.F.R. § 273.10(e)(2)(ii)(A). The Department must then deduct: (a) 20 percent of the household's monthly earned income; (b) a standard deduction; and (c) any available excess medical deduction, allowable dependent care expenses, allowable child support payments, or allowable shelter deductions. 7 U.S.C. §§ 2014(e)(1)–(6), 2017; 7 C.F.R. § 273.10(e)(1)(i)(B)–(I).

The Department's calculation of Ms. Green's Basic Food benefits under the ALJ order conformed to this exclusive federal formula.

b. The ALJ's Order Applied The Proper Calculation To Ms. Green's Basic Food Benefits

Ms. Green argued that former WAC 388-450-0162 and 388-450-0175 required the Department to augment the federal benefit formula by reducing recipients' earned income by an additional \$85 plus 50 percent of the remainder, plus an additional 20 percent – notwithstanding the fact that such an act would conflict with Federal Food Stamp Act requirements. The ALJ commented that one would have to read WAC 388-450-0175 “in a vacuum” to arrive at Ms. Green's conclusion. AR 000009.

In short, the ALJ recognized that Basic Food is a federally funded program governed by the Food Stamp Act of 1977, *et seq.*, and that state laws and regulations unequivocally require that Basic Food must operate

consistent with federal Food Stamp Act requirements. AR 000004 – 5, 000008 – 9. The ALJ observed that RCW 74.04.050, .500 and .510 express Washington’s “clear intent to comply with the federal Food Stamp Act,” mandating that the Department “adopt rules conforming to federal laws, rules and regulations required to be observed in maintaining the eligibility of the state to receive from the federal government and to issue . . . to recipients, food . . . benefits.” AR 000004 – 5. The ALJ found that inclusion of WAC 388-450-0175’s deduction in the Department’s Basic Food calculations, however, would conflict with the federal Food Stamp Act. AR 000008.

It is a given that agency rules must be interpreted and applied consistent with the agency’s enabling statute. *Cobra Roofing Service, Inc. v. Dep’t of Lab. & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004). “An administrative agency created by statute has only those powers granted or necessarily implied by that statute.” *PaoPao v. Dep’t of Soc. & Health Servs.*, 145 Wn. App. 40, 51, 185 P.3d 640 (2008); *Barendregt v. Walla Walla Sch. Dist. No. 140*, 26 Wn. App. 246, 249, 611 P.2d 1385 (1980). This is especially true in cases, like this one, where the public treasury will be directly affected. *PaoPao*, 145 Wn. App. at 646. “In order for an administrative rule to have the force of law, it must be promulgated pursuant to delegated authority.” *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). An agency rule adopted beyond an agency’s statutory authority is invalid. RCW 34.05.570(2)(c); *Campbell*, 150 Wn.2d at 892. Accordingly,

statutory provisions must prevail in any case of conflict between a statute and an agency's regulation. *Colgate-Palmolive-Peet Co., v. NLRB*, 338 U.S. 355, 362-64, 70 S. Ct. 166, 94 L. Ed. 161 (1949). WAC 388-400-0040, AR 000005 – 6.

Ms. Green's calculation did *not* conform to federal Food Stamp Act requirements and would have violated RCW 74.04.050, .057, .500, and .510. Thus, the ALJ correctly concluded that the Basic Food program precluded application of the income deductions under WAC 388-450-0175 to the calculation of Basic Food benefits. AR 000009. Accordingly, the ALJ order should be affirmed.

3. The Department Demonstrated A Rational Basis To Justify Upholding Any Inconsistency Between The ALJ's Order And The Department's Regulations

Assuming, for argument only, that this Court holds that the Basic Food benefit calculation applied in Ms. Green's case is inconsistent with the Department's rules, it should still uphold the ALJ's order because the Department has demonstrated a rational basis for its actions.

The Court should affirm an administrative law judge's order that it finds inconsistent with an agency's rules so long as the actions described in the order are otherwise legal and "the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency." RCW 34.05.570(3)(h). Here, the Department's explanations support the order. Specifically, the Department (through the ALJ) explains that it is necessary to be consistent with its statutory

mandate to operate a Basic Food program that complies with the federal Food Stamp Act's requirements, and to protect the state's ability to continue to receive federal food stamp dollars. AR 000001 – 9. Accordingly, this Court should determine the Department's calculation of Ms. Green's benefits is consistent with the applicable statutes and supported by a rational basis. It should then affirm the ALJ's order.

B. The Superior Court Erred By Certifying The Class

If the Court concludes that the Department's interpretation of the regulation was correct, then the class certification issues are mooted because the class members' legal argument will correspondingly fail on its merits. However, assuming for argument that Ms. Green's interpretation was correct, this Court should reverse the superior court's order certifying the class for any one of three reasons: (1) The court acted contrary to RCW 34.05.510(2) by applying CR 23 in a manner inconsistent with the APA; (2) The class members' claims do not state a claim because they do not meet the jurisdictional requirements for judicial review under RCW 34.05.570(3); and (3) The court erred in equitably tolling the APA's jurisdictional time limitations.

1. Law Governing Class Actions

A proposed class is appropriate for certification only if it satisfies all four requirements of CR 23(a) and one of the subsections of

CR 23(b).¹¹ *Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 789, 613 P.2d 769 (1980).

Relevant here, the alleged class representative must demonstrate: (1) that the purported class is so numerous as to make joinder impractical (numerosity); and (2) that the claims of the representative party are typical of the claims of members of the class (typicality). CR 23(a). To demonstrate numerosity, a plaintiff must show that “it would be extremely difficult or inconvenient” to individually join all members of the proposed class. *Miller v. Farmer Bros. Co.*, 115 Wn. App 815, 821, 64 P.3d 49 (2003). A representative plaintiff’s claim is typical if the same legal theory underlies all class members’ claims or defenses. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 151 P.3d 1090 (2007).

¹¹ The Rule provides in pertinent part:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition: (1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest[.]

While Washington courts have historically favored liberal interpretation of CR 23, “strict conformity” is still required. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974); *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 18, 65 P.3d 1 (2003). Accordingly, a superior court may order class certification only after it conducts a “rigorous analysis” to ensure that the petitioner has satisfied the prerequisites of CR 23. *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002)(citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 160–161, 102 S. Ct. 2364, 72 L. Ed. 2d. 740 (1982)). The trial court’s analysis must go beyond the pleadings; “the court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” *Oda*, 111 Wn. App. at 94 (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)(citing FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION, Sec. 30.11 (3d ed.1995)). This analysis must be supported by an articulation, on the record, of its consideration and application of each of the CR 23 criteria to the facts relevant to certification of the proposed class. *Wash. Educ. Ass’n*, 93 Wn.2d at 793; *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 300, 38 P.3d 1024 (2002).

A superior court's decision to certify a class under CR 23 is discretionary, but may be overturned upon a showing of "manifest abuse of discretion" or that the decision is based upon untenable grounds. *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207 (1992); *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). A superior court ruling based upon a misapplication of the law, as in this case, is an untenable ground and an abuse of discretion. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn App. 401, 427, 54 P.3d 687 (2002). Certification "without appropriate consideration and articulate reference to the criteria of CR 23" is also an abuse of discretion. *Washington Educ. Ass'n*, 93 Wn.2d at 793.

Here the superior court misapplied the law and failed to articulate its consideration of each of the CR 23 criteria.

2. The Superior Court Erred By Not Applying The APA's Jurisdictional Requirements For The Putative Class

The APA provides for three distinct causes of action, categorized by the type of agency action subject to review: Challenges to (a) agency rules; (b) agency orders in adjudicative proceedings; and (c) all other agency action. RCW 34.05.570(2)–(4). Ms. Green sought judicial review under RCW 34.05.570(3). She did so only after exhausting her

administrative remedies as required by RCW 34.05.534, and she filed her petition for judicial review within the time allowed by RCW 34.05.542.

When the superior court concluded that a class of persons too numerous to join had claims typical of Ms. Green's, it did so by misapplying the APA's jurisdictional requirements. This resulted in an application of CR 23 inconsistent with the APA, contrary to the express language of RCW 34.05.510(2). That statute provides that, when a court engages in judicial review of agency action, CR 23 applies *only* "to the extent not inconsistent with" the APA. RCW 34.05.510(2) (emphasis added).

a. The Class Members Had No Viable Claims For Judicial Review Of An "Agency Order"

The class members, unlike Ms. Green, did not have any claims for judicial review of an agency order after an adjudicative proceeding. A petition for judicial review of an agency order commences a statutory proceeding that invokes appellate, not general or original, superior court jurisdiction. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d. 193 (2004). Consequently, the superior court acts in a limited appellate capacity and has limited statutory jurisdiction to act. *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). To invoke this

limited appellate capacity, a party must comply with all statutory procedural requirements; failure to do so deprives the court of subject matter jurisdiction. *Diehl*, 153 Wn.2d at 217; *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617-618, 902 P.2d 1247 (1995); *City of Seattle v. Pub. Empl. Relations Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). “The superior court and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction.” *Diehl*, 153 Wn.2d at 217 (citations omitted).

Thus, the class members could not petition for judicial review without demonstrating that they: (1) received service of a final agency order in an adjudicative proceeding, and (2) within 30 days of service, filed with the superior court and served on all parties and the office of attorney general a copy of the petition for review. RCW 34.05.542(2). Strict compliance is required; substantial compliance is not sufficient to invoke the appellate jurisdiction of the superior court. *Union Bay Pres. Coal.*, 127 Wn.2d at 620. Noncompliance results in lack of superior court jurisdiction to review the claims asserted. *Skagit Surveyors & Eng'rs*, 135 Wn.2d at 555-557; *Union Bay Pres. Coal.*, 127 Wn.2d at 617-620;

City of Seattle, 116 Wn.2d at 926-927.¹² The burden of proving compliance is on the class of petitioners, who must set forth “[f]acts to demonstrate that [they are] entitled to obtain judicial review.” RCW 34.05.546(6).

To invoke the superior court’s jurisdiction to review the February 27, 2009 order denying her claim, Ms. Green complied with the APA’s strict jurisdictional requirements by filing and serving her petition within 30 days of service of the order. RCW 34.05.542(2). Insofar as Ms. Green sought certification of a class under CR 23, however, she had to demonstrate that a class of persons too large to individually join maintained viable independent claims typical of hers. This means she had to demonstrate that, at the time she filed her lawsuit, class members’ claims independently complied with the threshold procedural requirements of RCW 34.05.542(2). *See* RCW 34.05.546(6). Thus, Ms. Green had to show that class members challenged their Basic Food benefit calculations, exhausted their procedural remedies, and were served with ALJ orders denying their claims within 30 days prior to the date Ms. Green filed her lawsuit. RCW 34.05.542(2).

¹² The time limit under RCW 34.05.542(2) is “either complied with or it is not.” *City of Seattle*, 116 Wn.2d at 928-929. Accordingly, a petition filed more than 30 days after service of a final order is untimely, depriving the court of subject matter jurisdiction over the claims presented. *King County v. Cent. Puget Sound Growth Mgt. Hearings Bd.*, 138 Wn.2d 161, 179-180, 979 P.2d 374 (1999).

Ms. Green did not meet this burden. In sum, Ms. Green did not allege that any class member received or maintained an order subject to review, much less that the members had timely invoked the superior court's jurisdiction for judicial review under RCW 34.05.542(2) and .570(3).

Accordingly, the superior court misapplied the law and, thus, abused its discretion when it concluded that a large class of persons maintained claims "typical" of Ms. Green's request for judicial review under RCW 34.05.570(3). There is no statutory or jurisdictional basis, however, for the court to shoe-horn the class members' request for review onto Ms. Green's petition for review of an ALJ's order that applied to Green alone. *See* RCW 34.05.010(11)(a). In short, there were no underlying agency orders to form the basis of independent claims under RCW 34.05.570(3) "typical" of Ms. Green's claim. As a consequence, the superior court certified a class based on claims that class members could not independently bring on their own behalf under the APA. Accordingly, the court's certification of the class under CR 23 was inconsistent with the APA, violating RCW 34.05.510(2).

3. The Superior Court Erred In Equitably Tolling Jurisdictional Time Limitation

RCW 34.05.542(2) provides that a party must file and serve a petition for judicial review within 30 days of service of a final order. To avoid the patent defect in the claims from the putative class, the court held that the 30-day time-for-filing limitation for class members' claims was equitably tolled for almost two years (from March 27, 2007 to March 25, 2009). The tolling was based upon: (1) Ms. Green's July 17, 2009 request for an administrative hearing; (2) James Davis's filing of an April 7, 2008 lawsuit that was later dismissed; (3) CLS's March 26, 2008 letter to the Department threatening to bring a class action on behalf of unnamed clients; and (4) WAC 388-410-0040 (which governs the period of time during which the Department will restore benefits after an underpayment determination is made).

The court erred first, because it had no authority to equitably toll a jurisdictional time limit. The doctrine of equitable tolling applies to statutes of limitation but not to time limitations that are jurisdictional. *State v. Littlefair*, 112 Wn. App. 749, 757, 51 P.3d 116 (2002); *In re Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000). As stated above, Washington courts have consistently held the timely filing requirements of RCW 34.05.542 are jurisdictional: "The superior court

and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction.” *Diehl*, 153 Wn.2d at 217. Failure to comply with RCW 34.05.542(2) deprives the court of subject matter jurisdiction for judicial review. *King County v. Cent. Puget Sound Growth Mgt. Hearings Bd.*, 138 Wn.2d 161, 179-180, 979 P.2d 374, (1999); *Skagit Surveyors*, 135 Wn.2d at 555-557; *Union Bay Pres. Coal.*, 127 Wn.2d at 617-620.

By applying equitable tolling, the superior court bypassed the statutory requirement that individuals must file and serve a petition for judicial review within 30-days of service of an agency order to invoke the superior court’s jurisdiction to review agency action. *See* RCW 34.05.542(2). Accordingly, the superior court’s decision to equitably toll the applicable 30-day time limitation for judicial review of any class members’ claims was an error of law.

Assuming for argument that the 30-day time-for-filing limitation under RCW 34.05.542(2) was not jurisdictional and, consequently, subject to equitable tolling, the superior court misapplied the doctrine. The superior court did not find that the Department engaged in any harmful action. But application of the equitable tolling doctrine must be predicated on bad faith, deception, or false assurances by the defendant and the

exercise of diligence by the plaintiff. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998); *In Re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 811, 818 P.2d 1362 (1991). Where the plaintiff makes no showing of bad faith, deception, or false assurance on the part of the defendant, a request for application of the doctrine of equitable tolling must be rejected. *See e.g. Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009); *VanHess v. Dep't of Labor and Indus.*, 132 Wn. App. 304, 312, 130 P.3d 902 (2006); *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 318-319, 16 P.3d 35 (2000). Because there was no showing of bad faith, deception, or false assurances, the superior court erred in applying equitable tolling to get around the fact that the class had no viable claims for judicial review analogous to Ms. Green's claim.

Finally, the superior court misapplied the doctrine to the facts of this case. The court effectively held that class members whose claims under RCW 34.05.570(3) arose subsequent to March 26, 2007¹³ were excused from seeking administrative review of the agency action and excused from filing and serving a petition for judicial review within 30 days of service of a final order, as required by RCW 34.05.542(2), until Ms. Green filed her lawsuit two years later. The court described three

¹³ Under RCW 34.05.542(2), such a claim should arise when a person is served with an agency order.

events and an administrative regulation as effectively tolling these claims, but those events do not support tolling.

First, the court appeared to rely upon WAC 388-410-0040 to justify tolling the claims of class members between March 26, 2007 and March 25, 2008. Notably, this regulation describes the applicable period of restoration *after* a Basic Food underpayment determination has been made. It does not in any way, however, create a right of action, toll an existing right of action, or otherwise revive an expired right of action. Accordingly, the court misapplied the law when it relied on WAC 388-410-0040 to toll class members' claims.

Second, the court's application of the doctrine was arbitrary. For example, it utilized CLS's March 26, 2008 letter, James Davis's April 7, 2008 lawsuit, and Ms. Green's July 17, 2008 request for an administrative hearing to toll class members' claims under RCW 34.05.570(3) going back as far as March 26, 2008. The court appeared to hold that this stopped RCW 34.05.542(2)'s 30-day time limit for almost a year, but failed to address the 72-days during which no "event" tolled the time limits on class members' claims.

For instance, the court gave no explanation as to how or why the claims of class members were tolled during the 34-day gap between the June 13, 2008 dismissal of James Davis's lawsuit and Ms. Green's

July 17, 2008 request for an administrative hearing. Presumably, if a class member's claim arose on June 14, 2008, he or she would have had to file and serve a petition for judicial review within 30 days or be time-barred. RCW 34.05.542(2). Given that the subsequent tolling event (Ms. Green's request for an administrative hearing) occurred more than 30 days later, it would appear that such a claim (along with all prior claims) would have expired at that point.

Similarly, the court neglected to address tolling during the 26-day gap between February 27, 2009, when Ms. Green was served with her order, and March 25, 2009, when she filed her petition for judicial review.

In conclusion, the superior court misapplied the law when it equitably tolled the 30-day jurisdictional time limitations that barred class members' putative claims. Because the court's class certification order relied on application of the doctrine to create "typicality" and numerosity for the class, the certification relied on legal error and should be reversed.

4. The Superior Court Misapplied The Law When It Ordered The Department To Recalculate And Provide Additional Basic Food Benefits To Class Members Back To March 26, 2007

The superior court also misapplied the law when it ordered the Department to restore benefits to members of the class beginning

March 26, 2007. WAC 388-410-0040(3) gives a recipient a right to restoration of benefits for 12 months prior to any of the following:

- (a) The month the client requests restoration;
- (b) The month the department discovers an underpayment;
- (c) The date the household makes a fair hearing request when a request for restoration of benefits was not received;
- or
- (d) The date court action was started when the client has taken no other action to obtain restoration of benefits.

The superior court misapplied the law when it concluded that WAC 388-410-0040(3) required the Department to recalculate and provide additional food benefits to class members as far back as March 26, 2007.

The ultimate responsibility for interpreting a rule resides with the appellate court, using the de novo standard. *Children's Hosp. & Med. Cen. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999). That said, a reviewing court is to give substantial weight to an agency's interpretation of regulations within its area of expertise. *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004).

The superior court's application of WAC 388-410-0040(3) was in error. Ms. Green conceded early-on that the date of her fair hearing request, July 17, 2008, was the date upon which the 12-month look-back should begin with regard to the restoration of her alleged underpaid

benefits. AR 000079, 000197. But there was no evidence that any class member took any action to come within the provisions of WAC 388-410-0040(3) prior to March 25, 2009, when Ms. Green filed her lawsuit. Accordingly, to the extent that there could be a class action and to the extent WAC 388-410-0040 applied to the class members, the restoration of class members' food benefits should have been limited to the 12 months prior to March 25, 2009.

The superior court's conclusion that CLS's March 26, 2008 letter established the 12-month look-back date for class members' food benefits is contrary to the record. The letter was sent by and on behalf of CLS, a private non-profit advocacy organization, which did not purport to represent or speak on behalf of any named Basic Food recipient at that time. AR 000108 – 109. The letter referred to one unidentified Basic Food recipient, presumed to be James Davis, (who is not a member of the class since he received the maximum available Basic Food benefit). AR 000108 – 109. The record included no evidence that CLS represented Ms. Green or any other class member at the time the letter was sent. Accordingly, there was no showing that any member of the class took action prior to March 25, 2009, when Ms. Green filed her lawsuit and sought to act for the class.

Given that class members took no action to request additional benefits prior to Ms. Green filing her lawsuit, the filing date for Ms. Green's lawsuit controls. Accordingly, to the extent that WAC 388-410-0040(3) applies, the applicable period of restoration is limited to the 12-months prior to March 25, 2009.

5. The APA Provides Ample Remedies That Preclude The Superior Court's Strained Certification Of A Class Action

The Department does not suggest that the absence of final orders precludes Basic Food recipients from obtaining review independently or as a class under alternate provisions of the APA. For instance, class members maintained the independent ability to seek direct judicial review of the Department's grant of food assistance under RCW 34.05.570(4) (other agency action) without obtaining an agency order from the Department.¹⁴ To the extent that class members believed that exhaustion of administrative remedies under RCW 74.08.080 was inappropriate, they could have sought waiver under RCW 34.05.534(3). Any claims class members might have had for review of other agency action would have to be timely asserted, however, consistent with the limitations of RCW 34.05.542(3).

¹⁴ Ms. Green explicitly denied that any class members were seeking review of other agency action under RCW 34.05.570(4).

To the extent that Ms. Green and the members of the class believe that the Department's Basic Food regulations violate the law, she and the class may seek review under RCW 34.05.570(2). Notably, a party need not exhaust administrative remedies before seeking review of an agency rule and may seek review at any time (subject to limited exception). RCW 34.05.534(1), .542(1).

Moreover, to the extent that recipients believed that the Department's former rules did not comply with the law, they could have petitioned the Department for amendment or repeal. RCW 34.05.330.

In sum, Ms. Green's petition for judicial review of her February 27, 2009 order is not an appropriate vehicle for certification of a class based upon untimely general claims regarding the Department's distribution of food benefits. Rather, to the extent that Basic Food recipients believed that the Department's rules or distribution of benefits violated the law, they should have sought review under separate APA provisions.

C. This Court Should Reverse The Superior Court's Award Of Attorney's Fees Under RCW 74.08.080

If this Court affirms the Department's Basic Food calculation under the February 27, 2009 order, it should reverse outright the superior court's award of attorney's fees. If this Court should reverse only the superior court's certification of the class, however, then the issue of

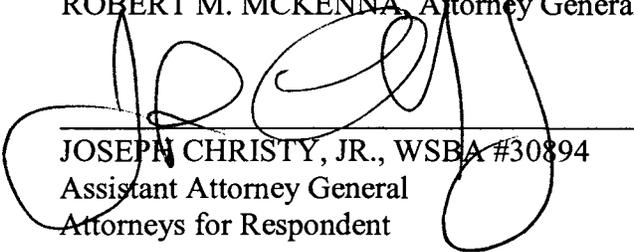
attorney's fees should be remanded to the superior court with direction to eliminate its award of attorney's fees related to certification of the class.

VI. CONCLUSION

This Court should affirm the Department's February 27, 2009 order because the Basic Food calculation contained therein is the only one allowed under state and federal law, and reverse the judgment of the superior court in its entirety. If it does not affirm the Department's construction of its regulation, the Court should nevertheless reverse the superior court's order certifying a class because, by certifying a class of persons who could not independently maintain actions for judicial review of an agency order, it applied CR 23 inconsistent with the requirements of the Administrative Procedure Act. In so doing, this Court should remand to Thurston County Superior Court with direction to amend its declaratory judgment order accordingly and reverse its order awarding attorney's fees.

RESPECTFULLY SUBMITTED this 3 day of May, 2010.

ROBERT M. MCKENNA, Attorney General



JOSEPH CHRISTY, JR., WSBA #30894
Assistant Attorney General
Attorneys for Respondent

APPENDIX 1

ORIGINAL

SUPERIOR COURT
THURSTON COUNTY WA.

'09 DEC -4 AM 11:49

BETTY J GOULD CLERK

BY _____ DEPUTY

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EXPEDITE
 Hearing set for:
Date: December 4, 2009
Time: 9:00 A.M.
Judge/Calendar: Anne Hirsch

SUPERIOR COURT OF
WASHINGTON
FOR THURSTON COUNTY

ALICIA L. GREEN, on behalf of
herself and all others similarly situated,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent

NO. 09-2-00744-3

CLASS ACTION

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECLARATORY
JUDGMENT ORDER
UNDER RCW 34.05.574

I. STATEMENT OF THE CASE

This judicial review proceeding was brought under the Administrative Procedure Act to challenge an agency order in an adjudicative proceeding pursuant to RCW 34.05.570(3). The Petitioner, Alicia L. Green, sought individual relief and relief on behalf of a class of similarly situated households. The Court granted Ms. Green's motion for class certification on June 18, 2009.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY
JUDGMENT ORDER - 1

Columbia Legal Services
711 Capitol Way S #304
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 This matter was tried by the Court on Friday, August 28, 2008, without a
2 jury, based on the agency record filed by the Department of Social and Health
3 Services (the Department) pursuant to RCW 34.05.566. The sole legal question
4 before the Court was whether the Department erroneously interpreted or applied
5 the law when the agency calculated Ms. Green's and other class members' Basic
6 Food benefits or allotment without providing them with the earned income
7 incentive/deduction described in former WAC 388-450-0175.

9 Petitioner Alicia Green and the class she represents appeared through their
10 attorneys of record, Amy L. Crewdson and Gregory D. Provenzano, of Columbia
11 Legal Services. The Department appeared through its attorneys of record, Rob
12 McKenna, Attorney General and Joseph Christy, Jr. and Dana Tumenova,
13 Assistant Attorneys General.

15 II. FINDINGS OF FACT

16 The Court makes the following Findings of Fact:

17 1. The facts are not in dispute. The Findings of Fact set forth by
18 Administrative Law Judge, Barbara Boivin in the Final Order mailed February 27,
19 2009, which is the order under review, are adopted by this Court. These findings
20 are summarized below, but not repeated in full. The Court has added some
21 additional findings based on the record below, which pertain to class issues not
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1 before the Administrative Law Judge. The findings are based on the Joint
2 Stipulation of Facts which was filed in the proceeding below, together with
3 Exhibits A – J and 1-9 which were admitted pursuant to the parties' stipulation,
4 Exhibit 10 which was admitted over the objection of the Petitioner, and the
5 Testimony of John Camp.
6

7 2. The Petitioner, Ms. Green, is a former General Assistance recipient
8 with earned income who also received Basic Food benefits from the Department
9 during the period of time in question.

10 3. In her Petition for Review, Ms. Green sought relief from an agency
11 order pursuant to RCW 34.05.570(3) on the grounds that the Department
12 erroneously interpreted or applied its regulations when calculating her Basic Food
13 benefits. She asserted that the Department overstated her countable income and
14 improperly reduced her Basic Food benefits or allotment by refusing to provide her
15 with the earned income incentive/deduction set forth in former WAC 388-450-
16 0175. She also sought class wide-relief for similarly situated households.
17

18 4. The legal issue now before this Court was first raised by another
19 Basic Food recipient, Tabitha Montgomery, who received a favorable hearing
20 decision on December 5, 2007. On March 26, 2008, Ms. Green's counsel sent a
21 letter to the Secretary of the Department, Robin Arnold-Williams, asking that the
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1 agency recalculate the monthly food benefits of all Basic Food recipients who
2 receive income from work while on General Assistance in accordance with former
3 WAC 388-450-0162 and former WAC 388-450-0175 as interpreted in the
4 *Montgomery* decision. The Secretary refused stating that the agency disagreed
5 with this interpretation of the law.
6

7 5. On April 7, 2008, James Davis filed a Petition for Judicial Review
8 and Declaratory Judgment in Thurston County Superior Court under Docket No.
9 08-2-00813-1 seeking individual and class-wide relief in an attempt to compel the
10 Department to apply the *Montgomery* decision to all similarly situated households.
11 On May 16, 2008, Ms. Green intervened in that lawsuit as an additional class
12 representative. On June 13, 2008, that lawsuit was dismissed.
13

14 6. While the above lawsuit was pending, the Department recalculated
15 Ms. Green's Basic Food benefits for the months of May and June 2008 and sent
16 her two letters explaining its calculations on June 6 and 9, 2008, respectively.
17 When the Department calculated Ms. Green's May and June 2008 Basic Food
18 benefits, the Department subtracted a standard deduction of \$134.00 and an earned
19 income deduction of \$118.37 (twenty percent of her gross income) from her
20 monthly gross income pursuant to WAC 388-450-0185(1) and WAC 388-450-
21 0185(2). The Department did not, however, apply the earned income
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1 incentive/deduction ($\$85.00 + \frac{1}{2}$ of the remainder of monthly gross income + 20%
2 of gross earned income) described under former WAC 388-450-0175.

3 7. On July 17, 2008, Ms. Green filed a request for an administrative
4 hearing based on the June 2008 notices. She asserted that the Department had
5 overstated her countable income and miscalculated her Basic Food benefits or
6 allotment by not providing her with the earned income incentive/deduction set
7 forth in former WAC 388-450-0175. During these administrative proceedings, the
8 parties stipulated that if the Department had applied this earned income
9 incentive/deduction when it calculated Ms. Green's food assistance benefits, she
10 would have received an additional Basic Food allotment of \$126.00 for March
11 2008, \$76.00 for April 2008, \$76.00 for May 2008, and \$76.00 for June 2008. In
12 total, Ms. Green would have received additional Basic Food benefits totaling
13 \$354.00 for the twelve month period prior to her request for an administrative
14 hearing.
15

16 8. An administrative hearing was held on January 6, 2009 before
17 Barbara Boivin, Administrative Law Judge for the Office of Administrative
18 Hearings for the Department of Social and Health Services. On February 27, 2009,
19 Administrative Law Judge, Barbara Boivin, mailed a Final Order upholding the
20 Department's calculations. This is the Final Order now under review.
21
22
23

1 9. On March 25, 2009, Ms. Green filed this action seeking relief for
2 herself and a class of similarly situated households.

3 10. On June 18, 2009, this Court entered an order that granted Ms.
4 Green's motion for class certification under CR 23(a) and 23(b)(2), defining the
5 class as all persons who, between March 26, 2007 and June 30, 2008, received
6 income from work while receiving General Assistance who received fewer or no
7 Basic Food benefits because the Department did not apply former WAC 388-450-
8 0162 and former WAC 388-450-0175 when determining their eligibility for the
9 Basic Food program or when calculating their Basic Food benefits.

10 11. Ms. Green asks that this Court reverse the Final Order and award her
11 \$354.00 in additional Basic Food Benefits. She also seeks class-wide declaratory
12 and injunctive relief. She asks that the Court declare that (1) Basic Food recipients
13 who had earned income while receiving General Assistance were entitled to
14 receive the earned income incentive/deduction set forth in former WAC 388-450-
15 0175 as long as this regulation remained in effect when the Department computed
16 their Basic Food benefits; and (2) class members are entitled to receive any
17 underpaid or wrongfully withheld benefits beginning on March 26, 2007 and
18 ending on June 30, 2008. Ms. Green also seeks an order compelling the
19 Department to restore to her and class members the underpaid or wrongfully
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FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY
JUDGMENT ORDER - 6

Columbia Legal Services
711 Capitol Way S #304
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 withheld Basic Food benefits in accordance with WAC 388-410-0040. Lastly, Ms.
2 Green seeks an award of costs and reasonable attorneys' fees pursuant to RCW
3 74.08.080 and RCW 4.84.030.

4
5 12. Ms. Green asserts that the Department failed to follow its own
6 regulations that required that she and other class members be given an earned
7 income incentive/deduction designed to encourage General Assistance –
8 Unemployable (GA-U) recipients to work. She further alleges that the
9 Department, through its failure to follow its former rules, overstated her countable
10 income and as a result provided her with fewer basic food benefits for the months
11 of March, April, May, and June of 2008. She asserts under RCW 34.05.570(3)(d)
12 that the Department erroneously interpreted or applied the law when it did not
13 provide her and other class members the earned income incentive/deduction set
14 forth in former WAC 388-450-0175 when calculating her and other class
15 members' Basic Food benefits.
16

17 13. The Department denies Ms. Green's assertions. The Department
18 argues that it acted consistent with the limits of its statutorily delegated authority in
19 refusing to apply the earned income deduction/incentive under former WAC 388-
20 450-0175 when calculating Ms. Green's and other class members' Basic Food
21 benefits. The Department asserts that to act otherwise, would contradict clear
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1 legislative intent, create internal statutory and regulatory conflict and create the
2 absurd result of requiring the Department to act *ultra vires*, or outside its authority.

3 The Department also asserts that its limited grant of authority only allows it to
4 adopt, create and implement a food assistance program that is consistent with the
5 Federal Food Stamp Act, as amended, and that Ms. Green is asking the Court to
6 require it to act beyond its authority in violation of state and federal laws. The
7 Department also repeatedly contends that federal funding for the Washington State
8 Basic Food program would be jeopardized if the Court rules against it in this case.

10 III. CONCLUSIONS OF LAW

11 Based on the above findings, the Court makes the following Conclusions of Law:

- 12 1. Ms. Green has standing under RCW 34.05.530 to obtain judicial
13 review of the Final Order mailed on February 27, 2009.
- 14 2. Ms. Green exhausted her administrative remedies prior to filing this
15 action in accordance with the requirements of RCW 34.05.534.
- 16 3. Ms. Green filed her petition for review within thirty days after service
17 of the Final Order as required by RCW 34.05.542.
- 18 4. This Court has subject matter jurisdiction under the Administrative
19 Procedure Act to review the Final Order that was served on February 27, 2009 and
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1 consider the other relief sought in Ms. Green's Petition for Judicial Review and
2 Declaratory Judgment.

3 5. The specific dispute in this case concerns the interplay between
4 former WAC 388-450-0162, former WAC 388-450-0175 and other Department
5 regulations concerning its federally funded Basic Food Program, scattered among
6 several chapters of the Washington Administrative Code, including WAC 388-
7 400-040 and WAC 388-450-0185.

9 6. In order to resolve this dispute, the Court must review the
10 Department's interpretation of its regulations, including former WAC 388-450-
11 0162 and former WAC 388-450-0175. A court reviews an agency's interpretation
12 or application of the law *de novo* under an error of law standard. This standard
13 allows a court to substitute its own interpretation of the statute or regulation in
14 question for the agency's interpretation.

16 7. A court generally gives great weight to an agency's interpretation of a
17 regulation within its area of expertise if the interpretation is not in conflict with the
18 regulatory language; a court is not bound, however, by an agency's interpretation
19 that conflicts with the plain language of the regulation.

21 8. Rules of statutory construction apply to the interpretation of
22 administrative rules and regulations. Where a regulation is unambiguous, a court
23

1 will not look beyond the plain meaning of the words in the regulation. A
2 regulation is unambiguous if it is susceptible to one reasonable interpretation after
3 considering the entire statutory scheme, including related regulations. When faced
4 with an unambiguous regulation, a court may not speculate as to the intent of the
5 regulation or add words to the regulation. The court's task is not to question the
6 wisdom of a particular regulation; rather, its review is limited to determining what
7 the regulation requires.
8

9 9. When reviewing the language of a statute, courts must give effect to
10 every word, clause, and sentence whenever possible; no part should be deemed
11 inoperative or superfluous.
12

13 10. Here, the analysis begins with the provisions of former WAC 388-
14 450-0162. This regulation states, in pertinent part, as follows: "The Department
15 uses countable income to determine if you are eligible and the amount of your **cash**
16 **and food assistance benefits.** (Emphasis added). This regulation contains no
17 language limiting its application to cash benefits only and in fact specifically
18 includes the words "cash and food assistance benefits." It also specifically states
19 that in determining countable income, the Department must subtract the deductions
20 or earned income incentives provided under multiple regulations, including WAC
21 388-450-0175. *See* former WAC 388-450-0162(1)(b).
22
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1 11. Former WAC 388-450-0175 states , in pertinent part, as follows:

2
3 The department gives special deductions to people who receive
4 income from work while receiving General Assistance -
5 Unemployable (GA-U). We allow the following deductions
6 before using your earnings to determine your eligibility and
7 **monthly benefits:**

- 8 1. We subtract eighty-five dollars plus one half of the
9 remainder of your monthly gross earned income as an
10 incentive to employment.
- 11 2. We also subtract an amount equal to twenty percent of
12 your gross earned income to allow for work expenses.

13 (Emphasis added). Similar to former WAC 388-450-0162, former WAC 388-450-
14 0175 contains no language creating any distinction between cash and food benefits
15 but rather refers to "monthly benefits."

16 12. The provisions of former WAC 388-450-0162 and former WAC 388-
17 450-0175 must be considered within the context of the Department's other Basic
18 Food regulations, including WAC 388-400-0040 and WAC 388-450-0185.

19 13. WAC 388-400-0040(2) states that to be *eligible* for federal food
20 benefits, households "must meet the *eligibility* requirements of the most current
21 version of the Food Stamp Act of 1977." (emphasis added). This regulation
22 speaks to the issue of eligibility not benefit level. Ms. Green and other class
23

1 members are “categorically eligible” for the Basic Food program pursuant to 7
2 U.S.C. §2014(a) and WAC 388-414-0001.

3
4 14. WAC 388-450-0185 sets forth a number of specific deductions that
5 must be subtracted from a household’s countable income before determining their
6 Basic Food benefit amount. This includes a standard deduction, an earned income
7 deduction, dependent care expenses, medical expenses, child support obligations,
8 and a portion of their shelter costs.

9
10 15. Neither WAC 388-400-0040 nor WAC 388-450-0185 contain
11 provisions in conflict with or which would be rendered superfluous by an
12 interpretation that the earned income incentive/deduction set forth in former WAC
13 388-450-0175 applies to both the Department’s cash and food assistance programs.

14
15 16. The words of the former regulations, including former WAC 388-450-
16 0162 and former WAC 388-450-0175 are not ambiguous; absent ambiguity, this
17 Court should not resort to using rules of statutory construction. If the Court
18 accepted the Department’s arguments it would necessarily have to both add and
19 delete words from two different former WAC provisions, something basic rules of
20 statutory construction note with disapproval. In short, the regulatory provisions at
21 issue are not reasonably susceptible to more than one interpretation unless the
22
23

1 court ignores the unambiguous language of one former WAC and then adds words
2 to another. This Court will not engage in that exercise.

3
4 17. The provisions of RCW 74.04.510 provide that the Department shall
5 adopt food stamp rules conforming to federal laws, rules and regulations required
6 to be observed in maintaining the eligibility of the state to receive from the federal
7 government and to issue or distribute to recipients, food stamps, coupons, or food
8 stamp or coupon benefits transferred electronically under a food stamp or benefits
9 plan.

10
11 18. A court may not add words to correct what the court perceives to be a
12 mistake, absent limited exceptions that are not present under the facts of this case.
13 *See., eg., In the Matter of Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951
14 (2008); *State v. Taylor*, 97 Wn.2d 724, 649 P.2d 633 (1982); *State v. Delgado*,
15 148 Wn.2d 723, 63 P.3d 792 (2003).

16
17 19. As an additional basis for her request to reverse the Department, Ms.
18 Green argues that the Department must not be permitted to change its rules without
19 first engaging in appropriate rule making because to allow that deprives the public
20 of its rightful opportunity to participate meaningfully in the rule making process.
21 This Court finds that to be the case; to rule otherwise, would, as argued by Ms.

1 Green, make meaningless the requirement that the Department engage in
2 appropriate rule making.

3
4 20. The record in this case does not support the Department's repeated
5 contention that federal funding for the Washington State Basic Food program
6 would be jeopardized if the Court rules against it in this case. Here the worst case
7 scenario supported by the record is that the Department properly promulgated rules
8 that were partially inconsistent with (because the rule gave greater benefits to
9 eligible clients) federal requirements. Nothing done by the State of Washington in
10 making that "mistake" would result in the state becoming ineligible to receive
11 federal funding although the record does support a suggestion that there may be
12 some penalty imposed. While appreciative of the concern the Department rightly
13 asserts on behalf of the taxpayer, the Court may not properly take that into account
14 in its analysis of the issues here.
15

16
17 21. In conclusion, the Court finds that the Department erroneously
18 interpreted or applied the law when it declined to apply the earned income
19 disregard provided in former WAC 388-450-0175 in calculating Ms. Green's and
20 other class members' Basic Food benefits.

21
22 22. Ms Green and the class she represents have a right under WAC 388-
23 410-0040 to the restoration of any food assistance benefits that were underpaid

1 where a court declares that such food benefits have been wrongfully withheld.
2 Under this regulation, the Department is required to restore underpaid benefits for
3 any of the twelve months prior to the date the client requests restoration or the date
4 the households makes a request for a fair hearing when a request for restoration of
5 benefits was not made, or the date court action was started when the client has
6 taken no other action to obtain restoration of benefits.
7

8 23. Here, Ms. Green's counsel made a request to the Department on
9 March 26, 2008 that the Department provide all General Assistance recipients with
10 earned income, with the earned income incentive/deduction set forth in former
11 WAC 388-450-0175 and that the agency restore wrongfully withheld benefits to
12 those who had been previously underpaid. In light of this request, Ms. Green and
13 the class she seeks to represent are entitled to the restoration of any underpaid
14 benefits that were wrongfully withheld from March 26, 2007 through June 30,
15 2008 when the amendments to WAC 388-450-0175 limiting the earned income
16 incentive/deduction to the Department's cash assistance program took effect.
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18

19 24. As the prevailing party, Ms. Green is entitled to reasonable attorneys'
20 fees and costs under RCW 74.08.080.
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IV. DECLARATORY JUDGMENT & RELIEF

Based on the above findings of fact and conclusions of law, the Court enters judgment as follows:

1. For purposes of this Judgment, the class shall be defined to include all persons who between March 26, 2007 and June 30, 2008 received income from work while receiving General Assistance who received fewer or no Basic Food benefits because the Department did not apply former WAC 388-450-0162 and former WAC 388-450-0175 when calculating their Basic Food benefits.

2. The Court declares that the Department erroneously interpreted and applied the law when it calculated Ms. Green and other class members' countable income and monthly Basic Food benefits by failing to subtract from their income the earned income deduction/incentive set forth in former WAC 388-450-0175. As a result of this error, the Department wrongfully withheld Basic Food benefits from Ms. Green and other class members.

3. The Final Order mailed on February 27, 2009 is reversed. The Department shall restore to Ms. Green the wrongfully withheld Basic Food benefits that were underpaid for the months of March, April, May, and June 2009 totaling \$354.00 in accordance with the provisions of WAC 388-410-040 within thirty (30) days.

1 4. The Department shall restore all wrongfully withheld Basic Food
2 benefits to other class members pursuant to WAC 388-410-0040 as soon as
3 administratively feasible.

4 a. In calculating the wrongfully withheld Basic Food benefits that
5 will be restored to each class member, the Department shall determine the class
6 member's countable income for purposes of the Basic Food program by
7 subtracting from their income the earned income deduction/incentive set forth in
8 former WAC 388-450-0175. This means that the Department shall subtract from
9 the class member's earnings eighty-five dollars plus one half of the remainder of
10 his or her monthly gross earned income as an incentive to employment. The
11 Department shall also subtract an amount equal to twenty percent of his or her
12 gross earned income to allow for work expenses. The Department shall then
13 subtract from the class members countable income the deductions set forth in
14 WAC 388-450-0185, except that the agency shall not deduct an additional twenty
15 percent of his or her gross earned income as an earned income deduction.
16

17 b. Each class member shall be eligible to have any wrongfully
18 withheld Basic Food benefits restored from March 26, 2007 through June 30, 2008.
19

20 c. The additional food assistance relief will be added to each class
21 member's existing EBT accounts.
22

1 d. For class members who are no longer eligible for or receiving
2 Basic Food benefits, the class member's Basic Food EBT account will be
3 reactivated (or a new account issued) and the additional food assistance relief
4 added thereto.

5
6 e. At the time that benefits are restored, the Department shall
7 notify class members of the judgment entered in this lawsuit and of the additional
8 food assistance benefit that each class member will receive as a result. The
9 Department shall ensure that class members are informed of the reason they are
10 receiving additional benefits and how the additional benefits were computed in
11 accordance with this Order. This notice shall advise each class member that he or
12 she may request a fair hearing if they disagree with the amount of benefits the
13 Department determines were underpaid.

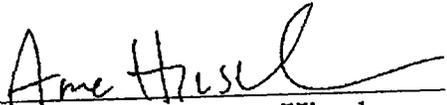
14
15 5. The Department shall provide Petitioner's counsel with copies of all
16 form letters or other documents pertaining to relief it intends to send to class
17 members sufficiently in advance of their actual distribution that they can apply to
18 this Court for modification should counsel consider the notices inadequate under
19 Paragraph 4 e.

20
21 6. The Department shall notify Petitioner's counsel in writing when it
22 has restored all wrongfully withheld Basic Food benefits to class members as
23

1 required by Paragraph 4 of this Order and provide them with a report stating the
2 number of class members who received restored benefits, the average benefits
3 restored, and the total cost of the benefits provided to all members of the class.

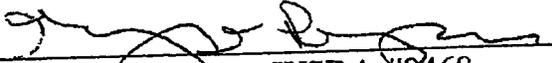
4 7. Petitioner is entitled to reasonable attorney's fees under RCW
5 74.08.080 in an amount to be determined by separate order.
6

7 Dated: 12/4/09


8 Honorable Anne Hirsch

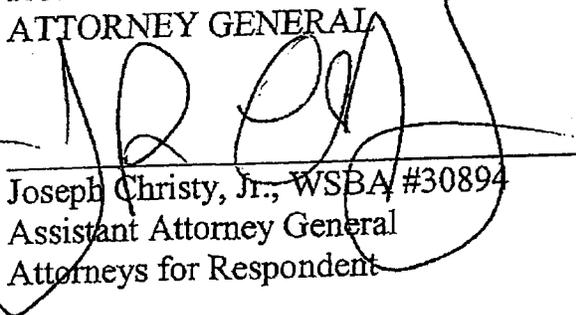
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10 Presented by:

11 COLUMBIA LEGAL SERVICES

12

13 Amy L. Crewdson, WSBA #9468
14 Gregory D. Provenzano, WSBA #12794
15 Attorneys for Petitioners

16 Approved for entry by:

17 ROB MCKENNA
18 ATTORNEY GENERAL

19

20 Joseph Christy, Jr., WSBA #30894
21 Assistant Attorney General
22 Attorneys for Respondent

23
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY
JUDGMENT ORDER - 19

Columbia Legal Services
711 Capitol Way S #304
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

APPENDIX 2

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'09 JUN 18 AM 11:13

BETTY J GOULD CLERK

BY _____ DEPUTY

No hearing set.
 EXPEDITE
 Hearing set for:
Date: June 9, 2009
Time: 10:00 A.M.
Judge/Calendar: Honorable Anne Hirsch

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

CLASS ACTION

ALICIA L. GREEN on behalf of herself and
all others similarly situated,

No. 09-2-00744-3

Petitioner,

ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION

vs.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

This matter came before the Court on Petitioner's CR 23(c) motion that this matter be allowed to proceed as a class action under CR 23(b)(2) on behalf of a class defined to include all persons who between March 26, 2007 and June 30, 2008 received income from work while receiving General Assistance who received fewer or no Basic Food benefits because the Department did not apply former WAC 388-450-0162 and former WAC 388-450-0175 when determining their eligibility for the Basic Food program or when calculating their Basic Food

ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION- 1

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Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 benefits. The Court heard the oral argument of counsel for the parties. The Court considered the
2 pleadings filed in this action and the following evidence:

- 3 1. The Declaration of the Petitioner, Alicia L. Green;
- 4 2. The Declaration of Petitioners' Counsel, Gregory D. Provenzano; and
- 5 3. The Stipulation by the parties.

6 Based on the argument of counsel and the evidence presented, the Court finds:

7 1. This matter is appropriately maintained as a class action under CR 23(a) and
8 23(b)(2).

9 2. The class is so numerous that joinder of all members is impracticable. During the
10 relevant time frame, there were more than 1,300 General Assistance (GA) households with
11 earned income who received less than the maximum Basic Food benefit. By definition, members
12 of the class are disabled and in financial need according to the Department's income and
13 resource rules. These additional factors make it unlikely that class members could each
14 effectively assert their claims through individual lawsuits.

15 3. There are questions of law and fact common to the class including: (1) whether
16 the Department erroneously interpreted or applied the law, including former WAC 388-450-0162
17 and former WAC 388-450-0175; (2) whether the Department acted inconsistently with its own
18 rules; (3) whether the Department's orders were arbitrary or capricious; (4) whether Petitioner
19 and the class she seeks to represent are entitled to declaratory relief finding that the Department
20 through its actions wrongfully withheld Basic Food benefits that were due under the agency's
21 regulations; and (5) whether Petitioner and absent class members are entitled to restoration of the
22

23
ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION- 2

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(360) 754-4578 (fax)

1 Basic Food assistance benefits they lost or never received because such benefits were wrongfully
2 withheld.

3 4. The claims of Petitioner are typical of the claims of the class which she seeks to
4 represent;

5 5. The Petitioner will fairly and adequately protect the interests of the class. The
6 Petitioner is represented by Columbia Legal Services who are experienced handling class actions
7 and cases involving federal and state public benefit programs. There is no evidence of any
8 conflict amongst class members;

9 6. The Department has acted or refused to act on grounds generally applicable to the
10 class, thereby making appropriate final injunctive and declaratory relief with respect to the class
11 as a whole;

12 7. The Petitioner, Alicia Green exhausted her administrative remedies before filing
13 this action. There are no provisions in the Administrative Procedure Act, RCW 34.05 that would
14 bar Ms. Green from seeking class relief for class members who have not exhausted their
15 administrative remedies. In the alternative, this Court will relieve class member of the
16 requirement to exhaust any or all administrative remedies because the underlying purpose behind
17 the exhaustion requirement would not be served by precluding Ms. Green from representing
18 class members who have not met this requirement;

19 8. The Petitioner, Alicia Green filed her petition for review within 30 days of a final
20 order as required by RCW 34.05.542(2). As a result, this Court has subject matter jurisdiction to
21 consider her individual claim for relief and her claims for class relief. Class certification is an
22 ancillary procedural matter under RCW 34.05.510, governed, to the extent not inconsistent with

23 ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION- 3

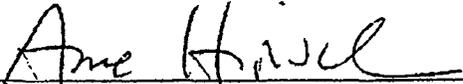
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Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 the APA, by court rule, CR 23. There is no requirement in RCW 34.05.542 that would preclude
2 Ms. Green from representing class members who had not sought judicial review within 30 days
3 of a final order. In the alternative, Ms. Green through her actions prior to filing this action,
4 equitably tolled any such requirement by her March 26, 2007 demand letter, by the filing of a
5 previous lawsuit, and by filing her latest request for an administrative hearing. These actions
6 sufficed to give the Department notice that this was a class-wide dispute. The Department has
7 suffered no prejudice. Where, as here, the Petitioner filed her petition for review within 30 days
8 of a final order, this tolling does not threaten to undermine the policies behind the 30 day
9 requirement nor confer subject matter jurisdiction on this Court where there is none.

10 Based on the above findings, IT IS ORDERED:

- 11 1. The Petitioner's motion for class certification is granted.
- 12 2. This action shall be maintained as a class action under CR 23(b)(2).
- 13 3. The class shall be defined to include all persons who between March 26, 2007 and
14 June 30, 2008 received income from work while receiving General Assistance who received
15 fewer or no Basic Food benefits because the Department did not apply former WAC 388-450-
16 0162 and former WAC 388-450-0175 when determining their eligibility for the Basic Food
17 program or when calculating their Basic Food benefits.

18 Dated: 6/18/09

19 
20 JUDGE ANNE HIRSCH

21
22
23 ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION- 4

Columbia Legal Services
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Olympia, WA 98501
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(360) 754-4578 (fax)

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Presented by:

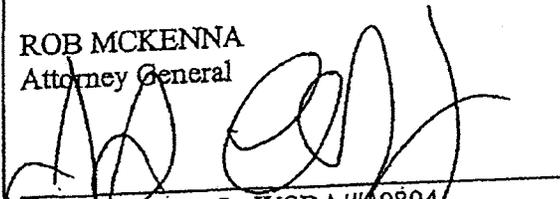
COLUMBIA LEGAL SERVICES



Amy L. Crewdson, WSBA #9468
Gregory D. Provenzano, WSBA #12794
Attorneys for Petitioner

Approved for entry by:

ROB MCKENNA
Attorney General



Joseph Christy, Jr. WSBA #80894
Dana Tumenova, WSBA #33996
Assistant Attorneys General
Attorneys for Respondent

ORDER ALLOWING MATTER
TO PROCEED AS CLASS ACTION- 5

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711 Capitol Way S #304
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

APPENDIX 3

4
**ORIGINAL
RECEIVED**

DEC 16 2009

OFFICE OF THE ATTORNEY GENERAL
SOCIAL & HEALTH SERVICES DIV

09 DEC 11 AM 9:09
BY BETTY J. GOULD, CLERK
DEPUTY

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

EXPEDITE
 Hearing set for:
Date:
Time:
Judge/Calendar:

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

EX PARTE

CLASS ACTION

No. 09-2-00744-3

AMENDED ORDER AWARDING
REASONABLE ATTORNEY'S FEES
UNDER RCW 74.08.080

ALICIA L. GREEN, on behalf of herself and
all others similarly situated,

Petitioner,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

JUDGMENT SUMMARY

Judgment Creditor:	Alicia L. Green
Judgment Debtor(s):	Department of Social and Health Services
Principal Judgment Amount:	\$ 0.00
Attorney's Fees	\$ 53,700
Costs:	\$ 0.00
Attorney for Judgment Creditor:	Columbia Legal Services

This matter came before the Court pursuant to Petitioner's motion for reasonable attorneys' fees under RCW 74.08.080. The Petitioner appeared through her attorneys of record, Amy L. Crewdson and Gregory D. Provenzano of Columbia Legal Services. The Defendant appeared through its attorneys of record, Rob McKenna, Attorney General of Washington and Joseph Christy, Assistant Attorney General.

ORDER AWARDING
REASONABLE ATTORNEYS' FEES
UNDER RCW 74.08.080 - 1

Columbia Legal Services
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Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

09-9-01614-6

1 The Court considered the pleadings filed in this action, including the following evidence:

2 1. The Declaration of Amy L. Crewdson in Support of Motion for Reasonable
3 Attorneys' Fees; and

4 2. The Declaration of Gregory D. Provenzano in Support of Motion for Reasonable
5 Attorneys' Fees.

6 Based on the argument of counsel and the evidence presented, the Court finds and
7 concludes:

8 1. Petitioner, Alicia L. Green brought this petition for judicial review to challenge an
9 adjudicative order entered in a public assistance program pursuant to the Administrative
10 Procedure Act, RCW 34.04 and RCW 74.08.080.

11 2. Petitioner prevailed in this action.

12 3. As the prevailing party, Petitioner is entitled to an award of reasonable attorney's
13 fees under RCW 74.08.080.

14 4. RCW 4.84.340, .350, and .360 do not apply to this Court's award of reasonable
15 attorney's fees in this case.

16 5. Where, as here, the fee shifting statute (RCW 74.08.080) fails to indicate how an
17 attorney's fee award is to be calculated, Washington courts use the lodestar method. A court
18 arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours
19 reasonably expended on the matter. The lodestar amount may then be adjusted to account for
20 subjective factors such as the level of skill required by the litigation, the amount of potential
21 recovery, time limitations imposed by the litigation, the attorney's reputation, and the
22 undesirability of the case. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675
23 P.2d 193 (1983); RPC 1.5(a).

6. Based on the prevailing market rates for the kind and quality of services furnished
and taking into account the experience and expertise of Petitioner's counsel, amongst other

1 factors, an hourly rate of \$300 is appropriate for both Ms. Crewdson and Mr. Provenzano, when
2 calculating an award of reasonable attorney's fees.

3 7. This Court reviewed the declarations filed by Petitioner's counsel showing the
4 time they spent on this matter. The Court also considered the Department's response to
5 Petitioner's motion for attorney's fees, including its Exhibit A. The Court reviewed each time
6 entry, line by line, to assess whether the time spend by Petitioner's counsel was redundant,
7 duplicative , unreasonable, excessive, or unnecessary as asserted by the Department. The Court
8 finds that Petitioner's counsel reasonably expended 179 hours on this action. In reaching this
9 conclusion, the Court excluded 50.5 hours of the 229.5 hours that the Petitioner sought in this
10 matter from its lodestar calculations. The bulk of the hours excluded were the 42.5 hours that
11 Petitioner's counsel indicated that they spent responding to the Department's motion for
12 discretionary review. The remaining 8 hours excluded were time that this Court found to be
13 duplicative or unnecessary.

14 8. This court lacks the authority to award fees for time spent in the appellate court.
15 Petitioner must request fees for such work as provided in RAP 18.1. RCW 74.08.080 does not
16 specify that a request for fees incurred before the appellate court is to be directed to the trial
17 court. Therefore, this Court excluded from its lodestar determination 42.5 hours that Ms.
18 Green's co-counsel claimed related to their efforts opposing the Department's motion for
19 discretionary review before Division II of the Washington Court of Appeals.

20 9. Based on the reasonable hours expended and a reasonable hourly rate, the
21 reasonable attorney's fees in this matter should be set in the sum of Fifty-Three Thousand, Seven
22 Hundred Dollars (\$53,700.00).

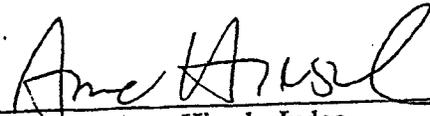
23 10. The burden of justifying any deviation from the "lodestar" rests on the party
proposing the deviation. In this case, neither party demonstrated that an adjustment of the
lodestar was justified.

1 Based on the above findings, IT IS ORDERED

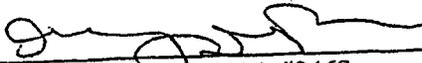
2 1. Petitioner's motion is granted.

3 2. Petitioner is awarded judgment against the Respondent for reasonable attorney's
4 fees in the sum of Fifty-Three Thousand, Seven Hundred Dollars (\$53,700.00).

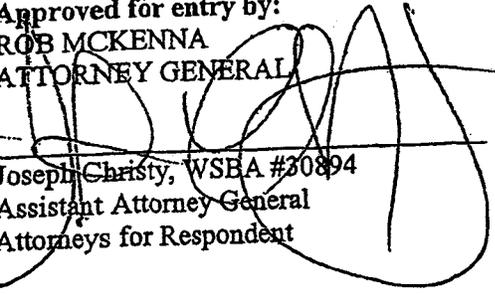
5 Dated this 14th day of December 2009.

6 
Honorable Anne Hirsch, Judge

7 Presented by:
8 COLUMBIA LEGAL SERVICES

9 
Amy Crewdson, WSBA #9468
10 Gregory D. Provenzano, WSBA #12794
Attorneys for Petitioner

11 Approved for entry by:
12 ROB MCKENNA
ATTORNEY GENERAL

13 
14 Joseph Christy, WSBA #30894
Assistant Attorney General
15 Attorneys for Respondent

16
17 STATE OF WASHINGTON
County of Thurston
18 I, Betty J. Gould, County Clerk and Ex-officio Clerk of
the Superior Court of the State of Washington, for
Thurston County holding session at Olympia, do
19 hereby certify that the foregoing is a true and correct
copy of the original as the same appears on
file and of record in my office containing four pages.
20 IN WITNESS WHEREOF, I have hereunto set my hand and
affixed the seal of said court December 15, 2009

21 DATED: BETTY J. GOULD
County Clerk, Thurston County, State of Washington
22 By Jane C. [Signature] Deputy
23

ORDER AWARDING
REASONABLE ATTORNEYS' FEES
UNDER RCW 74.08.080 - 4

Columbia Legal Services
711 Capitol Way S #304
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

APPENDIX 4

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

In Re:

ALICIA L GREEN

Appellant.

Docket No. 07-2008-B-1820

Client ID# 50019953

FINAL ORDER

(Food Assistance)

MAILED
FEB 27 2009
SEATTLE-OAH

On January 6, 2009, BARBARA BOIVIN, Administrative Law Judge (ALJ), held a hearing in the above-captioned matter at the Department of Social and Health Services (DSHS) Belltown Community Services Office. The Appellant, Alicia L. Green, appeared through and was represented by Columbia Legal Services attorney Amy Crewdson. DSHS appeared through and was represented by Assistant Attorneys General Joseph Christy and Dana Tumenova.

John Camp, DSHS lead Food Assistance Analyst, testified for DSHS.

The parties filed a Joint Stipulation of Facts on November 3, 2008.

Exhibits A - J and 1 - 9 were admitted pursuant to the parties' stipulation. Exhibit 10 was admitted pursuant to a ruling on Appellant's motion to exclude.

ISSUE

Is Ms. Green entitled to the earned income incentive provided by former WAC 388-450-0175 for GA-U (General Assistance -Unemployable) clients in the calculation of her countable income for the purposes of determining her BFA (Basic Food Assistance) allotment ?

RESULT

No.

FINDINGS OF FACT

Findings 1 - 12 are based on the Joint Stipulation of Facts and the Exhibits.

1. In May and June 2008, Alicia Green had no resources.

FINAL ORDER -- 1
Docket Number 07-2008-B-1820

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

Exhibit F

11. On July 17, 2008, Ms. Green requested a hearing to contest DSHS's determination of her BFA allotment for the months of May and June 2008. She specifically alleges that, by not including the income deduction described under former WAC 388-450-0175, the DSHS overstated her countable income by \$456.81 and therefore improperly reduced her BFA allotment. She requests her BFA allotment be recalculated by including the income deduction described under former WAC 388-450-0175 for May and June 2008 and for the prior twelve months pursuant to WAC 388-410-0040.

12. If DSHS had applied the income deduction under former WAC 388-450-0175 when it calculated Ms. Green's food assistance benefits, she would have received an additional food assistance allotment of \$76.00 for each of the months of May and June 2008; during the twelve months prior, Ms. Green would have received an additional BFA allotment of \$76.00 for April 2008 and \$126.00 for March 2008. In sum, Ms. Green would have received additional BFA in the amount of \$354.00.

13. As a condition of receipt of federal funding for its food assistance program, the State of Washington signed a Food Stamp Program Federal/State Agreement in June 1981. The agreement provides in pertinent part:

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food Stamp Act of 1977, as amended, and in the manner prescribed by regulations issued pursuant to the Act[.]

Exhibit 10.

14. The Washington Administrative Code (WAC) public assistance regulations have been amended many times to comply with directives from the governor to reduce the number of regulations and to render them in "plain talk" and for other reasons. At no time did DSHS intend to amend the Basic Food assistance (BFA) regulations to grant BFA to any individual in an amount in excess of that permitted under federal regulations. Testimony of John Camp.

74.04.510. See 7 United States Code (USC) 2011 *et seq* and 7 Code of Federal Regulations (CFR) 271.1 *et seq*.

3. The state laws which authorize DSHS to administer public assistance programs generally and the food assistance program specifically are found at RCW 74.04.050 *et seq*. Consistent with the Food Stamp Program Federal/State Agreement signed by the State of Washington in 1981, all of these statutes express the State of Washington's clear intent to comply with the federal Food Stamp Act. In furtherance of that intent, RCW 74.04.510 provides that DSHS "...shall adopt rules conforming to federal laws, rules and regulations required to be observed in maintaining the eligibility of the state to receive from the federal government and to issue... to recipients, foodbenefits.

4. The BFA rules promulgated to implement these statutes are scattered among several Washington Administrative Code (WAC) chapters (Chapters 388-400; 388-408; 388-412; 388-418; 388-450, 388-478 WAC, and others). In some places they are intertwined with rules governing other programs (for example, Chapter WAC 388-450, notably WAC 388-450-0162). There is overlap and repetition (*e.g.*, WAC 388-412-0015(4) and WAC 388-450-0162(4)). Necessary specific regulations are not referenced in the general regulation (*e.g.*, WAC 388-400-0040 requires determining gross and net countable income but does not reference all the provisions in chapter 388-450 WAC necessary to that determination; it also does not reference WAC 388-412-0015 which is necessary to calculate allotment).

5. Because the WAC does not clearly set out the steps to determined eligibility for BFA, the disparate relevant WACs must be assembled to form an eligibility determination structure. WAC 388-400-0040, the general rule governing the food assistance program, requires that recipients meet the eligibility requirements of the current version of the Food Stamp Act of 1977. Therefore, all rules relating to determining eligibility for food assistance must be construed consistently with the provisions of that Act. Administrative law judges are required to use the regulations as their first source of law. WAC 388-02-0220. Therefore, the best way to assemble the structure is to start with the general rule, proceed to its referenced rules, search all public assistance rules to locate other applicable but not referenced rules, and organize them to track

in WAC 388-478-0060. WAC 388-400-0400(6)(a) and (8) (d). See 7 CFR 273.9 (a) and (a) (1). If it meets that standard, net countable income must be calculated. WAC 388-400-0040 (7). See 7 CFR 273.9 (a)

8. According to the general rule, net countable income is calculated by applying applicable deductions under WAC 388-450-0185. WAC 388-400-0040(7). See also 7 CFR 273.9(d) and 7 CFR 273.10 (d) and (e) which list the same deductions and clearly state that these are the only deductions allowed. Deductions allowed, in sum, are a standard deduction, a 20% earned income deduction, a dependent care deduction, a medical expense deduction and an excess shelter cost deduction.

9. WAC 388-450-0162, an example of a compressed regulation with provisions applicable to both cash and food assistance, also addresses how countable net income is calculated. The portion of the rule contributing to the dispute here is underlined. It provides:

THE DEPARTMENT USES COUNTABLE INCOME TO DETERMINE IF YOU ARE ELIGIBLE AND THE AMOUNT OF YOUR CASH AND FOOD ASSISTANCE BENEFITS.

The department uses countable income to determine if the client is eligible and the amount of the cash and food assistance benefits.

(1) Countable income is all income that remains after we subtract the following:

- (a) Excluded or disregarded income under WAC 388-450-0015;
- (b) Deductions or earned income incentives under WAC 388-450-0170 through 388-450-0200;

...

[Statutory Authority: RCW 74.08.090 and 74.04.510. 99-24-008, § 388-450-0162, filed 11/19/99, effective 1/1/00.]

10. Subsection (1)(b) refers to “deductions” or “earned income incentives” under WAC 388-450-0170 through - 0200. A review of these provisions shows that each one is only applicable to certain programs: WAC 388-450-0170 explicitly applies to TANF and SFA only; WAC 388-450-0185 through -0200 explicitly apply to FA only.

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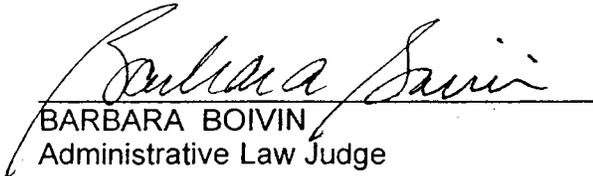
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the WACs are not clearly written. By reading all of the WACs related to public assistance, a list can be constructed of all that relate to BFA. From there, they must be untangled and matched to CFR provisions to understand the required steps to determine eligibility and allotment. In doing so, it is clear that WAC 388-450-0175 does not provide a second earned income deduction for GA recipients. Only by reading that regulation in a vacuum does it appear to do so. This is not consistent with commonly understood rules of construction as thoroughly briefed by both the Appellant and the Department.

DECISION

The version of WAC 388-450-0175 in effect in May and June 2008 did not apply to the calculation of BFA.

SERVED on the date of mailing.


BARBARA BOIVIN
Administrative Law Judge

BB:jfk

Enclosure(s)

cc: Alicia L. Green, Appellant
Joseph Christy Jr., Department Representative
Amy L. Crewdson, Appellant Representative
John Emmerson, Department Representative
Gregory D. Provenzano, Appellant Representative
Dana Tumenova, Other
Community Services Division - Food Assistance, MS 45440, Program Admin.

MAILED

FEB 27 2009

SEATTLE-OAH

REQUEST FOR RECONSIDERATION

Name: _____ Docket # 07-2008-B-1820

Please explain why you want the Final Order reconsidered. Try to be specific. For example, explain:

- Why you think the Order is wrong (why you disagree with it).
- How the Order should be changed.
- The importance of certain facts that the Administrative Law Judge should consider.

I want the Administrative Law Judge to reconsider the Final Order because:

Signature and Date:

Address:	
Telephone Number:	