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COURT OF APPEALS  
DIVISION II

10 OCT 18 PM 12:55

STATE OF WASHINGTON

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No. 40391-9-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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*Cossetta Stroud, Appellant*

v.

State of Washington, Department of Social and Health Services

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REPLY BRIEF OF APPELLANT

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**A. Introduction**

The central question in this case is whether Cossetta Stroud neglected her father. The trier of fact found that she did not. On review the Department of Social and Health Services (DSHS) Board of Appeals review judge reversed, violating DSHS's standard of appeal rule by substituting his own weighing of facts, including reversing credibility findings. If the trier of fact had been a Superior Court Judge with review by an appellate court, there would be no question that the review decision exceeded the allowable scope. Under WAC 388-02-0600, the result here is the same here.

DSHS's assumption of de novo authority on appellate review defines the legal issue here: Must DSHS follow its own rules? The answer comes from decades of consistent Washington Court decisions requiring agency compliance with agency rules, especially rules governing appeals. DSHS's response brief does not attempt to reconcile that standard of review applied by its review judge with its rule. In effect, it seeks to apply the rule it is currently working to adopt: an amendment to WAC 388-02-0600 granting review judges de novo review. *See* WSR 10-19-141, exhibit 1, p. 21, 22. This case requires application of DSHS's current rule, not one proposed for future adoption. The review judge's assumption of original

jurisdiction violated the current rule. Ms. Stroud asks this Court to reverse that error of law.

**B. Argument**

**1. DSHS's Review Judge Exceeded the Allowable Scope of Review.**

WAC 388-02-0600 defines DSHS's authority to alter the decision of the trier of fact on review. Although central to this appeal, DSHS only cites its own rule in passing, *Respondent's brief*, p. 18, 19. That rule lists specific types of appeals where "the review judge has the same decision making authority as the ALJ" 388-0WAC 2-0600(1)<sup>1</sup>. Ms. Stroud's appeal is not one of those cases.

(2) In all other cases, the review judge may only change the initial order if:

- (a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;
- (b) The findings of fact are not supported by substantial evidence based on the entire record;
- (c) The decision includes errors of law;
- (d) The decision needs to be clarified before the parties can implement it; or

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<sup>1</sup> WAC 388-02-0600 was amended in 2008, including the addition of a new subsection (1). While this caused (1) and (2) to be renumbered as (2) and (3), there was no change in its language, WSR 08-21-144. This brief will refer to the numbering used in the 2004 rule and maintain consistency with the cases, which use the prior numbering.

(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record. [emphasis added]

WAC 388-02-0600(2). DSHS violated that rule by changing the trier of fact's findings even after expressly holding those findings were supported by substantial evidence. HR 709, 712.

**a. Washington Courts Consistently Require Agencies to Follow Their Own Rules.**

It is axiomatic that DSHS must follow its own properly adopted rules. The possibility that it could adopt a different rule does not alter that axiom: " District administrators and trustees may not disregard the duties imposed by their own regulations simply because it is more convenient to do so, and they are not excused from full compliance because of their inattention to the requirements imposed by law." *Smith v. Greene*, 86 Wn.2d 363, 373, 374 545 P.2d 550 (1976).

An agency's duty to comply with its own regulations is particularly binding when those regulations govern a citizen's hearing rights. *Ritter v. Board of Commissioners*, 96 Wn.2d 503, 507, 637 P.2d 940(1981). This long line of consistent caselaw applies to DSHS's scope of review rule:

Administrative agencies are bound by their own rules. *Ritter v. Board of Commissioners*, 96 Wash.2d 503, 637 P.2d 940 (1981); *Christensen v. Terrell*, 51 Wash.App. 621, 754 P.2d 1009 (1988). This general rule is particularly appropriate in the hearing process, which is conducted by an administrative law judge from an independent agency of government to insure that the contestant has a fair and impartial fact finder. The "substantial evidence rule" contained in WAC 388-08-413(3)(b), delineating for the review judge the standard to be used for review of the ALJ's initial decision, is analogous to its familiar application between trial and appellate courts. It was properly invoked by the appellant.

*Deffenbaugh v. Department of Social and Health Services*, 53 Wn.App. 868, 871, 770 P.2d 1084 (April, 1989)<sup>2</sup>.

**b. The APA Incorporates that Rule.**

The Legislature incorporated existing law in the current APA:

The legislature intends to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the administrative procedure act in effect before July 1, 1989, shall remain in effect.

RCW 34.05.001. The current agency practices and court decisions preserved and incorporated in the current APA include DSHS's standard of review rule as construed in *Deffenbaugh* under *Smith* and *Ritter*, supra.

The legislature codified the preservation of existing law regarding

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<sup>2</sup> The substantial evidence rule in WAC 388-08-413 was reenacted as WAC 415-02-0600 in 2000. The text of WAC 388-08-413 at issue in *Deffenbaugh* is quoted therein at 871.

scope of review in RCW 34.05.464(4):

The reviewing officer shall exercise all the decision making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent the issues subject to review are limited by a provision of law...

[emphasis added].

DSHS longstanding rule limiting its review judge's authority, and the cases construing that rule, are the exact type of provisions of law excepted from RCW 34.05.464(4). "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Manor v Nestle Food Co.* 131 Wn.2d 439, 445, 932 P.2d 628 (1997) quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979). See also *Smith v. Greene*, supra, at 507, construing agency hearing rules as "requirements imposed by law."

Courts have held that RCW 34.05.464 does not by its own terms limit a reviewing judge's authority, but those cases involve agencies other than DSHS who lack rules to the contrary: See *Smith v Employment Security Dep't*, 155 Wn.App. 24, 226 P.3d 263, fn 2 (2010); *Tapper v. Employment Security Dep't*, 122 Wn. 2d 397, 120 P.3d 130(2005); and *Regan v. Dep't of Licensing*, 130 Wash.App. 39, 59, 121 P.3d 731 (2005), *review denied*, 157

Wash.2d 1013, 139 P.3d 350 (2006). DSHS is currently working to adopt the same standard in its rules, *See* Preproposal Notice of Inquiry, WSR 10-19-141, exhibit 1, p. 21, 22. At issue here, however, is the law defined by the current rule.

Cases adjudicating the review authority of other agencies are inapposite here: “But *Tapper* was not a DSHS case. Here, DSHS hearing rules delineate the authority of the review judge, and DSHS is bound by those rules.” *Costanich v. Soc. & Health Servs.*, 138 Wn.App. 547, 554, 156 P.3d 232 (2007) *reversed on other grounds* 164 Wn.2d 925, 194 P.3d 988(2008). DSHS ignores *Costanich* by urging this Court to apply *Tapper* here, *see respondent’s brief*, p. 14, 15. DSHS’s argument is as invalid in Division II as it was in Division I. DSHS’s rule requires “significant deference to the ALJ” in DSHS appeals. *Costanich* at 555.

**c. DSHS Ignores its Rule.**

DSHS first specifically found that the trier of fact’s findings were supported by substantial evidence. HR 709, 712. The review judge was clear that he was assuming original jurisdiction by reexamining the evidence himself and evaluating it under the preponderance of the evidence standard,

CP 241, COL 56. Rather than following DSHS's rule that he could only change the trier of fact's findings if they were not supported by substantial evidence, he treated those findings as a rebuttable presumption reversible by a preponderance of the evidence. *Cowell v. Good Samaritan Community Health Care*, 153 Wn.App. 911, 926, 225 P.3d 294 (2009).

DSHS's response does not dispute that the review judge substituted his judgment for that of the trier of fact. This is an acknowledgment that the review judge violated WAC 388-02-0600's limitation on the standard of review. This brings the main legal issue in this case into sharp relief: Is that violation legal?

DSHS's response urges the Court to ignore WAC 388-02-0600(2)(b) by applying the substantial evidence standard to the review judge's finding rather than where the rule places requires it: as the standard for review of the trier of fact's findings. DSHS seeks to turn this appeal into a factual review of the review judge's weighing of the evidence instead of a legal review of his application of the standard of review. *Respondent's brief*, p. 23, 24.

"If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be

superfluous.” *Costanich* at 555. An empty proceeding with a superfluous decision is a cruel and expensive joke to play on Washington’s citizens.

DSHS’s attempts to distinguish *Costanich* fail. WAC 388-02-0600(2)(b) limits review to the substantial evidence standard for all ALJ fact findings. While the Court in *Kabbe v DSHS* overturned the limitation on a review judge’s authority to add additional findings in WAC 388-02-0600(2)(e) it specifically upheld the substantial evidence standard in WAC 388-02-0600(2)(b), 144 Wn.App. 432, 442, 192 P.3d 903(2008). Significantly, the language in WAC 388-02-0600(2)(e) was not part of DSHS’s appellate review rule when the current APA took effect. Unlike the substantial evidence standard, it was not part of the law preserved under 34.05.001. *See* exhibit 3.

The *Kabbe* court did not overrule *Costanich* and *Deffenbaugh*: “Our conclusion that WAC 388-02-0600(2)(e) is invalid would not affect the outcome in *Costanich*.” *Kabbe* id., fn 2. DSHS must apply the substantial evidence rule in WAC 388-02-0600(2)(b), specifically upheld by *Kabbe*.

**d. The ALJ’s Findings Were Supported by Substantial Evidence. The Review Judge’s Reversal Was an Error of Law.**

DSHS’s Board of Appeals found that the trier of fact’s findings were

supported by substantial evidence. HR 709, 712. There has never been a finding to the contrary. The review judge's reweighing of the evidence and substitution of his own view violated DSHS's rule: "The reviewing agency or court must accept the fact finder's 'views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.'" *Costanich*, at 556. This is particularly true with credibility findings identified under RCW 34.05.461(3).

DSHS's invitation to violate the substantial evidence standard is nowhere more obvious than in its review of the 5 factors cited by the review judge in overturning the trier of fact's credibility findings. After citing the factors, DSHS explained "He [the review judge] evaluated the evidence before him and explained why his legal conclusion was different from the ALJ." *Respondent's Brief*, p. 26, 27. That is, he discarded the trier of fact's findings of fact and substituted his own based on a preponderance of the evidence. A credibility determination is a factual determination, labeling it "legal" does not change that.

DSHS seeks to support its reweighing of the evidence by claiming the fact finder's credibility finding was based on the testimony of "one witness" rather than the 3 presented by DSHS. *Respondent's brief* p. 24-27.

Although this case is not about counting votes, for the record, Ms. Stroud presented the testimony of 3 medical professionals supporting her position. *Appellant's opening brief*, p. 11. More importantly, counting witnesses could only be relevant on a de novo review, not a substantial evidence review.

Reweighting of evidence is outside the scope of substantial evidence review, particularly when reviewing credibility findings. *Faghih v. Washington State Dept. of Health, Dental Quality Assurance Commission*, 148 Wn.App. 836, 850, 202 P.3d 962 (2009) and cases cited therein. What is outside a court's scope of appellate review under the substantial evidenced standard was outside DSHS's scope of review under that same standard. Exceeding that scope was an error of law.

- 2. Ms. Stroud is Entitled to Damages and Attorney's Fees.**
  - a. Ms. Stroud was Injured by DSHS's Wrongful Finding of Neglect.**

DSHS has consistently argued that this case sounds in contract. The Superior Court judge rejected that characterization:

The court disagrees with the Department that this case is simply about contractual damages. Judge Hicks previously

specifically directed that there be a review of the underlying determination of neglect and although the determination that Ms. Stroud neglected her father resulted in the termination of her contract, that determination does not mean that the case is only a contract case.

*Letter ruling of Judge Hirsch, CP 181.*

DSHS clings to its mischaracterization by claiming Ms. Stroud's damages are contractual. As Judge Hirsch pointed out, the injury does not flow from a contractual breach, it flows from the wrongful neglect finding. That finding led to both the termination of the IP contract and Ms. Stroud's damages. In reversing that finding, the APA grants this Court the authority to fashion a remedy. That remedy includes compensation for uncompensated care Ms. Stroud provided to her father prior to his death.

*Appellant's opening brief, p. 26, 27<sup>3</sup>.*

**b. Ms. Stroud is Entitled to Attorney's Fees.**

The Equal Access to Justice Act (EAJA) provides attorney's fees to a prevailing party on judicial review of agency final orders. RCW 4.84.350. Ms. Stroud is a qualifying party under that statute, *See* February 25, 2010

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<sup>3</sup> DSHS implies that it provided 24 hour care for Mr. Stroud using other caretakers, leaving no residual responsibility on Ms. Stroud. in fact, the caseworker requested an additional 48 hours per week. Though not clear from the record that this was awarded, this still left Ms. Stroud responsible for over 300 hours per month uncompensated care, far more than her contract would have compensated her for. HR 843, 867, *see* 845.

letter ruling from Judge Hirsch, attached as exhibit 2, included in record on appeal pursuant to DSHS supplemental designation of clerk's papers dated August 10, 2010.

Under the EAJA: "A party is considered to have prevailed if that party obtains relief on a 'significant issue.'" *Herbert v. PDC*, 136 Wn. App. 249, 268, 148 P.3d 1102 (2006). Ms. Stroud has 3 grounds for fees under RCW 4.84.350.

**i) Ms. Stroud Prevailed in Reversing DSHS's Final Order Denying Her Standing**

Ms. Stroud fully overturned DSHS's May 3, 2006, final order denying her standing to pursue her appeal. DSHS's response characterizes this as simply winning an intermediary motion rather than obtaining relief from a final agency order. That characterization is at odds with the facts. Had the review judge upheld DSHS's May 3, 2006, final order, Ms. Stroud's case would have been over. Calling it a motion to dismiss rather than judicial review of a final agency action does not change Ms. Stroud's eligibility for attorney's fees. Ms. Stroud fully prevailed on that issue. She is entitled to attorney's fees and costs incurred in obtaining that reversal.

**ii) Ms. Stroud Will Be Entitled to Fees Incurred in Superior Court.**

Ms. Stroud will be entitled to additional attorney's fees on reversal of DSHS December 30<sup>th</sup>, 2004 finding of neglect. As a prevailing party she will be entitled to attorney's fees incurred for pursuing that claim before superior court up to a maximum of \$25,000.

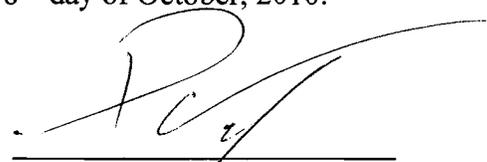
DSHS is not shielded by the exemption for substantially justified agency action in RCW 4.84.350. The agency has the burden of showing fees should be denied, *Union Elevator & Warehouse v. State*, 144 Wn.App. 593, 608 (2008). DSHS cannot meet that burden here. When awarding fees under EAJA the *Costanich* Court upheld the trial court's award of fees finding that "DSHS's actions were not substantially justified primarily because the DSHS review judge exceeded the scope of his power in reversing the ALJ." *Costanich* at 563. The same facts apply here: the review judge exceeded his allowable scope of review; his decision was not substantially justified under the EAJA.

**iii) Ms. Stroud Will Be Entitled to Fees Incurred Before the Court of Appeals.**

Ms. Stroud will also be entitled to an award of costs and fees incurred in bringing her appeal before this Court, despite the fact that her

lower court fees exceed the \$25,000 statutory cap. “we hold the statutory cap of \$25,000 applies separately to the superior court, the Court of Appeals, and our review as well” *Costanich v. Washington State Dept. of Social and Health Services*, 164 Wn.2d 925, 933 194 P.3d 988 (2008). Ms. Stroud asks leave to establish the level of attorney’s fees and costs incurred in the consolidated case before the Superior Court and the Court of Appeals in a subsequent proceeding.

Respectfully submitted this 18<sup>th</sup> day of October, 2010.



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Paul Neal, WSBA #16822  
Attorney for Cossetta Stroud

**WSR 10-19-141**  
**PROPOSED RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
(Financial Services Administration)  
[Filed September 22, 2010, 9:17 a.m.]

# Exhibit 1

Original Notice.

Preproposal statement of inquiry was filed as WSR 08-22-051.

Title of Rule and Other Identifying Information: The department is amending chapter 388-02 WAC, department hearing rules.

Hearing Location(s): Office Building 2, Auditorium, DSHS Headquarters, 1115 Washington, Olympia, WA 98504 (public parking at 11th and Jefferson. A map is available at <http://www1.dshs.wa.gov/msa/rpau/RPAU-OB-2directions.html> or by calling (360) 664-6094), on November 9, 2010, at 10:00 a.m.

Date of Intended Adoption: Not earlier than November 10, 2010.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504-5850, delivery 1115 Washington Street S.E., Olympia, WA 98504, e-mail [DSHSRPAURulesCoordinator@dshs.wa.gov](mailto:DSHSRPAURulesCoordinator@dshs.wa.gov), fax (360) 664-6185, by 5 p.m. on November 9, 2010.

Assistance for Persons with Disabilities: Contact Jennisha Johnson, DSHS rules consultant by October 26, 2010, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at [jennisha.johnson@dshs.wa.gov](mailto:jennisha.johnson@dshs.wa.gov).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules:

A. Rules to promote timeliness.

1. Prehearing conferences: The proposed rule revision makes a prehearing conference mandatory if a prehearing conference is requested by either party and clarifies the administrative law judge (ALJ) responsibility to record the prehearing. Prehearing conferences can help expedite or settle cases.

2. Notice of hearings: The proposed rule revision requires office of administrative hearings (OAH) to mail hearing notices not less than fourteen days before the hearing in most situations and requires rescheduling if requested by a party when adequate notice is not given. The proposed rule revision also requires OAH to send copies of requests for hearing to the department unless the request was received from the department. These changes support prehearing planning and opportunities for communication and settlement.

3. Late requests for review: The proposed rule revision changes the standard for granting review when a request is late from "good reason" to "good cause" to comport with the standard used elsewhere in the rules regarding the issues of lateness or failure to act.

4. Hearing record content: The proposed rule revision sets forth the required contents for administrative hearing files. Missing items can delay board of appeals (BOA) review.

B. Rules to make other process improvements.

5. Review standards: The proposed rule revision deletes review standards from the hearing rules to comport with applicable published case law and the Administrative Procedure Act.

6. What laws apply: The proposed rule revision clarifies that the ALJ should apply the substantive rules that were in effect when the department made its original decision, notwithstanding subsequent amendments, and the procedural rules that were in effect on the date the procedure was followed.

7. The proposed rule revision clarifies when notice is required regarding assignment of ALJs and the grounds and procedures for a motion of prejudice.

8. The proposed rule revision deletes the ALJ's authority to dismiss or reverse department actions when the department does not attend a prehearing conference.

9. The proposed rule revision addresses the effect of the department's indexed final orders. The RCW permits an agency to cite a final order (such as a BOA review decision) as precedent if it is included in the agency's published index of significant decisions. The proposed rule revision informs parties of this authority.

10. Equitable estoppel: The proposed rule revision clarifies the circumstances under the law in which department statements or actions which were relied upon by the appellant may be used by the appellant to defend against a department action (such as collection of an overpayment). The proposed rule amendments are made so that the rule comports with applicable appellate case law.

11. Limited authority of ALJs: The proposed rule revision clarifies that under existing law, ALJs do not have the same equitable powers as a superior court judge.

12. The proposed rule revision clarifies when and how a hearing can be converted from one format to another (i.e. in-person versus telephonic).

13. The proposed rule revision makes corrections for grammar and other minor changes for clarification.

Reasons Supporting Proposal: See Purpose above.

Statutory Authority for Adoption: RCW 34.05.020, 34.05.220.

Statute Being Implemented: Chapter 34.05 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Jim Conant, 1115 Washington Street S.E., Olympia, WA 98504, (360) 664-6081.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed rules adopt, amend, or repeal "a procedure, practice or requirement relating to agency hearings" and under RCW 19.85.025(3) and 34.05.310 (4)(g)(i), a small business economic impact statement is not

required.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rules are "procedural rules" related to agency hearings and do not meet the definition of a "significant legislative rule" under RCW 34.05.328 (5)(c)(iii). Under RCW 34.05.328 (5)(a)(i), a cost-benefit analysis is only required for significant legislative rules. A cost-benefit analysis is not required for procedural rules.

September 20, 2010  
Katherine I. Vasquez  
Rules Coordinator

**SHS-4225.7**

AMENDATORY SECTION (Amending WSR 08-21-144, filed 10/21/08, effective 11/21/08)

**WAC 388-02-0010 What definitions apply to this chapter?**

The following definitions apply to this chapter:

"**Administrative law judge (ALJ)**" means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not ((DSHS)) department employees or ((DSHS)) department representatives.

"**BOA**" means the ((DSHS)) board of appeals.

"**Business days**" means all days except Saturdays, Sundays and legal holidays.

"**Calendar days**" means all days including Saturdays, Sundays and legal holidays.

"**Deliver**" means giving a document to someone in person.

"**Department**" means the department of social and health services.

"**Documents**" means papers, letters, writings, or other printed or written items.

"**DSHS**" means the department of social and health services.

"**DSHS or department representative**" means an employee of ((DSHS)) the department, a ((DSHS)) department contractor, or an assistant attorney general authorized to represent ((DSHS)) the department in an administrative hearing. ((DSHS)) Department representatives include, but are not limited to, claims officers and ((fair)) administrative hearing coordinators.

"**Final order**" means an order that is the final ((DSHS)) department decision.

"**Hearing**" means a proceeding before an ALJ or review judge that gives a party an opportunity to be heard in disputes about ((DSHS)) department programs. For purposes of this chapter, hearings include administrative hearings, adjudicative proceedings, and any other similar term referenced under chapter

AMENDATORY SECTION (Amending WSR 08-21-144, filed 10/21/08, effective 11/21/08)

**WAC 388-02-0590 How does the party that is not requesting review respond to the review request?** (1) A party does not have to respond to the review request. A response is optional.

(2) If a party decides to respond, that party must send the response so that BOA receives it on or before the seventh business day after the date the other party's review request was mailed to the party by BOA.

(3) The party (~~must~~) should send a copy of the response to all other parties or their representatives.

(4) A review judge may extend the deadline in subsection (2) of this section if a party asks for more time before the deadline to respond expires and gives a good reason.

(5) If you ask for more time to respond, the time period provided by this section for responding to the review request, including any extensions, does not count against any deadline, if any, for a review judge to enter the final order. A review judge may accept and consider a party's response even if it is received after the deadline.

[Statutory Authority: RCW 34.05.020, 34.05.220, 42 C.F.R. 431.10 (e)(3), 45 C.F.R. 205.100 (b)(3), chapter 34.05 RCW, Parts IV and V. 08-21-144, § 388-02-0590, filed 10/21/08, effective 11/21/08.

Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0590, filed 9/1/00, effective 10/2/00.]

AMENDATORY SECTION (Amending WSR 08-21-144, filed 10/21/08, effective 11/21/08)

**WAC 388-02-0600 What is the authority of the review judge?**

(1) Review judges review initial orders and enter final orders. The review judge has the same decision-making authority as the ALJ. The review judge considers the entire record and decides the case de novo (anew). In reviewing findings of fact, the review judge must give due regard to the ALJ's opportunity to observe witnesses.

(2) Review judges may return (remand) cases to the OAH for further action.

~~((2) The review judge has the same decision-making authority as the ALJ when reviewing initial orders in the following cases, but must consider the ALJ's opportunity to observe the witnesses:~~

- ~~(a) Licensing, certification and related civil fines;~~
- ~~(b) Rate-making proceedings;~~
- ~~(c) Parent address disclosure;~~
- ~~(d) Temporary assistance to needy families (TANF);~~

~~(e) Working connections child care (WCCC);~~  
~~(f) Medical assistance eligibility;~~  
~~(g) Medical or dental services funded by Title XIX of the Social Security Act;~~  
~~(h) Adoption support services; and~~  
~~(i) Eligibility for client services funded by Title XIX of the Social Security Act and provided by the aging and disability services administration.~~

~~(3) In all other cases, the review judge may only change the initial order if:~~

~~(a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;~~

~~(b) The findings of fact are not supported by substantial evidence based on the entire record;~~

~~(c) The decision includes errors of law;~~

~~(d) The decision needs to be clarified before the parties can implement it; or~~

~~(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.~~

~~(4)) (3) Review judges may not review ALJ final orders ((~~See~~)) for the types of cases listed in WAC 388-02-0217(2) ((~~for cases in which the ALJ enters a final order~~)).~~

~~((5)) (4) A review judge conducts the hearing and enters the final order in cases covered by WAC 388-02-0218.~~

[Statutory Authority: RCW 34.05.020, 34.05.220, 42 C.F.R. 431.10 (e) (3), 45 C.F.R. 205.100 (b) (3), chapter 34.05 RCW, Parts IV and V. 08-21-144, § 388-02-0600, filed 10/21/08, effective 11/21/08.

Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0600, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0600, filed 9/1/00, effective 10/2/00.]

**SHS-4221.2**

AMENDATORY SECTION (Amending WSR 00-18-059, filed 9/1/00, effective 10/2/00)

**WAC 388-02-0030 ((Where is the board of appeals located))**

**How do I contact the board of appeals?** (1) ((The mailing address of the DSHS board of appeals (BOA) is:

DSHS Board of Appeals

P.O. Box 45803

Olympia, WA 98504-5803;

(2) The general telephone numbers of the BOA are:

~~(360) 664-6100~~  
~~1-877-351-0002 (toll free)~~  
~~(360) 664-6178 (TTD)~~  
~~(360) 664-6187 (fax);~~

~~(3) The physical location of the DSHS Board of Appeals (BOA) is:~~

~~Blake Office Bldg. East, 2nd Floor  
4500 10th Ave. SE~~

~~Lacey, WA 98503))~~ The information included in this section is current at this time of rule adoption, but may change. Current information and additional contact information are available on the department's internet site, in person at the board of appeals office, or by a telephone call to the board of appeal's main public number.

<u>Department of Social and Health Services</u> <u>Board of Appeals</u>	
<u>Location</u>	<u>Office Building 2 (OB-2)</u> <u>First Floor Information</u> <u>1115 Washington Street</u> <u>Olympia, Washington</u>
<u>Mailing address</u>	<u>P.O. Box 45803</u> <u>Olympia, WA 98504-5803</u>
<u>Telephone</u>	<u>(360) 664-6100</u>
<u>Fax</u>	<u>(360) 664-6187</u>
<u>Toll free</u>	<u>1-877-351-0002</u>
<u>Internet web site</u>	<u>www.dshs.wa.gov/boa</u>

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0030, filed 9/1/00, effective 10/2/00.]

Superior Court of the State of Washington  
For Thurston County

Family and Juvenile Court

Paula Casey, Judge  
Department No. 1  
Thomas McPhee, Judge  
Department No. 2  
Richard D. Hicks, Judge  
Department No. 3  
Christine A. Pomeroy, Judge  
Department No. 4  
Gary R. Tabor, Judge  
Department No. 5  
Chris Wickham, Judge  
Department No. 6  
Anne Hirsch, Judge  
Department No. 7  
Carol Murphy, Judge  
Department No. 8



2801 32<sup>nd</sup> Avenue SW, Tumwater, WA 98512  
Mailing Address: 2000 Lakeridge Drive SW, Olympia, WA 98502  
Telephone: (360) 709-3201 Fax: (360) 709-3256

Christine Schaller,  
Court Commissioner  
Indu Thomas,  
Court Commissioner

Marti Maxwell,  
Court Administrator  
(360) 786-5560  
Gary Carlyle, Assistant  
Court Administrator  
(360) 709-3140

February 25, 2010

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112 E. 4<sup>th</sup> Avenue, Suite 200  
Olympia, WA 98501

**Letter Opinion**

RE: *Cossetta Stroud v. State DSHS*  
Thurston County Cause No. 06-2-01133-1

**Exhibit 2**

Dear Ms. Coates McCarthy and Mr. Neal,

The Court has had yet another opportunity to review the record in this matter, along with the most recent filings pertaining to Ms. Stroud's Motion for Partial Reconsideration. After that review, the Court has determined that the Motion is without merit and will be denied.

As I indicated at oral argument on the Motion for Partial Reconsideration last month, I allowed hearing because of the long and complicated history of this (and the companion) case. It is my belief, after a thorough review, that the Petitioner is not entitled to attorney fees, for the following reasons.

First, as noted by the Respondent, Petitioner is not entitled to receive attorney fees under RCW 74.08.080. That provision allows for an award for fees in certain instances regarding receipt of and disputes regarding Public Assistance. Petitioner correctly points out that this attorney fee provision has been applied in contexts other than strict receipt of public benefits, but this Court is not persuaded that the rationale applied in, for example, *Whitehead v. Social & Health Services*, 92 Wn.2d 265, 595 P.2d 926 (1979), applies in

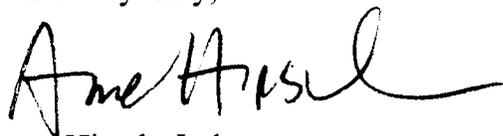
this instance. Ms. Stroud's claims did not pertain to her receipt of public assistance or the payment of child support, but rather to issues regarding her receipt, as a COPEs provider, of funds for caring for her father. As such, R.C.W. 74.08.080 does not apply.

Ms. Stroud also requests fees under the Equal Access to Justice Act, R.C.W. 4.84.350 which provides as follows:

A court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the Court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

Ms. Stroud is a qualified party, having a net worth under one million dollars. The next issue is, then, whether Ms. Stroud is entitled to fees because she prevailed on a significant issue in this case. Even if she did so prevail, the Court may still deny a request for an award of attorney fees when the agency action was "substantially justified." In this case Ms. Stroud did ultimately receive the ability to have a review of the allegations made against her regarding the care of her father. That review came first, when the review judge performed the review required on remand by the Honorable Judge Hicks. This Court also reviewed the record made before the review judge and upheld his rulings. The Department in this case was unwavering in its position that Ms. Stroud's conduct constituted neglect and, though reasonable minds may have differed in that conclusion, its position was not arbitrary and capricious, and was substantially justified by the facts presented. Additionally, at least some of the litigation in this case occurred on direction of the Court, and not because of any independent action taken by the Department. For all of these reasons, this Court is not reconsidering its earlier denial of the request for fees, and other relief. The Motion for Partial Reconsideration is denied. The Court would hope that the parties will be able to present agreed findings and an order and that this matter will be concluded. If the parties are unable to so agree, they may schedule a hearing for presentation by contacting Bev Morgan at Family and Juvenile Court. Otherwise, an agreed order may be presented ex parte.

Yours very truly,



Anne Hirsch, Judge

cc: Court File

**VOLUME 8**  
**Titles 388 through 448**

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**1986**  
**WASHINGTON ADMINISTRATIVE CODE**

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**Published under authority of chapters 1.08, 28B.19, and 34.04 RCW.**

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Containing all permanent rules adopted pursuant to chapter 28B.19 or 34.04 RCW, up to and including those filed on December 31, 1986.

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**Exhibit 3**

fair hearing and additional evidence or argument is necessary to cure the irregularity, or

(c) The secretary or designee considers a remand necessary.

(8) The secretary or designee shall not substantially modify the proposal for decision unless, in the reasoned opinion of the reviewing officer:

(a) Irregularity in the proceedings occurred by which a party was prevented from having a fair hearing. This includes misconduct by the prevailing party and misconduct or abuse of discretion by the administrative law judge; and/or

(b) The proposed findings of fact are unsupported by substantial evidence in view of the entire record; and/or

(c) The application of law in the proposed conclusions is erroneous; and/or

(d) There is need for clarification in order for the parties to implement the decision.

(9) The secretary or designee may issue a proposed final decision.

(10)(a) The secretary's or designee's decision shall identify any substantial difference between it and the proposal for decision.

(b) The secretary's or designee's decision may incorporate all or part of the proposal for decision by reference.

(c) The secretary's or designee's final decision shall be effective on the date of filing. The reviewing officer shall file the original of the decision in the record of the proceedings and shall mail copies to the parties and their representatives.

[Statutory Authority: RCW 34.04.020. 85-07-048 (Order 2217), § 388-08-406, filed 3/20/85; 84-05-040 (Order 2076), § 388-08-406, filed 2/17/84; 79-09-054 (Order 1426), § 388-08-406, filed 8/24/79.]

**WAC 388-08-409 Petition for review by review judge.** (1) In fourteen days or less from the mailing of the initial order or decision, either party may petition, in writing, for review of the initial order or decision with the review judge (designee of the secretary). The petition for review shall set forth in detail the basis for the requested review, and shall be mailed postage prepaid to the office of hearings and to the other party at his or her last known address.

(2) The petition shall be based on any one of the following grounds materially affecting the substantial rights of a party:

(a) Irregularity in the proceedings by which the petitioning party was prevented from having a fair hearing. This includes misconduct by the prevailing party and ~~misconduct or abuse of discretion by the administrative law judge.~~

(b) The findings of fact are unsupported by substantial evidence in view of the entire record,

(c) Errors of law,

(d) Need for clarification in order for the parties to implement the decision.

(3) The other party may respond in writing to the petition for review. The response shall be mailed postage

prepaid to the office of hearings and to the petitioner at his or her last known address.

[Statutory Authority: RCW 34.04.020. 84-05-040 (Order 2076), § 388-08-409, filed 2/17/84; 79-09-054 (Order 1426), § 388-08-409, filed 8/24/79.]

**WAC 388-08-413 Procedure on review by review judge.** (1) A petition for review shall be granted only if, in the reasoned opinion of the review judge, one of the grounds for review set forth in WAC 388-08-409(2) is shown. Otherwise, the petition for review shall be denied and the initial order or decision shall be the final decision of the secretary as of the date of denial of the petition or petitions for review.

(2) In determining whether to grant review and in reviewing the initial order or decision, the review judge shall consider the initial order or decision, the petition or petitions for review, the record or any part thereof and any additional evidence submitted by the agreement of both parties in accordance with WAC 388-08-413(4).

(a) The fourteen-day time limit established by WAC 388-08-409 for filing a petition for review of an initial order or decision shall be waived where the petitioner demonstrates good cause for failure to file a timely petition for review. Good cause includes mistake, inadvertence, and excusable neglect on the part of petitioner or unavoidable casualty or misfortune preventing the petitioner from timely filing a petition for review. Upon a showing of good cause, either party may petition for review of an initial order or decision within thirty days of the date the initial order or decision becomes final.

(b) The fourteen-day time limit established by WAC 388-08-409 for filing a petition for review of the initial order or decision shall be waived where petitioner demonstrates that the initial decision was not received by petitioner. In such case the petitioner may petition for review of the initial decision within a reasonable period of time.

(3) If review is granted, the administrative law judge's initial findings of fact, conclusions of law, and decision shall not be modified by the review judge unless, in the reasoned opinion of the review judge:

(a) Irregularity in the proceedings occurred by which the petitioning party was prevented from having a fair hearing. This includes misconduct by the prevailing party and misconduct or abuse of discretion by the administrative law judge and/or

(b) The findings of fact are unsupported by substantial evidence in view of the entire record and/or

(c) The application of law in the conclusions is erroneous and/or

(d) There is need for clarification in order for the parties to implement the decision.

(4) The review judge may accept additional evidence to correct omissions in the record, but only after notice to and agreement by both parties.

(5) The review judge may remand the proceedings to the administrative law judge for additional evidence or argument if:

(a) Neither party cited the law correctly applicable to the issue or issues defined at the hearing and additional

evidence or argument is needed for the review judge to reach a reasoned decision. Nothing in this subsection shall be construed to allow the review judge to remand the case to consider additional grounds for denial, termination, or ineligibility for assistance which were not alleged by the department at the hearing.

(b) Irregularity in the proceedings occurred by which the party seeking review was prevented from having a fair hearing and additional evidence or argument is necessary to cure the irregularity or

(c) The review judge considers a remand necessary and both parties assent to the remand.

(6) If review is granted, the review judge shall render a reasoned decision affirming, reversing, modifying, or remanding the initial order or decision.

(7) The review decision shall be final on the date of filing and shall be the final decision of the secretary. The review judge shall file the original of the decision in the record of the proceedings and shall mail copies to the parties and their representatives.

[Statutory Authority: RCW 34.04.020. 84-05-040 (Order 2076), § 388-08-413, filed 2/17/84; 79-09-054 (Order 1426), § 388-08-413, filed 8/24/79.]

**WAC 388-08-416 Selected final decisions as precedent.** (1) In order to promote consistency of final decisions on like issues of fact and law, the chief review judge may identify certain final decisions or portions thereof which may be relied upon, used, or cited as precedents during the hearing and review processes. In determining which decisions will be so identified, the chief review judge shall give preference to:

(a) Decisions usefully illustrating proper application of general legal principles or procedures adequately developed through administrative and/or judicial review;

(b) Decisions clarifying the meaning of undefined or inadequately defined regulatory terms or phrases;

(c) Decisions providing particularly well-supported conclusions on legal issues raised in many cases with conflicting results;

(d) Decisions reflecting significant departure from prior final decisions or portions thereof;

(e) Decisions in which an existing precedential decision or any portion thereof is distinguished, modified, or overruled;

(f) Decisions resulting from hearings in which both parties were adequately represented and the issues were fully briefed.

(2)(a) The chief review judge shall make and maintain a list of people writing to him or her stating they desire to receive notice of and offer comments regarding decisions or portions of decisions the chief review judge selects for consideration as precedential.

(b) When the chief review judge selects a decision or portion for consideration as precedential, he or she shall mail notice thereof to the people who so requested.

(c) Interested parties shall have thirty days from the date of mailing the notice of selection for consideration as a precedential decision to provide the chief review judge with comments on the appropriateness of assigning the decision or portion with precedential value.

(d) The chief review judge shall consider all comments prior to final designation or rejection of a decision or portion of a decision as precedential.

(3) Decisions and portions of decisions adopted as precedential shall be maintained by the chief review judge at the office of hearings in Olympia, Washington, and shall be public records.

(6) Nothing in this section limits the secretary's authority to adopt rules pursuant to the Administrative Procedure Act, specifically including rules modifying or overruling a holding in a precedential decision.

(7) Precedential decisions may be used by administrative law judges and review judges, appellants, and their representatives, and department representatives in connection with the hearings process. Precedential decisions are binding on administrative law judges in rendering a proposal for decision or order or an initial decision or order. Precedential decisions are binding on review judges when rendering a decision after a party has filed exception or argument or a petition for review unless clear and substantial argument is presented which, in the reasoned opinion of the review judge, demonstrates a precedential decision should be modified or reversed. Precedential decisions shall not be used by employees of the department as a substitute for manual provisions or numbered policy memoranda.

[Statutory Authority: RCW 34.04.020. 84-05-040 (Order 2076), § 388-08-416, filed 2/17/84; 81-12-015 (Order 1657), § 388-08-416, filed 5/29/81, effective 7/1/81.]

**WAC 388-08-435 Separate hearing regarding disclosure of investigative and intelligence files.** (1) In the event a fair hearing regarding public assistance or food stamp program is being conducted under chapter 388-08 WAC, the appellant shall be advised of his or her right to seek inspection of the data. If the appellant seeks disclosure of any data maintained by the office of special investigation which is subject to the exemption contained in WAC 388-320-220(3), the following process shall be followed to determine whether, on a case-by-case basis, such disclosure shall be ordered:

(a) The appellant or his or her representative shall file a written request with the office of hearings or the hearings examiner, if one has been appointed, no later than fifteen days prior to the hearing.

(b) The request must identify the type of information sought.

(c) The request shall state the reasons why the requester believes disclosure of the information is necessary.

(d) The request shall identify the local community service office or the office of special investigation field office where the appellant would review the documents.

(e) The office of hearings or examiner shall forward a copy of the request to the office of special investigation at the main office of special investigation in Olympia.

(f) Upon a showing of good cause by the appellant, the fifteen-day notice period may be shortened by the hearings examiner.

(2) Within ten days of receipt of a properly filed request, the office of special investigation shall determine

FILED  
COURT OF APPEALS  
DIVISION II

10 OCT 18 PM 12:55

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

**COSSETTA STROUD**

v.

**STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES**

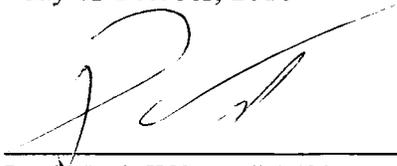
**No. 40391-9-II**

**PROOF OF SERVICE**

I, Paul Neal, declare that I am the attorney of record for Appellant Cossetta Stroud in this action. On October 18<sup>th</sup>, 2010, I delivered the original and 3 copies of Ms. Stroud's Reply Brief to the offices of the Washington State Court of Appeals, Division 2. On October 18<sup>th</sup>, 2010, I personally delivered a copy of said brief to DSHS's counsel of record at her offices at 7141 Cleanwater Drive SW; Olympia, WA 98504-0124.

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

Signed at Olympia, Washington on this 18<sup>th</sup> day of October, 2010

  
\_\_\_\_\_  
Paul Neal, WSBA # 16822  
Attorney for Cossetta Stroud