

NO. 45594-3-II

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

MAGDALENE PAL,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
ADULT PROTECTIVE SERVICES,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER STATEMENT OF THE ISSUES	2
III.	COUNTER STATEMENT OF THE CASE	2
IV.	ARGUMENT	6
	A. Standard Of Review.....	7
	B. Ms. Pal Failed To Timely File Her Request For An Administrative Hearing.....	9
	1. The Plain Meaning Of The Department's Rules Is That The Deadline For Filing An Appeal Ends At 5:00 P.M. On The Last Day.....	11
	2. Ms. Pal Failed To Comply With The Department's Rules That Allow Service By Facsimile Only If The Appellant Also Timely Places A Copy In The Mail	16
	C. A Party Cannot Argue Substantial Compliance With Procedural Requirements For Service When Deadlines For Service Require Strict Compliance	19
	D. Ms. Pal Was Afforded Due Process When She Was Given Notice Of The Adverse Finding And An Opportunity To Timely Request A Hearing	21
	E. Ms. Pal Failed To Argue At The Administrative Level That There Was Good Cause For A Late Filing And She Cannot Argue It Upon Appeal	26
	F. Ms. Pal Is Not Entitled To Attorney's Fees Under The Equal Access To Justice Act.....	30
V.	CONCLUSION	32

TABLE OF AUTHORITIES

Cases

<i>Brown v. Dep't of Health</i> , 94 Wn. App. 7, 972 P.2d 101 (1998), <i>review denied</i> 138 Wn.2d 1010, 989 P.2d 1136 (1999).....	8
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007).....	14, 15, 20
<i>City of Seattle v. Pub. Emp. Relations Comm'n (PERC)</i> , 116 Wn.2d 923, 809 P.2d 1377 (1991).....	19, 20
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 153 Wn.2d 207, 103 P.3d 193 (2004).....	19
<i>Edwards v. LeDuc</i> , 157 Wn. App. 455, 238 P.3d 1187 (2010).....	26
<i>Elkins v. Dreyfus</i> , 2011 WL 3438666.....	24
<i>Evergreen Wash. Healthcare Frontier, LLC, v. Dep't of Social & Health Servs.</i> , 171 Wn. App. 431, 287 P.3d 40 (2012).....	8
<i>Goldsmith v. Dep't of Social & Health Servs.</i> , 169 Wn. App. 573, 280 P.3d 1173 (2012).....	19
<i>Hardee v. Dep't of Soc. & Health Servs.</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	7, 8, 18
<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995).....	8
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992).....	13
<i>Lang v. Dep't of Health</i> , 138 Wn. App. 235, 156 P.3d 919 (2007).....	8

<i>Life Care Ctrs. of Am., Inc. v. Dep't of Social & Health Servs.</i> , 162 Wn. App. 370, 254 P.3d 919 (2011).....	7, 12
<i>Marcum v. Dep't of Social & Health Servs.</i> , 172 Wn. App. 546, 290 P.3d 1045 (2012).....	8, 30
<i>McConnell v. City of Seattle</i> , 44 Wn. App. 316, 722 P.2d 121 (1986).....	25
<i>Olympic Healthcare Servs. II, LLC v. Dep't of Social & Health Servs.</i> , 175 Wn. App. 174, 304 P.3d 491 (2013).....	12, 13
<i>Payne v. Mount</i> , 41 Wn. App. 627, 705 P.2d 297 (1985).....	25
<i>Port of Seattle v. Pollution Control Hearing Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	9
<i>Puget Sound Medical Supply v. Dep't of Social & Health Servs.</i> , 156 Wn. App. 364, 234 P.3d 246 (2010).....	passim
<i>Roberts v. Johnson</i> , 137 Wn.2d 84, 969 P.2d 446 (1999).....	16, 20
<i>Rodriguez v. Chen</i> , 985 F. Supp. 1189 (D. Az. 1996).....	23, 24
<i>Ruland v. Dep't of Social & Health Servs.</i> , 144 Wn. App. 263, 182 P.3d 470 (2008).....	20
<i>Scully v. Emp't Sec. Dept.</i> , 42 Wn. App. 596, 712 P.2d 870 (1986).....	28
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	22
<i>Skagit Surveyors and Engineers, LLC v. Friends of Skagit Cnty.</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	31

<i>Skinner v. Civil Serv. Comm’n</i> , 168 Wn.2d 845, 232 P.3d 558 (2010).....	19
<i>Snohomish Cnty. Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd. Snohomish Cnty.</i> , 121 Wn. App. 73, 87 P.3d 1187 (2004).....	19
<i>Speelman v. Bellingham/Whatcom Hous. Auth.</i> , 167 Wn. App. 624, 273 P.3d 1035 (2012).....	23
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	12
<i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997).....	21, 22
<i>Thompson v. Hanson</i> , 167 Wn.2d 414, 219 P.3d 659 (2009).....	16
<i>Troxell v. Rainier Pub. School Dist. No. 307</i> , 154 Wn.2d 345, 111 P.3d 1173 (2005).....	14, 15
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).....	22

Statutes

RCW 4.84.350(1).....	30
RCW 34.05	22
RCW 34.05.010(19).....	10, 17
RCW 34.05.440(1).....	11
RCW 34.05.510	7
RCW 34.05.534	7, 23
RCW 34.05.554	12, 27

RCW 34.05.558	7
RCW 34.05.570(1)(a)	7
RCW 34.05.570(3).....	7
RCW 41.14.120	25
RCW 74.34.020(12)(b)	22

Rules

CR 5(b)(7).....	14
CR 60	27, 28
CR 60(b)(1).....	28

Regulations

WAC 388-02.....	passim
WAC 388-02-0020.....	27, 28
WAC 388-02-0020(2).....	28
WAC 388-02-0035.....	25
WAC 388-02-0035(2).....	9, 10, 11, 14
WAC 388-02-0035(3).....	11
WAC 388-02-0050.....	10
WAC 388-02-0085–388-02-0115	13
WAC 388-02-0100(3).....	11, 17, 31
WAC 388-02-035.....	13
WAC 388-02-035(2).....	13

WAC 388-02-0640(1).....	7
WAC 388-71.....	4, 14, 22, 23
WAC 388-71-01215(2).....	10
WAC 388-71-01235.....	10
WAC 388-71-01240.....	16, 17
WAC 388-71-01240(1).....	passim
WAC 388-71-01245.....	14
WAC 388-71-01255.....	8

APPENDIX

1. Department's Notice to Ms. Pal of a finding of abuse and neglect, dated December 20, 2011 (4 pages).
2. Initial Order to Dismiss, Office of Administrative Hearings, filed March 28, 2012 (6 pages).
3. Review Decision and Final Order, Board of Appeals, filed December 28, 2012 (8 pages).
4. Decision Granting Reconsideration, Board of Appeals, filed January 16, 2013 (5 pages).

I. INTRODUCTION

On December 20, 2011, the Respondent, Department of Social and Health Services/Adult Protective Services (Department), made a finding that Ms. Pal had abused a vulnerable adult. Ms. Pal had thirty days, or until January 19, 2012, to appeal the finding and request an administrative hearing. By agency rule, the deadline to file a request ends at 5:00 p.m., on the last day. Ms. Pal missed this deadline because she faxed her request for an administrative hearing to the Office of Administrative Hearings (OAH) after business hours, at approximately 7:15 p.m., on January 19, 2012. She further failed to perfect her filing by placing a written copy of her appeal in the mail, post-marked by the thirtieth day as required by the agency hearing rules.

Courts have consistently upheld procedural filing deadlines, and the failure of a litigant to comply with an appeal deadline is a basis for dismissal because the administrative tribunal lacks jurisdiction to hear the matter. The letter sent to Ms. Pal provided clear notice of the deadline to file her appeal, and referenced other procedural rules that required that she must file her appeal with OAH during business hours. The Department respectfully requests that the Court affirm the Board's decision to dismiss Ms. Pal's request for an administrative hearing due to her failure to timely file her request for a hearing.

II. COUNTER STATEMENT OF THE ISSUES

1. If an appellant fails to comply with all procedural requirements for filing an appeal with the Office of Administrative Hearings, does the tribunal lack jurisdiction to hear the matter?

2. Were the rules clear and unambiguous when informing an appellant when and how to file an appeal with the Office of Administrative Hearings?

3. Was Ms. Pal afforded due process when she was given notice of the adverse finding and an opportunity to timely request a hearing where the notice stated a clear deadline for filing her request and further referenced administrative rules that specified requests must be received during normal business hours?

III. COUNTER STATEMENT OF THE CASE

After an investigation, the Department made a finding that Ms. Pal neglected a vulnerable adult. AR at 78-81.¹ (Notice sent to Ms. Pal Appendix 1). It is undisputed that a notice informing Ms. Pal of the Department's finding was dated and mailed to Ms. Pal on

¹ The agency record (AR) filed with the superior court is located at Clerk's Papers, CP at 6 (certified appeal board record) and consists of approximately 87 pages. It is consecutively numbered and will be referred to in this brief as AR followed by the page number.

December 20, 2011. AR at 76-83. It is undisputed that Ms. Pal received the notice on December 22, 2011. AR at 82; VR 18.²

The notice informed Ms. Pal about how to request a hearing and how much time she had to timely request the hearing. AR at 78-79. The notice stated:

At this time, you have a right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to:

Office of Administrative Hearings
5300 MacArthur Boulevard, Suite 100
Vancouver, WA 98661

AR at 78-79 (emphasis in original).

The Department provided an appeal form for Ms. Pal to use, and the form was attached to the notice titled, "Request for Adult Protective Services Hearing." AR at 80; *see* Appendix 1. In addition to referring

² The verbatim record (RP) filed with the superior court is located at Clerk's Papers, CP at 9 (verbatim report of proceedings) and consists of approximately 64 pages.

Ms. Pal to WAC 388-02 and WAC 388-71 in the body of the notice, a separate reference is contained below the caption of the request form.

On January 19, 2012, which was the thirtieth day from the mailing of the notice, at approximately 7:16 p.m., Ms. Pal faxed her request for hearing from a Kinkos/Fed Ex store to OAH. AR at 86. Ms. Pal acknowledged that she faxed the request after 7:00 p.m. RP at 20. The request is date stamped by OAH on January 20, 2012. AR at 84. OAH never received a written copy of the request in the U.S. mail. AR at 3, 21, 45-46, 59 ll. 1-4.

The Department filed a motion to dismiss for lack of jurisdiction on two bases: 1) OAH did not receive Ms. Pal's faxed request for a hearing until after the close of business on January 19, 2012; and 2) that OAH never received a written request in the mail for a hearing in order to challenge the substantiated finding. AR at 53-65, 68-70. The Administrative Law Judge (ALJ) granted the Department's motion and issued the Initial Order To Dismiss. AR at 44-49, Appendix 2. The ALJ found, in part, that:

[Ms. Pal] was specifically told on the notification form that she could appeal the finding, but had to do so by sending, delivering or faxing a written request to the Office of Administrative Hearings (OAH). OAH had to *receive* a written request within 30 calendar days of the date the notification letter was mailed. If the Appellant chose to fax

her appeal/hearing request, she was required to also mail a copy of the request to OAH on the same day.

The deadline for OAH to receive any written appeal was thus January 19, 2012.

[Ms. Pal] faxed her appeal to OAH at 7:16 p.m. on that date. Because the office was closed at this time, the appeal was not stamped as "received" until January 20, 2012.

There is no written appeal post-marked by January 19, 2012, in evidence.

AR at 45, Appendix 2.

The ALJ concluded that Ms. Pal was required to deliver her request for hearing to OAH on January 19, 2012, during business hours.

AR at 46 The ALJ further concluded that while the notice did not specify the time of day, Ms. Pal had to have known that a state office was not open at 7:00 p.m., and that no one would see her appeal until the next day.

AR at 46. Therefore, Ms. Pal failed to timely file her appeal. AR at 46.

Furthermore, Ms. Pal failed to meet the other requirements, in that there is no evidence that she mailed a copy of her appeal to OAH as required.

AR at 46.

Ms. Pal timely filed a petition for review of the initial decision with the Board. AR at 34. A review decision and final order was issued on December 28, 2012. AR at 19-26, Appendix 3. The reviewing judge with the Board found:

The Appellant faxed her appeal to the Office of Administrative Hearings (OAH) at 7:16 p.m. on January 19, 2012. The OAH office was closed at that time.

This document was not stamped received until January 20, 2012. The OAH did not receive any mailed copy of the Appellant's appeal.

Finding of Fact (FF) 7; AR at 20-21.

Based on those findings, the Board's reviewing judge concluded that OAH did not have jurisdiction to hear Ms. Pal's request for a hearing.

Because the Appellant's request for hearing to challenge the notice was not received by OAH until after the regulatory time period for filing such a challenge had run, and the challenge was never perfected by the same day mailing of a copy of the appeal, the ALJ lacked jurisdiction to hear the case on its merits and only had the authority to dismiss the case due to lack of subject matter jurisdiction.

Conclusion of Law (CL) 8, in part; AR at 23-24.

The Board affirmed the initial order. AR at 24. The Board issued an order granting reconsideration and acknowledged that the dates in its final order should be corrected as identified by the Department;³ however, the conclusion of law from the final order remained the same. AR at 1-3, Appendix 4.

IV. ARGUMENT

The parties are in agreement that January 19, 2012, was the thirtieth day in order for Ms. Pal to timely file her request for a hearing/appeal. Ms. Pal failed to diligently and timely pursue her appeal.

³ The reviewing judge made a number of typographical errors and kept referring to the December 20, 2011, notice as the December 21, 2011, notice and/or being mailed on that later date. The reviewing judge corrected the dates to be December 20, 2011.

She faxed in her appeal after business hours, at 7:15 p.m., on the last day to request a hearing, when OAH was closed and could not conduct business such as receiving mail and date stamping pleadings and correspondence. The rules are clear about how much time Ms. Pal had to appeal. Ms. Pal cannot claim substantial compliance or that she had good cause to miss a deadline to appeal a decision. Notwithstanding her arguments, this Court should affirm the Board's final order.

A. Standard Of Review

The Administrative Procedures Act (APA) governs judicial review of agency orders in adjudicative proceedings. RCW 34.05.510; *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011). Judicial review is limited to the agency's actions and the administrative record developed in the judicial proceeding below. RCW 34.05.558. The court reviews the Board's final decision, and not the findings and conclusions of the superior court. RCW 34.05.534; RCW 34.05.558; WAC 388-02-0640(1); *Life Care Ctrs. of Am., Inc. v. Dep't of Social & Health Servs.*, 162 Wn. App. 370, 374, 254 P.3d 919 (2011). The court may grant relief only if it determines that the agency's order is deficient in one of the nine ways provided for in judicial reviews under the APA. RCW 34.05.570(3). The party asserting the invalidity of the order has the burden of demonstrating the invalidity. RCW 34.05.570(1)(a).

The standard of proof at the agency level in an administrative hearing is preponderance of the evidence. WAC 388-71-01255. An agency order is supported by substantial evidence if there is a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order. *Hardee*, 172 Wn.2d at 7. When findings of fact are not specifically assigned error, the findings are treated as verities on appeal. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). The court's review is then limited to determining whether the facts support the Board's conclusions of law and judgment. *Brown v. Dep't of Health*, 94 Wn. App. 7, 13, 972 P.2d 101 (1998), *review denied* 138 Wn.2d 1010, 989 P.2d 1136 (1999).

The Court reviews de novo a motion to dismiss for lack of subject matter jurisdiction. *Evergreen Wash. Healthcare Frontier, LLC, v. Dep't of Social & Health Servs.*, 171 Wn. App. 431, 444, 287 P.3d 40 (2012). The Court reviews de novo the Board's legal determinations. *Marcum v. Dep't of Social & Health Servs.*, 172 Wn. App. 546, 559, 290 P.3d 1045 (2012). Notwithstanding the *de novo* standard of review, courts grant substantial weight to an agency's interpretations of the statutes and rules the agency administers. *Lang v. Dep't of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007).

Ms. Pal does not specifically assign error to any findings of fact in the Board's final order. Thus, those determinations are verities upon appeal. The only factual issue that Ms. Pal appears to dispute is that she mailed a copy of her appeal on the thirtieth day. Appellant's Brief at 12. The reviewing judge determined that no such mailing was received by OAH. AR at 20-21, FF 7. Appellate courts do not weigh evidence or render judgments regarding witness credibility; that is the exclusive province of the trier of fact. *Port of Seattle v. Pollution Control Hearing Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004). Ms. Pal bears the burden of demonstrating how the Board's legal conclusions were incorrect. She fails to demonstrate that the Board's interpretation and reliance upon WAC 388-02-0035(2) and WAC 388-71-01240(1) to compute time periods was erroneous and deprived her of a hearing. Ms. Pal has the burden to demonstrate that the Board's final order should be invalidated. Ms. Pal has not met her burden.

B. Ms. Pal Failed To Timely File Her Request For An Administrative Hearing

Ms. Pal failed to timely serve her request for a hearing in two ways. The first is that she faxed her request after business hours on the thirtieth day; therefore, receipt of the facsimile request by OAH was considered to be on the thirty-first day. The second procedural error by

Ms. Pal was that when she chose to serve her request for a hearing via facsimile, she failed to perfect the service by placing a copy in the U.S. mail to be postmarked by January 19, 2012.

After a finding of abuse or neglect by the Department, an alleged perpetrator may challenge that finding. WAC 388-71-01235. After being served with the Department's adverse finding, the alleged perpetrator has 30 days to request an administrative before OAH. WAC 388-71-1240(1). Service by the Department is complete when the notification is placed in the mail. RCW 34.05.010(19); WAC 388-71-01215(2); and *see* WAC 388-02-0050. The rule for requesting an administrative hearing provides:

To request an administrative hearing the alleged perpetrator must send, deliver, or fax a written request to the office of administrative hearings. OAH must receive the written request *within* thirty calendar days of the date the department's letter of notice is mailed or personally served upon the alleged perpetrator, whichever occurs first. *If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day.*

WAC 388-71-01240(1) (italics added).

The Department's hearing rules provide additional guidance, and reiterate that if the appellant serves her request by facsimile, then she must also timely place a copy in the mail. The rule provides:

You may send a written request by mail, delivery service, personal service, or by fax if you mail a copy the same day. You should send written requests to the location on the notice or to OAH at the location specified in WAC 388-02-0025(2).

WAC 388-02-0100(3) (italics added).

The Department hearing rules are also explicit that when requesting a hearing, “the deadline ends at 5:00 p.m. on the last day.” WAC 388-02-0035(2). This rule further defines the “within 30 days” requirement to file an appeal. The agency rules provide that if the requestor misses a deadline, she may lose her right to a hearing. WAC 388-02-0035(3); RCW 34.05.440(1); *Puget Sound Medical Supply v. Dep’t of Social & Health Servs.*, 156 Wn. App. 364, 378, 234 P.3d 246 (2010) (affirming dismissal because filing one day late for administrative appeal is untimely).

1. The Plain Meaning Of The Department’s Rules Is That The Deadline For Filing An Appeal Ends At 5:00 P.M. On The Last Day

Ms. Pal incorrectly argues that the 5:00 p.m. deadline applies only to deadlines after an administrative hearing has begun, and does not apply to the initial filing of an appeal. Appellant Br. at 15-17. This Court need not even consider this argument since it was not raised below. In any event, a plain reading of the rules shows that Ms. Pal is incorrect.

Ms. Pal did not specifically argue this issue to the Board of Appeals, and she should not be allowed to argue it on appeal. In APA actions, litigants are generally limited to arguing the issues raised before the agency. RCW 34.05.554. Although there are exceptions to this limitation, Ms. Pal does not argue that any apply. Here, Ms. Pal's appeal to the Board focused on the substantive issues of whether she abused or neglected a vulnerable adult, and did not argue that the rules provided for any deadline other than 5:00 p.m. on the thirtieth day. AR at 34-42. Thus, this Court need not consider her argument and may affirm on this basis alone. Even if the court were to now consider her argument, Ms. Pal's claim that a calendar day extends to midnight for purposes of filing an appeal of a Department action ignores the plain language of applicable administrative rules and would lead to absurd results.

In construing administrative rules, courts apply rules of statutory construction. *Olympic Healthcare Servs. II, LLC v. Dep't of Social & Health Servs.*, 175 Wn. App. 174, 187, 304 P.3d 491 (2013). The Court looks first to the statute's or rule's plain language. *Life Ctrs. of Am.*, 162 Wn. App. at 375. If the plain language is unambiguous, the "legislative intent is apparent, and [the court] will not construe the statute otherwise." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). A legislative definition prevails over a dictionary definition or common

understanding of any given term. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 458, 832 P.2d 1303 (1992). Finally, courts avoid a construction that results in an unlikely, absurd, or strained consequences because the courts assume that the legislature did not indent absurd results. *Olympic Healthcare*, 175 Wn. App. at 187-88.

Here, the relevant rule establishing a 5:00 p.m. deadline is WAC 388-02-035, entitled “How are days counted when calculating deadlines for the hearing process?” The rule explains in plain language how to calculate a filing deadline, and unambiguously provides that “[t]he deadline ends at 5:00 p.m. on the last day.” WAC 388-02-035(2). Ms. Pal claims that this rule does not apply to filing requests for administrative hearings, but only to deadlines after that initial filing. Appellant Br. at 15. Ms. Pal fails to explain why a generally applicable rule explaining how to calculate time and determine deadlines would *sub silentio* exclude deadlines for requests for administrative hearings. More importantly, her apparent argument that the entire chapter of WAC 388-02 applies only after a hearing has already been initiated is inconsistent with those rules. *See, e.g.*, WAC 388-02-0085 through 388-02-0115 (series of administrative rules addressing requests for hearings).

Moreover, the scheme of the rules as a whole shows that the administrative rules specific to Adult Protective Services incorporates this

deadline. Adult Protective Services titled a rule “What laws and rules will control the administrative hearings held regarding APS findings?” WAC 388-71-01245. This rule directs a litigant and/or their attorney to chapter 388-02 WAC, which is titled “DSHS HEARING RULES.” Therefore chapter 388-71 WAC incorporates the rules in chapter 388-02 WAC.⁴ Thus, the Department’s rule that mandates that an appellant file an appeal within 30 calendar days per WAC 388-71-01240(1) incorporates WAC 388-02-0035(2) that defines the “within” to be by the close of business, 5:00 p.m.

Contrary to Ms. Pal’s assertions, the Department’s hearing rules do not modify the “within 30 calendar days” requirement to file an appeal. Rather, the 5:00 p.m. deadline merely provides clarity that for the Department to “receive” the request, it must be open for business. *Cf.* Court Rule (CR) 5(b)(7) (allowing service by facsimile or electronic means if it is sent before 5:00 p.m. on a judicial day).

Ms. Pal’s reliance on *Troxell v. Rainier Pub. School Dist. No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005) (waiting period of 60 days in order to file a tort lawsuit) and *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007) (three day waiting period for landlord to commence

⁴ In the event of a conflict between the rules in WAC chapter 388-71 and those in WAC chapter 388-02, the rules of chapter 388-71 prevail. Here, there is no conflict between the two chapters because chapter 388-71 sets a deadline for requesting a hearing, and chapter 388-02 merely explains how to calculate that deadline.

an unlawful detainer action) is misplaced. Those cases did not consider filing deadlines, but rather statutes that required waiting periods before filing suit. A waiting period requires that a party not commence an action until *after* the time period has elapsed, while a deadline requires that the action be commenced *within* the time period.

First, those cases are inapposite because, unlike this case, the statutes at issue in those cases contained no express provisions stating at what time of day a deadline ended. *Troxell*, 154 Wn.2d at 352-53; *Christensen*, 162 Wn.2d at 373. Second, those cases are inapposite because neither considered the issue here: whether a party may serve and file documents after business hours in order to meet a filing deadline. Rather, the cases primarily concerned whether to include the day of filing in the calculation of the waiting period (*Troxell*) and whether to include weekends and holidays in the waiting period (*Christensen*). Thus, they are of limited, if any, usefulness here. Finally, the cases are not relevant because they address waiting periods rather than filing deadlines. *See Troxell*, 154 Wn.2d at 357 (distinguishing between time periods in which a party must act from those in which a party must refrain from acting).

Not only does the plain meaning of the rules show that a deadline for requesting an administrative hearing ends at 5:00 p.m., but this conclusion avoids absurd results. *See Thompson v. Hanson*,

167 Wn.2d 414, 219 P.3d 659 (2009) (courts construe statutes to avoid absurd results). The Department's rule requires that requests for administrative hearings be "received" within 30 days, and provides several allowable ways to send the request to the Department. WAC 388-71-01240. In order to "receive" the request, it makes sense that the office must be open, in part to be able to verify receipt and date-stamp the document. Allowing parties to send documents after 5:00 p.m. could lead to uncertainty and litigation about when a document was personally delivered or mailed, or even faxed, since fax machines date and time stamps are not necessarily accurate. By contrast, the rules defining 5:00 p.m. as the deadline for the last day provides consistency and fairness to all litigants at every stage in the proceedings. Therefore, OAH cannot be considered to have received a facsimile that comes in after hours.

2. Ms. Pal Failed To Comply With The Department's Rules That Allow Service By Facsimile Only If The Appellant Also Timely Places A Copy In The Mail

In order for an appellant to perfect an appeal when choosing facsimile as the manner for filing an appeal, she must also mail a copy on the same day. WAC 388-71-01240(1). The mailing does not extend the time for filing, it is merely proof that the filing was within the 30-day period. It is a technical requirement for perfecting an appeal sent by facsimile. *Cf. Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 446 (1999)

(filing of mandatory arbitration award is not complete until and unless accompanied by proof of service of the award; strict compliance with proof of service requirement is required when filing award). The APA provides that the Department may create rules for filing and service by facsimile or electronic means. RCW 34.05.010(19). The Department's rules specifically state that service by facsimile is permitted only *if* the alleged perpetrator also mails a copy the same day. WAC 388-02-0100(3); WAC 388-71-1240. OAH has no record of ever receiving a copy of the request for hearing by mail. AR at 3, 21, 45, 59.

The record below shows that Ms. Pal did not mail a copy of her request to OAH. The ALJ and reviewing judge determined that "The OAH did not receive any mailed copy of the appellant's appeal" and "There is no written appeal, postmarked January 19, 2011, in evidence." AR at 3, 21; AR at 45. The reviewing judge therefore concluded that "the challenge was never perfected by the same day mailing of a copy of the appeal." AR at 23-24.

Ms. Pal's nevertheless claims that it is undisputed that she mailed a copy of her request on the same day, relying solely on Ms. Pal's testimony that she mailed the letter. Appellant Br. at 14. Ms. Pal's assertion ignores the factual findings that the letter was never received, and the reviewing judge's ultimate conclusion that she failed to perfect her appeal by mailing

the request on the same day she sent her fax. AR at 3, 21, 23-24, 45. The fact that the Department never received the letter and that Ms. Pal has no evidence other than her testimony that she mailed the request provides substantial evidence supporting the reviewing judge's finding, and it should therefore be affirmed. *See Hardee*, 172 Wn.2d at 7 ("An agency order is supported by substantial evidence if there is a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order."). Ms. Pal faxed her request after the 5:00 p.m. deadline, and further failed to perfect her appeal by mailing a copy of the request to OAH with a postmark no later than January 19, 2012.

The Department determined that in order for the administrative tribunal to obtain jurisdiction, certain requirements must be met for service. Ms. Pal not only missed the deadline for facsimile service, but failed to mail a copy to OAH. If she did not like the facsimile/ mailing option, she could have opted for one of the other service options, but still had to complete service of the request within 30 days, regardless of the option for service that she chose. Ms. Pal missed every deadline in this case. The Board's reviewing judge correctly interpreted the Department's rules, and Ms. Pal missed the deadline to file her appeal.

C. A Party Cannot Argue Substantial Compliance With Procedural Requirements For Service When Deadlines For Service Require Strict Compliance

When Ms. Pal failed to timely file her request for an administrative hearing, the tribunal lacked jurisdiction to hear the matter. The jurisdiction of the administrative tribunal is invoked only through compliance with the statutory filing and service time requirements. *City of Seattle v. Pub. Emp. Relations Comm'n (PERC)*, 116 Wn.2d 923, 927-29, 809 P.2d 1377, 1379 (1991). If a party fails to comply with statutory timelines, the court lacks jurisdiction to hear the appeal. *Snohomish Cnty. Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd. Snohomish Cnty.*, 121 Wn. App. 73, 82, 87 P.3d 1187 (2004) (holding that compliance with the statutory filing deadline is a jurisdictional prerequisite). Without jurisdiction, a court or administrative tribunal can do nothing more than dismiss the action. *Goldsmith v. Dep't of Social & Health Servs.*, 169 Wn. App. 573, 580, 280 P.3d 1173 (2012).

The requirement of strict compliance for timely service should not be confused with the limited circumstances where the courts have allowed substantial compliance with the *method* of timely service. See *Skinner v. Civil Serv. Comm'n*, 168 Wn.2d 845, 856, 232 P.3d 558 (2010) (service upon city clerk gave sufficient notice to commission); *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d. 193 (2004)

(substantial compliance allowed where all parties were timely served by mail, but plaintiff could not identify with specificity the individuals that received service) and *Continental Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 604, 910 P.2d 1284 (1996) (substantial compliance allowed where plaintiff timely served the parties by the thirtieth day via Federal Express, rather than United States mail); *PERC*, 116 Wn.2d at 928 (substantial compliance is actual compliance in respect to the substance of the objectives of the statute); *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 118, 43 P.3d 548 (2002) (placing of petition for judicial review in mail on last day of appeal, without further service on attorney, is sufficient service under the APA). None of the facts from those cases exist here.

Despite the well-established case law that substantial compliance does not apply to filing deadlines, Ms. Pal attempts to argue that she substantially complied. Her reliance upon *Ruland v. Dep't of Social & Health Servs.*, 144 Wn. App. 263, 182 P.3d 470 (2008) is misplaced. There, the parties had met with the hearing officer about the licensing revocation hearing, and all agreed that a related statutory finding of abuse/neglect would be joined with the licensing matter once the agency finalized its review. Thus, when *Ruland* failed to timely appeal the related statutory finding, the court found substantial compliance because the

parties were on notice of the appeal based on the initial appeal, all of which contained common facts. None of these circumstances exists here.

Ms. Pal was required to strictly comply with all procedural timelines in order for OAH to obtain jurisdiction. When considering the entire record, this is substantial evidence to support the Board's determination that Ms. Pal's facsimile request was not received by OAH until the thirty-first day, or January 20, 2012. There was never any evidence of a written appeal post-marked by January 19, 2012. Therefore, she failed to timely file her request for hearing by January 19, 2012, and the ALJ correctly determined that the administrative tribunal lacked jurisdiction to hear the matter.

D. Ms. Pal Was Afforded Due Process When She Was Given Notice Of The Adverse Finding And An Opportunity To Timely Request A Hearing

Due process requires notice and the opportunity to be heard. *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). In the context of advising affected persons of their appeal rights, due process does not require express notification of the deadline for requesting a formal hearing as long as the order of revocation cites the statute that contains the applicable time limit. *Id.* at 528. The specific statute need not be cited; citation to the chapter containing the appeal deadline is sufficient. *Id.* (Upholding notice sent to drivers because it cited RCW 46.65, which

contained the hearing request time limit). Due process is a flexible concept, requiring such procedural protections as the particular situation demands. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Minor procedural errors do not rise to the level of due process violations. *Storhoff*, 133 Wn.2d at 527.

Ms. Pal received meaningful notice of the issues and the agency's action. In the notice of neglect of a vulnerable adult, dated December 20, 2011, Ms. Pal was provided information about how the Department determined that she neglected a vulnerable adult, sufficient that she should know who the individual was; the date of the occurrence; and the basis for the finding. AR at 78-79. The notice also provided a legal definition of "neglect" with a citation to the specific statute, RCW 74.34.020(12)(b). *Id.* The notice further informed her that she had a right to request a hearing, how many days she had to make that request; and where to send it. *Id.* The notice identified the general hearing rules and administrative process by citing to RCW 34.05; WAC 388-02; and WAC 388-71. *Id.* The notice informed her what would happen if she failed to timely appeal the finding. *Id.* The information provided to Ms. Pal gave her the facsimile number to serve her request. AR at 64; AR at 81; AR at 85. The

request form again cites to WAC 388-02 and WAC 388-71 for all of the hearing rules. *Id.*

An agency does not have to identify each and every hearing rule when reminding an appellant that they have a deadline for filing a request for hearing. Ms. Pal's reliance upon *Ryan v. Dep't of Social & Health Servs.*, 171 Wn. App. 454, 287 P.3d 629 (2012) and *Speelman v. Bellingham/Whatcom Hous. Auth.*, 167 Wn. App. 624, 273 P.3d 1035 (2012) is misplaced. In both cases, the agency defaulted the appellant after failing to serve that person at an address that was reasonably calculated to give the individual notice and apprise that person of the pendency of the proceedings. That is not the case here. Ms. Pal received her notice. She failed to take timely action in accordance with the agency's hearing rules. Ms. Pal's due process rights to notice and opportunity to be heard were not violated in this case.

Similarly, Ms. Pal reliance upon *Rodriguez v. Chen*, 985 F. Supp. 1189 (D. Az. 1996) does not advance her argument that every hearing rule must be detailed in a notice. "The Court finds that providing the law itself in the notice is not required. To impose such a requirement would result in a notice that would be akin to a small book while imposing needless fiscal and administrative burdens on the State." *Id.* at 1195.

In *Rodriguez*, the appellants were not provided meaningful notice of why adverse action was taken against them. *Id.* at 1194. Some of the notices lacked sufficient financial information in order to dispute any claimed errors. *Id.* Additionally, the notices for termination of benefits inadequately stated reasons for the agency's decisions; including citations to incorrect or inapplicable manual provisions, incorrect law; and string citations that lead to lengthy and difficult to understand program eligibility rules. *Id.* at 1196. The federal laws cited to were voluminous and difficult to navigate. *Id.* None of those issues exist in this case. Here, Ms. Pal was provided adequate information to put her on notice of the issues and the applicable laws that applied to her case.⁵ Specifically, Ms. Pal was informed that her deadline for requesting a hearing was within 30 days of the date of mailing of the letter, and she was referred to applicable administrative rules for further detail. Appendix 1. Unlike the voluminous and complex regulations at issue in *Rodriguez*, the WAC referenced here, WAC 388-02 chapter is written in plain English, with headings in bold including one section entitled "DEADLINES." One of the three rules under this bold-faced heading is "How are days counted

⁵ Ms. Pal cites to an unpublished federal case, *Elkins v. Dreyfus*, 2011 WL 3438666. To the extent that the court looks to that case for guidance, the issue in *Elkins*, was complicated public benefits eligibility after the legislature enacted new statutes two years in a row. There, the Department did not give sufficient information as to how it calculated time for benefits; SSI determinations; documents reviewed for determination; and reference to the specific federal statute relied upon.

when calculating deadlines for the hearing process?” WAC 388-02-0035. The answer to this question includes the 5:00 p.m. deadline. *Id.* Thus, the Department provided sufficient notice to Ms. Pal that her request for hearing was due by 5:00 p.m.

Ms. Pal’s citation to *Payne v. Mount*, 41 Wn. App. 627, 705 P.2d 297 (1985) and *McConnell v. City of Seattle*, 44 Wn. App. 316, 722 P.2d 121 (1986) are apposite to this matter. In both of those cases, the court found that there is sufficient notice of an appeal deadline if the notice of discharge cites to the applicable statute, and while such notice is not preferable to express notification of an appeal period deadline, it does meet the minimum requirement of due process. In *Payne*, the notice of discharge for the sheriff’s officer only referenced RCW 41.14.120, which provides that a written demand for investigation be filed within 10 days. *Payne* argued that he be expressly notified of the deadline, and the court disagreed that he was entitled to such specific notice. *Payne*, 41 Wn. App. at 634. Similarly, in *McConnell*, the appellant argued that he was not given sufficient notice of the charges against him or his procedural rights. *McConnell*, 44 Wn. App. at 324. The court disagreed as he had received the letter notifying him that he was dismissed from his position as a law enforcement officer, and he received a copy of the applicable appeal procedures. *Id.* at 325.

Ms. Pal was responsible for knowing the applicable hearing rules. She was referred to Chapter 388-02 WAC. Ms. Pal was directed to the statute defining neglect, 74.34.020(12)(b), and was given sufficient information from which she could request a hearing and mount a defense. This is evidenced by her initial explanations when requesting a hearing. AR at 35-42; AR at 65. The hearing rules were identified in the notice and the appeal form provided to her. Whether *pro se* or represented by counsel, a litigant has a duty to know the rules that affect timely requests for hearings. *Edwards v. LeDuc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010).

The notice informed her that she must have her request for hearing submitted within 30 days. Again, a common sense approach would dictate that a tribunal/state agency/business is closed by 5:00 p.m. If she thought otherwise, then she should have reviewed the agency hearing rules for more details or otherwise called OAH. Even if best practice would be to include the time deadline, it is at best a minor procedural error and does not rise to the level of a due process violation.

E. Ms. Pal Failed To Argue At The Administrative Level That There Was Good Cause For A Late Filing And She Cannot Argue It Upon Appeal

At the administrative hearing level, Ms. Pal failed to raise the claim that good cause existed in order to excuse her untimely service and

request for an administrative hearing. Under the APA, issues not raised before the agency, generally may not be raised on appeal. RCW 34.05.554. At the hearing on the motion to dismiss, Ms. Pal stated that she believed the deadline to be January 20, 2012, and not January 19, 2012. RP at 30. She did not request that the court consider a good cause exception as to why she missed the deadline for filing her appeal. Thus, the Department did not have an opportunity to create a record regarding this issue, and the ALJ and review judge did not have the opportunity to consider and rule on this argument. Accordingly, this Court should not consider her argument raised for the first time on appeal.

Even if the court were to now consider her argument, Ms. Pal cannot meet the stringent requirements for showing good cause for missing the appeal deadline. *See* WAC 388-02-0020. Good cause is defined as “a substantial reason or legal justification for failing to appear, to act, or respond to an action.” *Id.* The rule also refers to CR 60 as a guideline in determining good cause. *Id.*; *see also Puget Sound Med. Supply*, 156 Wn. App. at 373-74 (applying case law regarding CR 60 in rejecting argument that party had “good cause” to miss appeal deadline). The agency’s hearing rules illustrate the kind of exceptional circumstances that can constitute good cause, giving as examples where the party was in the hospital or otherwise prevented from responding, or because the party

did not understand the order due to language barriers. WAC 388-02-0020(2).

Ms. Pal cites a decision regarding the meaning of “good cause” in the context of a late appeal in an unemployment compensation case. Appellant Br. at 32 (citing *Scully v. Emp’t Sec. Dept.*, 42 Wn. App. 596, 712 P.2d 870 (1986)). But this Court has explicitly rejected reliance on the “good cause” standard from employment security statutes when examining “good cause” under DSHS administrative rules. *Puget Sound Med. Supply*, 156 Wn. App. at 372. Rather, in examining “good cause” under DSHS rules, the Court applies the language of WAC 388-02-0020 and its illustrative examples, and pursuant to the language in the rule, uses CR 60 as a guide. *Id.*

Although Ms. Pal cites to CR 60, she does not assert any particular reason under CR 60 to set aside the dismissal. *See* Appellant Br. at 31-32. However, her argument implies that she may be relying on CR 60(b)(1), which authorizes relief from an order based on “mistakes, inadvertence, surprise, [and] excusable neglect” In a similar case, this Court recently rejected a claim that excusable neglect caused a party to miss a DSHS appeal deadline, where the party filed its appeal one day late. *Puget Sound Med. Supply*, 156 Wn. App. at 377-78. There, the Court rejected as reasons for excusable neglect that the lead attorney left the

firm, difficulty contacting a witness, the short 10-day window in which to appeal, office staff being out for holidays, that the decision came earlier than expected, and the possibility that the Department would seek to supplement the record. *Id.* at 374. The Court reasoned that none of these reasons were excusable neglect, primarily relying on its conclusion that the “statutorily-imposed deadline and internal organizational failings do not constitute ‘excusable neglect.’” *Id.* at 376. Also relevant to the Court’s analysis was that the party did not take advantage of available remedies such as requesting an extension of the appeal deadline. *Id.*

Similarly, Ms. Pal has failed to demonstrate good cause to extend the time periods for filing her request for an administrative hearing, through showing excusable neglect or otherwise. Ms. Pal fails to provide any evidence that she was unable to address her personal, legal, and business obligations. Ms. Pal’s failure to understand the rules that govern administrative hearings and/or her inability to properly calculate the number of days she had to file an appeal does not constitute good cause for allowing her to file and serve the parties in excess of the mandatory time period of 30 days. Moreover, Ms. Pal did not act diligently: She waited until the final day to send her request for hearing; she faxed her request after 5:00 p.m.; she failed to mail a copy of the appeal on the same day; and she failed to communicate with OAH any request to extend the

time period prior to its expiration. Ms. Pal has failed to show good cause why the timelines should be extended for her. The final administrative order should be affirmed.

F. Ms. Pal Is Not Entitled To Attorney's Fees Under The Equal Access To Justice Act

If the court affirms the Board's final order, then Ms. Pal has not prevailed and is not entitled to attorney's fees. If the court determines that Ms. Pal is entitled to an administrative hearing on the merits, then she still is not entitled to attorney's fees as the Department was substantially justified in its actions. Here, the Department promulgated specific rules on how to request an administrative hearing. Ms. Pal missed the deadlines, and the Department requested that the matter be dismissed for lack of jurisdiction. The Department's stance had a reasonable basis in law and fact, and, thus was substantially justified.

Washington State's Equal Access to Justice Act (EAJA) authorizes qualified parties that prevail in judicial appeals of administrative decisions to receive attorney's fees and other expenses unless the agency action is substantially justified or other circumstances would make an award unjust. RCW 4.84.350(1); *Marcum*, 172 Wn. App. 546 (fees not awarded even though Department relied upon an invalid interpretation of the rule it promulgated).

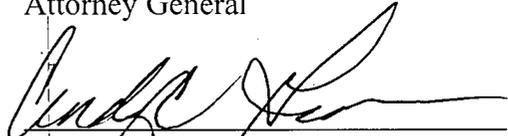
The Department's hearing rules require that all requests for an administrative hearing on a finding of abuse/neglect of a vulnerable adult be filed within 30 days. WAC 388-71-01240(1). The rules provide options for serving her request for a hearing. WAC 388-02-0100(3); WAC 388-71-01240(1). The rules provide the requestor with information where the request must be filed, and by what time. Chapter 388-02 WAC. Courts have found in similar administrative matters involving the Department that filing one day late for administrative appeal is untimely. *Puget Sound Med. Supply*, 156 Wn. App. 364. A party may not waive subject matter jurisdiction. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). If this court were to find that Ms. Pal was entitled to a hearing on the merits, she still would not be entitled to attorney's fees under the EAJA. The Department was justified in relying on its rules, prior appellate precedent, and its inability to waive jurisdictional requirements.

V. CONCLUSION

The Department requests that this Court affirm the Board of Appeal's final order and dismissal of Ms. Pal's administrative appeal as untimely.

RESPECTFULLY SUBMITTED this 2nd day of April, 2014

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360-759-2100

APPENDIX 1



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

4500 10TH AVE SE BLAKE OFFICE PARK EAST 2ND FLR

PO Box 45610

Olympia, WA 98504-5610

December 20, 2011
Certified and Regular Mail

Magdaline Pal
11406 NE 43rd Ave.
Vancouver, WA 98686

Dear Ms. Pal:

The Department of Social and Health Services' (DSHS) Adult Protective Services (APS) program recently investigated a report of possible mistreatment of a vulnerable adult (Case ID# 124663). Based on this investigation, APS has determined that you neglected a vulnerable adult. As specified in RCW 74.34, neither the name of the victim nor the reporter may be disclosed to you in this notification letter.

On or about August 18, 2011 you left a vulnerable adult to self administer his medications while you went out of town for a few days, knowing the vulnerable adult had a history of inaccurate medication administration and that the vulnerable adult was unable to read or write. Your actions posed a serious risk to the vulnerable adult's health, safety and welfare. The vulnerable adult was admitted to the hospital on August 18, 2011 due to medication overdose.

These actions met the definition of neglect in RCW 74.34.020(12)(b):

"Neglect" means:

(b) means an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

At this time, you have a right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to:

Office of Administrative Hearings
5300 MacArthur Boulevard, Suite 100
Vancouver, WA 98661

If you choose not to use the form provided, you may request a hearing by providing enough information in your written request for the Office of Administrative Hearings to identify you and the DSHS action, including:

- Your full legal name, current address and phone number;
- A brief explanation of why you disagree with the finding of the investigation by APS;
- A description of any assistance you need in the administrative appeal process, including a foreign or sign language interpreter or any accommodation for a disability.

If you do not timely request a hearing, APS' initial finding will become final and your name will be placed on a registry.

You may be represented by an attorney or other person at the hearing (provided such representative is not a DSHS employee). If you choose to have an attorney represent you, you are responsible to pay the attorney at your own expense.

If you timely request a hearing and subsequently withdraw or default, the APS finding will become final and your name will be placed on a registry. If you timely request a hearing and the judge upholds the finding, it will become the final finding and your name will be placed on a registry. If you timely request a hearing and the judge reverses APS' finding, the finding will be changed to unsubstantiated or inconclusive, consistent with the ruling of the judge.

If the APS finding becomes final, state law may prevent you from being employed in a position or hold a license that involves the care of vulnerable adults or children or work or volunteer in a position that gives you unsupervised access to vulnerable adults or children. If the information is requested from APS or the DSHS Background Check Central Unit, DSHS may disclose the substantiated finding and your identity.

If you have questions about this notice you may call me at 360-397-9519.

Sincerely,

Samantha A. Petshow

Samantha Petshow
Adult Protective Services
Home and Community Services

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APPENDIX 2

OFFICE OF ADMINISTRATIVE HEARINGS
5300 MACARTHUR BLVD STE 100
VANCOUVER, WA 98661
(360) 690-7189 or (800) 243-3451
FAX (360) 696-6255

MAILED
MAR 28 2012
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In Re:

Magdalene Pal,

Appellant.

Docket No.: 01-2012-L-1127

Client ID No.: 124663

INITIAL ORDER TO DISMISS

Adult Protective Services

On February 3, 2012, the Department of Social and Health Services, Adult Protective Services filed a Motion to Dismiss with the Office of Administrative Hearings in the above-entitled case.

MOTION

The Motion alleges that the Appellant was late in filing her appeal to a Department of Social and Health Services, Adult Protective Services (APS) notification letter that the Appellant had neglected a vulnerable adult.

The Motion also alleges the Appellant's failure to timely appeal creates a lack of subject matter jurisdiction and thus the appeal should be dismissed.

FACTS

On December 20, 2011, APL sent the Appellant two copies of a notification letter; one by certified mail, the other by regular mail. Both were sent on the same day, December 20, 2011.

The letter advised the Appellant that it had been determined she had neglected a

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vulnerable adult in her care. She was specifically told on this notification letter that she could appeal the finding, but had to do so by sending, delivering or faxing a written request for hearing to the Office of Administrative Hearings (OAH). OAH had to *receive* a written request within 30 calendar days of the date the notification letter was mailed. If the Appellant chose to fax her appeal/hearing request, she was required to also mail a copy of the request to OAH on the same day. (Exhibit 1).

The Appellant received the certified copy of the notification letter on December 22, 2011. (Exhibit 2). The deadline for OAH to receive any written appeal was thus January 19, 2012.

The Appellant faxed her appeal to OAH at 7:16 p.m. on that date. (Exhibit 3).

Because the office was closed at this time, the appeal was not stamped "received" until January 20, 2012.

There is no written appeal, postmarked January 19, 2011, in evidence.

The Appellant argues that OAH "received" the faxed appeal on January 19, 2011, and that she mailed her appeal by regular mail the same date.

CONCLUSIONS OF LAW

The Office of Administrative Hearings has jurisdiction over this motion. RCW 34.05, WAC 388-02-0100 and WAC 388-71-01240.

RCW 34.05.413(3) provides:

An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding. An agency may require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits.

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WAC 388-71-01240 provides:

To request an administrative hearing the alleged perpetrator must send, deliver or fax a written request to the office of administrative hearings. OAH must receive the alleged perpetrators' written request for hearing within thirty (30) calendar days of the date the Department's letter of notice is mailed or personally served upon the alleged perpetrator, which ever occurs first. If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day.

The Appellant was required to deliver her request for hearing/appeal to OAH on January 19, 2011 during business hours. WAC 388-02-0070(3).

The Appellant did not deliver her appeal request until after 7 p.m. on January 19, 2011. While she argues that the appeal information on the notification letter does not state this, that is the law. Further, and though it is not determinative, the Appellant had to have known that a state office was not open at 7 p.m. and that no one would see her appeal until the next day.

The Appellant has therefore failed to file her appeal timely as required by WAC 388-71-01240.

It is also concluded the Appellant did not meet the other requirement of WAC 388-71-01240 in that there is no evidence she mailed a copy of her appeal to OAH as required.

Failure of a party to file an application for an adjudicative proceeding within the time limit established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding. RCW 34.05.440(1)

ORDER

The Appellant failed to file a timely appeal in this matter. She is in default and has lost her right to a hearing in this matter. The Appellant's appeal is Dismissed.

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SERVED on the date of mailing, stamped above:



Katherine A. Lewis
Administrative Law Judge

cc: Magdalene Pal, Appellant
Joan Trivison, Department Rep
Vicky Gawlik, Program Admin

NOTICE TO APPELLANT: If you want your hearing reinstated, you must write the DSHS Board of Appeals at PO Box 45803, Olympia, WA 98504-5803. Your request must be received within **21 calendar days** of the date this order was mailed. You must state the reasons why you had good cause for not appearing for your hearing. WAC 388-02-0285 through WAC 388-02-0305. You may use the "Petition to Reinstate Appeal" form below to ask to have your hearing reinstated.

You may make a late request to vacate the order of dismissal **up to one year** from the date it was mailed to you but you must show good cause according to WAC 388-02-0020 for the late request to be accepted and the dismissal vacated.

If you ask to vacate **more than one year** after the order was mailed, the ALJ may vacate the order of dismissal if the DSHS representative and any other party waive the deadline.

General information about the hearing process can be found on the Office of Administrative Hearings web site at www.oah.wa.gov.

000047

If You Disagree You Can Appeal

- **DEADLINE for Appeal:** The Board of Appeals must receive your appeal within twenty-one (21) calendar days from the date stamped on the enclosed hearing decision. **If you miss the deadline, you may lose all rights to appeal the decision.**
- **If You Need More Time:** A Review Judge can delay (postpone, extend) the deadline, but you must ask within the twenty-one (21) day time limit.
- **WHO May Appeal:** Generally, anyone directly affected by the decision.
- **HOW to Appeal:** Use the form on the other side or make your own. You must send or deliver the Appeal to the Board of Appeals (see addresses below). Be sure to keep a copy.
- **COPIES to Other Parties:** You must send or deliver a copy of the appeal (and attachments) to every other party in this matter.
- **What Happens Next:** The Board of Appeals will inform all parties when it receives an Appeal or a request for more time. A Review Judge ("RJ") will read all the paperwork related to the case and will listen to the tape-recording of the hearing. The RJ will also consider the law and the arguments that the parties submit. The RJ may decide whether to consider new evidence (that is, something that was not considered at the hearing). **The RJ will NOT hold a new hearing.** The RJ will then write a decision and mail it to all parties. The RJ may agree with or change the decision being appealed. The RJ may order a new hearing and/or a new decision. If you disagree with the RJ's decision on the appeal, you will be able to appeal to superior court, or ask the RJ to reconsider, or both. You will receive more information about the next level of appeal rights when you receive the review decision.
- **If You Need Help:** If you had a person (such as an attorney or friend) represent you at the hearing, contact him or her. If you think you need an attorney, try to find one that specializes in the type of law involved in your case. Ask friends or relatives for a reference, or contact your local bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Evergreen Legal Services, Puget Sound Legal Assistance Foundation, the Northwest Women's Law Center, Spokane Legal Services, some law schools, and other non-profit legal organizations may be able to provide you with legal assistance or referrals. **You are not guaranteed an attorney free of charge.**
- **Translations and Visual Challenges:** If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. Let the Board of Appeals know your needs.

Send or deliver your Appeal (Request for Review) to the OFFICE OF APPEALS:

MAILING ADDRESS

BOARD OF APPEALS
PO BOX 45803
OLYMPIA WA 98504-5803

PERSONAL SERVICE LOCATION

DSHS / HCA Board of Appeals
Office Bldg 2 (OB-2), 1st Fl. Information Desk
1115 Washington St. SE, Olympia WA

FAX

1-(360) 664-6187

TELEPHONE (for more information)

1-(360) 664-6100 or 1-877-351-0002

000049

APPENDIX 3

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:

MAGDALENE PAL

Appellant

) Docket No. 01-2012-L-1127

) REVIEW DECISION AND FINAL ORDER

) Adult Protective Services

) Client ID No. 124663

MAILED

DEC 28 2012

DSHS
BOARD OF APPEALS

I. NATURE OF THE ACTION

1. Administrative Law Judge (ALJ) Katherine A. Lewis conducted a telephonic pre-hearing conference on March 1, 2012, to address the Department of Social and Health Services' (Department) motion to dismiss. The Department asserted that since the Appellant's request for hearing to challenge an Adult Protective Services (APS) substantiated finding of neglect was not received within the regulatory time frame, and since a hard copy of the notice of appeal was not mailed following the telefaxed copy, the ALJ lacked jurisdiction to conduct a hearing on the merits of the substantiated finding.

2. The ALJ issued an Initial Order on March 28, dismissing the Appellant's request for hearing based on the lack of jurisdiction.

3. The Appellant submitted a petition for review of the Initial Order to the Department's Board of Appeals (BOA) on May 1, 2012, within the extended time allowed by an order dated April 16, 2012.

4. The Department submitted a response to the petition for review on May 8, 2012.

II: FINDINGS OF FACT

1. On December 20, 2010, the Division of Adult Protective Services of the Department of Social and Health Services mailed a notice to the Appellant, Magdalene Pal, advising that, "The Department of Social and Health Services (DSHS) Adult Protective Services (APS) program recently investigated a report of possible mistreatment of a vulnerable adult

0000191

(Case ID # 124663). Based on this investigation, APS has determined that you neglected a vulnerable adult."¹

2. One copy of the December 20, 2011, Department notice was mailed to the Appellant via certified mail, return receipt requested. The certified mailing number was 7004 2510 0003 5678 4044. The second copy of the December 20, 2011, letter was mailed to the Appellant by regular mail.²

3. Joan Trivison certified that the Department's December 20, 2011, notice to the Appellant was mailed both certified and regular mail on December 21, 2010.³

4. The December 20, 2011 notice sent to the Appellant stated:

At this time, you have the right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to

Office of Administrative Hearings
5300 Mac Arthur Boulevard, Suite 100
Vancouver, WA 98661

...If you do not timely request a hearing, APS' initial finding will become final and your name will be placed on a registry.⁴

5. The date thirty days following December 20, 2011, was January 19, 2012.

6. The December 21, 2011, Department notice was delivered to the Appellant on December 22, 2011, as evidenced by the certified mail return receipt.⁵

7. The Appellant faxed her appeal to the Office of Administrative Hearings (OAH) at 7:16 p.m. on January 19, 2012. The OAH office was closed at this time. This document was

000020

¹ Exhibit 1, p.1.

² Exhibit 2, p. 1. Declaration of Joan F. Trivison, Department's Motion to Dismiss.

³ Exhibit 1, p. 3.

⁴ Exhibit 1, p. 1 - 2 (emphasis in original).

⁵ Exhibit 2, p. 1..

stamped received by the OAH on January 20, 2012. The OAH did not receive any mailed copy of the Appellant's appeal.

III. CONCLUSIONS OF LAW

1. The Petition for Review of the Initial Order was timely filed and is otherwise proper.⁶ Jurisdiction exists to review the order and to enter the final agency order.⁷
2. In Adult Protective Service cases, the undersigned's authority is the same as the ALJ's with the exception that the undersigned is required to give due regard to the ALJ's opportunity to observe witnesses.⁸
3. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the executive branch of government and neither the ALJ nor the Review Judge enjoy the broad equitable authority of a Superior Court Judge within the judicial branch of government. It is well settled that administrative agencies, such as the OAH and the Board of Appeals, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.⁹ It is also well settled that an ALJ's or a Review Judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or WAC provision(s).¹⁰ This is because ALJs and Review Judges must first apply the Department rules adopted in the WAC to resolve an issue.¹¹ If there is no Department WAC governing the issue, the ALJ and the Review Judge must resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and

⁶ WAC 388-02-0580.

⁷ WAC 388-02-0560 to -0600.

⁸ WAC 388-02-0600(1).

⁹ *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 388-02-0216 which provides, "The authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule. The ALJ and the review judge do not have any inherent or common law powers."

¹⁰ *Id.*

¹¹ WAC 388-02-0220(1).

0000211

Washington constitutions, statutes and regulations, and court decisions.¹² The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.¹³

4. Any decision maker, whether it is a little-league second base umpire or a United States Supreme Court Justice, must first determine whether he/she has jurisdiction to decide a matter before proceeding to hear and render a decision on the merits of a case. Washington appellate courts have ruled that the issue of subject matter jurisdiction cannot be waived and can be raised at any time. *J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004). "Even in the absence of a contest, where there is a question as to jurisdiction, [the] court has a duty to itself raise the issue." *Riley v. Sturdevant*, 12 Wn. App. 808, 810, 532 P.2d 640 (1975). Parties cannot stipulate to jurisdiction where it does not otherwise exist.

5. Department regulations relevant to the issue on appeal provide: "To request an administrative hearing the alleged perpetrator must send, deliver, or fax a written request to the office of administrative hearings. OAH must receive the written request within thirty calendar days of the date the department's letter of notice is mailed or personally served upon the alleged perpetrator, whichever occurs first. If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day."¹⁴ The regulations do not allow a late hearing request to be accepted upon a showing of good cause or reason for such tardiness. The time frames for submitting a hearing request are jurisdictional and a presiding officer (ALJ) in the administrative hearing process only has authority to conduct a full hearing and render a decision on the merits of a case when a timely request has been submitted to OAH.¹⁵ Based on this conclusion, a determination must be

¹² WAC 388-02-0220(2).

¹³ WAC 388-02-0225(1).

¹⁴ WAC 388-71-01240(1).

¹⁵ *Id* and RCW 34.05.413(2).

0000221

made as to when did the Department effectively serve the Appellant with the APS substantiated finding of neglect and when was the request for hearing received by OAH.

6. Department regulations allow service of an APS substantiated initial finding by sending a letter certified mail/return receipt requested and regular mail to the alleged perpetrator's last know place of residence. The regulations also allow service by APS having the written notice delivered or personally served.¹⁶ Notice is completed when the notice by mailing is properly stamped, addressed and deposited in the United States mail.¹⁷ The Department may prove service of the notice by mailing through an affidavit or certificate of mailing.¹⁸ The Department has provided evidence that the notification letter was mailed to the Appellant's last known address on December 20, 2011, and that she received the notice the following day on December 22, 2011.

7. The Department sought dismissal of the Appellant's appeal based on two different grounds: (1) on the Appellant's failure to serve the faxed copy of the appeal before 5:00 p.m. on January 19, 2011, and (2) on the Appellant's failure to perfect her hearing request by mailing a copy of the request to OAH on the same day she faxed the hearing request as required by the last sentence of WAC 388-71-01240(1). The evidence in the hearing record also supports the conclusions that (1) the OAH did not receive the Appellant's faxed request for a hearing until after close of business on January 19, 2012, after the regulatory deadline for submission of the hearing request, and (2) that the OAH never received a written request for hearing to challenge the substantiated finding.

8. Based on the foregoing conclusions, it must be ultimately concluded that the Appellant was served by mail with the Department's substantiated finding of neglect on the date of mailing of the notice, December 20, 2011. Because the Appellant's request for hearing to challenge the notice was not received by the OAH until after the regulatory time period for filing

¹⁶ WAC 388-71-01210(1) and (2), respectively.

¹⁷ WAC 388-71-01215(2).

¹⁸ WAC 388-71-01220(3).

0000231

such a challenge had run, and the challenge was never perfected by the same day mailing of a copy of the appeal, the ALJ lacked jurisdiction to hear the case on its merits and only had the authority to dismiss the matter due to lack of subject matter jurisdiction. *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App 121, 124, 989 P.2d 102 (1999).

IV. DECISION AND ORDER

Based on the legal conclusions entered above, the Initial Order is **affirmed**.

Mailed on December 28th, 2012.


MARJORIE R. GRAY
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Magdalene Pal, Appellant
Joan Trivison, Department's Representative, MS: 45610
Vicky Gawlik, Program Administrator, MS: 45600
Katherine A. Lewis, Administrative Law Judge, Vancouver OAH

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STATE OF WASHINGTON
PARTMENT OF SOCIAL AND HEALTH SERV
BOARD OF APPEALS
PETITION FOR RECONSIDERATION OF
REVIEW DECISION

See information on back.

Print or type detailed answers.

NAME(S) (PLEASE PRINT)	DOCKET NUMBER	CLIENT ID OR "D" NUMBER
MAILING ADDRESS	CITY	STATE
ZIP CODE		
TELEPHONE AREA CODE AND NUMBER		

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

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

I want the Review Judge to reconsider the Review Decision because...

PRINT YOUR NAME	SIGNATURE	DATE
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<p style="text-align: center;"><u>MAILING ADDRESS</u></p> <p>BOARD OF APPEALS PO-BOX 45803 OLYMPIA WA 98504-5803</p>	<p style="text-align: center;"><u>PERSONAL SERVICE LOCATION</u></p> <p>DSHS / HCA Board of Appeals Office Bldg 2 (OB-2), 1st FL Information Desk 1115 Washington St SE, Olympia WA</p>
<p style="text-align: center;"><u>FAX</u></p> <p style="text-align: center;">1-(360) 664-6187</p>	<p style="text-align: center;"><u>TELEPHONE (for more information)</u></p> <p style="text-align: center;">1-(360) 664-6100 or 1-877-351-0002</p>

00002

RECONSIDERATION REQUEST

Page ____ of ____

If You Disagree with the Judge's Review Decision or Order and Want it Changed,
You Have the Right to:

- (1) Ask the Review Judge to reconsider (rethink) the decision or order (10 day deadline);
- (2) File a Petition for Judicial Review (start a Superior Court case) and ask the Superior Court Judge to review the decision (30 day deadline).

DEADLINE for Reconsideration Request - 10 DAYS: The Board of Appeals must RECEIVE your request within ten (10) calendar days from the date stamped on the enclosed Review Decision or Order. The deadline is 5:00 p.m. If you do not meet this deadline, you will lose your right to request a reconsideration.

If you need more time: A Review Judge can extend (postpone, delay) the deadline, but you must ask within the same ten (10) day time limit.

HOW to Request: Use the enclosed form or make your own. Add more paper if necessary. You must send or deliver your request for reconsideration or for more time to the Board of Appeals on or before the 10-day deadline (see addresses on enclosed form).

COPIES to Other Parties: You must send or deliver copies of your request and attachments to every other party in this matter. For example, a client must send a copy to the DSHS office that opposed him or her in the hearing.

Translations and Visual Challenges: If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. Let the Board of Appeals know your needs. Call 1-(360)-664-6100 or TTY 1-(360) 664-6178.

DEADLINE for Superior Court Cases - 30 DAYS: The Superior Court, the Board of Appeals, and the state Attorney General's Office must all RECEIVE copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Review Decision or Order. There are rules for filing and service that you must follow.

EXCEPTION: IF (and only if) you file a timely reconsideration request (see above), you will have thirty days from the date of the Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

If You Need Help: Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. You are not guaranteed an attorney free of charge.

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APPENDIX 4

MAILED

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

JAN 16 2013

BOARD OF APPEALS

In Re:)	Docket No.	01-2012-L-1127	DSHS
)			BOARD OF APPEALS
MAGDALENE PAL)	DECISION GRANTING RECONSIDERATION		
)			
Appellant)	Adult Protective Services		
)	Client ID No.: 124663		

I. NATURE OF PROCEEDING

1. The undersigned Review Judge entered a Review Decision and Final Agency Order in this matter on December 28, 2012. The Order held that the Appellant had failed to file a timely request for hearing, and never perfected her faxed request by same day mailing of a copy of the appeal, and affirmed the Administrative Law Judge's decision that she lacked jurisdiction to conduct a hearing on the merits of the substantiated finding.

2. The Department timely filed a motion for reconsideration to correct typographical errors on December 31, 2012. The Department alleges in its petition that there is a clerical error in the decision. The error is that in three different places the Order states that the Department mailed a notice to the Appellant on December 20, 2010, and the correct date is December 20, 2011.

3. The Appellant filed a response to the petition for review which does not address the timeliness of her request for hearing. Her response contains her arguments on the merits of the decision that she neglected a vulnerable adult.

II. FINDINGS OF FACT

The Findings of Fact in the Review Decision and Final Order are corrected as follows:

1. On December 20, ~~2010~~ 2011, the Division of Adult Protective Services of the Department of Social and Health Services mailed a notice to the Appellant, Magdalene Pal, advising that, "The Department of Social and Health Services (DSHS) Adult Protective Services (APS) program recently investigated a report of possible mistreatment of a vulnerable adult

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(Case ID # 124663). Based on this investigation, APS has determined that you neglected a vulnerable adult."¹

2. One copy of the December 20, 2011, Department notice was mailed to the Appellant via certified mail, return receipt requested. The certified mailing number was 7004 2510 0003 5678 4044. The second copy of the December 20, 2011, letter was mailed to the Appellant by regular mail.²

3. Joan Trivison certified that the Department's December 20, 2011, notice to the Appellant was mailed both certified and regular mail on December 21, 2010.³

4. The December 20, 2011 notice sent to the Appellant stated:

At this time, you have the right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to

Office of Administrative Hearings
5300 Mac Arthur Boulevard, Suite 100
Vancouver, WA 98661

...If you do not timely request a hearing, APS' initial finding will become final and your name will be placed on a registry.⁴

5. The date thirty days following December 20, 2011, was January 19, 2012.

6. The December 21, 2011, Department notice was delivered to the Appellant on December 22, 2011, as evidenced by the certified mail return receipt.⁵

7. The Appellant faxed her appeal to the Office of Administrative Hearings (OAH) at 7:16 p.m. on January 19, 2012. The OAH office was closed at this time. This document was

¹ Exhibit 1, p. 1.

² Exhibit 2, p. 1. Declaration of Joan F. Trivison, Department's Motion to Dismiss.

³ Exhibit 1, p. 3.

⁴ Exhibit 1, p. 1 - 2 (emphasis in original).

⁵ Exhibit 2, p. 1.

stamped received by the OAH on January 20, 2012. The OAH did not receive any mailed copy of the Appellant's appeal.

III. CONCLUSIONS OF LAW

1. The Department's Petition for Reconsideration was timely filed and is otherwise proper.⁶ Jurisdiction exists for the undersigned Review Judge to reconsider the Review Decision and Final Order.⁷

2. The conclusions of law in the Final Order remain the conclusions of law in this matter.

IV. DECISION AND ORDER

The Department's Petition for Reconsideration is granted. The typographical corrections to the findings of fact sought by the Department are made as indicated above.

Mailed on January 16, 2013.


MARJORIE R. GRAY
Review Judge

Attached: Judicial Review Information
Copies have been sent to: Magdalene Pal, Appellant
Joan Trivison, Department's Representative, MS: 45610
Vicky Gawlik, Program Administrator, MS: 45600
Katherine A. Lewis, Administrative Law Judge, Vancouver OAH

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⁶ WAC 388-02-0620.

⁷ RCW 34.05.470.



PETITION FOR RECONSIDERATION OF
REVIEW DECISION

See information on back.

Print or type detailed answers.

NAME(S) (PLEASE PRINT) DOCKET NUMBER CLIENT ID OR "D" NUMBER

MAILING ADDRESS CITY STATE ZIP CODE

TELEPHONE AREA CODE AND NUMBER

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

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

I want the Review Judge to reconsider the Review Decision because...

PRINT YOUR NAME SIGNATURE DATE

<u>MAILING ADDRESS</u> BOARD OF APPEALS PO BOX 45803 OLYMPIA WA 98504-5803	<u>PERSONAL SERVICE LOCATION</u> DSHS / HCA Board of Appeals Office Bldg 2 (OB-2), 1st Fl. Information Desk 1115 Washington St. SE, Olympia WA
<u>FAX</u> 1-(360) 664-6187	<u>TELEPHONE (for more information)</u> 1-(360) 664-6100 or 1-877-351-0002

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RECONSIDERATION REQUEST

Page ____ of ____

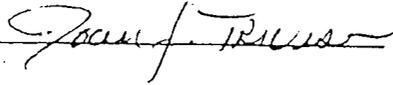
Magdaline Pal
December 20, 2011
Page 3

cc: APS Case Record

I, Joan F. Trivison, certify that I mailed the original of this document, postage prepaid, to the above addressee via certified and regular mail. I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated: December 20, 2011, at Lacey, Wa.

By:



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REQUEST FOR ADULT PROTECTIVE SERVICES HEARING

Per WAC 388-02 and WAC 388-71

APSAS CASE ID #: 124663

MAIL YOUR REQUEST TO THIS ADDRESS:
OFFICE OF ADMINISTRATIVE HEARINGS (OAH)
5300 MACARTHUR BLVD, STE 100
VANCOUVER, WA 98661

OR FAX TO THIS NUMBER: (360) 696-6255 (FAX)

I am requesting a hearing because I want to challenge the decision made by Adult Protective Services (APS). I disagree because:

I was notified of the APS decision on: _____ by the Lacey APS Office.
DATE YOU RECEIVED THE LETTER LOCATION OF THE OFFICE THAT SENT THE LETTER

IMPORTANT: Attach a copy of the letter you received from APS.

PRINT YOUR NAME HERE

ADDRESS OF PERSON REQUESTING HEARING CITY STATE ZIP CODE

TELEPHONE NUMBER (INCLUDE AREA CODE) MESSAGE TELEPHONE NUMBER (INCLUDE AREA CODE)

If you want someone to represent you at the hearing, you must obtain your own representation. PLEASE CHECK:

- I am going to represent myself at the APS hearing.
- OR
- I am represented by the person below (do not fill in if you are going to represent yourself):

Is this representative an attorney? (check one): YES NO

NAME OF YOUR REPRESENTATIVE	ORGANIZATION	TELEPHONE NUMBER
ADDRESS	CITY	STATE ZIP CODE

Do you need any assistance, an interpreter or any accommodation for a disability for the hearing? YES NO **000081**

If yes, what language or what assistance? _____

YOUR SIGNATURE	DATE
----------------	------

NO. 45594-3-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

MAGDALENE PAL,

Appellant,

v.

D.S.H.S., STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING TO KAREN L
CAMPBELL, ATTORNEY
FOR APPELLANT

FILED
COURT OF APPEALS
DIVISION II
2014 APR - 3 PM 1:50
STATE OF WASHINGTON
BY _____

The undersigned on oath states that:

That I am a citizen of the United States and competent to be a witness herein.

That I am over the age of eighteen years; that on the 2nd day of April, 2014, I mailed to Karen L. Campbell, Attorney at Law, Northwest Justice Project, 500 W. 8th Street, Suite 275, Vancouver, WA 98660-3086; a copy of the Respondent's Brief and Declaration of Mailing in regards to the above-referenced case. The document was sent by regular mail, postage prepaid.

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

Signed at Vancouver, Washington, this 2nd day of April, 2014.


CINDY M. THOMPSON
Legal Assistant