

NO. 30458-2-III

APR 17 2017

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

KATHRYN RYAN,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

 A. Did the trial court properly find that the Department complied with the provisions of WAC 388-71-01210 by sending notice to Ms. Ryan’s last know place of residence?.....2

 B. Did the trial court properly find that substantial evidence exists to show the Department made a reasonable good faith effort to determine Ms. Ryan’s last known place of residence?.....2

 C. Did Ms. Ryan demonstrate a violation of due process where the Department, in compliance with WAC 388-71-01210 and -01215, served notice on Ms. Ryan by certified mail/return receipt requested and by regular mail to her last known address, after taking reasonable but unsuccessful steps to contact Ms. Ryan and determine her present location?2

III. COUNTERSTATEMENT OF THE CASE3

IV. ARGUMENT8

 A. Standard Of Review.....9

 B. The Department Complied With The Notice Provisions Of WAC 388-71-0121010

 C. Substantial Evidence Exists To Show That The Department Made A Reasonable, Good Faith Effort To Determine The Address Of Ms. Ryan’s Last Known Place Of Residence14

D.	The Department's Notice to Ms. Ryan was reasonably calculated under the circumstances to apprise her of the substantiated finding.	15
E.	Ms. Ryan's Failure To Timely Respond To The Notice Sent By The Department Does Not Amount To Good Cause.....	18
F.	Ms. Ryan is not entitled to an award of attorney fees.....	22
V.	CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Accord American Continental Ins. Co. v. Steen</i> , 151 Wn.2d 512, 91 P.3d 864 (2004).....	12
<i>Alpine Lakes Prot. Soc’y v. Department of Natural Res.</i> , 102 Wn. App. 1, 979 P.2d 929 (1999).....	22
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 201, 142 P.3d 155 (2006)	12
<i>Construction Ind. Trng. Council v. Wash. State Apprenticeship & Training Council</i> , 96 Wn. App. 59, 977 P.2d 655 (1999).....	22
<i>Covey v. Somers</i> , 351 U.S. 141, 76. S. Ct. 724, 100 L. Ed. 1021 (1956).....	16
<i>H&H P`ship v. State</i> , 115 Wn. App. 164, 62 P.3d 510 (2003).....	22
<i>Hardee v. State of Wash., Dep’t of Soc. & Health Serv.</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	9, 10
<i>In re Custody of E.A.T.W.</i> , 168 Wn.2d 335, 227 P.3d 1284 (2010).....	10
<i>Johnson v. Cash Store</i> , 116 Wash. App. 833, 68 P.3d 1099 (2003).....	20
<i>Jones v. Flowers</i> , 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).....	16, 17
<i>Kettle Range Conservation Group v. Department of Natural Res.</i> , 120 Wn. App. 434, 85 P.3d 894 (2003), <u>review denied</u> , 152 Wn.2d 1026 (2004)	23
<i>Mader v. Health Care Authority</i> , 149 Wn.2d 458, 70 P.3d 931 (2003).....	10
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	21

<i>Morin</i> , 160 Wn.2d at 754.....	21
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....	16
<i>Pfaff v. State Farm Mutual Auto. Ins. Co.</i> , 103 Wn. App 829, 14 P.3d 837 (2000).....	19
<i>Pierce v. Underwood</i> , 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)	22
<i>Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.</i> , 99 Wn. App. 579, 993 P.2d 287 (2000)	22
<i>Prest v. Am. Bankers Life Assurance Co.</i> , 79 Wn. App. 93, 900 P.2d 595 (1995).....	19
<i>Puget Sound Med. Supply v. Wash. State Dep't of Soc. & Health Servs.</i> , 156 Wn. App. 364, 234 P.3d 246 (2010)	19, 20
<i>Robinson v. Hanrahan</i> , 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).....	16, 18
<i>Speelman v. Bellingham/Whatcom Cnty. Housing Auths.</i> , 2012 WL 1150265 (Wash. App. Div. 1) (Apr. 9, 2012).....	18
<i>TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.</i> , 140 Wn. App 191, 165 P.3d 1271 (2007).....	20
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968).....	21

Statutes

RCW 34.05.510	9
RCW 34.05.570(3).....	9
RCW 4.84.350 (1).....	22

Rules

CR 60 19, 20
CR 60(b)..... 19, 20, 21
RAP 18.1 22

Regulations

WAC 388-02-0020..... 21
WAC 388-02-0580..... 20
WAC 388-71-01210..... 1, 2, 4, 6, 9, 10, 11, 12, 13, 15, 23
WAC 388-71-01210(1)..... 11, 12, 14, 15
WAC 388-71-01210(2)..... 11
WAC 388-71-01215..... 1, 2, 4, 6, 9
WAC 388-71-01240..... 4

I. INTRODUCTION

In October 2009, the Department of Social and Health Services, Adult Protective Services (hereinafter 'Department') made a substantiated finding that Ms. Ryan had mentally abused a vulnerable adult. Under WAC 388-71-01210 and -021215, the Department was required to notify her by first class mail and certified mail sent to her residence of record. Before sending notice by mail, the Department attempted to contact Ms. Ryan personally to determine whether she was still living at her residence of record. Through this investigation, the Department learned Ms. Ryan temporarily had moved from her residence of 29 years, that she had temporarily moved out many times before but always returned, and that she had not changed her address with the United States Postal Service. The Department's investigator spoke with her mother and with her current employer, obtained a telephone number for Ms. Ryan from her current employer, and left a message for her, which was not returned. Finally, on November 24, 2009, having determined that there was no other address for Ms. Ryan, and having not received any return communication from her, the Department sent the notice required by rule. Nine months later, she requested a hearing.

Despite all the Department's efforts to locate and communicate with Ms. Ryan, she claims the Department's notice was inadequate, that

the Department did not act in good faith in attempting to locate her, and that sending a letter was not reasonably calculated to notify her of the finding. She claims she should be excused from the deadline for appealing the substantiated finding.

An administrative law judge found that the Department fulfilled its duty to make a reasonable, good faith effort to discover any change in Ms. Ryan address, and dismissed her late-filed appeal. A review judge affirmed. The superior court also affirmed, ruling that the administrative findings are supported by substantial evidence in the record. This Court should affirm the decisions below and dismiss this appeal.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Did the trial court properly find that the Department complied with the provisions of WAC 388-71-01210 by sending notice to Ms. Ryan's last know place of residence?
- B. Did the trial court properly find that substantial evidence exists to show the Department made a reasonable good faith effort to determine Ms. Ryan's last known place of residence?
- C. Did Ms. Ryan demonstrate a violation of due process where the Department, in compliance with WAC 388-71-01210 and -01215, served notice on Ms. Ryan by certified mail/return receipt requested and by regular mail to her last known address, after

taking reasonable but unsuccessful steps to contact Ms. Ryan and determine her present location?

- D. Did Ms. Ryan demonstrate that her failure to timely respond to the Department's notice amounts to good cause, after the Department made numerous, but unreciprocated, attempts to determine her present location?
- E. Is Ms. Ryan entitled to an award of attorney fees where the Department was substantially justified in sending notice of a substantiated finding by certified mail/return receipt requested and by regular mail to her last known address, after taking reasonable but unsuccessful attempts to contact Ms. Ryan and determine her present location?

III. COUNTERSTATEMENT OF THE CASE

On November 24, 2009, the Department sent Ms. Ryan a letter informing her that the Department had made a substantiated finding against her of mental abuse of a vulnerable adult.¹ AR 5, 82. The letter stated that she had the right to appeal the finding by requesting a hearing

¹ Adult Protective Services makes a "substantiated finding" against a person found to have abused, abandoned, neglected, or financially exploited an adult who is vulnerable, based upon a preponderance of evidence. Such person has a right to challenge the substantiated finding in an administrative hearing. If the Department prevails in the hearing, the person with a final finding of abuse, abandonment, neglect or financial exploitation is placed in a Department database and disqualified from being employed in any long-term care setting or obtaining a license or certification to operate a long-term care facility or program in Washington.

“within thirty calendar days of the date the department’s letter of notice is mailed or personally served upon the alleged perpetrator whichever comes first.” WAC 388-71-01240; AR 5-6, 83. Consistent with WAC 388-71-01210 and -01215, the letter was sent by certified mail/return receipt requested and by regular mail to Ms. Ryan’s last known place of residence.

The regular mailing was not returned to the Department. AR 65. The certified mailing was returned to the Department, on December 16, 2009, after the United States Postal Service made three attempts to deliver it; the envelope was marked ‘return to sender unclaimed unable to forward.’ AR 6, 83. There was no indication on the envelope of a forwarding address for Ms. Ryan. *Id.*

The letters were sent to Ms. Ryan at 22105 E. Wellesley #58, Otis Orchards, WA 99027, where she had resided with her mother for 29 years. AR 6, 31, 46; RP 11. The home is located in a mobile home park, where the mailboxes are grouped together in cluster box units, with individual locked boxes for each residence. AR 6, 31. Only three people had a key to the box associated with lot #58: (1) Ms. Ryan; (2) Ms. Ryan’s mother; and, (3) Ms. Ryan’s sister, who died in 2006. AR 6, 32.

Before mailing the letter to Ms. Ryan, the Department attempted to contact her personally and to discover where she was living, without

success. On October 21, 2009, Ms. Ryan apparently had moved temporarily from the Wellesley address. AR 7, 32. However, she did not submit a change of address form to the Post Office, and continued to receive her mail at this address. AR 32; RP 11. Paul Wood, testifying on behalf of Ms. Ryan, explained that she did not change her mailing address because she had temporarily moved out of her mother's home 30 to 40 times after arguments with her mother. CP 19. Each time, after a couple weeks, she returned to the Wellesley address. CP 19.

On October 26, 2009, the Department investigator visited with Ms. Ryan's mother at her home. AR 7, 33. The mother reported that Ms. Ryan had lived with her for some time, had moved out after the event that initiated the substantiated finding that Ms. Ryan had mentally abused a vulnerable adult, and that she did not know where Ms. Ryan was living. *Id.* Two days later, the Department investigator again went to the mother's home, and was told by the mother that she had not heard from her daughter and did not know where she was, but she told the investigator that Ms. Ryan was employed by Addus. AR 7-8, 33.

Following the visit with Ms. Ryan's mother, the Department investigator called the COPES² case manager for the mother, who reported

² "COPES" is the abbreviation for Community Options Program Entry System, a state program that provides alternatives to placement in a medical facility, with the goal of providing a safe level of care with maximum independence.

that she did not know where Ms. Ryan was or how to reach her. AR 8, 33. The investigator then called Ms. Ryan's employer, Addus, and spoke with the assistant director of the company. *Id.* The investigator was told that the company did not have a telephone number on file for Ms. Ryan, but that the company would call her at the home of the client where she was working, and have her call the investigator. *Id.*

On October 28, 2009, the Department investigator received a phone call from another employee at Addus, who provided the investigator with a telephone number for Ms. Ryan. AR 8, 33. That same day, the investigator called that number, and left a voice message asking that Ms. Ryan call the investigator back; the investigator did not receive a return call and there is no evidence Ms. Ryan attempted to contact the investigator. *Id.*

After failing to establish contact with Ms. Ryan, the Department notified her of the substantiated finding against her by letter sent both by certified mail/return receipt requested and by regular mail to her last known place of residence, as provided in WAC 388-71-01210 and -01215. The letter specifically informed her of her right to a hearing to contest the finding. AR 5-6, 82-83.

Ms. Ryan ultimately did request a hearing, but her request was not received by the Office of Administrative Hearings until August 23, 2010,

which was 271 days following the November 24, 2009, date the regular and certified mailings were sent. AR 8, 33, 64. The return address on Ms. Ryan's request for hearing was the same address to which the notice had been mailed: 22105 E. Wellesley #58, Otis Orchards, WA 99207. AR 62.

Upon receiving notice of Ms. Ryan's untimely request for an administrative hearing, the Department filed a motion to dismiss for lack of subject matter jurisdiction. AR 63. Ms. Ryan argued in her response to the motion to dismiss that "[s]imple inquiry could have established her last known address as it was within the knowledge of her mother..." AR 47.

The hearing on the motion to dismiss was heard by the Spokane Office of Administrative Hearings on October 27, 2010. AR 30. Ms. Ryan testified at the hearing that she chose not to change her address from the residence on Wellesley and continued to receive all of her mail there. RP 11.

On November 2, 2010, the Administrative Law Judge ('ALJ') found that Ms. Ryan's request for a hearing was untimely, and dismissed the proceedings. AR 30-38. The ALJ found that the Department had "fulfilled its duty to make a reasonable, good faith effort to determine a new address for the Appellant," by inquiring with Ms. Ryan's mother, contacting the case manager for Ms. Ryan's mother, contacting

Ms. Ryan's employer, and leaving a message on the telephone number Ms. Ryan's employer provided to the Department investigator. AR 36.

Ms. Ryan timely appealed the ALJ's Initial Order, requesting that the decision be reversed and that a hearing on the merits be held. AR 24-29. The Board of Appeals Review Judge affirmed the ALJ's decision and dismissed Ms. Ryan's hearing request in a final order issued November 2, 2010. AR 1-12. The Review Judge affirmed that the Department exercised reasonable efforts to locate Ms. Ryan by inquiring with her mother, the case manager, and her employer. AR 12-13. In addition, the Review Judge found that "[t]he Appellant conceded under oath at the hearing that she never changed her mailing address and admitted to receiving mail at her mother's address even after she had moved out of her mother's residence." *Id.*

Ms. Ryan petitioned for judicial review in the Spokane County Superior Court. Superior Court Judge Tari Eitzen affirmed, finding substantial evidence in the record to establish that the Department made reasonable and good faith efforts to determine Ms. Ryan's last known place of residence. Ms. Ryan appealed to this Court.

IV. ARGUMENT

The only issues properly before this Court on review are (1) whether there is substantial evidence in the record to support the finding

by the Review Judge that the Department made reasonable efforts to determine Ms. Ryan's last known address before mailing her a notice of a substantiated finding that she had mentally abused a vulnerable adult; (2) whether the Review Judge erred in ruling that Ms. Ryan did not demonstrate good cause for failing to meet the jurisdictional deadline for requesting a hearing; and (3) whether Ms. Ryan has demonstrated that the Department's compliance with WAC 388-71-01210 and -01215 violated due process. Ms. Ryan has failed to meet her burden on each issue and this Court should affirm the rulings below.

A. Standard Of Review

Judicial review of an administrative action or decision is governed exclusively by the Administrative Procedure Act ("APA"). *Hardee v. State of Wash., Dep't of Soc. & Health Serv.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011); RCW 34.05.510. Under RCW 34.05.570(3), in relevant part, the Court may grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provision on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

...

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

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court . . . ;

(f) The agency has not decided all issues requiring resolution by the agency.

The burden of demonstrating the invalidity of the agency's action is on Ms. Ryan, since she is the party asserting its invalidity. *Hardee*, 172 Wn.2d at 6.

B. The Department Complied With The Notice Provisions Of WAC 388-71-01210

Ms. Ryan contends WAC 388-71-01210 is ambiguous and must be interpreted to require the Department to personally serve her if it could not ascertain her last known address.

Courts interpret administrative regulations under the rules of statutory construction. *Mader v. Health Care Authority*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). "If a regulation is unambiguous, intent can be determined from the language alone, and we will not look beyond the plain meaning of the words of the regulation." *Id.* at 473. *See also In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010) (if the text is clear and unambiguous on its face, we do not resort to statutory construction principles).

WAC 388-71-01210 is clear and unambiguous.³ It provides two distinct methods by which the Department can properly notify an alleged perpetrator of a substantiated initial finding of abuse of a vulnerable adult. One method, specified in subsection (1), permits the Department to notify the alleged perpetrator by “sending a letter certified mail/return receipt requested and regular mail to the alleged perpetrator’s last known place of residence.” WAC 388-71-01210(1). Under this subsection, the Department has a duty to make a “reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator.” *Id.* An alternative method is specified in subsection (2), which permits the Department to serve notice personally on an alleged perpetrator. WAC 388-71-01210(2).⁴

³ WAC 388-71-01210 (entitled “How may APS give the alleged perpetrator notice of the substantiated initial finding?”) provides as follows:

(1) APS [Adult Protective Services] shall notify the alleged perpetrator of a substantiated initial finding by sending a letter certified mail/return receipt requested and regular mail to the alleged perpetrator's last known place of residence. The duty of notification created by this section is subject to the ability of the department to ascertain the location of the alleged perpetrator. APS shall make a reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator; or

(2) APS shall have the written notice delivered or personally served upon the alleged perpetrator.

⁴ That these two methods of service are distinct is supported by the language of WAC 388-71-01215, which specifies when notice is complete:

Notice is complete when:

- (1) Personal service is made;
- (2) Mail is properly stamped, addressed and deposited in the United States mail;

Ms. Ryan argues that the regulation is ambiguous, in that it requires the Department “to select the method reasonably calculated to provide notice to the alleged perpetrator based on the information the Department has about the alleged perpetrator’s location.” Appellant’s Brief pg. 15. That language is not found in the rule and should not be added at Ms. Ryan’s request. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (court does not add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it). *Accord American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

Nothing contained in WAC 388-71-01210 requires the Department to choose one method of service over the other. So long as the Department exercises a “reasonable, good faith effort to determine the address of the last known place of residence of the alleged perpetrator,” the Department has fulfilled its duty under the regulation. WAC 388-71-01210 (1).

(3) A parcel is delivered to a commercial delivery service with charges prepaid; or

(4) A parcel is delivered to a legal messenger service with charges prepaid.

By the plain language of this rule, it defines four *alternatives* for completing notice. Accordingly, when notice is complete by mail, personal service is not also required.

Ms. Ryan argues that the Department could have served notice under subsection (1) only if it ascertained the location of the alleged perpetrator. Appellant's Brief pg 18. She has incorrectly interpreted the law. WAC 388-71-01210 reads in full, "the duty of notification created by this section is *subject to the ability of the department* to ascertain the location of the alleged perpetrator." (Emphasis added.) There is no requirement that the Department actually find Ms. Ryan. The duty imposed by this regulation is that the Department made an effort, *subject to its ability*, to locate her by making a reasonable, good faith effort to determine the address of her last known place of residence. As explained below, the record shows that the Department did exercise reasonable, good faith efforts by making several attempts to contact the Appellant, without receiving any response.

Ms. Ryan also argues that the Department ought to have served her personally because it knew that she did not reside at the place where notification was sent. Appellant's brief pg 18. Even if she had changed her residence—which the record refutes—the Department has no such duty. WAC 388-71-01210 does not require the Department to search out Ms. Ryan or to allow her to evade notice by concealing herself; subsection (1) only requires the Department to send notice to the *last* known place of

residence, as determined through the Department's reasonable, good faith efforts, which is exactly what the Department did.

C. Substantial Evidence Exists To Show That The Department Made A Reasonable, Good Faith Effort To Determine The Address Of Ms. Ryan's Last Known Place Of Residence

Mr. Ryan argues that the Department had a duty to "locate" Ms. Ryan and faults the Department for not having done so. Appellant's Brief at 22. She misstates the Department's duty. When providing notice of a substantiated finding to the alleged perpetrator, WAC 388-71-01210(1) requires that the Department exercise reasonable, good faith efforts to determine the address of her "last known place of residence."

The record contains substantial evidence that the Department fulfilled its duty under WAC 388-71-01210(1). As summarized above, the Department twice contacted her mother at the residence she shared with Ms. Ryan, contacted her employer, and left a message with a client for who she was working, and obtained no information indicating her last known place of residence had changed. AR 7-8, 32-33; RP 11. Moreover, the record shows that the Department in fact correctly determined her last known place of residence. At the administrative hearing, Ms. Ryan admitted under oath that the address the notification was sent to was indeed the address where she received her mail, and that she did not want to, and in fact, did not change her address. AR 12-13; RP 11. By her own

admission, on November 29, 2009, the date notice was mailed, there was no other address the Department could have discovered since she purposefully did not change her mailing address with the United States Postal Service. AR 35. When she finally requested an administrative hearing, the return address on her envelope was the very address used by the Department to send her notice. AR 62.

The Department made reasonable, good faith efforts to determine whether Ms. Ryan's address had changed. It attempted through multiple channels to contact her, without success, to determine if she had a new address. As shown at the hearing, the address to which the Department mailed the notice in fact was her current mailing address at the time the notice was mailed. The evidence in the record shows that the Department fully complied with WAC 388-71-01210(1).

D. The Department's Notice to Ms. Ryan was reasonably calculated under the circumstances to apprise her of the substantiated finding.

Ms. Ryan argues that that as applied to her, WAC 388-71-01210 violated due process, in that the method the Department used to deliver notice to her was not reasonably calculated to inform her of the substantiated finding. Appellant's Brief at 28-29.

Due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Actual knowledge that a notice given using normal procedures would be ineffective or may have been ineffective may trigger a due process obligation to take additional or alternative steps to provide notice., *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (when mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps, if available, to attempt to provide notice to the property owner before selling the property); *Robinson v. Hanrahan*, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) (where the state knew the appellant was in county jail awaiting trial, sending notice to appellant’s home address was not “reasonably calculated” to reach appellant); *Covey v. Somers*, 351 U.S. 141, 76. S. Ct. 724, 100 L. Ed. 1021 (1956) (where appellant’s mental incompetency was long known to town officials and citizens, sending notice by mail and by publication was not “reasonably calculated” to reach appellant).

Consistent with these cases, once the Department learned that the initial method used to provide Ms. Ryan with notice of the substantiated finding might be problematic, the Department took additional reasonable steps to provide her notice. As summarized above, the Department twice

contacted her mother at the residence she shared with Ms. Ryan, contacted her employer, and left a message with a client for whom she was working, and obtained no information indicating her last known place of residence had changed. AR 7-8, 32-33; RP 11. When it was determined that there was no other address reasonably calculated to apprise Ms. Ryan of the action, the Department sent the notice to the Wellesley address, an address Ms. Ryan admitted under oath was indeed the address where she received her mail, and that she did not want to, and in fact did not, change her address. AR 12-13; RP 11.

Ms. Ryan argues that the State knew at the time that her employer had access to Ms. Ryan at her current work location. Appellant's Brief at 27. However, Ms. Ryan fails to mention that the Department, with this knowledge, did in fact contact her employer in an attempt to speak with her, but that Ms. Ryan failed to return calls or messages left by the investigator. AR 8, 33.

The State's burden to provide notice is not unlimited and "if there are no reasonable additional steps the government could have taken...it cannot be faulted for doing nothing." *Jones*, 547 U.S. at 234. The Department exhausted all reasonable methods to provide notice of the substantiated finding to Ms. Ryan, in addition to its compliance with the

notice requirement established in rule, and as such, complied with procedural due process requirements.⁵

E. Ms. Ryan’s Failure To Timely Respond To The Notice Sent By The Department Does Not Amount To Good Cause

Ms. Ryan argues that the Review Judge erred by failing to consider whether she had good cause for filing the late hearing request. Appellant’s Brief pg 32. WAC 388-02-0020 states that “[g]ood cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Rule 60 as a guideline.”

CR 60(b) provides for relief from an order where one party committed excusable neglect. To prevail in a CR 60(b) motion, the movant must show:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;

⁵ Division I’s recent decision in *Speelman v. Bellingham/Whatcom Cnty. Housing Auths.*, 2012 WL 1150265 (Wash. App. Div. 1) (Apr. 9, 2012), is readily distinguishable. In that case, as in *Robinson*, 409 U.S. 38, the government agency sent notice to the appellant’s home even though it had actual knowledge he was incarcerated. In *Speelman*, the appellant was incarcerated at the Whatcom County jail. The court held that the special circumstances of the case, the fact that the Housing Authority knew that Spellman was incarcerated and would not receive the letter, was not “reasonably calculated under the circumstances to provide notice.” In this case, unlike *Speelman*, Mr. Ryan was not in the Department’s custody or control, and the Department, despite numerous attempts to contact her, had no actual knowledge of Ryan’s whereabouts.

- (2) That the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise, or excusable neglect;
- (3) That the moving party acted with due diligence after notice of entry of a default judgment; and
- (4) That no substantial hardship will result to the opposing party.

Pfaff v. State Farm Mutual Auto. Ins. Co., 103 Wn. App 829, 832, 14 P.3d 837, 839 (2000). A party must satisfy *all* of the above elements in order to prevail under a CR 60(b) motion. *Puget Sound Med. Supply v. Wash. State Dep't of Soc. & Health Servs.*, 156 Wn. App. 364, 374, 234 P.3d 246, 251 (2010).

Ms. Ryan cites no cases that interpret CR 60 in a factual context like this one. Generally, Washington courts have found no "excusable neglect" in cases where notice was sent to the proper location but the person to be notified did not receive the notice because of the actions or inactions of a third party. *See Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) (holding that excusable neglect did not exist when an insurer failed to answer the complaint because the insurer misplaced a copy of the legal process sent by the insurance commissioner when the person designated to receive process was reassigned to other duties); *See also Johnson v. Cash Store*, 116 Wash.

App. 833, 848-49, 68 P.3d 1099 (2003) (finding that excusable neglect did not exist when someone other than general counsel accepted service of process and then neglected to forward the complaint). Ms. Ryan cannot establish excusable neglect based on another person's actions.⁶

In the case at hand, Mr. Ryan temporarily changed residences without leaving any forwarding address with the United States Post Office, or her mother, with whom she had lived for 29 years. AR 7-8, 33, 62; RP 11. Neglecting to have her mail forwarded, if she intended to establish a new residence, was not excusable. Failing to respond to telephone messages left for her with her current employer is not excusable. By failing to leave any information at her former residence, with her current employer, or with any other known person, which would have allowed the Department to contact her, she committed inexcusable neglect. She has presented no other evidence. Since she has not satisfied the "excusable neglect" requirement of a CR 60(b) analysis of good cause, this Court need not address the other elements.

⁶ This result is consistent with interpretations of CR 60 in other contexts. Washington Courts have "repeatedly held that if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App 191, 212, 165 P.3d 1271 (2007). Applying this rule, a recent Court of Appeals case specifically addressed the use of CR 60 as a guideline application of WAC 388-02-0580 (another DSHS rule) and held that the mis-calendarling by an appellant's attorney did not constitute excusable neglect. *Puget Sound Medical Supply v. Department of Social and Health Services*, 156 Wn. App. 364, 234 P.3d 246 (2010).

In addition to arguing that good cause exists to ‘excuse’ the late filing of her request for hearing, Ms. Ryan argues that principles of equity favor setting aside the default. *See Appellants’ Brief pg. 42.* (“A proceeding to set aside a default judgment is equitable in character. *Morin*, 160 Wn.2d at 754). When determining whether equity supports setting aside default judgment, a party must meet the four-part test as set forth in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). These factors are (1) that there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Id.* at 352. As noted above, in reference to Ms. Ryan’s assertion that CR 60(b) provides relief from judgment, Ms. Ryan fails to establish excusable neglect as required by *White* and has not otherwise satisfied the second factor; as such, equity does not support finding good cause under WAC 388-02-0020. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

F. Ms. Ryan is not entitled to an award of attorney fees

Ms. Ryan argues that, pursuant to RAP 18.1, she is entitled to an award of attorney fees and costs in accordance with RCW 4.84.350 (1), in the event she prevails in these proceedings. Appellant's Brief, pg 45. RCW 4.84.350 (1) states that, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust."

The term "substantially justified" has been defined to mean that the State's position has a reasonable basis in law and fact. *H&H P'ship v. State*, 115 Wn. App. 164, 62 P.3d 510 (2003), citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988); *Construction Ind. Trng. Council v. Wash. State Apprenticeship & Training Council*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). It has further been defined to mean "justified in substance or in the main—in other words, justified to a degree that could satisfy a reasonable person." *Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000); *Alpine Lakes Prot. Soc'y v. Department of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999); see *H&H*, 115 Wn. App. at 171;

Kettle Range Conservation Group v. Department of Natural Res., 120 Wn. App. 434, 468, 85 P.3d 894 (2003), review denied, 152 Wn.2d 1026 (2004).

Because the Department was substantially justified when it sent notice of a substantiated finding of abuse by certified and regular mail to Ms. Ryan's last known residence, after a reasonable, good faith effort to determine whether her address had changed, she should not be entitled to an award of attorney fees or costs. By Ms. Ryan's own admission, there was no other address that could have been discovered by the Department to facilitate notice; she failed to take proactive steps by submitting a change of address, and failed to return the investigator's telephone call. AR 7, 8, 33, 36, 62; RP 11.

V. CONCLUSION

The Department respectfully requests that this court hold: (1) that the Department complied with the notice provisions of WAC 388-71-01210; (2) that the Department made a reasonable, good faith effort to determine the address of Ms. Ryan's last known place of residence; (3) that the notice provided by the Department satisfied due process; (4) that Ms. Ryan did not demonstrate good cause for her failure to timely request an administrative hearing; and (5) in the event Ms. Ryan prevails, that the

Department's actions were substantially justified in light of the law and facts, and as such, she is not entitled to an award of attorney fees.

RESPECTFULLY SUBMITTED this 17 day of April, 2012.



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