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No. 57214-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KATHIE COSTANICH, *21470*

Petitioner, *17250*

vs. *09542*

STATE OF WASHINGTON, DSHS

Respondent. *19375*

PETITION FOR REVIEW

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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A. Identity Of Petitioner.

Kathie Costanich is the petitioner in this Court, and was respondent in the Court of Appeals. She asks this Court to accept review of the Court of Appeals decision designated in Part 2 of this petition.

B. Decision Below.

The Court of Appeals filed its opinion on January 29, 2007 affirming the superior court (Appendix A), and amended its decision on May 3, 2007 to include an award of attorney fees to Costanich under RCW 4.84.350 (Equal Access to Justice Act). (Appendix B) The Court of Appeals decision is published at 138 Wn. App. 547, 156 P.3d 232 (2007). (Appendix C)

On June 25, 2007, a commissioner of the Court of Appeals determined that the fees incurred by Costanich were reasonable, and awarded her fees of \$46,239, plus costs of \$198. (Appendix D) On October 12, 2007, a panel of the Court of Appeals modified the commissioner's ruling and ordered that Costanich was not entitled to fees under RCW 4.84.350 because she had already been awarded fees of \$25,000 in the superior court. (Appendix E)

Petitioner seeks review of the Court of Appeals order granting DSHS' motion to modify as a decision terminating review

and subject to review under RAP 13.4(b). If the Court does not consider the Court of Appeals' order to be a decision terminating review, review is appropriate under RAP 13.5(b). See RAP 13.3(d).

C. Issue Presented For Review.

The express purpose of the Washington Equal Access to Justice Act is to reimburse parties who find themselves forced to incur substantial expenses "in securing the vindication of their rights in administrative proceedings." Should the \$25,000 fee limit in RCW 4.84.350 be interpreted to apply to each level of "judicial review of an agency action"?

D. Statement Of The Case.

The following background and procedural history is taken from the Court of Appeals' published decision and its post-decision rulings:

Kathie Costanich and her husband Ken were foster parents devoted to caring for some of the neediest and most difficult foster children in the system. Costanich's foster home received accolades from the State. However, she also regularly used profanity, sometimes swearing around her foster children. The Department of Social and Health Services (DSHS) found that

Costanich's language was emotionally abusive and revoked her foster care license. 138 Wn. App. at 551-52, ¶ 1.

Costanich appealed both the finding of abuse and the revocation of her license in an administrative hearing. The Administrative Law Judge (ALJ) overturned DSHS' decision, finding that the children had not been emotionally abused and were, in fact, "thriving," based on their therapists' and social workers' testimony. 138 Wn. App. at 553, ¶ 4.

DSHS appealed this decision to the DSHS Board of Appeals. The review judge reversed the ALJ's initial decision. He found there was substantial evidence that Costanich had threatened and swore at the children in her home. Substituting his own view of the evidence for that of the ALJ based primarily on the hearing testimony and reports of the Child Protective Services investigator, the review judge concluded this constituted emotional abuse and justified revoking her license. 138 Wn. App. at 553, ¶¶ 4, 1.

Costanich sought judicial review. The superior court reversed the review judge's final administrative decision. The superior court awarded Costanich attorney fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350, of \$25,000 – the limit

under the statute for “judicial review of an agency action.” 138 Wn. App. at 553, ¶ 4.

DSHS appealed the superior court judge’s decision to Division One. The appellate court affirmed the superior court’s decision, including its award of attorney fees. 138 Wn. App. at 564, ¶ 24. Division One held that that DSHS was “not substantially justified” in revoking Costanich’s foster care license. 138 Wn. App. at 564, ¶ 23. Division One also awarded attorney fees to Costanich for the fees incurred on appeal, holding that she was “entitled to attorney fees on appeal” under RCW 4.84.350 and RAP 18.1. 138 Wn. App. at 564, ¶¶ 24, 25.

Costanich filed an attorney fee affidavit in the Court of Appeals requesting fees totaling \$46,239 and costs of \$198. DSHS did not move for reconsideration of order amending the opinion to include a fee award and did not file an objection to the amount requested by Costanich. On June 22, 2007, Commissioner Mary Neel found that “[g]iven the length of the record and the extent of the matters litigated in this court, the time spent is reasonable and relates to this appeal,” and awarded all the fees and costs requested by Costanich. (Appendix D)

DSHS moved to modify the commissioner's ruling. For the first time, DSHS alleged that Costanich could not be awarded on appeal attorney fees under RCW 4.84.350 because she had already received the maximum limit under the statute from the superior court.

On October 12, 2007, the panel who originally awarded attorney fees to Costanich granted DSHS' motion to modify the commissioner's ruling. The panel imposed \$1,000 in sanctions against DSHS "because appellant made its argument based on the \$25,000 fee limitation contained in RCW 4.84.350(2) for the first time in its motion to modify" but denied Costanich's request for any attorney fees on appeal. (Appendix E)

E. Argument Why Review Should Be Granted.

This Court should grant review of the Court of Appeals decision denying attorney fees to the petitioner at the appellate court level based on its determination that RCW 4.84.350, the Equal Access To Justice Act ("EAJA"), limits an award of attorney fees to a prevailing qualified party who has been forced to defend against a position taken by the State that is "not substantially justified" to \$25,000 for all levels of review. Division One's interpretation of the statute is contrary to the legislative intent

behind the EAJA, which is intended to ensure that “parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.” Laws 1995, ch. 403 § 901 (legislative findings). This issue is of substantial public interest and should be decided by this Court under RAP 13.4(b)(4).

RCW 4.84.350, which was enacted as part of the Equal Access to Justice Act, entitles a “qualified party that prevails in a judicial review of an agency action” reasonable attorneys’ fees “unless the court finds that the agency action was substantially justified:”

[A] court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.

RCW 4.84.350(1). The statute caps the attorney fees award to \$25,000. RCW 4.84.350(2) (“[t]he amount awarded a qualified party under subsection (1) . . . “shall not exceed twenty-five thousand dollars”).

The Equal Access to Justice Act was enacted in 1995. The intent, as expressed by the legislature, was to ensure that parties have an opportunity to defend themselves from unreasonable agency actions by allowing them an award of fees if they prevail:

The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Laws 1995, ch. 403 § 901 (legislative findings).

The plain language of the EAJA does not limit attorney fees on appeal. The Act uses the phrase "judicial review of an agency decision" to trigger the right to fees. "Judicial review" means a judicial review as defined by chapter 34.05 RCW," the Administrative Procedure Act ("APA"). RCW 4.84.340(7). Under the APA, "judicial review" is a specific event, the initial review of an agency decision, RCW 34.05.570, which must be initiated by petition in superior court. RCW 34.05.524. The APA separately provides for "appellate review" of the superior court decision under another statute, RCW 34.05.526. These statutes must be read in

harmony, and the specific definitions in the APA govern. 138 Wn. App. at 563-64, ¶ 22.

Capping a qualified prevailing party's fees to \$25,000 over *all* levels of review, as in this case, allows an agency to pursue an unjustified position at successive levels of review with no consequence if the prevailing party has already received the statutory limit for judicial review in the superior court. The party who prevailed in the superior court may be deterred from defending against an appeal because of the additional attorney fees they will be forced to incur on appeal, which under Division One's interpretation of the statute they will have no ability to recoup. In this case, for instance, a foster parent who prevailed against DSHS at the administrative fact-finding hearing and at superior court would still face a finding of abuse if they could not afford to defend again in the Court of Appeals.

This is contrary to the legislative intent behind the Equal Access to Justice Act, which was to avoid having parties be "deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings." Laws 1995, ch. 403 § 901 (legislative findings). The

statute itself can and should be read in a manner that allows an award for each level of review, as it speaks in terms of “a court’s” assessment of an agency’s justification for acting. RCW 4.84.350(1). As the Court of Appeals itself recognized in affirming the fee award below, 138 Wn. App. At 564, ¶ 23, this is a determination that may be different in the superior and appellate courts, and that as a matter of policy requires that each level of review be subject to a fee award.

There is no appellate decision addressing the effect of the limitation in RCW 4.84.350(2) directly. In ***Alpine Lakes Protection Society v. Washington State Dep’t of Natural Resources***, 102 Wn. App. 1, 20, 979 P.2d 929 (1999), Division One remanded for an award of fees, noting in dicta “the total fees for judicial review and the trial and appellate court levels not to exceed the statutory cap of \$25,000.” In ***Alpine Lakes***, however, the private party did not wholly prevail, and the award at trial had been limited to \$7500.

Several other cases grant fees on appeal to substantially prevailing parties under RCW 4.84.350, but the amount or any limitation on fees is not discussed in the opinions. ***Nor-Pac Enterprises, Inc. v. Dep’t of Licensing***, 129 Wn. App. 556, 572 ¶¶ 28, 30, 119 P.3d 889 (2005); ***Moen v. Spokane Police Dep’t***, 110

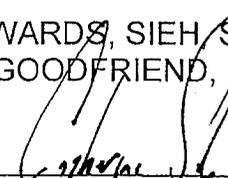
Wn. App. 714, 722, 42 P.3d 456 (2002); ***Eidson v. Dep't of Licensing***, 108 Wn. App. 712, 731, 32 P.3d 1039 (2001); ***Hunter v. University of Washington***, 101 Wn. App. 283, 294, 2 P.3d 1022 (2000), *rev. denied*, 142 Wn.2d 1021 (2001). Neither ***Alpine Lakes*** nor any other case considers or decides the issue raised by this petition whether the limitation of RCW 4.84.350(2) applies at each level of review, particularly when DSHS has instituted the appellate court proceedings for which additional fees are sought.

F. Conclusion.

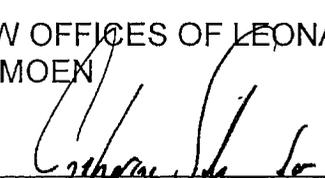
Given the express purpose of the Washington EAJA to reimburse parties who find themselves required to incur substantial expenses "in securing the vindication of their rights in administrative proceedings," the Court should accept review under RAP 13.4(b)(4), interpret RCW 4.84.350's \$25,000 limit on fees to apply to only the first level of "judicial review of an agency action," reinstate the fee award in Division One, and award petitioner her fees and costs in this Court.

Dated this 12th day of November, 2007.

EDWARDS, SIEH, SMITH
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 13, 2007, I arranged for service of the foregoing Petition for Review to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-mail
Carol Farr Law Offices of Leonard W. Moen 1107 S.W. Grady Way, Suite 100 Renton, WA 98055-1217	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Michael Collins Assistant Attorney General Office of the Attorney General 800 Fifth Avenue #2000 Seattle WA 98104	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 13th day of November, 2007.



Daniel F. King

APPENDICES

TITLE OF DOCUMENT	APPENDIX
Court of Appeals, Division I Unpublished Opinion, filed January 29, 2007	App. A
Order Granting Motion for Reconsideration and Amending Opinion, entered May 3, 2007	App. B
<i>Costanich v. WA State DSHS</i> , 138 Wn. App 547, 156 P.3d 232 (2007)	App. C
Appellate Court Commissioner Richard D. Johnson's Notation Ruling on Attorney Fees & Costs, entered June 22, 2007	App. D
Order Granting Motion to Modify, entered October 12, 2007	App. E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHIE COSTANICH,)	
)	No. 57214-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
WASHINGTON STATE DEPARTMENT)	
OF SOCIAL AND HEALTH SERVICES,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 29, 2007

AGID, J. -- Kathie Costanich and her husband Ken were foster parents devoted to caring for some of the neediest and most difficult foster children in the system. Costanich's foster home received accolades from the state, but she also regularly used profanity, sometimes swearing around her foster children. The Department of Social and Health Services (DSHS) found that Costanich's language was emotionally abusive and revoked her foster care license. Both the Administrative Law Judge (ALJ) and the superior court disagreed, concluding that Costanich's language did not constitute emotional abuse and did not justify revocation of her license. But the DSHS review judge substituted his own view of the evidence for that of the ALJ, based primarily on the hearsay testimony and reports of the Child Protective Services (CPS) investigator, and upheld the abuse finding and the revocation. Because the review judge exceeded

his authority under DSHS hearing rules, we agree with the superior court and the ALJ and reverse his decision.

FACTS

Costanich was a licensed foster parent in Washington for over 20 years. Her license allowed her to provide foster care for up to six children at a time, and she sometimes had waivers to care for additional children. All of these children had been victims of abuse or neglect and many had severe behavioral, developmental, and medical problems. She specialized in violent, sexually aggressive youth (SAY) and medically fragile infants. Costanich was also the president of Foster Parents of Washington State (FPAWS) and a trainer for DSHS. Before the abuse allegations, the most recent state evaluation described the Costanich foster home as a "unique and valuable resource . . . unsurpassed by any foster home in the State."

During the summer of 2001, DSHS investigated an allegation that Costanich emotionally and physically abused her foster children, based on what K, one of her foster children, told his therapist.¹ At the time of the investigation, Costanich had six foster children living in her home: F (17), K (15), J (12), P (10), and two sisters, E (8) and B (4). Sandra Duron investigated the allegations for CPS and reported there was inconclusive evidence of physical abuse, but the emotional abuse allegations were "founded." This finding was based primarily on two specific incidents. K claimed that Costanich said "I'll kill you bastard" to F, when she had to pull him off one of her female aides. The aide and F had gotten into an altercation because F was spying on her while

¹ In order to protect the privacy of the foster children, we refer to them by their first initials.

she was sunbathing. K also said Costanich told P, the only African-American child in the house, to move his "black ass." Additionally, he alleged Costanich had a general habit of swearing at the children and had called E a "cunt." Later investigation resulted in allegations that Costanich also called E a "bitch." On March 14, 2002, DSHS informed Costanich that it upheld the finding of emotional abuse after an internal review. On August 16, 2002, DSHS revoked Costanich's foster care license based primarily on this finding of abuse.

Costanich appealed both the finding of abuse and the revocation of her license in an administrative hearing. The ALJ overturned DSHS' decision, finding that the children had not been emotionally abused and were, in fact, "thriving" based on their therapists' and social workers' testimony. DSHS appealed this decision to the DSHS Board of Appeals. The review judge reversed the ALJ's initial decision. He found there was substantial evidence that Costanich had threatened to kill F, told P to move his "black ass," called E names, and swore at the children in her home. The review judge concluded this constituted emotional abuse and justified revoking her license. Costanich sought judicial review, and the superior court reversed the review judge's final administrative decision. The court awarded Costanich attorney fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350. DSHS appeals.

DISCUSSION

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of final agency action.² When reviewing an agency action, we sit in the same position as the superior court, applying the standards of the APA directly to the record before the agency.³ There are a number of statutory bases for setting aside an administrative decision, including: (1) the decision is not based on substantial evidence; (2) the agency has erroneously interpreted or applied the law; (3) the agency failed to follow a prescribed procedure; or (4) the order is inconsistent with a rule of the agency.⁴ The party challenging an agency's decision has the burden of establishing error.⁵

I. Authority of the Review Judge

The primary issue in this case is what level of deference the review judge owed the ALJ. DSHS relies on Tapper v. Employment Sec. Dep't for the proposition that the review judge has the power to make his or her own factual findings and to modify or set aside the findings of the ALJ.⁶ But Tapper was not a DSHS case. Here, DSHS hearing rules delineate the authority of the review judge, and DSHS is bound by those rules.⁷ WAC 388-02-0600(1) states that in licensing and similar administrative cases, the

² RCW 34.05.510; Conway v. Dep't of Soc. & Health Servs., 131 Wn. App. 406, 414, 120 P.3d 130 (2005) (citing Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)).

³ Conway, 131 Wn. App. at 414.

⁴ RCW 34.05.570(3).

⁵ RCW 34.05.570(1)(a); RCW 34.05.574(1).

⁶ Tapper, 122 Wn.2d 397, 404, 858 P.2d 494 (1993).

⁷ Deffenbaugh v. Dep't of Soc. & Health Servs., 53 Wn. App. 868, 871, 770 P.2d 1084 (1989).

review judge has the same decision-making authority as an ALJ.⁸ But, in all other cases, the review judge cannot change the ALJ's hearing decision unless:

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

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

(c) The decision includes errors of law;

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

(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.⁹

This standard requires significant deference to the ALJ, which is appropriate because an independent ALJ hears the case to "insure that the contestant has a fair and impartial fact finder."¹⁰ If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be superfluous. As we explained in Deffenbaugh v. Dep't of Soc. & Health Servs., when considering a similarly-worded earlier version of the hearing rules, this deferential standard is "analogous" to appellate court review of a trial court's decision.¹¹

DSHS fails to address WAC 388-02-0600(2) and essentially argues this case should be treated as a licensing case under WAC 388-02-600(1), the section that gives the review judge wide latitude to substitute his own evidentiary findings and legal conclusions for those of the ALJ. But DSHS predicated its decision to revoke

⁸ The other types of cases in which the review judge the same authority as the ALJ are certification and related fines, rate-making, and parent address disclosure. WAC 388-02-0600(1).

⁹ WAC 388-02-0600(2).

¹⁰ Deffenbaugh, 53 Wn. App. at 871.

¹¹ 53 Wn. App. 868, 871, 770 P.2d 1084 (1989).

Costanich's license on a formal finding that she had emotionally abused the children. Findings of abuse are separate from licensing decisions and require the review judge to use the more deferential standard of WAC 388-02-0600(2).¹² DSHS cannot now argue that the licensing standard should apply to the abuse finding merely because the two decisions were reviewed together. This is particularly true because DSHS predicated the license revocation on its finding of abuse. There was no independent basis for the revocation. Thus, the review judge should have applied the standard of review for abuse cases, WAC 388-02-0600(2).

II. Factual Findings

Under WAC 388-02-600(2), the review judge was justified in substituting his factual findings for those of the ALJ only if the ALJ's factual findings were not supported by substantial evidence or if the ALJ failed to make an essential factual finding. Substantial evidence is that which is "sufficient to persuade a reasonable person that the declared premise is true."¹³ The reviewing agency or court must accept the fact finder's "views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."¹⁴ While hearsay is admissible in the administrative context, under WAC 388-02-0475(3) the fact-finder may only base a finding on hearsay evidence if he or she finds that "the parties had the opportunity to question or contradict it."

¹² See WAC 388-02-0215(l)-(m) (listing abuse findings and licensing decisions as two separate kinds of decisions for which a party may seek review).

¹³ Alberston's, Inc. v. Employment Sec. Dep't, 102 Wn. App. 29, 36, 15 P.3d 153 (2000) (citing Galvin v. Employment Sec. Dep't, 87 Wn. App. 634, 640-41, 942 P.2d 1040 (1997), review denied, 134 Wn.2d 1004 (1998)).

¹⁴ Freeburg v. City of Seattle, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993).

Here, the review judge purported to apply the correct standard, reciting that the ALJ's findings needed to be changed because they were not supported by substantial evidence and the ALJ failed to make an essential factual finding. The ALJ found that, although Costanich used profanity around the children, her swearing was "never directed at the children." He also found that she told P to move his "black ass." There was substantial evidence for these findings. He based them solely on the testimony of the adult witnesses at the hearing, including the children's therapists and the aides who worked in the Costanich home. The ALJ explicitly chose not to rely on the CPS investigator's hearsay statements about what the children told her. In contrast, the review judge based his decision to uphold the revocation of Costanich's license on four factual findings: (1) Costanich's telling F, "I'll kill you bastard," (2) telling P to move his "black ass," (3) calling E a "bitch" and a "cunt," and (4) swearing at the children. The review judge added findings one and three, and finding four is in direct conflict with the ALJ's characterization of Costanich's swearing. The propriety of these three findings is at the core of Costanich's appeal.

Costanich argues that the DSHS review judge erred by reversing the ALJ's decision because he substituted his own factual findings for the ALJ's and relied on hearsay evidence that the ALJ specifically found lacked credibility. The review judge's three contested findings are all based primarily on the CPS investigators' hearsay statements which the ALJ found not credible.

The review judge relied heavily on the investigator's claim that she took near-verbatim notes from her interviews with E, F, and K, none of whom testified before the ALJ. The review judge stated: "[T]he undersigned presumes that the statements of the

children reported in Ms. Duron's near-verbatim notes are the words of the children rather than the interpretation or summary of Ms. Duron." But Duron herself admitted that she did not always take near-verbatim notes, stating on cross-examination that K "wouldn't say much, so I just kind of summarized what he was saying." Duron conducted all but one of her interviews with the children without a third person present and did not record any of the interviews. The only documentary evidence of the interviews in the administrative record is her Service Episode Reports (SERs), which represent the data she entered into the computer from her handwritten notes. The original near-verbatim notes were not produced at the hearing. And the SERs show that she put words in the mouth of at least one of the children. When interviewing J, Duron asked "When you say[], 'go to your fucken [sic] room' whom does she [Costanich] say that to[]?" But J never claimed Costanich said that. Additionally, even the review judge acknowledged that there were a number of problems with Duron's reporting of her conversations with adults, including that she made up the statement of one witness and misquoted a number of others. The review judge acknowledged that Duron's reports of her interviews with adults were incredible, but assumed that her interviews with the children were accurate "near verbatim" recordings simply because she said so. The review judge's decision to give greater weight to Duron's hearsay testimony than to all the other witnesses who testified before the ALJ is clearly inappropriate under WAC 388-02-0600(2).

Costanich also argues that the review judge failed to "give due regard" to the ALJ's opportunity to observe the witnesses, as required by RCW 34.05.464(4). The review judge justified this lack of deference by asserting that the ALJ "failed to record

any observations about 48 of the 49 witnesses.”¹⁵ This is a misreading of the record. While the ALJ specifically recorded the demeanor of only one witness, four pages of his decision are devoted to a section entitled “Credibility of Witnesses.” In that section, the ALJ explicitly based his decision only on the testimony of the witnesses at the hearing, not on Duron’s reports and hearsay statements. He found it was impossible to determine whether she was “taking the answers out of context or to know whether or not the answering party fully understood the nature of the question being asked.” He also found K’s statements as recorded by his therapist lacking in credibility. The review judge not only ignored the ALJ’s credibility determinations, he also chose to base his decision on the very evidence the ALJ rejected as lacking credibility, the testimony of the CPS investigator and K’s hearsay statements to his therapist. The review judge substituted his own view of the evidence for the ALJ’s findings which are supported by substantial evidence. This is clearly error under the deferential standard that applies to appeals from the ALJ’s decision about abuse allegations.

The review judge also asserted that it was necessary to add his finding that Costanich called E names because the ALJ did not make a specific finding that Costanich did not call E a “bitch” or a “cunt.” But the absence of a finding does not mean that the ALJ omitted a finding directly contrary to his other findings. Although Constanich admitted swearing when speaking to the children, the ALJ found that she did not direct her swearing at the children. Based on the non-hearsay testimony of all the adult witnesses, we conclude this finding meant that her swearing was not used to discipline, demean, or shame the children, but rather was just part of her vocabulary.

¹⁵ (Emphasis omitted.) See RCW 34.05.461(3) (requiring ALJ to identify “findings based substantially on credibility of evidence or demeanor of witnesses”).

Certainly, calling a child "bitch" or "cunt" would be considered swearing directed at the children. Thus, the ALJ's factual finding that Costanich did not direct her swearing at the children necessarily encompasses the worst of the statements the review judge attributes to her, including calling E names. The review judge also added a finding that Costanich said "fuck you" to the children. This would have been classified as swearing directed at the children. As with his finding that Constanich called E names, this finding was also based solely on the hearsay statements Duron reported and is not "consistent with the ALJ's findings that are supported by substantial evidence."¹⁶ Because the review judge based his additional, contradictory factual findings solely on hearsay evidence the ALJ rejected as lacking credibility, we hold the review judge acted outside the scope his authority under WAC 388-02-0600(2) in adding them.

III. Error of Law

Under WAC 388-02-0600(2)(c), a review judge may change an ALJ's decision if it includes an error of law. As we noted earlier, this standard is analogous to an appellate court's standard of review.¹⁷ In reversing the ALJ and ruling that Costanich's language toward her foster children constituted emotional abuse and violated foster care licensing regulations, the review judge stated that the ALJ made two errors of law: (1) he required evidence of actual harm, when only a "substantial risk" of harm is necessary to prove emotional abuse and (2) he failed to find that swearing violates WAC 388-148-0470, a foster care licensing regulation.

¹⁶ WAC 388-02-0600(2)(e).

¹⁷ Deffenbaugh, 53 Wn. App. at 871.

A. Emotional Abuse

The review judge concluded that Costanich's language toward the children constituted emotional abuse under the regulation in effect at the time, former WAC 388-15-130(3), which provides in relevant part:

Abusive, neglectful, or exploitative acts defined in RCW 26.44.020 . . .

. . . .
(d) Committing acts which are cruel or inhumane regardless of observable injury. Such acts include, but are not limited to, instances of extreme discipline demonstrating a disregard of a child's pain and/or mental suffering.

. . . .
(g) Engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child.^[18]

Because there was no actual observable injury to the children, the ALJ had to determine whether telling an African-American child to move his "black ass" or swearing around the children was either cruel and inhumane or posed a "substantial risk" to the mental health or development of the children. Unfortunately, there is no case law interpreting former WAC 388-15-130(3) or providing examples of language that would create a substantial risk to the mental health of a child. But even Duron, the CPS investigator, who regularly decides what is and is not abusive, admitted that cursing at one's children is not per se abusive and that the language must be considered in context. Accordingly, the ALJ looked to the context of the language and considered the testimony of all of the medical professionals and social workers who had direct contact with the children as well as the DSHS experts who testified but had not interviewed the children. He found:

¹⁸ Former WAC 388-15-130(3) (2001), repealed by WSR 02-15-098 and 02-17-045 (effective February 10, 2003). The current version of this regulation, WAC 388-15-009(5), is similarly worded.

None of the experts who provided testimony on behalf of DSHS could say with any degree of certainty that there was a risk of harm. They spoke in terms of possibility not in terms of likelihood. All of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment. This is clearly a statement that the use of profanity around these children did not constitute a risk of harm because there was no harm.

It is clear from this statement that the ALJ found there was no "substantial risk" to the children from Costanich's use of profanity. But his last sentence, evaluating the risk of harm in the context of actual harm, is a misstatement of the law. The ALJ made several erroneous statements of this nature. Had the ALJ left out these statements, his opinion would have been unassailable. But despite his occasional recitation of the wrong standard, his ultimate conclusion that the evidence does not support a finding of "substantial risk" of harm, is legally sound. Because WAC 388-02-0600(2) imposes an appellate standard of review on the DSHS review judge, the mere recitation of the wrong standard in a few places by the ALJ does not warrant reversal where the ultimate legal conclusions were supported by the findings and those findings were based on substantial evidence.

B. Violation of Foster Care Licensing Regulation

The review judge asserted that the ALJ erred by failing to find that Costanich violated WAC 388-148-0470, which prohibits discipline that is "cruel, unusual, frightening, unsafe or humiliating" and lists "name calling," and "threatening" as two practices which are per se violations of foster care licensing regulations. The review judge erred in reversing the ALJ's conclusion because he relied primarily on his own additional findings, that Costanich called E names and threatened F, which he lacked the authority to add under WAC 388-02-0600(2).

He also ruled that the ALJ erred in finding that swearing does not constitute humiliating discipline because under Morgan v. Dep't of Soc. & Health Servs.,¹⁹ "the use of profanity alone is sufficient to prove a violation." This is an unwarranted extension of the holding in Morgan. There, the court said the way in which Morgan used profanity was humiliating discipline, not that all profanity constitutes a per se violation.²⁰ In Morgan, the court did not explain how Morgan's swearing was humiliating for the children and did not specify exactly which statements it considered humiliating. The only specific allegation mentioned in Morgan is that the foster parent told one of the children to stop "acting like a little bitch."²¹ While this is similar to the allegation that Costanich called E a "bitch," that allegation was not proven. Further, the conclusion that all swearing is a violation of WAC 388-148-0470, is undercut by the fact that swearing is not on the list of per se violations. Thus the review judge erred in reversing the ALJ's decision that Costanich's swearing did not constitute humiliating discipline in violation of WAC 388-148-0470.

IV. Attorney Fees

The superior court awarded Costanich attorney fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350, which provides in relevant part:

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. . . .

¹⁹ 99 Wn. App. 148, 992 P.2d 1023 (2000).

²⁰ Id. at 155.

²¹ Id. at 151.

DSHS argues Costanich was not entitled to attorney fees because it was “substantially justified” in finding her language toward her foster children constituted emotional abuse and revoking her foster care license. “[A]gency action is substantially justified if it has a reasonable basis both in law and fact.”²² We review a determination that agency action was not substantially justified for abuse of discretion.²³ A court abuses its discretion when it bases its decision on untenable grounds or reasons.²⁴

The superior court awarded Costanich attorney fees primarily because it found that the DSHS review judge exceeded the scope of his power in reversing the ALJ. While this is true, it is not an appropriate basis for an award of fees under the EAJA. The act does not apply to the decision of a purely adjudicative body rendered in the course of an adjudicatory proceeding.²⁵ The superior court should have based its decision on DSHS' actions, not those of the review judge. DSHS was justified initially in its concerns that Costanich's use of profanity could constitute emotional abuse or violated foster care licensing regulations. It was only after the evidence on both sides was examined in an open hearing before the ALJ that its factual errors became evident. Thus, it was not unreasonable for DSHS to believe that its position was correct. As such, the agency was substantially justified in its initial revocation action, and the trial court could not award Costanich attorney fees. For the same reason, Costanich is not entitled to attorney fees on appeal under RAP 18.1.

²² H & H P'ship v. State, 115 Wn. App. 164, 171, 62 P.3d 510 (2003) (citing Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

²³ Id. (citing Alpine Lakes Prot. Soc'y v. Dep't of Natural Res., 102 Wn. App. 1, 19, 979 P.2d 929 (1999)).

²⁴ Cobra Roofing Serv. v. Dep't of Labor & Indus., 122 Wn. App. 402, 420, 97 P.3d 17 (2004) (citing Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)), aff'd, 157 Wn.2d 90, 135 P.3d 913 (2006).

²⁵ Duwamish Valley Neighborhood Pres. Coalition v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 97 Wn. App. 98, 100, 982 P.2d 668 (1999).

We set aside the DSHS review judge's decision and reinstate the ALJ's decision.
But we reverse the superior court's decision to award Costanich attorney fees.

Ajda, J.

WE CONCUR:

Appelwick, J.

Cox, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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May 3, 2007

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CASE #: 57214-8-1
Kathie Costanich, Respondent v. DSHS, Appellant
King County No. 04-2-23203-1 KNT

Counsel:

Enclosed please find a copy of the order granting motion for reconsideration and amending opinion entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Page 2 of 2
57214-8-I, Kathie Costanich v. DSHS
May 3, 2007

For counsel's information, the Supreme Court has determined that a filing fee of \$200.00 will be required in that court.

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. Richard F. McDermott
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KATHIE COSTANICH,)	
)	No. 57214-8-I
Respondent,)	
)	ORDER GRANTING MOTION
v.)	FOR RECONSIDERATION
)	AND AMENDING OPINION
WASHINGTON STATE DEPARTMENT)	
OF SOCIAL AND HEALTH SERVICES,)	
)	
Appellant.)	
_____)	

Respondent, Kathie Costanich, having filed a motion for reconsideration of the opinion filed January 29, 2007; appellants, Department of Social & Health Services, having filed a response to respondent's motion for reconsideration; respondent having filed a reply to appellant's response to respondent's motion for reconsideration; and the court having determined that said motion should be granted; Now therefore it is hereby

ORDERED that respondent's motion for reconsideration is granted and the opinion be amended as follows:

DELETE section IV, which begins on page 13 and ends on page 15, entitled "Attorney Fees."

REPLACE section IV with the following:

IV. Attorney Fees

The superior court awarded Costanich attorney fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350, which provides in relevant part:

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. . . .

DSHS argues Costanich was not entitled to attorney fees because it was "substantially justified" in finding her language toward her foster children constituted emotional abuse and revoking her foster care license. "[A]gency action is substantially justified if it has a reasonable basis both in law and fact."²² We review a determination that agency action was not substantially justified for abuse of discretion.²³ A court abuses its discretion when it bases its decision on untenable grounds or reasons.²⁴

The superior court awarded Costanich attorney fees, finding that DSHS' actions were not substantially justified primarily because the DSHS review judge exceeded the scope of his power in reversing the ALJ. Although there are no cases holding that a DSHS review judge's decision falls within the definition of "agency action" for purposes of granting fees under the EAJA, the statutes defining agency action support such an award. RCW 4.84.340 states that "agency action" is defined by chapter 34.05 RCW. While RCW 34.05.010(3) does not specifically include or exclude adjudicative proceedings from the definition of agency action, a review board that conducts adjudicative proceedings falls within RCW 34.05.010(2)'s definition of what constitutes an "agency." In Muckleshoot Indian Tribe v. Dept. of Ecology, we held that the APA's definition of "agency action" must be applied broadly.²⁵ Thus, we hold that the review judge's decision constitutes agency action because he is part of the agency and his actions are not expressly excluded from the definition of "agency action."

Additionally, although DSHS was justified initially in its concerns about Costanich's use of profanity, the evidence before the ALJ shows that DSHS was not substantially justified in revoking her license once it became aware of the problems with Duron's investigation.

We conclude there was no abuse of discretion and affirm the superior court's award of fees. For the same reasons, Costanich is entitled to attorney fees on appeal under RAP 18.1.

We set aside the DSHS review judge's decision and reinstate the ALJ's decision. We affirm the superior court's decision to award

²² H & H P'ship v. State, 115 Wn. App. 164, 171, 62 P.3d 510 (2003) (citing Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

²³ Id. (citing Alpine Lakes Prot. Soc'y v. Dep't of Natural Res., 102 Wn. App. 1, 19, 979 P.2d 929 (1999)).

²⁴ Cobra Roofing Serv. v. Dep't of Labor & Indus., 122 Wn. App. 402, 420, 97 P.3d 17 (2004) (citing Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)), aff'd, 157 Wn.2d 90, 135 P.3d 913 (2006).

²⁵ 112 Wn. App. 712, 722, 50 P.3d 668 (2002), review denied, 150 Wn.2d 1016 (2003).

Costanich attorney fees and award attorney fees on appeal on the same grounds.

DATED this 3rd day of may 2007.

Agid, J.

Appelwick, J.

COX, J.

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(Cite as: 138 Wash.App. 547, 156 P.3d 232)

▷
Costanich v. Washington State Dept. of Social and
Health Services
Wash.App. Div. 1, 2007.

Court of Appeals of Washington, Division 1.
Kathie COSTANICH, Respondent,

v.

WASHINGTON STATE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES, Appellant.
No. 57214-8-I.

Jan. 29, 2007.

Publication Ordered April 18, 2007.

As Amended on Reconsideration May 3, 2007.

Background: Department of Social and Health Services (DSHS) revoked foster mother's license after finding that she emotionally abused foster children through her use of profanity. Foster mother appealed. An ALJ overturned DSHS's decision. DSHS appealed. A review judge of the DSHS Board of Appeals reversed the ALJ's decision. Foster mother sought judicial review. The Superior Court, King County, Richard F. McDermott, J., reversed review judge's decision and awarded foster mother attorney fees under Equal Access to Justice Act (EAJA). DSHS appealed.

Holdings: The Court of Appeals, Agid, J., held that:

(1) review judge was required to apply deferential standard of review for abuse cases, in reviewing ALJ's decision;

(2) review judge failed to apply deferential standard of review; and

(3) decision by reviewing judge qualified as "agency action" under the EAJA.

Superior Court's decision affirmed.

West Headnotes

[1] **Administrative Law and Procedure 15A** ↪
651

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(A) In General

15Ak651 k. In General. Most Cited Cases
Administrative Procedure Act (APA) governs
judicial review of final agency action. West's
RCWA 34.05.510.

[2] **Administrative Law and Procedure 15A** ↪
683

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(A) In General

15Ak681 Further Review

15Ak683 k. Scope. Most Cited Cases
When reviewing an administrative agency action,
appellate court sits in the same position as the
superior court, applying the standards of the
Administrative Procedure Act (APA) directly to the
record before the agency. West's RCWA 34.05.001
et seq.

[3] **Infants 211** ↪17

211 Infants

211II Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

Department of Social and Health Services (DSHS)
hearing rules delineate the authority of the review
judge of the DSHS Board of Appeals, and DSHS is
bound by those rules. WAC 388-02-0600(1, 2).

[4] **Infants 211** ↪226

211 Infants

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App. C

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138 Wash.App. 547, 156 P.3d 232
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211VIII Dependent, Neglected, and Delinquent Children

211VIII(E) Judgment; Disposition of Child

211k226 k. Foster or Adoptive Homes, Placement To. Most Cited Cases

Review judge of Department of Social and Health Services (DSHS) Board of Appeals, in reviewing ALJ's decision overturning DSHS's decision finding that foster mother emotionally abused foster children and revoking her license, was required to apply deferential standard of review for abuse cases, rather than standard of review for licensing cases, which permitted review judge wide latitude to substitute his own evidentiary findings and legal conclusions for those of the ALJ, as DSHS predicated revocation of foster mother's license on formal finding that she had emotionally abused foster children, and findings of abuse were separate from licensing decisions and required review judge to use more deferential standard of review. WAC 388-02-0600(1, 2).

[5] Administrative Law and Procedure 15A 791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 k. Substantial Evidence.

Most Cited Cases

"Substantial evidence" is that which is sufficient to persuade a reasonable person that the declared premise is true.

[6] Administrative Law and Procedure 15A 787

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak787 k. Credibility. Most Cited

Cases

Administrative Law and Procedure 15A 789

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak789 k. Inferences or Conclusions from Evidence in General. Most Cited Cases

Administrative Law and Procedure 15A 793

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak793 k. Weight of Evidence. Most Cited Cases

Reviewing administrative agency or court must accept the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

[7] Infants 211 226

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(E) Judgment; Disposition of Child

211k226 k. Foster or Adoptive Homes, Placement To. Most Cited Cases

Review judge of Department of Social and Health Services (DSHS) Board of Appeals, in reviewing ALJ's decision overturning DSHS's decision finding that foster mother emotionally abused foster children and revoking her license, failed to apply deferential standard of review that applied to DSHS's appeal from ALJ's decision, as required by administrative rule, or to give "due regard" to the ALJ's opportunity to observe witnesses, as required by statute, as review judge gave greater weight to DSHS investigator's hearsay testimony than to all the other witnesses who testified before ALJ, he substituted his own view of the evidence for the ALJ's findings, which were supported by substantial evidence, and he based his additional, contradictory factual findings solely on hearsay evidence the ALJ rejected as lacking credibility. West's RCWA 34.05.464(4); WAC 388-02-0600(2).

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[8] Infants 211 ↪226

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(E) Judgment; Disposition of Child

211k226 k. Foster or Adoptive Homes, Placement To. Most Cited Cases

Even though ALJ recited wrong standard of what constitutes "emotional abuse" as defined by administrative regulation in a few places in his opinion in determining that there was no substantial risk to foster children from foster mother's use of profanity, such recitations did not warrant reversal of ALJ's decision overturning DSHS's decision finding that foster mother emotionally abused foster children and revoking her license, as ALJ's ultimate legal conclusions were supported by his findings, and his findings were based on substantial evidence. WAC 388-02-0600(2), 388-148-0470.

[9] Infants 211 ↪226

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(E) Judgment; Disposition of Child

211k226 k. Foster or Adoptive Homes, Placement To. Most Cited Cases

Review judge of Department of Social and Health Services (DSHS) Board of Appeals, in reviewing ALJ's decision overturning DSHS's decision finding that foster mother emotionally abused foster children by her use of profanity and revoking her license, lacked authority to reverse ALJ's conclusion that foster mother had not violated foster care regulation prohibiting discipline that is "cruel, unusual, frightening, unsafe or humiliating," as review judge relied primarily on his additional findings to do so, which findings he lacked authority to add under administrative regulation requiring him to apply deferential standard of review. WAC 388-02-0600(2), 388-148-0470.

[10] States 360 ↪215

360 States

360VI Actions

360k215 k. Costs. Most Cited Cases

For purposes of attorney fee provision of Equal Access to Justice Act (EAJA), which permits award of fees to qualified prevailing party in judicial review of an administrative agency action unless agency action was "substantially justified," an agency's action is "substantially justified" if it has a reasonable basis both in law and fact. West's RCWA 4.84.350(1).

[11] States 360 ↪215

360 States

360VI Actions

360k215 k. Costs. Most Cited Cases

Abuse of discretion standard is applied to review of trial court's determination that administrative agency action was not substantially justified, for purposes of attorney fee provision of Equal Access to Justice Act (EAJA), which permits award of fees to qualified prevailing party in judicial review of an agency action unless agency action was "substantially justified." West's RCWA 4.84.350(1).

[12] Courts 106 ↪26

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k26 k. Scope and Extent of Jurisdiction in General. Most Cited Cases

A court abuses its discretion when it bases its decision on untenable grounds or reasons.

[13] Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

Infants 211 ↪226

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(E) Judgment; Disposition of Child

211k226 k. Foster or Adoptive Homes, Placement To. Most Cited Cases

Decision by reviewing judge of the Department of

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Social and Health Services (DSHS) Board of Appeals, which reversed ALJ's decision overturning administrative revocation of foster mother's license, qualified as "agency action" under the Equal Access to Justice Act (EAJA), and thus, finding that reviewing judge's decision exceeded scope of his power supported award of attorney fees on ground that actions of DSHS were not substantially justified, even if DSHS was initially justified in investigator's concern over foster mother's use of profanity, errors became evident. West's RCWA 4.84.350(1).

****234** Michael W. Collins, Attorney at Law, Seattle, WA, for Appellant.
David Ruzumna, Carly Cozine Hansen, Seattle, for Other Party Valerie Rogan.
Carol Farr, The Law Offices of Leonard W. Moen & Asso., Renton, WA, for Respondent.
AGID, J.

***551** ¶ 1 Kathie Costanich and her husband Ken were foster parents devoted to caring for some of the neediest and most difficult foster children in the system. Costanich's foster home received accolades from the state, but she also regularly used profanity, sometimes swearing around her foster children. The Department of Social and Health Services (DSHS) found that Costanich's language ***552** was emotionally abusive and revoked her foster care license. Both the Administrative Law Judge (ALJ) and the superior court disagreed, concluding that Costanich's language did not constitute emotional abuse and did not justify revocation of her license. But the DSHS review judge substituted his own view of the evidence for that of the ALJ, based primarily on the hearsay testimony and reports of the Child Protective Services (CPS) investigator, and upheld the abuse finding and the revocation. Because the review judge exceeded his authority under DSHS hearing rules, we agree with the superior court and the ALJ and reverse his decision.

FACTS

¶ 2 Costanich was a licensed foster parent in Washington for over 20 years. Her license allowed

her to provide foster care for up to six children at a time, and she sometimes had waivers to care for additional children. All of these children had been victims of abuse or neglect and many had severe behavioral, developmental, and medical problems. She specialized in violent, sexually aggressive youth (SAY) and medically fragile infants. Costanich was also the president of Foster Parents of Washington State (FPAWS) and a trainer for DSHS. Before the abuse allegations, the most recent state evaluation described the Costanich foster home as a "unique and valuable resource ... unsurpassed by any foster home in the State."

****235** ¶ 3 During the summer of 2001, DSHS investigated an allegation that Costanich emotionally and physically abused her foster children, based on what K, one of her foster children, told his therapist.^{FN1} At the time of the investigation, Costanich had six foster children living in her home: F(17), K(15), J(12), P(10), and two sisters, E(8) and B(4). Sandra Duron investigated the allegations for CPS and reported there was inconclusive evidence of physical ***553** abuse, but the emotional abuse allegations were "founded." This finding was based primarily on two specific incidents. K claimed that Costanich said "I'll kill you bastard" to F, when she had to pull him off one of her female aides. The aide and F had gotten into an altercation because F was spying on her while she was sunbathing. K also said Costanich told P, the only African-American child in the house, to move his "black ass." Additionally, he alleged Costanich had a general habit of swearing at the children and had called E a "cunt." Later investigation resulted in allegations that Costanich also called E a "bitch." On March 14, 2002, DSHS informed Costanich that it upheld the finding of emotional abuse after an internal review. On August 16, 2002, DSHS revoked Costanich's foster care license based primarily on this finding of abuse.

FN1. In order to protect the privacy of the foster children, we refer to them by their first initials.

¶ 4 Costanich appealed both the finding of abuse

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and the revocation of her license in an administrative hearing. The ALJ overturned DSHS' decision, finding that the children had not been emotionally abused and were, in fact, "thriving" based on their therapists' and social workers' testimony. DSHS appealed this decision to the DSHS Board of Appeals. The review judge reversed the ALJ's initial decision. He found there was substantial evidence that Costanich had threatened to kill F, told P to move his "black ass," called E names, and swore at the children in her home. The review judge concluded this constituted emotional abuse and justified revoking her license. Costanich sought judicial review, and the superior court reversed the review judge's final administrative decision. The court awarded Costanich attorney fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350. DSHS appeals.

DISCUSSION

[1][2] ¶ 5 The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of final *554 agency action.^{FN2} When reviewing an agency action, we sit in the same position as the superior court, applying the standards of the APA directly to the record before the agency.^{FN3} There are a number of statutory bases for setting aside an administrative decision, including: (1) the decision is not based on substantial evidence; (2) the agency has erroneously interpreted or applied the law; (3) the agency failed to follow a prescribed procedure; or (4) the order is inconsistent with a rule of the agency.^{FN4} The party challenging an agency's decision has the burden of establishing error.^{FN5}

FN2. RCW 34.05.510; *Conway v. Dep't of Soc. & Health Servs.*, 131 Wash.App. 406, 414, 120 P.3d 130 (2005) (citing *Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 402, 858 P.2d 494 (1993)).

FN3. *Conway*, 131 Wash.App. at 414, 120 P.3d 130.

FN4. RCW 34.05.570(3).

FN5. RCW 34.05.570(1)(a); RCW 34.05.574(1).

I. Authority of the Review Judge

[3] ¶ 6 The primary issue in this case is what level of deference the review judge owed the ALJ. DSHS relies on *Tapper v. Employment Sec. Dep't* for the proposition that the review judge has the power to make his or her own factual findings and to modify or set aside the findings of the ALJ.^{FN6} But *Tapper* was not a DSHS case. Here, DSHS hearing rules delineate the authority of the review judge, and DSHS is bound by those rules.^{FN7} WAC 388-02-0600(1) states that in licensing and similar administrative cases, the review judge has the same decision-making**236 authority as an ALJ.^{FN8} But, in all other cases, the review judge cannot change the ALJ's hearing decision unless:

FN6. *Tapper*, 122 Wash.2d 397, 404, 858 P.2d 494 (1993).

FN7. *Deffenbaugh v. Dep't of Soc. & Health Servs.*, 53 Wash.App. 868, 871, 770 P.2d 1084 (1989).

FN8. The other types of cases in which the review judge the same authority as the ALJ are certification and related fines, rate-making, and parent address disclosure. WAC 388-02-0600(1).

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

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

(c) The decision includes errors of law;

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

(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be

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consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.^[FN9]

FN9. WAC 388-02-0600(2).

¶ 7 This standard requires significant deference to the ALJ, which is appropriate because an independent ALJ hears the case to "insure that the contestant has a fair and impartial fact finder."^{FN10} If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be superfluous. As we explained in *Deffenbaugh v. Dep't of Soc. & Health Servs.*, when considering a similarly-worded earlier version of the hearing rules, this deferential standard is "analogous" to appellate court review of a trial court's decision.^{FN11}

FN10. *Deffenbaugh*, 53 Wash.App. at 871, 770 P.2d 1084.

FN11. 53 Wash.App. 868, 871, 770 P.2d 1084 (1989).

[4] ¶ 8 DSHS fails to address WAC 388-02-0600(2) and essentially argues this case should be treated as a licensing case under WAC 388-02-600(1), the section that gives the review judge wide latitude to substitute his own evidentiary findings and legal conclusions for those of the ALJ. But DSHS predicated its decision to revoke Costanich's license on a formal finding that she had emotionally abused the children. Findings of abuse are separate from licensing decisions and require the review judge to use the more *556 deferential standard of WAC 388-02-0600(2).^{FN12} DSHS cannot now argue that the licensing standard should apply to the abuse finding merely because the two decisions were reviewed together. This is particularly true because DSHS predicated the license revocation on its finding of abuse. There was no independent basis for the revocation. Thus, the review judge should have applied the standard of review for abuse cases, WAC 388-02-0600(2).

FN12. See WAC 388-02-0215(l)-(m) (listing abuse findings and licensing decisions as two separate kinds of decisions for which a party may seek review).

II. Factual Findings

[5][6] ¶ 9 Under WAC 388-02-600(2), the review judge was justified in substituting his factual findings for those of the ALJ only if the ALJ's factual findings were not supported by substantial evidence or if the ALJ failed to make an essential factual finding. Substantial evidence is that which is "sufficient to persuade a reasonable person that the declared premise is true."^{FN13} The reviewing agency or court must accept the fact finder's "views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."^{FN14} While hearsay is admissible in the administrative context, under WAC 388-02-0475(3) the fact-finder may only base a finding on hearsay evidence if he or she finds that "the parties had the opportunity to question or contradict it."

FN13. *Alberton's, Inc. v. Employment Sec. Dep't*, 102 Wash.App. 29, 36, 15 P.3d 153 (2000) (citing *Galvin v. Employment Sec. Dep't*, 87 Wash.App. 634, 640-41, 942 P.2d 1040 (1997), review denied, 134 Wash.2d 1004, 953 P.2d 95 (1998)).

FN14. *Freeburg v. City of Seattle*, 71 Wash.App. 367, 371-72, 859 P.2d 610 (1993).

[7] ¶ 10 Here, the review judge purported to apply the correct standard, reciting that the ALJ's findings needed to be changed **237 because they were not supported by substantial evidence and the ALJ failed to make an essential factual finding. The ALJ found that, although Costanich used profanity around the children, her swearing was "never *557 directed at the children." He also found that she told P to move his "black ass." There was substantial evidence for these findings. He based them solely on the testimony of the adult witnesses at the hearing, including the children's therapists

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and the aides who worked in the Costanich home. The ALJ explicitly chose not to rely on the CPS investigator's hearsay statements about what the children told her. In contrast, the review judge based his decision to uphold the revocation of Costanich's license on four factual findings: (1) Costanich's telling F, "I'll kill you bastard," (2) telling P to move his "black ass," (3) calling E a "bitch" and a "cunt," and (4) swearing at the children. The review judge added findings one and three, and finding four is in direct conflict with the ALJ's characterization of Costanich's swearing. The propriety of these three findings is at the core of Costanich's appeal.

¶ 11 Costanich argues that the DSHS review judge erred by reversing the ALJ's decision because he substituted his own factual findings for the ALJ's and relied on hearsay evidence that the ALJ specifically found lacked credibility. The review judge's three contested findings are all based primarily on the CPS investigators' hearsay statements which the ALJ found not credible.

¶ 12 The review judge relied heavily on the investigator's claim that she took near-verbatim notes from her interviews with E, F, and K, none of whom testified before the ALJ. The review judge stated: "[T]he undersigned presumes that the statements of the children reported in Ms. Duron's near-verbatim notes are the words of the children rather than the interpretation or summary of Ms. Duron." But Duron herself admitted that she did not always take near-verbatim notes, stating on cross-examination that K "wouldn't say much, so I just kind of summarized what he was saying." Duron conducted all but one of her interviews with the children without a third person present and did not record any of the interviews. The only documentary evidence of the interviews in the administrative record is her Service Episode Reports (SERs), which represent the *558 data she entered into the computer from her handwritten notes. The original near-verbatim notes were not produced at the hearing. And the SERs show that she put words in the mouth of at least one of the children. When interviewing J, Duron asked "When you say [], 'go to your fucken [sic] room' whom does she [Costanich] say that to []?" But J

never claimed Costanich said that. Additionally, even the review judge acknowledged that there were a number of problems with Duron's reporting of her conversations with adults, including that she made up the statement of one witness and misquoted a number of others. The review judge acknowledged that Duron's reports of her interviews with adults were incredible, but assumed that her interviews with the children were accurate "near verbatim" recordings simply because she said so. The review judge's decision to give greater weight to Duron's hearsay testimony than to all the other witnesses who testified before the ALJ is clearly inappropriate under WAC 388-02-0600(2).

¶ 13 Costanich also argues that the review judge failed to "give due regard" to the ALJ's opportunity to observe the witnesses, as required by RCW 34.05.464(4). The review judge justified this lack of deference by asserting that the ALJ "failed to record any observations about 48 of the 49 witnesses." FN15 This is a misreading of the record. While the ALJ specifically recorded the demeanor of only one witness, four pages of his decision are devoted to a section entitled "Credibility of Witnesses." In that section, the ALJ explicitly based his decision only on the testimony of the witnesses at the hearing, not on Duron's reports and hearsay statements. He found it was impossible to determine whether she was "taking the answers out of context or to know whether or not the answering party fully understood the nature of the question being asked." He also found K's statements **238 as recorded by his therapist lacking in credibility. The review judge not only ignored the ALJ's credibility *559 determinations, he also chose to base his decision on the very evidence the ALJ rejected as lacking credibility, the testimony of the CPS investigator and K's hearsay statements to his therapist. The review judge substituted his own view of the evidence for the ALJ's findings which are supported by substantial evidence. This is clearly error under the deferential standard that applies to appeals from the ALJ's decision about abuse allegations.

FN15. (Emphasis omitted.) See RCW 34.05.461(3) (requiring ALJ to identify "

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findings based substantially on credibility of evidence or demeanor of witnesses”).

¶ 14 The review judge also asserted that it was necessary to add his finding that Costanich called E names because the ALJ did not make a specific finding that Costanich did not call E a “bitch” or a “cunt.” But the absence of a finding does not mean that the ALJ omitted a finding directly contrary to his other findings. Although Costanich admitted swearing when speaking to the children, the ALJ found that she did not direct her swearing at the children. Based on the non-hearsay testimony of all the adult witnesses, we conclude this finding meant that her swearing was not used to discipline, demean, or shame the children, but rather was just part of her vocabulary. Certainly, calling a child “bitch” or “cunt” would be considered swearing directed at the children. Thus, the ALJ’s factual finding that Costanich did not direct her swearing at the children necessarily encompasses the worst of the statements the review judge attributes to her, including calling E names. The review judge also added a finding that Costanich said “fuck you” to the children. This would have been classified as swearing directed at the children. As with his finding that Costanich called E names, this finding was also based solely on the hearsay statements Duron reported and is not “consistent with the ALJ’s findings that are supported by substantial evidence.”^{FN16} Because the review judge based his additional, contradictory factual findings solely on hearsay evidence the ALJ rejected as lacking credibility, we hold the review judge acted outside the scope his authority under WAC 388-02-0600(2) in adding them.

FN16. WAC 388-02-0600(2)(e).

**560 III. Error of Law*

¶ 15 Under WAC 388-02-0600(2)(c), a review judge may change an ALJ’s decision if it includes an error of law. As we noted earlier, this standard is analogous to an appellate court’s standard of review.^{FN17} In reversing the ALJ and ruling that Costanich’s language toward her foster children constituted emotional abuse and violated foster care

licensing regulations, the review judge stated that the ALJ made two errors of law: (1) he required evidence of actual harm, when only a “substantial risk” of harm is necessary to prove emotional abuse and (2) he failed to find that swearing violates WAC 388-148-0470, a foster care licensing regulation.

FN17. *Deffenbaugh*, 53 Wash.App. at 871, 770 P.2d 1084.

A. Emotional Abuse

¶ 16 The review judge concluded that Costanich’s language toward the children constituted emotional abuse under the regulation in effect at the time, former WAC 388-15-130(3), which provides in relevant part:

¶ 17 Abusive, neglectful, or exploitative acts defined in RCW 26.44.020...

....

(d) Committing acts which are cruel or inhumane regardless of observable injury. Such acts include, but are not limited to, instances of extreme discipline demonstrating a disregard of a child’s pain and/or mental suffering.

....

(g) Engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child.^{[[[FN18]]]}

FN18. Former WAC 388-15-130(3) (2001), *repealed by* WSR 02-15-098 and 02-17-045 (effective February 10, 2003). The current version of this regulation, WAC 388-15-009(5), is similarly worded.

Because there was no actual observable injury to the children, the ALJ had to determine whether telling an *561 African-American child to move his “black ass” or swearing around the children was either cruel and inhumane or posed a “substantial risk” to the mental health or development of the children. Unfortunately, there is no case law

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interpreting former WAC 388-15-130(3) or providing examples**239 of language that would create a substantial risk to the mental health of a child. But even Duron, the CPS investigator, who regularly decides what is and is not abusive, admitted that cursing at one's children is not per se abusive and that the language must be considered in context. Accordingly, the ALJ looked to the context of the language and considered the testimony of all of the medical professionals and social workers who had direct contact with the children as well as the DSHS experts who testified but had not interviewed the children. He found: None of the experts who provided testimony on behalf of DSHS could say with any degree of certainty that there was a risk of harm. They spoke in terms of possibility not in terms of likelihood. All of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment. This is clearly a statement that the use of profanity around these children did not constitute a risk of harm because there was no harm.

[8] ¶ 18 It is clear from this statement that the ALJ found there was no "substantial risk" to the children from Costanich's use of profanity. But his last sentence, evaluating the risk of harm in the context of actual harm, is a misstatement of the law. The ALJ made several erroneous statements of this nature. Had the ALJ left out these statements, his opinion would have been unassailable. But despite his occasional recitation of the wrong standard, his ultimate conclusion that the evidence does not support a finding of "substantial risk" of harm, is legally sound. Because WAC 388-02-0600(2) imposes an appellate standard of review on the DSHS review judge, the mere recitation of the wrong standard in a few places by the ALJ does not warrant reversal where the ultimate legal conclusions were supported by the findings and those findings were based on substantial evidence.

**562 B. Violation of Foster Care Licensing Regulation*

[9] ¶ 19 The review judge asserted that the ALJ

erred by failing to find that Costanich violated WAC 388-148-0470, which prohibits discipline that is "cruel, unusual, frightening, unsafe or humiliating" and lists "name calling," and "threatening" as two practices which are per se violations of foster care licensing regulations. The review judge erred in reversing the ALJ's conclusion because he relied primarily on his own additional findings, that Costanich called E names and threatened F, which he lacked the authority to add under WAC 388-02-0600(2).

¶ 20 He also ruled that the ALJ erred in finding that swearing does not constitute humiliating discipline because under *Morgan v. Dep't of Soc. & Health Servs.*,^{FN19} "the use of profanity alone is sufficient to prove a violation." This is an unwarranted extension of the holding in *Morgan*. There, the court said the way in which Morgan used profanity was humiliating discipline, not that all profanity constitutes a per se violation.^{FN20} In *Morgan*, the court did not explain how Morgan's swearing was humiliating for the children and did not specify exactly which statements it considered humiliating. The only specific allegation mentioned in *Morgan* is that the foster parent told one of the children to stop "acting like a little bitch."^{FN21} While this is similar to the allegation that Costanich called E a "bitch," that allegation was not proven. Further, the conclusion that all swearing is a violation of WAC 388-148-0470, is undercut by the fact that swearing is not on the list of per se violations. Thus the review judge erred in reversing the ALJ's decision that Costanich's swearing did not constitute humiliating discipline in violation of WAC 388-148-0470.

FN19. 99 Wash.App. 148, 992 P.2d 1023 (2000).

FN20. *Id.* at 155, 992 P.2d 1023.

FN21. *Id.* at 151, 992 P.2d 1023.

**563 IV. Attorney Fees*

¶ 21 The superior court awarded Costanich attorney fees under the Equal Access to Justice Act

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(EAJA), RCW 4.84.350, which provides in relevant part:

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust....

[10][11][12] ¶ 22 DSHS argues Costanich was not entitled to attorney fees because it was **240 "substantially justified" in finding her language toward her foster children constituted emotional abuse and revoking her foster care license. "[A]gency action is substantially justified if it has a reasonable basis both in law and fact." FN22 We review a determination that agency action was not substantially justified for abuse of discretion.FN23 A court abuses its discretion when it bases its decision on untenable grounds or reasons.FN24

FN22. *H & H P'ship v. State*, 115 Wash.App. 164, 171, 62 P.3d 510 (2003) (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)).

FN23. *Id.* (citing *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wash.App. 1, 19, 979 P.2d 929 (1999)).

FN24. *Cobra Roofing Serv. v. Dep't of Labor & Indus.*, 122 Wash.App. 402, 420, 97 P.3d 17 (2004) (citing *Moreman v. Butcher*, 126 Wash.2d 36, 40, 891 P.2d 725 (1995)), *aff'd*, 157 Wash.2d 90, 135 P.3d 913 (2006).

[13] ¶ 23 The superior court awarded Costanich attorney fees, finding that DSHS' actions were not substantially justified primarily because the DSHS review judge exceeded the scope of his power in reversing the ALJ. Although there are no cases holding that a DSHS review judge's decision falls within the definition of "agency action" for purposes of granting fees under the EAJA, the

statutes defining agency action support such an award. RCW 4.84.340 states that "agency action" is defined by chapter 34.05 RCW. While RCW 34.05.010(3) does not specifically include or exclude adjudicative proceedings from the definition of agency action,*564 a review board that conducts adjudicative proceedings falls within RCW 34.05.010(2)'s definition of what constitutes an "agency". In *Muckleshoot Indian Tribe v. Dep't. of Ecology*, we held that the APA's definition of "agency action" must be applied broadly.FN25 THUS, WE HOLD THAT the review judge's decision constitutes agency action because he is part of the agency and his actions are not expressly excluded from the definition of "agency action."

FN25. 112 Wash.App. 712, 722, 50 P.3d 668 (2002), *review denied*, 150 Wash. 2d 1016, 79 P.3d 446 (2003).

¶ 24 Additionally, although DSHS was justified initially in its concerns about Costanich's use of profanity, the evidence before the ALJ shows that DSHS was not substantially justified in revoking her license once it became aware of the problems with Duron's investigation.

¶ 25 We conclude there was no abuse of discretion and affirm the superior court's award of fees. For the same reasons, Costanich is entitled to attorney fees on appeal under RAP 18.1.

¶ 26 We set aside the DSHS review judge's decision and reinstate the ALJ's decision. We affirm the superior court's decision to award Costanich attorney fees and award attorney fees on appeal on the same grounds.

WE CONCUR: MARLIN APPELWICK and RONALD COX, JJ.

Wash.App. Div. 1, 2007.

Costanich v. Washington State Dept. of Social and Health Services

138 Wash.App. 547, 156 P.3d 232

END OF DOCUMENT

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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Seattle
98101-4170

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CASE #: 57214-8-I
Kathie Costanich, Respondent v. DSHS, Appellant

Counsel:

The following ruling on attorney fees and costs by a Commissioner was entered on June 22, 2007 in the above case.

NOTATION RULING ON ATTORNEY FEES & COSTS
Costanich v. DSHS, No. 57214-8-I
June 22, 2007

In an opinion filed January 29, 2007 a panel of this court affirmed the trial court, and then on May 3, 2007 granted respondent Kathie Constanich's motion for reconsideration and amended the opinion to include an award of attorney fees to respondent under RCW 4.84.350.

Respondent seeks attorney fees totaling \$46,239.00 and costs of \$198.00. Counsel has filed an affidavit setting forth the details of time spent on appeal and counsel's hourly rate. The fee request is based on 308 hours at an hourly rate of \$150. Appellant DSHS did not file an objection. In the absence of an objection the hourly rates will be deemed reasonable, Absher Constr. V. Kent Sch. Dist. 415, 79 Wn. App. 841, 848, 905 P.2d 1086 (1996), but in any event the hourly rate here is reasonable. Given the length of the record and the extent of matters litigated in this court, the time spent is reasonable and relates to this appeal. Respondent Costanich is awarded attorney fees of \$46,239.00.

Page 2 of 2

57214-8-1, Kathie Costanich v. DSHS

June 25, 2007

Respondent is also awarded costs of \$198, as the amounts requested are authorized by RAP 14.3.

Now, therefore, it is hereby

ORDERED that respondent Costanich is awarded attorney fees of \$46,239.00 and costs of \$198.

Mary S. Neel
Commissioner

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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October 12, 2007

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CASE #: 57214-8-1
Kathie Costanich, Respondent v. DSHS, Appellant

Counsel:

Enclosed please find a copy of the Order Granting Motion to Modify entered by this court in the above case today.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

enclosure

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OCT 15 2007
DIVISION I

OFFICE RECEPTIONIST, CLERK

To: Dan King
Subject: RE: Costanich v. WA State DSHS, Appellate Ct. Cause No. 57214-8-I [Supreme Court cause No. not yet assigned]

Rec. 11-13-07

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: Dan King [mailto:dank@washingtonappeals.com]
Sent: Tuesday, November 13, 2007 11:29 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Costanich v. WA State DSHS, Appellate Ct. Cause No. 57214-8-I [Supreme Court cause No. not yet assigned]

Attached for filing are the Notice of Association For Purposes of Appeal and the Petition For Review in Constanich v. DSHS, Cause No. 57214-8-I [Supreme Court Cause No. not yet assigned].

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KATHIE COSTANICH,

Respondent,

v.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Appellant.

No. 57214-8-1

ORDER GRANTING
MOTION TO MODIFY

Appellant has moved to modify the commissioner's June 22, 2007 ruling awarding respondent Kathie Costanich costs and attorney fees totaling \$46,437 for responding to this appeal. We have considered the motion under RAP 17.7 and have determined that it should be granted, but that sanctions are appropriate because appellant made its argument based on the \$25,000 fee limitation contained in RCW 4.48.350(2) for the first time in its motion to modify.

Now, therefore, it is hereby

ORDERED that the motion to modify is granted. It is further

ORDERED that appellant Washington State Department of Social and Health Services is assessed sanctions in the amount of \$1,000, payable to respondent.

Done this 12th day of October, 2007.

Azid, J.

COX, J

Appelwick, CJ

2007 OCT 12 PM 2:11

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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SUPREME COURT
STATE OF WASHINGTON

DECLARATION OF SERVICE

2007 NOV 13 A 11: 32

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on November 13, 2007, I arranged for service of the foregoing Letter to the Clerk to the court and the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-mail
Carol Farr Law Offices of Leonard W. Moen 1107 S.W. Grady Way, Suite 100 Renton, WA 98055-1217	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Michael Collins Assistant Attorney General Office of the Attorney General 800 Fifth Avenue #2000 Seattle WA 98104	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 13th day of November,
2007.


Daniel F. King