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73920-4

NO. 73920-4-I

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MOHAMED ABDELKADIR,

*Appellant,*

*v.*

SHORELINE SCHOOL DISTRICT,

*Respondent.*

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BRIEF OF RESPONDENTS

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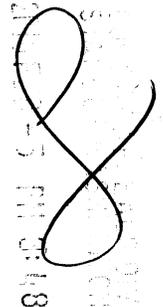


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## I. INTRODUCTION

After more than a year of stalling and dilatory tactics by the Appellant Mohamed Abdelkadir, an Administrative Law Judge finally dismissed his administrative case when he failed to appear for a prehearing conference, in direct violation of her written order. Before resorting to dismissal, the ALJ had warned Abdelkadir in writing more than 20 times that his failure to appear at scheduled proceedings could result in dismissal. In fact, after his last-minute cancellation of a previous prehearing conference, she had sent him a written notice with a more explicit warning, in bold text, reminding him that a prehearing conference could be cancelled only by an order of the ALJ. He was on clear notice that he was expected to appear at future conferences unless she issued an order of continuance. Instead of complying with this order, however, he again attempted to unilaterally cancel the next conference by faxing a written objection to the scheduling order. He then failed to respond when the ALJ left messages for him. In seeking to vacate the ALJ's dismissal, his proffered excuse was that he "assumed" his objection would cancel the pre-hearing conference.

The core issue in this appeal is whether the ALJ's dismissal of Abdelkadir's case under these circumstances was arbitrary or capricious or an abuse of discretion. Abdelkadir cannot demonstrate that the ALJ's decision is reversible under any standard. This Court should uphold both

the ALJ's decision and the trial court's order to deny his appeal under Washington's Administrative Procedure Act (APA).

In addition, this Court should affirm on the alternate ground that Abdelkadir failed to comply with the strict service requirements of the APA, Chapter 34.05 RCW, when filing his appeal in superior court. His service of the appeal on OSPI failed to comply with those strict service requirements in several ways: he mailed the appeal to OSPI instead of hand-delivering it as required by the statute, he failed to serve the head of the agency instead of a subdivision, and he failed to file his appeal in a timely manner.

The Court should also affirm the trial court's decision to award sanctions to the District under CR 11. Abdelkadir has failed to properly assign error to the sanctions order. Even if the Court reviews the sanctions order, Abdelkadir has failed to establish any grounds for reversal of the trial court's order, which was entered only after the District gave ample warning and opportunity for Abdelkadir to withdraw a frivolous motion.

Finally, the Court should order sanctions against Abdelkadir pursuant to RAP 18.9 as a result of this frivolous appeal. Abdelkadir has raised no meritorious arguments on appeal, and the financial burden of his continued litigiousness should no longer be borne by taxpayers.

## II. STATEMENT OF THE ISSUES

(1) Whether the superior court correctly dismissed Abdelkadir's administrative appeal because it was improper and untimely, where Abdelkadir failed to comply with the APA's service requirements in RCW 34.05.542(2) and (4).

(2) Whether the superior court properly dismissed Abdelkadir's administrative appeal on the alternative basis that, even if his appeal had been properly before the superior court, the ALJ's Order Denying Petition to Vacate was not arbitrary or capricious per RCW 34.05.570(3)(i), where Abdelkadir's failure to attend a scheduled prehearing conference was not excusable neglect and the ALJ properly exercised her inherent discretion.

(3) Whether the superior court properly concluded that the ALJ did not fail to follow a prescribed agency procedure per RCW 34.05.570(3)(c) in issuing the Order Denying Petition to Vacate.

(4) Whether the Court should decline to consider whether the Order Denying Petition to Vacate is supported by substantial evidence, where Abdelkadir raises that issue for the first time on appeal.

(5) Whether the Court should decline to review the superior court's September 2, 2015, Order Vacating May 20, 2015 Order and Denying Motion to Reconsider, because Abdelkadir has not assigned error to it as required by RAP 10.3, or, in the alternative, affirm the order because the

superior court did not abuse its discretion in declining to reconsider its earlier order awarding CR 11 sanctions to the District.

(6) Whether the Court should order sanctions against Abdelkadir per RAP 18.9 for filing a frivolous appeal.

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

During the 2013-14 school year, Abdelkadir's daughter (the "Student")<sup>1</sup> attended elementary school in the District. In April 2013, Abdelkadir filed a complaint asserting racial discrimination against his daughter by District employees. Ex. 7 (R. at 661).<sup>2</sup> Specifically, he complained that a teacher told the Student to "find a white color family," and that two reports filed by District staff to Child Protective Services (CPS) about the Student were racially motivated. R. at 661-62.

Pursuant to then-existing regulations issued by OSPI, Chapter 392-190 WAC, the District hired an outside attorney to investigate Abdelkadir's complaint. R. at 661-66. The investigator determined that the allegations were unfounded. R. at 664-65. Based on the results of that investigation, then-

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<sup>1</sup> Names of Abdelkadir's daughter and spouse are not used to protect confidentiality.

<sup>2</sup> RAP 9.7(c) requires the clerk of the trial court to transmit the certified record of administrative adjudication that was reviewed by the superior court in this matter. Here, the District understands that the clerk transmitted the certified agency record as File Exhibit ("FE") 7, rather than designating the pages of the record as part of the Clerk's Papers. For clarity, the District will cite to the Record (abbreviated as "R.") and relevant page number of information appearing in the certified agency record consistent with RAP 10.4(f). See *Cena v. Dep't of Labor and Indus.*, 121 Wn. App. 915, 926, 91 P.3d 903 (2004).

Superintendent Susanne Walker issued a decision denying the complaint per former WAC 392-190-065(2) (2011). R. at 660. Abdelkadir appealed that decision to the District's Board of Directors per former WAC 392-190-070 (2011). R. at 654-59. The District denied Abdelkadir's appeal as untimely.

**1. Abdelkadir appealed denial of his complaint to OSPI.**

On July 23, 2013, Abdelkadir filed an administrative appeal of the Board's decision with OSPI pursuant to former WAC 392-190-075 (2011), initiating Cause No. 2013-EE-0004.<sup>3</sup> R. at 603-09. The ALJ scheduled an initial prehearing conference for August 28, 2013, and a hearing for September 17, 2013. R. at 600. Abdelkadir appeared *pro se*. The initial Prehearing Order, dated July 25, 2013, stated as follows:

FAILURE TO APPEAR AND NOTICE OF DEFAULT

A party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding, including a prehearing

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<sup>3</sup> Chapter 392-190 WAC contains OSPI's regulations governing complaints of discrimination against school districts under Chapters 28A.640 and 28A.642 RCW. At the time of Abdelkadir's administrative appeal, the regulations permitted a complainant to appeal a district's decision to OSPI, which contracted with the Office of Administrative Hearings (OAH) to appoint an ALJ to oversee an administrative adjudication. However, significant amendments to the regulations effective in 2014 removed this direct right of administrative review. *See* WAC 392-190-079(1). A complainant now must seek investigation by OSPI prior to an appeal before an ALJ. *Id.* As a result, the District asserts that Abdelkadir does not have the ability to re-file his administrative appeal, even though it was dismissed *without* prejudice. *See* R. at 86 (stating order does not "preclude the parties from requesting a new administrative hearing").

Further, the District has asserted since the first prehearing conference in this matter that Abdelkadir did not timely file his administrative appeal and thus his case should be dismissed. R. at 40. However, the District did not obtain a briefing schedule on its anticipated motion to dismiss for over a year as Abdelkadir sought repeated delays in this matter, as described below.

conference, may be held in default in accordance with RCW 34.05.440 and -.434. If the party failing to appear is the Appellant, the matter may be dismissed.

R. at 600-01.

The case was subsequently reassigned to ALJ Senter. R. at 585-86.<sup>4</sup> A prehearing conference remained scheduled for August 28, 2013. *Id.* However, on that day, attorney H. Richmond Fisher filed a request for a continuance, stating he had been retained by Abdelkadir. R. at 568.

At the prehearing conference, attorney Parker A. Howell appeared for the District, and Fisher appeared for Abdelkadir. R. at 557. Howell explained that the District wanted to move to dismiss the case. R. at 40. The ALJ did not rule on the motion, but indicated that the parties would have an opportunity to submit written briefing. *Id.* The ALJ scheduled a second prehearing conference for September 9, 2013. R. at 557. The following prehearing order contained the following statement in bold text:

**NOTICE OF POTENTIAL DEFAULT**

**A party who fails to appear at the hearing may be held in default in accordance with RCW 34.05.440 and .434. If the party failing to appear is the appellant, the matter may be dismissed without prejudice.**

R. at 557-58 (emphasis in original).

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<sup>4</sup> The Order of Reassignment also contained the statement quoted above regarding failure to appear. R. at 586.

The ALJ subsequently issued more than 19 prehearing orders containing the above-quoted language on “Notice of Potential Default” in bold text. R. at 532-33, 443-44, 402-03, 400-01, 389-90, 387-88, 385-86, 369-70, 341-42, 330-31, 236-37, 234-35, 218-19, 200-201, 198-199, 196-97, 194-95, 133-34, 93-94.

**2. The administrative appeal was delayed for more than a year as a result of Abdelkadir’s continuance requests.**

The case was effectively continued for more than a year while Abdelkadir sought—and repeatedly was granted—continuances, often over the District’s objection. Due to the lengthy procedural history of this case, the District will summarize only the most salient events between September 2013 and September 2014 below.

On November 25, 2013, the ALJ issued a prehearing order establishing a deadline of December 13, 2013, for the District’s intended motion to dismiss. R. at 385-86. By subsequent order dated December 12, 2013, the ALJ struck that briefing schedule. R. at 369-70.

By notice of December 16, 2013, Fisher withdrew from the representation. R. at 374-76. At Abdelkadir’s request, the ALJ continued the next prehearing conference during the following periods to allow him additional time to find a replacement attorney: January 13 to February 3, R. at

341; February 3 to March 3, R. at 330; March 3 to March 31, R. at 236; and March 31 to April 28, 2014 (over the District's objections), R. at 234, 218.

On August 11, 2014, Abdelkadir requested a continuance of a prehearing conference scheduled for that same day to consider discovery matters. R. at 108. Abdelkadir claimed to be ill. *Id.* The District objected, given that Abdelkadir had caused previous delays regarding the motion at issue. *Id.* The ALJ granted the continuance. R. at 108-09.

**3. Abdelkadir did not attend a prehearing conference.**

On September 4, the ALJ issued an Order Setting Prehearing Conference for September 11, 2014, at 5:15 p.m. R. at 95-96. One purpose of the conference was to establish a briefing schedule for the motion. R. at 41. However, on September 11, Abdelkadir verbally informed the ALJ that he and Student's mother were unavailable to attend, and that third parties he wished to have present also were unavailable. R. at 91. He further stated that he had not received an audio recording of a prior conference as requested. *Id.* At or around 2:50 p.m., OAH informed Howell by phone that the hearing was cancelled because Abdelkadir was unavailable. R. at 41.

**4. The ALJ rescheduled the prehearing conference, warning Abdelkadir that his objection would not strike the conference and nonattendance could lead to default.**

On September 15, 2014, the ALJ issued a new order scheduling a prehearing conference for September 22, 2014, at 4 p.m. for purposes of

setting a briefing schedule on the District's motion to dismiss. R. at 91. The time and date of the prehearing conference were selected by Abdelkadir after OAH made multiple requests over several weeks for dates on which he was available. R. at 85. Due to "previous continuances and delays in the case," R. at 15, the September 15 Order instructed, in bold text, as follows:

**All future requests that a scheduled prehearing conference or other deadline be continued or stricken must be in writing. A prehearing conference or other deadline is not continued or stricken unless the Administrative Law Judge (ALJ) issues an order continuing or striking the conference or deadline. The fact of a request for continuance or a statement that a party is not available to attend or does not wish to attend for other reasons does not itself continue or strike a conference or other deadline.**

R. at 91 (emphasis in original). The ALJ further ordered that a "**party who fails to appear at the hearing may be held in default in accordance with RCW 34.05.440 and .434. If the party failing to appear is the appellant, the matter may be dismissed without prejudice.**" R. at 92.

On September 22, 2014, the day of the scheduled conference, Abdelkadir filed an objection to the most recent order by fax at approximately 10 a.m. R. at 88-90.<sup>5</sup> The objection did not state that he objected to the prehearing conference itself, and he did not request to

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<sup>5</sup> Abdelkadir complained that he had not received the hearing record and wanted more than one person to observe the conference. R. at 88-90. He also complained that the ALJ had not ruled on three motions, and stated that he desired to amend his complaint. *Id.*

continue the conference. R. at 16. Nor did Abdelkadir assert that he, the Student's mother, or other people he wanted to invite were unavailable. *Id.*

Because the objection arrived on the day of the prehearing conference and did not contain a request for a continuance or an assertion that Abdelkadir was unavailable, the ALJ's assistant left him a voicemail stating that the ALJ would address his objection at the prehearing conference scheduled later that day at 4 p.m. R. at 16, 85.

**5. Abdelkadir failed to attend the prehearing conference on September 22, and the ALJ issued a default order.**

On September 22, 2014, Abdelkadir did "not appear for the prehearing telephone conference, did not request a continuance, and did not respond to telephone calls to his home and cellular phones at the time of the prehearing conference." R. at 85. The ALJ left messages for him "stating that he would need to call in as soon as possible." R. at 16.

The prehearing conference commenced around 4:18 p.m., with the ALJ, Howell, and a District administrator in attendance. R. at 41. The ALJ stated that it was not clear from Abdelkadir's written objection that he was objecting to having a prehearing conference on September 22. Ex. 7 (Prehearing Conference at 8:42, September 22, 2014, Cause No. 2013-EE-0004). However, the ALJ stated that the objection reasonably could be construed as either an objection to the holding of the conference or as a

request for a continuance. *Id.* The ALJ held that to the extent the objection could be considered a motion to continue or that the objection was to holding of prehearing conference itself, the objection was denied because none of the reasons cited by Abdelkadir were valid reasons to strike or continue the prehearing conference. *Id.* at 11:40.

Howell then moved for the ALJ to enter a default order due to Abdelkadir's failure to appear. The ALJ granted the motion and issued a default order on September 23, 2014, dismissing the case *without prejudice* per RCW 34.05.440. R. at 85-86.

**6. The ALJ denied Abdelkadir's petition to vacate the default order because he did not show "excusable neglect" or any other valid reason for nonattendance.**

On September 30, 2014, Abdelkadir filed a Petition to Vacate Order of Default and Dismissal. R. at 82-83. Abdelkadir argued that he was not required to attend the conference because he objected to the Order dated September 15 within 10 days. *Id.*

On October 31, the ALJ issued an Order Denying Petition to Vacate ("Final Order"). R. at 15-18. The ALJ found that the request for a hearing, which had been filed in July 2013, had been "continued several times" over several months while Abdelkadir sought a new attorney. R. at 16. The ALJ pointed out that delays "were also caused ... by the Appellant's insistence,

on most occasions, that he was only available for prehearing conferences at 4:00 p.m. on Mondays.” R. at 17. The ALJ noted that “[m]any of the continuances and accommodations to [Abdelkadir’s] schedule in this case were made over the District’s objections.” *Id.*

The ALJ stated that the APA does not provide criteria for an ALJ to consider when ruling on a petition to vacate. R. at 17. Therefore, she analogized to CR 60, which addresses relief from judgments in civil cases. *Id.* The ALJ reasoned that Abdelkadir did not assert any of the grounds allowed by CR 60. *Id.* The ALJ concluded:

He asserts that he ‘assumed’ the prehearing conference was cancelled because he objected to the prehearing order in which it was scheduled and that he had ‘no idea’ that the prehearing conference would go forward when the ALJ had not ruled on his objection. However, because of previous delays and continuances in this case, the Appellant had just been put on notice in the Continuance Order that a prehearing conference is not continued or stricken until an ALJ issues an order continuing or striking it, and that the fact of a request for continuance or a statement that a party is not available to attend or does not wish to attend for other reasons does not itself continue or strike a prehearing conference.

R. at 17-18. Given this “recent and explicit notice,” the ALJ concluded that his failure was not “excusable neglect or any of the other grounds warranting a vacation of judgment under CR 60.” R. at 18. The ALJ also “balance[ed]

the interests of the parties,” noting that he had received “significant continuances,” often over the objection of the District. *Id.*

On November 7, 2014, Abdelkadir filed a Motion for Reconsideration. R. at 9-13. The ALJ issued an Order Denying Motion for Reconsideration that same day, after “consider[ing] all of the issues now raised by [Abdelkadir].” R. at 7.

**B. Procedural Posture**

**1. The superior court affirmed the ALJ’s Final Order.**

On December 1, 2014, Abdelkadir appealed the Final Order to King County Superior Court pursuant to the APA. CP 1-9.<sup>6</sup> On August 7, 2015, the court heard oral argument in the matter, Cause No. 14-2-32203-8 SEA. CP 437. At the hearing, the court made an oral ruling affirming the Final Order and dismissing Abdelkadir’s administrative appeal. RP 39-41.

On August 18, 2015, the court entered an Order on Administrative Appeal (“Appeal Order”) containing findings of fact and conclusions of law and incorporating by reference the court’s oral ruling. CP 437-43. The court dismissed Abdelkadir’s appeal on two alternative grounds. First, the court

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<sup>6</sup> The “final order” under review in this matter is the ALJ’s Order Denying Petition to Vacate, entered October 31, 2014. R. at 15-18. Although Abdelkadir in his Petition for Review stated that he was challenging the November 7, 2014, order denying his motion for reconsideration of the petition to vacate, his briefing in superior court, *see* CP 1-9, and before this Court, Appeal Br. 2, clearly states that he in fact challenges the October 31 order. Further, an order denying reconsideration “is not subject to judicial review.” RCW 34.05.470(5).

concluded that his appeal was “improper and untimely, because [he] failed to comply with the express terms of the APA requiring personal service on the principal office of OSPI within the deadline provided by the APA.” CP 439. The court held that “[Abdelkadir] did not comply with RCW 34.05.542(2) and (4) in the following respects: (a) he did not personally serve OSPI; (b) he mailed a copy of the Petition for Review to a subdivision of OSPI, rather than the agency head at the principal office of the agency; and (c) he did not timely serve the agency.” CP 440. As a result, this matter was “not properly before the Court for review and should be dismissed.” *Id.*

Second, the court concluded that even if Abdelkadir’s case had been properly before the court, the court would uphold the Final Order “on the merits.” CP 440. Applying the standards of the APA, the court held that the Final Order was not “arbitrary or capricious” per RCW 34.05.570(3)(i). CP 441. The court reasoned that the ALJ “issued a well-reasoned [Final Order] that took into account the circumstances of the case”:

The ALJ rightly concluded that [Abdelkadir], having clear notice both that the prehearing conference was scheduled for September 22, 2014, and that failure to attend might result in a default order dismissing his case, has not provided a reason justifying his decision not to attend the scheduled conference. He argues only that he mistakenly believed that his objection on September 22 to the September 15 Order ... operated to void the September 22 conference. However, Petitioner was provided clear notice in the September 15

order that such an objection would not obviate his need to attend the conference absent an order by the ALJ.

CP 441. Applying CR 60 by analogy, the court further held that Abdelkadir did not show “excusable neglect,” or “any other cognizable reason excusing his failure to attend.” *Id.* The Final Order “properly took into account both [Abdelkadir’s] *pro se* status and the lengthy history of delays and continuances granted to [Abdelkadir] by the ALJ—often over the District’s objection—that resulted in the case being continued for a long period.” *Id.* The court noted that Abdelkadir is an “experienced litigant, having previously argued for a default judgment in his favor in a different matter.” *Id.* Finally, the court concluded that Abdelkadir’s lengthy delays have resulted in “significant expenditure of limited public funds devoted to public education on this matter.” CP 442.<sup>7</sup>

**2. The superior court separately ordered Abdelkadir to pay CR 11 sanctions, and he unsuccessfully sought reconsideration and vacation of that order.**

Earlier in the administrative appeal to superior court, Abdelkadir on March 9, 2015, filed a motion seeking CR 11 sanctions against the District and asking for a revised case schedule. CP 175-81. In the motion—which was prepared by attorney Doug Prestrud on Abdelkadir’s behalf—Abdelkadir

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<sup>7</sup> On August 18, 2015, the court also issued a Final Judgment on Administrative Appeal Awarding Costs awarding the District statutory attorney’s fees of \$200. CP 435-36.

alleged that the District was responsible for OSPI's alleged failure to comply with the case schedule set by the superior court for providing the administrative record related to the ALJ's decision. *See id.*

On April 9, 2015, the District made a counter-motion for CR 11 sanctions against Abdelkadir, on the grounds that the District offered to stipulate to the proposed case schedule, advised him that his sanctions motion was frivolous, and informed him that the District would pursue CR 11 sanctions if he continued to pursue his frivolous motion. CP 190-98.

On April 17, 2015, the court issued an order imposing CR 11 sanctions on Abdelkadir in the amount of \$1,825 in attorney's fees and amending the case schedule. CP 215-16. The court found that Abdelkadir's "motion for fees against the District was not submitted based on any good faith basis in law or fact," and that he was given "sufficient notice and opportunity to withdraw his motion for fees and failed to do so." CP 215-16. The court reasoned that Abdelkadir "persisted in a motion for fees after being placed on written notice by counsel for the District that the motion was lacking in merit." CP 215. Further, the court stated that he "should be held to the same standard as a represented party due to his prior experience with the court system as well as the disclosed assistance he is receiving from legal counsel in briefing to this Court." *Id.*

On April 27, 2015, Abdelkadir filed a motion to reconsider and vacate the fee award. CP 222-29. On May 20, 2015, the court entered an order denying his motion for reconsideration. CP 256-57. On August 7, 2015, Abdelkadir moved to vacate the order denying reconsideration per CR 60. CP 418-29.

On September 2, 2015, the superior court issued an order (“Sanctions Order”) vacating its May 20, 2015, order denying reconsideration of the fee award, but nonetheless denying Abdelkadir’s motion to reconsider the underlying award. CP 466-67. The court noted that this “case has had a tortured procedural posture,” due in part to Abdelkadir “holding himself out to be a pro se litigant entitled to leniency while relying on a member of the bar to assert in support of his claims sometimes incomprehensible and irrelevant factual information and misstatements of law.” *Id.*

The court stated that Abdelkadir filed his reply brief regarding his motion to reconsider after noon on its due date, and as a result the court “erroneously denied his motion before receiving the reply.” CP 467. The court thus vacated the order denying his motion to reconsider. *Id.* However, after reviewing his reply brief and the records of this case, the court again denied his motion to reconsider the April 20, 2015, order awarding sanctions. *Id.* Abdelkadir was “fully advised that there was no objection to

his motion to amend the case schedule yet he chose to pursue it at a cost to respondent.” *Id.*

**3. Abdelkadir filed two appeals, which were consolidated.**

This matter consolidates two appeals. First, Abdelkadir initiated Appeal No. 73920-4-I, on September 1, 2015, contesting the Appeal Order and Judgment. Notice of Appeal 1. Abdelkadir asks the Court to reverse the Appeal Order and the Final Order; he appears to make four assignments of error regarding the Final Order. *See* Appeal Br. 9-10.

Second, on October 2, 2015, attorney Prestrud filed a notice of appeal on behalf of Abdelkadir purporting to contest the Sanctions Order “in its entirety.” Notice of Appearance 1. That matter, Appeal No. 74031-8, was later consolidated for review with Appeal No. 73920-4-I. Abdelkadir does not assign any specific error to the Sanctions Order. *See* Appeal Br. 9-10.<sup>8</sup>

#### **IV. ARGUMENT**

**A. The superior court correctly dismissed Abdelkadir’s appeal because it was not properly before the court, where he did not comply with the APA’s service requirements.**

The superior court properly dismissed Abdelkadir’s administrative appeal after concluding that he failed to comply with the APA’s mandates for

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<sup>8</sup> It is unclear to what extent Prestrud continues to represent Abdelkadir in this consolidated matter. Although Abdelkadir signed his appeal brief as a *pro se* appellant, Appeal Br. 26, Prestrud has not filed a notice of withdrawal.

service on OSPI, the agency responsible for the order at issue. CP 439-40. A petition for review of an ALJ decision that is not served according to the APA's requirements in RCW 34.05.542 is not properly before the superior court and should be dismissed. *See Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004); *Skagit Surveyors and Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998); *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 957-58, 235 P.3d 849 (2010), *review denied*, 170 Wn.2d 1023 (2011).<sup>9</sup> Abdelkadir does not challenge this proposition. Rather, he incorrectly argues that he complied with the APA requirements because he (1) was not required to serve OSPI because it was not a "party" to the matter, (2) was not required to personally serve OSPI, and (3) timely served OSPI by sending his petition via certified mail on the last day of the appeal period. Appeal Br. 10. These arguments fail, and thus dismissal was warranted in this case, for the reasons stated below.

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<sup>9</sup> These cases establish that an appeal from an ALJ's decision "invokes the appellate, rather than the general, jurisdiction of the superior court." *Skagit Surveyors*, 135 Wn.2d at 555. "Acting in its appellate capacity, the superior court is of limited statutory jurisdiction, and all statutory procedural requirements must be met before jurisdiction is properly invoked." *Id.* Those statutory requirements for service of a petition for review are stated in RCW 34.05.542(2) and (4). *See id.* The same result obtains even if Abdelkadir's improper service is characterized as noncompliance with the express terms of the APA, rather than depriving the court of jurisdiction. *See, e.g., Sprint Spectrum*, 156 Wn. App. at 964-67 (Becker, J., concurring). The District thoroughly briefed this issue in its Respondent's Brief filed in superior court. CP 360-61. Given that Abdelkadir does not challenge the court's interpretation of this authority, the District will not elaborate further here.

**1. The court correctly held that RCW 34.05.542(2) required Abdelkadir to serve OSPI as the agency responsible for the ALJ’s decision.**

Abdelkadir incorrectly argues that he was not required to serve OSPI because it was not identified as a “party” to the matter. Appeal Br. 9, 14. RCW 34.05.542(2) outlines the “procedural and jurisdictional requirements” under the APA for filing and service of a petition for review. *See Skagit Surveyors*, 135 Wn.2d at 555. This statute states that a “petition for judicial review of an order shall be filed with the court *and served on the agency*, the office of the attorney general, and all parties of record within thirty days after service of the final order.” RCW 34.05.542(2) (emphasis added).<sup>10</sup> In addition, RCW 34.05.542(4) provides the required means of service on the agency:

Service of the petition on the agency shall be by *delivery* of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. *Service of a copy by mail upon the other parties* of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

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<sup>10</sup> Service on the agency serves a vital function: it is “prerequisite to and triggers transmittal of the agency record.” *Sprint Spectrum*, 156 Wn. App. 957. Such service is “vital to the timely functioning of the review process. Without such service, there is no record before the superior court and thus, no basis for review.” *Id.* at 958. Here, Abdelkadir’s improper and untimely service on OSPI led to OSPI transmitting the agency record after the deadline set in the court’s scheduling order—a large part of Abdelkadir’s claimed basis for his improper motion for CR 11 sanctions against the District and OSPI. *See* CP 175-181.

(emphasis added). Construction of a statute such as RCW 34.05.542 is a question of law that the Court reviews *de novo*. *Diehl*, 153 Wn.2d at 212. Washington courts strictly construe and apply the APA provisions regarding service. *See Skagit Surveyors*, 135 Wn.2d at 557.

Here, it is undisputed that OSPI is the agency responsible for the ALJ's Final Order pursuant to former WAC 392-190-075(1) (2011). Thus, regardless of whether OSPI was identified as a party, the court rightly decided that Abdelkadir was obligated to properly serve that agency per the explicit language of RCW 34.05.542. CP 439-40.

**2. The court correctly held that RCW 34.05.542(2) required *personal service* on OSPI, and that Abdelkadir improperly mailed his petition for review to the agency.**

The superior court also correctly determined that Abdelkadir failed to satisfy the APA requirement of hand-delivering a copy of the petition for review to the office of the head of the agency responsible for the ALJ's decision, when he sent a copy by certified mail to a subdivision of OSPI. CP 440 (citing *Ricketts v. Wash. St. Bd. of Accountancy*, 111 Wn. App. 113, 115, 43 P.3d 548 (2002)). Abdelkadir sent the petition for review by certified mail to the Equity and Civil Rights Office of OSPI, the District's superintendent, and the superior court clerk via certified mail on December 1, 2014. CP 438. The above-named office is not the office of the director or other chief

administrative officer of OSPI. *Id.* Abdelkadir has not contested these facts. Rather, he admits that he sent the petition to OSPI on December 1, 2014, and that the Equity and Civil Rights Office did not receive it until December 2, 2014. Appeal Br. 24.

Based on these undisputed facts, the court correctly decided that Abdelkadir did not comply with the APA's service requirements in RCW 34.05.542. CP 440. The court analyzed the language of RCW 34.05.542(4), holding that the term "delivery" as used in that statute "means personal service upon the office, rather than service by mail." *Id.* Both Washington precedent and the plain language of the APA support the superior court's determination that RCW 34.05.542 required Abdelkadir to personally serve OSPI, and to serve the office of the head of OSPI, rather than a subdivision.

RCW 34.05.542(4) specifies that the manner of service of the petition on the agency must be by "delivery." This provision creates an exception to the general rule in RCW 34.05.010(19) that service under the APA may be accomplished by mail and is effective on the date of mailing, instead requiring personal service upon the correct office of the agency within the 30-day petition period. *See Ricketts*, 111 Wn. App. at 115.<sup>11</sup>

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<sup>11</sup> The *Ricketts* decision is consistent with the later decision in *Diehl*. Although *Diehl* states that a petitioner may serve his or her petition by mail or personal service, 153 Wn.2d at 217-18, the Court made this statement in the context of quoting the general rule in RCW

The *Ricketts* court’s interpretation is reinforced by the plain language of the statute. A “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). The Legislature used the term “delivery” in RCW 34.05.542(4) to define the method of service of the petition upon an agency head. In contrast, the Legislature used the phrase “[s]ervice of a copy by mail” to define the method of service upon the “other parties of record” and “the office of the attorney general,” which service is deemed complete upon deposit in the mail. RCW 34.05.542(4). By providing that service by mail is allowed on parties and the Attorney General’s Office, the statute excludes service by mail upon the agency head and requires personal service. Any other reading of RCW 34.05.542(4) renders the phrase “[s]ervice of a copy by mail” mere surplus, especially considering the general definition of service as that by mail in RCW 34.05.010(19).

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34.05.010(19), rather than scrutinizing the language of RCW 34.05.542(4). In its summary of its opinion, the Court stated that the “APA service requirements are met when *parties* are served in person or by mail under RCW 34.05.010(19), within 30 days of the agency decision under RCW 34.05.542(2), (4).” (emphasis added). Further, the *Diehl* decision is distinguishable because in that case the petitioner in fact personally served the agencies at issue. 153 Wn.2d at 218. In this case, the Abdelkadir only mailed a copy of the appeal to OSPI and failed to serve the Attorney General’s Office.

Here, Abdelkadir did not satisfy RCW 34.05.542(2) and (4), because he did not personally serve the director or other chief administrative officer or chairperson of OSPI. CP 440. Abdelkadir served OSPI only by mail. CP 118, 438; Appeal Br. 24-25. Moreover, the mail was not even addressed to the director or chief administrative officer of OSPI. Rather, it was addressed to a subdivision of the agency, the Equity and Civil Rights Division. CP 118, 438. Therefore, Abdelkadir's appeal was not properly before the superior court.

Abdelkadir offers no authority for his bald assertion that RCW 34.05.542(4) did not require personal service on OSPI. Appeal Br. 9. Instead, he argues that he was ignorant of the statutory requirement and claims that he should be entitled leeway as a *pro se* party. *See id.* at 14. These arguments are unpersuasive, because even "substantial compliance" with the APA's service requirements is not sufficient to bring an improperly and untimely served petition before the superior court. *See Skagit Surveyors*, 135 Wn.2d at 556; *Union Bay Pres. Coal.*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995); *see also Wells Fargo Bank v. Dep't of Revenue*, 166 Wn. App. 342, 362, 271 P.3d 268, *review denied*, 175 Wn.2d 1009, 285 P.3d 885 (2012) (failure to comply with APA's 30-day filing period was not substantial compliance, thus the superior court could not exercise original appellate jurisdiction). *But see*

*Skinner v. Civil Serv. Cmm'n*, 168 Wn.2d 845, 854, 232 P.3d 558 (2010) (holding “substantial compliance with service requirements is generally sufficient to invoke a superior court’s appellate jurisdiction”).<sup>12</sup>

Further, claimed ignorance of the APA’s required service procedures is not an excuse for noncompliance. Abdelkadir cites no authority for his proposition that he “should have been advised of this requirement” for personal service on OSPI. Appeal Br. 14. Although he accurately points out that the Final Order states that the matter may be further appealed by filing a petition for review in court within 30 days of mailing of the decision, neither the APA nor OSPI/OAH regulations mandate that the order contain a recital of RCW 34.05.542. As a *pro se* party, Abdelkadir assumed the responsibility to research applicable requirements.

Moreover, although Abdelkadir holds himself out to be a *pro se* litigant entitled to leniency, the superior court noted that he is in fact an “experienced litigant.” CP 441. He also had access to, and at least some

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<sup>12</sup> Although the *Skinner* Court distinguished *Skagit Surveyors*, *supra*, the *Skinner* decision did not overrule *Skagit Surveyors* and merely held that substantial compliance applies in cases under Title 41 RCW, not the APA. Washington courts continue to follow the principle announced in *Skagit Surveyors* that substantial compliance is not sufficient under the APA. See, e.g., *Wells Fargo Bank*, 166 Wn. App. at 362.

assistance from, an attorney with this matter. *Id.* He should not be allowed to bypass strict procedural requirements by claiming ignorance.<sup>13</sup>

**3. The court correctly held that Abdelkadir did not timely serve OSPI.**

The court also properly determined that Abdelkadir did not comply with the APA's service requirements because his petition for review was not timely served on OSPI. Abdelkadir erroneously argues that he timely served his petition for review on the agency because he filed it within 30 days of the ALJ's November 7, 2014, order denying reconsideration. Appeal Br. 17. The superior court found that he was required to properly serve the petition on OSPI by December 1, 2014, and that he did not send it by mail until the next day, December 2. CP 438 (Finding of Fact 3). Although Abdelkadir is correct that the petition could have been served on the agency through December 7, rather than December 1,<sup>14</sup> the Court should affirm the trial court's decision dismissing his administrative appeal for two reasons.

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<sup>13</sup> Abdelkadir also erroneously suggests that the District was required to show "prejudice" in order for the superior court to determine his petition for review was not properly before the court. Appeal Br. 14. Again, he offers no authority for this argument. The plain text of the APA, and Washington courts' interpretation of that statute, do not require any showing of prejudice. Rather, the APA mandates strict compliance with the service procedures. *See Skagit Surveyors*, 135 Wn.2d at 556.

<sup>14</sup> The APA provides that if a party to an administrative adjudication properly files a petition for reconsideration, the "time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration." RCW 34.05.470. Assuming, *arguendo*, that his petition sought review of the Final Order, he had 30 days from November 7, 2014, to *properly* serve the petition—which he did not for the reasons stated herein.

First, Abdelkadir fails to assign error to Finding of Fact 3. RAP 10.3(g) provides that a separate assignment of error for each allegedly improper finding of fact must be included with reference to the finding by number. Abdelkadir does not make separate assignments of error or cite to any challenged findings in his brief. Thus, the Court should not consider Abdelkadir's challenge to the petition deadline as determined by the superior court. *Cf. State v. Estrella*, 115 Wn.2d 350, 355, 798 P.2d 289 (1990).

Second, even if the Court determines that the superior court erred in finding that the petition had to be served by December 1, such error is harmless and is not a basis to overturn the court's first rationale for dismissal. In Washington civil cases, "error without prejudice is not grounds for reversal." *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983), *cited in Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013); *see also* RCW 4.36.240 ("The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."). An error "will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id.*

Here, any error in the court's determination of the deadline is harmless because the record does not indicate that Abdelkadir *ever* properly served the head of OSPI as required by RCW 34.05.542 by December 7, 2014. He made no showing that he corrected his improper service by certified mail, discussed above, by hand-delivering a copy of the petition to the correct component of OSPI by December 7, 2014. Rather, OSPI's letter acknowledging receipt of Abdelkadir's petition for review states that the OSPI office responsible for compiling the agency record received the petition dated January 12, 2015, CP 148, long after the statutory deadline. These other, unremedied defects in his service under the APA support the superior court's holding, and the Court should affirm.

**B. The superior court properly held that the Final Order was not “arbitrary or capricious.”**

Even assuming, *arguendo*, that Abdelkadir's administrative appeal was properly before the superior court, the Court should affirm dismissal of his case and uphold the Final Order on the merits. The superior court properly rejected Abdelkadir's primary challenge to the Final Order—his claim that it was “arbitrary or capricious”—holding that Abdelkadir's failure to attend the September 22, 2014, prehearing conference was not “excusable neglect” and that the ALJ properly exercised her discretion in refusing to vacate the default order. CP 441. In his brief, Abdelkadir merely

restates the erroneous arguments already made to—and rejected by—the superior court. The Court should uphold the Final Order on the grounds stated by the superior court.

**1. The APA limits the scope of the Court’s review of the ALJ’s Final Order.**

Abdelkadir incorrectly argues that the Court should “exercise its discretion” to remand this matter to the ALJ. Appeal Br. 2. The APA makes clear that the Court has no such discretion. Rather, when reviewing a superior court’s decision on an appeal under the APA, the Court sits in the same position as the superior court and applies the APA’s standards to the agency record. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Under the APA, the ALJ’s decision “is considered prima facie correct.” *Graves v. Dep’t of Emp’t Sec.*, 144 Wn. App. 302, 308, 182 P.3d 1004 (2008). As the superior court pointed out, Abdelkadir has the “burden of demonstrating the invalidity of agency action.” CP 440 (citing RCW 34.05.570(1)(a)).

Moreover, the APA limits the scope of judicial review of an agency order in an adjudicative proceeding, as here. *See* RCW 34.05.570-.574. The Court may grant relief from the Final Order only if it determines that one or more of nine bases enumerated in RCW 34.05.570(3) applies. *Graves*, 144 Wn. App. at 308. In this case, Abdelkadir challenges the ALJ’s decision on two

bases: “(i) The order is arbitrary or capricious”; and “(c) the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.” *See* Appeal Br. 9-10. Therefore, the Court may only reverse and remand if Abdelkadir carries his burden of demonstrating that the Final Order was “arbitrary or capricious” or in violation of prescribed procedure, which he cannot.<sup>15</sup>

**2. The ALJ had the statutory authority to enter a default order under the APA, which prohibits the Court from substituting its judgment for that of the ALJ.**

Under the APA, the ALJ had the authority to enter a default order in response to Abdelkadir’s deliberate failure to attend the September 22, 2014, prehearing conference. RCW 34.05.440(2) provides that if “a party fails to attend or participate in a hearing *or other stage of an adjudicative proceeding* . . . the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.” (emphasis added). The statute is silent regarding the grounds upon which the ALJ may base the decision to issue a default order. RCW 34.05.440. By stating that an ALJ “may” issue such an order without providing qualifying criteria, the Legislature delegated discretionary authority to the ALJ.

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<sup>15</sup> Abdelkadir’s argument regarding APA procedures is addressed in Section IV.C, below. Abdelkadir also claims on appeal that the Final Order was not supported by “substantial evidence.” He did not claim this error in superior court, thus he has not preserved this argument for appeal, as described in Section IV.E, below.

The APA specifically provides that a reviewing court must not substitute its judgment for that of an agency: “In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1). This rule accords with the standard for review of orders denying a motion to vacate in civil court: on appeal, a trial court’s disposition of a motion to vacate “will not be disturbed unless it clearly appears that it abused its discretion.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

**3. Abdelkadir fails to show that the Final Order was arbitrary or capricious or that the ALJ abused her discretion.**

Abdelkadir has failed to meet his burden of demonstrating *under any standard* that the Final Order was arbitrary or capricious or that the ALJ abused her discretion in refusing his petition to vacate. CP 441. The APA provides that within seven days of service of a default order, the “party against whom the default order was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon.” RCW 34.05.440(3). “The decision to set aside a default judgment is discretionary.” *Graves*, 144 Wn. App. at 309 (citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1290 (1979)).

An ALJ's decision declining to vacate an order is "arbitrary or capricious" only "if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision." *See Beatty v. Fish and Wildlife Comm'n*, 185 Wn. App. 426, 443-44, 341 P.3d 291 (2015). "A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on honest and due consideration, even if we disagree with it." *Id.* Similarly, an abuse of discretion occurs only when a decision is "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Graves*, 144 Wn. App. at 309 (citing *Griggs*, 92 Wn.2d at 582).

Here, the superior court reviewed the agency record and properly concluded that the Final Order was "not arbitrary and capricious per RCW 34.05.570(3)(i)." CP 441. Rather, the ALJ entered a "well-reasoned Order Denying Petition to Vacate that took into account the circumstances of the case." *Id.* The court reasoned that Abdelkadir had "clear notice both that the prehearing conference was scheduled for September 22, 2014, and that failure to attend might result in a default order dismissing his case." *Id.* The court held that the ALJ correctly applied CR 60 by analogy, determining that Abdelkadir did not show "excusable neglect." *Id.* The court also held that Abdelkadir has "not provided a reason justifying his decision not to attend the scheduled conference." *Id.* Review of the ALJ's application of CR 60,

and her consideration of the other circumstances of the case, demonstrates that the Final Order was not arbitrary or capricious.

**4. The ALJ properly applied the CR 60 standard by analogy in determining not to vacate the default order.**

As the superior court determined, the ALJ appropriately applied CR 60 by analogy, determining that Abdelkadir did not show “excusable neglect” when he decided not to attend the September 22, 2014, prehearing conference despite forewarning that his failure to appear could result in dismissal. CP 441.<sup>16</sup> Although an ALJ has discretion to vacate a default order, the APA is silent on a standard for consideration of such a motion. In the absence of a statutory standard, the ALJ aptly looked to CR 60, which addresses relief from judgments in civil cases in superior court. R. at 17. Abdelkadir has not challenged the ALJ’s citation to CR 60. Although the requirements of CR 60 applicable in civil court are not strictly controlling here, if the Court should look to that rule for guidance in determining that the ALJ exercised her discretion in a manner that was well-reasoned, rather than arbitrary or capricious.

CR 60(b)(1) provides that a court may vacate a default order based on “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” To set aside a default judgment under CR

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<sup>16</sup> Application of the standard in CR 55(c) for setting aside a default order by analogy would have the same result. *See* CP 368-69.

60(b)(1), a petitioner must show: “(1) excusable neglect, (2) due diligence, plus (3) a meritorious defense, and (4) no substantial hardship to the opposing party.” *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999).

In the instant case, the ALJ concluded in the Final Order that Abdelkadir did not assert any of the relevant grounds for vacating a judgment under CR 60. R. at 17. He merely “assert[ed] that he ‘assumed’ the prehearing conference was cancelled because he objected to the prehearing order in which it was scheduled and that he had ‘no idea’ that the prehearing conference would go forward when the ALJ had not ruled on his objection.” R. at 17. The ALJ concluded that this excuse was not “excusable neglect” R. at 18. The superior court properly affirmed the ALJ’s conclusion, CP 440, because the record demonstrates that Abdelkadir does not demonstrate excusable neglect or any other valid reason for his deliberate failure to attend the prehearing conference.

(a) *Abdelkadir’s decision not to attend the prehearing conference about which he had notice was not “excusable neglect.”*

Abdelkadir fails to show that his deliberate nonattendance at the September 22, 2014, prehearing conference was “excusable neglect.” Courts generally determine whether excusable neglect applies on a case-by-case basis. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 406, 196 P.3d 711 (2008). A “trial court has *broad discretion* over the issue of

excusable neglect and may make credibility determinations and weigh facts in order to resolve it.” *Id.* (emphasis added).

In an administrative case heard by an ALJ, failure to attend a scheduled prehearing conference about which a party has notice is *not* excusable neglect, but rather cause for issuance of a default order. *See Graves*, 144 Wn. App. at 310-11 (no abuse of discretion for ALJ to issue default order, where party claimed he mismarked prehearing conference date on his calendar). Likewise, reviewing courts uphold trial court decisions not to vacate default orders where parties show willful intent not to participate in court proceedings. *See, e.g., Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007) (party made “deliberate choice, after being told of the consequence by the trial judge, not to prevent default judgment by filing an answer. The decision not to participate does not meet the standard required.”).<sup>17</sup>

Here, the record does not demonstrate any circumstance that prevented Abdelkadir from participating in the September 22 prehearing

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<sup>17</sup> *See also Rosander*, 147 Wn. App. at 406-07 (affirming trial court’s denial of defendant’s motion to vacate default judgment, where defendant had actual notice of hearing date but did not appear); *Johnson v. Cash Store*, 116 Wn. App. 833, 848-49, 68 P.3d 1099, *review denied*, 150 Wn.2d 1020, 81 P.3d 120 (2003) (affirming denial of motion to vacate default judgment, where party’s failure to forward complaint to corporate counsel “constituted at least inexcusable neglect, if not willful noncompliance”); *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 105, 533 P.2d 852 (1975) (affirming denial of motion to vacate default judgment, where defendant “offered no excuse or justification for not so appearing save for a statement of his purely subjective belief that he thought the action was ‘merely a bluff’”). *Cf. Griggs*, 92 Wn.2d at 582 (no abuse of discretion in finding excusable neglect and vacating default order, where petitioner “had no knowledge of the actual trial date”).

conference, nor does he deny that he was available or had adequate advance notice of the conference time and location. Abdelkadir not only knew the date of the hearing, he selected it. R. at 85. Rather, having notice of the potential consequences of not attending, he simply chose not to attend. His sole argument continues to be “only that he mistakenly believed that his objection on September 22 to the September 15 Order Continuing Prehearing Conference operated to void the September 22 conference.” CP 441. His failure to attend was not excusable neglect, for several reasons.

First, Abdelkadir cites no authority for the proposition that a party to a case may be excused from deliberately choosing not to attend a prehearing conference for which he was available based on his subjective interpretation of the prehearing order.

Second, Abdelkadir had considerable notice that he could not avoid the prehearing conference merely by filing an objection to the prehearing order setting the conference. It is not clear from the face of the Abdelkadir’s objection that it is an objection to holding the conference. However, even treating the objection as one to holding the conference, his “assumption” that his objection operated to void the conference was plainly unreasonable, given that he had “just been put on notice in the Continuance Order [dated September 15] that a prehearing conference is not continued or stricken until an ALJ issues an order continuing or striking it.” R. at 17-18.

The Order Continuing Prehearing Conference dated September 15—issued just seven days prior to Abdelkadir’s same-day objection to the prehearing conference—specifically cautioned him that a “prehearing conference or other deadline is *not continued stricken unless the [ALJ] issues an order continuing or striking the conference or deadline.*” R. at 91 (emphasis added). Further, the ALJ’s September 15 Order informed Abdelkadir “that the fact of request for continuance or a statement that a party is not available to attend or does not wish to attend for other reasons *does not itself continue or strike a prehearing conference.*” *Id.* (emphasis added). Abdelkadir does not contest that he received, reviewed, and understood this Order.<sup>18</sup> As the superior court pointed out in its oral ruling, the ALJ “couldn’t have made it clearer” that he was “to abide by the schedule of the case unless there was an order to the contrary.” RP 40. The ALJ “did that because there were so many times when she had to continue the case for one reason or another because of delays that you were requesting.” *Id.*

This September 15 Order put Abdelkadir on notice that even if he objected to a scheduled prehearing conference, he was required to attend

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<sup>18</sup> Although Abdelkadir might argue that he did not understand the ALJ’s written orders because he is an immigrant and English is not his first language, the record demonstrates that he repeatedly declined offers to receive assistance from an interpreter. *See, e.g.*, RP 41 (“you actually speak very good English and I think you understand that because you told the administrative law judge that you didn’t want an interpreter”). Abdelkadir should be estopped from now arguing that he could not understand the written orders.

unless the ALJ continued or struck the conference. OAH received Abdelkadir's fax of his written objection at approximately 10 a.m. on the morning of the hearing. R. at 88. This last-minute attempt to further delay the proceedings by objecting to the order setting the date of the conference for that day contradicted the clear statement of the ALJ's procedure.

Third, Abdelkadir had significant notice that his failure to appear could lead to dismissal due to the nearly two-dozen prehearing notices stating that failure to appear could result in dismissal and his history as a litigant who has made arguments that a party defaulted under RCW 34.05.440(2)—the same statute at issue here. Numerous orders issued by the ALJs in this matter contained the following text in bold font:

**A party who fails to appear at the hearing may be held in default in accordance with RCW 34.05.440 and .434. If the party failing to appear is the appellant, the matter may be dismissed without prejudice.**

Abdelkadir ignored these numerous warnings. His conduct in this case is far more egregious than the conduct of the appellant in *Graves*, 144 Wn. App. 302, in which the Court of Appeals upheld a default order based on an OAH prehearing notice contained a similar warning in bold text. *Id.* at 306. In this case, however, Abdelkadir had not one, but numerous occasions to review this warning. He cannot reasonably now claim that he did not understand that the sanction for his failure to appear would be dismissal.

In addition, Abdelkadir is no stranger to judicial and administrative proceedings and is well aware—or at least should be aware—of the rules. In fact, Abdelkadir recently litigated a case to the Court of Appeals, Division One, as a *pro se* plaintiff. *See* R. at 70-77.<sup>19</sup> Ironically, Abdelkadir in that case argued for default judgment against the ESD because his employer’s representative did not appear in the administrative hearing. R. at 68, 77. Based on this record, there can be no doubt that Abdelkadir was informed of the potential for default judgment, both through the notices issued in these proceedings and through his own arguments made as a *pro se* litigant. Under these circumstances, it was fair, appropriate, and consistent with the exercise of sound discretion to deny Abdelkadir’s motion to vacate.

(b) *Abdelkadir did not demonstrate due diligence when he failed to attend the September 22, 2014, prehearing conference.*

Abdelkadir also did not show due diligence in avoiding the prehearing conference. As discussed at length above, he was available for the prehearing conference scheduled at a time of his choosing, he had knowledge of the consequences for not attending both from the ALJ in the instant case and his

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<sup>19</sup> State court rules prohibit citation of unpublished opinions as authority in state courts. GR 14.1. However, the unpublished decision is used here to show Abdelkadir’s notice of the rules and standards of conduct in judicial and administrative proceedings, not as legal authority. Therefore, GR 14.1 does not prohibit the Court from taking notice of Abdelkadir’s prior experience in the judicial system.

prior experience in the legal system, and yet he did not attend the conference in order to make any objection to the order.

Abdelkadir also failed to show due diligence given that OAH made further efforts on the day of the conference to inform him that it was not cancelled and to secure his participation. An OAH representative called Abdelkadir and left messages stating that his objections would be heard at the scheduled prehearing conference that day. R. at 18. In addition, when he did not appear for the conference, the ALJ made “telephone calls to his home and cellular phones at the time of the prehearing conference.” R. at 16. The ALJ also “left messages for [Abdelkadir] stating that he would need to call in as soon as possible to participate in the prehearing conference,” then waited for 15 minutes past the scheduled start time before going on the record. R. at 16. These efforts to contact Abdelkadir provided more than sufficient notice that the hearing was not cancelled (contrary to his unfounded assumption), and that he had a duty to attend.

(c) *Abdelkadir did not show—and the ALJ was not required to evaluate—whether he had a meritorious case.*

It was not necessary for the ALJ to address the strength of Abdelkadir’s case under the common law test used by trial courts for vacation of a default judgment under CR 60. First, Abdelkadir provides no argument below or on appeal that there is substantial evidence supporting

his prima facie case, thus he failed to carry his burden to support the Petition to Vacate. Second, even if Abdelkadir had made such a showing, he has not established excusable neglect—the primary element of the CR 60 test.

(d) *Vacating the default order would have resulted in substantial hardship to the District.*

The record also reflects that vacating the default order would have caused the District substantial hardship by prolonging the unnecessary expenditure of public funds on Abdelkadir’s administrative appeal. As described above, Abdelkadir requested—and the ALJ granted—continuances for various reasons *for more than a year*. These continuances resulted in expensive and unnecessary delays. As the superior court stated, “The other side of this is that we have a school district that has the obligation to educate children and they have limited funds with which to do that. . . . And the money that the state is spending coming into court over and over and over again because of delays in your case is money that, frankly, needs to be spent for other reasons.” RP 40-41.

(e) *Holding the scheduled conference did not invalidate Abdelkadir’s ability to object to the last order.*

Abdelkadir incorrectly argues that an objection to the prehearing order issued on September 15 would serve no purpose if an objection did not operate to cancel the hearing. However, the September 15 Order was clear that if Abdelkadir objected to the scheduled conference, his remedy was to

appear and make his objection on the record. R. at 91-92. An objection to an ALJ's order generally necessitates argument on the matter, which is accomplished through a prehearing conference. Accordingly, the ALJ in fact ruled on Abdelkadir's objection at the September 22 conference, as described above, stating that taking his September 22 document as either an objection to the prehearing conference or as a request for continuance, his request for relief was denied. Abdelkadir cites no authority for the proposition that a party may refuse to appear at a prehearing conference due to objections based not on availability but on a desire to have additional observers present and/or to first have rulings on unrelated motion. The appropriate course of action for Abdelkadir if he objected to the September 22 conference would have been to appear and raise his objection, not to make himself unavailable for the conference.<sup>20</sup>

**5. In exercising her discretion, the ALJ reasonably considered Abdelkadir's record of delays and continuances.**

The ALJ rightly considered the "facts and circumstances underlying the decision" to issue the default order, taking into account Abdelkadir's lengthy record in this matter of requesting continuances and canceling prehearing conferences. *See Beatty*, 341 P.3d at 443-44. The ALJ did not

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<sup>20</sup> Moreover, Abdelkadir's argument that the ALJ should have proceeded with the prehearing conference to set a briefing schedule without his input, Appeal Br. 13, strains credulity based on his prior conduct as reflected in the record.

make the decision to uphold her default order lightly: the ALJ pointed out that default judgments are “generally disfavored because courts prefer to decide cases on their merits rather than by default.”<sup>21</sup> R. at 17 (quoting *Griggs*, 92 Wn.2d at 581). However, as the *Griggs* court pointed out, “justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.” *Griggs*, 92 Wn.2d at 582. RCW 34.05.440 serves an important purpose—preventing stale litigation and delay by a party that fails to prosecute its case.

In this case, justice required a default, as the ALJ recognized based in part upon the record of delay by the Abdelkadir. He requested, and was granted, continuances on at least six occasions, often over the District’s objection. During the last prehearing conference, the ALJ pointed out that she had given Abdelkadir the benefit of the doubt on many occasions due to his *pro se* status. For example, on the day of the prehearing conference scheduled for September 11, 2014, pursuant to notice to the parties, Abdelkadir verbally notified OAH that he was not available. R. at 91. This resulted in the prehearing conference being rescheduled for September 22, a day that Abdelkadir represented he was available. R. at 85.

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<sup>21</sup> The superior court stated in its oral ruling that the ALJ “really went through quite a process of looking at the history of the case and trying to determine what was the right thing to do.” RP 40.

In addition, Abdelkadir caused delay by insisting that he could only attend prehearing conferences on Monday afternoon. R. at 108, 320. This scheduling restriction reduced the number of available times to conduct prehearing conferences in this case.

Abdelkadir's failure to appear on September 22 appeared calculated to cause further delay of the scheduling and filing of the District's dispositive motion, which the District raised early in the case but had not been scheduled during the ensuing year as Abdelkadir sought and received continuances. The fact that Abdelkadir represented himself did not excuse these stalling tactics, especially in light of Abdelkadir's experience with the legal system, described above. In balancing the interests of the parties, the ALJ was well-justified in upholding dismissal of Abdelkadir's case.

**C. Abdelkadir fails to show that the ALJ did not follow a prescribed procedure.**

Abdelkadir has not met his burden under the APA to demonstrate that the "agency has failed to follow a prescribed procedure," RCW 34.05.570(3)(c). A party claiming a procedural error under RCW 34.05.570 must show that "(1) the agency did not correctly follow its own procedure, and (2) the irregularity substantially prejudiced the petitioner." *Alpha Kappa Lambda Fraternity v. Wash. St. Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009).

The superior court correctly held that the ALJ did not fail to follow a prescribed procedure, because Abdelkadir “does not identify any specific procedure(s) he alleges that the order violated.” CP 442. In his brief, Abdelkadir again fails to identify any procedure at issue or to provide support for his bald assertion that the agency did not follow a procedure. Appeal Br. 12. Instead, he merely claims the ALJ’s September 15, 2014, order confused him, because it retained at the end a statement that the order would be effective in 10 days unless a party made an objection.

Abdelkadir’s argument is misplaced. Abdelkadir has provided no authority that the boilerplate statement at the end of the order was required by the APA or OAH regulations. Moreover, the ALJ’s order scheduling the September 22 prehearing conference clearly stated in bold text that the next prehearing conference or other deadline would not be “continued or stricken” unless the ALJ issued an order to that effect. R. at 91.

**D. The superior court correctly held that Abdelkadir has not demonstrated any other basis for relief from the Final Order.**

Abdelkadir incorrectly argues for the first time on appeal that the superior court erred in determining that the ALJ’s findings of fact were supported by “substantial evidence.” Appeal Br. 16. This argument fails. Abdelkadir did not challenge the sufficiency of the evidence considered by the ALJ in superior court, and thus has waived it on appeal. The Court

should refuse to review this claim of error not raised in the trial court. *See* RAP 2.5(a); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) (declining to “consider the belatedly raised arguments” made for the first under the APA and RAP 2.5).

Even assuming, *arguendo*, that Abdelkadir preserved this assignment of error, the record reflects that the ALJ’s Final Order is supported by substantial evidence. RCW 34.05.570(3)(e) provides that a court may reverse an ALJ decision that is “not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under” the APA.

Here, Abdelkadir does not explain how he views the Final Order as not supported by substantial evidence, other than reiterating his assertion that he timely filed an objection to the September 15 order. Appeal Br. 16. There is no dispute that he filed an objection to the September 15 order on September 22, 2014. However, as explained above, the terms of the ALJ’s relevant orders made clear that his objection did not obviate his duty to attend the September 22 prehearing conference.

**E. The Court should not review the Sanctions Order, because Abdelkadir has not assigned specific error to it.**

Abdelkadir fails to assign any specific error to the Sanctions Order. *See* Appeal Br. 9-10. Further, he fails to provide argument, citations to legal authority, or citations to relevant portions of the record in support of reversing that order. As a result, the Court should not consider the validity of the Sanctions Order. *See* RAP 10.3(a)(4), (6).<sup>22</sup> His passing treatment of this issue does not merit appellate review (and the Court should order sanctions against Abdelkadir under RAP 18.9, as discussed below).

However, even in the event that the Court reviews the Sanctions Order, the Court should affirm because Abdelkadir fails to establish any of the grounds on which a trial court may reconsider a decision under CR 59(a). The civil rules provide that a party may seek vacation and reconsideration of an order only for one of nine causes “materially affecting the substantial rights” of the party. CR 59(a). The Court reviews the trial court’s order on

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<sup>22</sup> RAP 10.3(a)(4) requires an appellant to submit a “separate concise statement of each error” he contents was made by the trial court, “together with the issues pertaining to the assignments of error.” RAP 10.3(a)(6) directs that an appeal brief include “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” To enforce RAP 10.3(a)(6), the Court does not review issues not argued, briefed, or supported with citation to authority. *Valente v. Bailey*, 74 Wn.2d 857, 858, 447 P.2d 589 (1968). The Court also does not consider conclusory arguments. *Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021, 297 P.3d 708 (2013). Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

reconsideration for “manifest abuse of discretion.” *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 728-29, 354 P.3d 249 (2015). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010).

Here, Abdelkadir fails to show that the superior court exercised its discretion in an unreasonable manner or upon untenable grounds when it entered the Sanctions Order. Abdelkadir appears to erroneously argue that the court erred by ruling against him on September 2, 2015, prior to reviewing his reply brief. Appeal Br. 22. However, the court remedied this issue: the Sanctions Order explicitly grants reconsideration of the earlier order denying Abdelkadir’s petition to vacate in order to allow the court to consider the statements in his reply brief. CP 215-16.

Further, Abdelkadir incorrectly argues that the court demonstrated bias or prejudice against him in entering the Sanctions Order. Appeal Br. 23. The record shows that the Sanctions Order resulted not from prejudice, but from Abdelkadir’s own misconduct. Abdelkadir’s motion for fees against the District “was not submitted based on any good faith basis in law or fact,” and he was given “sufficient notice and opportunity to withdraw his motion for fees and failed to do so.” CP 215-16. Abdelkadir does not dispute that he had an opportunity to withdraw his motion for sanctions but did not. Nor

does he explain a good-faith basis for his CR 11 sanctions motion against the District. The Court should affirm the Sanctions Award.

**F. The Court should impose RAP 18.9 sanctions on Abdelkadir.**

Given the frivolous nature of Abdelkadir's appeal, the Court should order sanctions against him. RAP 18.9(1) allows the Court to award sanctions against an appellant for filing a frivolous appeal. An appeal is frivolous if, "considering the entire record, no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal." *In re Guardianship of Wells*, 150 Wn. App. 491, 504, 208 P.3d 1126 (2009). Sanctions, including attorney's fees, are appropriate where a party's argument lack merit, rely on misunderstanding of the record, and are not adequately briefed. *See, e.g., Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012).

Abdelkadir has not identified any meritorious basis for reversing the dismissal of his appeal or the Sanctions Order. To the extent that they exist, his arguments raise no debatable point of law and are not adequately briefed. *See Stiles*, 168 Wn. App. at 268. Rather, having already received sanctions for pursuing a frivolous motion in superior court, Abdelkadir seeks to double-down by continuing to make frivolous arguments already rejected by the superior court at the expense of the District and its taxpayers. *See CP*

440. As a result, the Court should hold that Abdelkadir's appeal is frivolous and award the District its reasonable attorney's fees incurred in responding.

## V. CONCLUSION

The Court should affirm the superior court's Appeal Order on both grounds cited by the court below, thus upholding the ALJ's Final Order and dismissing Abdelkadir's administrative case. In addition, the Court should not review the Sanctions Award, or, in the alternative, affirm that order. Finally, the Court should award the District reasonable attorney's fees as a sanction under RAP 18.9 for Abdelkadir's frivolous appeal.

**RESPECTFULLY SUBMITTED this 5th day of February, 2016.**

**PORTER FOSTER RORICK LLP**



**By: Parker A. Howell, WSBA #45237**

**Lance Andree, WSBA #32078**

**Attorney for Shoreline School District**



# **APPENDIX A**

**RCW 34.05.440****Default.**

(1) Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice to, or hearing for the benefit of, that party, except that any default or other dispositive order affecting that party shall be served upon him or her or upon his or her attorney, if any.

(2) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

(3) Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

[1989 c 175 § 16; 1988 c 288 § 411.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

## **APPENDIX B**

**RCW 34.05.542****Time for filing petition for review.**

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

[1998 c 186 § 1; 1988 c 288 § 509.]

# **APPENDIX C**

**RCW 34.05.570****Judicial review.**

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

- (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
- (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
- (c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
- (d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

- (A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and
- (B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall 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 provisions 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;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has 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, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

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

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

#### NOTES:

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

**Part headings not law—Severability—1995 c 403:** See RCW 43.05.903 and 43.05.904.

**Effective date—1989 c 175:** See note following RCW 34.05.010.