

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re: ) Docket No. 04-2013-L-0617  
)  
[APPELLANT] ) REVIEW DECISION AND FINAL ORDER  
)  
Appellant ) Children's Administration – CPS Review

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I. NATURE OF ACTION

1. Administrative Law Judge Robert M. Murphy received oral argument regarding a Department *Motion to Dismiss for Lack of Jurisdiction* on August 27, 2013, and mailed an *Initial Order* on September 10, 2013. In this ruling, the Administrative Law Judge (ALJ) determined that the Appellant had failed to timely request an adjudicative procedure. The ALJ granted the Department's *Motion* and dismissed the Appellant's hearing request.

2. The Appellant filed a *Petition for Review of Initial Decision* on September 20, 2013.

II. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, and the Appellant's *Petition for Review*. The following necessary findings of fact were relevant and supported by substantial evidence in the record.

1. The Appellant is a [AGE]-year-old female.
2. On **March 19, 2010**, the Department of Social & Health Services Children's Administration/Child Protective Services (Department) received a report alleging that the Appellant had abused or neglected a child in her care.
3. On **March 21, 2011**, the Department sent to the Appellant, by certified mail, a letter advising her that the allegations as to "[CHILD 1] and [CHILD 2] only" were "Founded" for "negligent treatment or maltreatment" of a child.
4. Specifically, the letter referenced an investigation denominated, "Intake number

[INTAKE NUMBER].” A brief description (who, what, and where) of the investigation that led to the finding reads:

During the course of the investigation, the [RELATIVE 1] admitted that she used a towel to lock the older children in their bedroom at night. Although the [RELATIVE 1] states that she did so in order to protect the child from getting out of bed and injuring herself in the apartment or wandering out of the apartment, this action created a serious risk of substantial harm to the child, especially in case of an emergency.

5. The Appellant received and signed for the letter on **March 31, 2011**, at 9:09 A.M.

The Appellant received the letter at her address at [ADDRESS 1], Washington.

6. The letter further advised the Appellant that she could request an internal review of the Founded findings of child neglect by filling out a “Review Request Form” (RRF).

7. The Appellant formally requested an internal review by completing the RRF on **April 6, 2011**. The Department received the RRF on **April 8, 2011**.

8. The Appellant requested that notice of the outcome of the internal review be mailed to her [ADDRESS 1] address.

9. Thereafter, the Appellant shortly left the [ADDRESS 1] address and moved in with her [RELATIVE 2] on [ADDRESS 2]. The Appellant did not leave a change of address with the United States Postal Service (USPS). The Appellant did not advise the Department of her change of address.

10. The Department acknowledged receipt of the RRF. An internal review concluded that the finding of neglect was correct. The Department sent the review outcome to the Appellant by certified mail at the [ADDRESS 1] address on **April 12, 2011**. This notice advised the Appellant that she could challenge the determination by sending a written request for administrative hearing to the Office of Administrative Hearings (OAH) within 30 calendar days from the date she received the letter. The notice cited RCW 26.44.125.

11. The USPS attempted, unsuccessfully, to deliver the review notice to Appellant on **April 14, 2011, and April 29, 2011**. The USPS returned the letter to the Department on

**May 4, 2011.** The returned envelope only reads “Return to Sender” it did not state that the addressee was no longer at this address or had moved.

12. The Department did not attempt to further contact the Appellant via personal service, regular mail, or by telephone.

13. The Department did not know that the Appellant had moved from the [ADDRESS 1] address.

14. After the Appellant moved, she continued to return to the [ADDRESS 1] address to see if any mail had been received. She did not receive any mail from the new occupants or the owner of the dwelling.

15. The Appellant did not receive actual notice of the review determination.

16. Approximately two years later, the Appellant began an internship at [SCHOOL]. She was dismissed from the program during her internship, because there had been a founded finding against her for child neglect.

17. The Appellant contacted attorney, Douglas J Phelps. Attorney Phelps had the Appellant request a copy of her file from the Department. Upon review of the file, the Appellant learned of the Department’s decision to uphold the founded finding.

18. On **April 1, 2013**, the Appellant requested an administrative hearing by certified mail, pursuant to RCW 26.44.125. OAH received the request in [CITY] on **April 4, 2013**.

### **III. CONCLUSIONS OF LAW**

1. The petition for review was timely filed and is otherwise proper.<sup>1</sup> Jurisdiction exists to review the *Initial Order* and to enter the final agency order.<sup>2</sup>

2. ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal

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<sup>1</sup> WAC 388-02-0560 through -0585.

<sup>2</sup> WAC 388-02-0215, -0530(2), and -0570.

authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.<sup>3</sup>

3. In an adjudicative proceeding regarding a founded CPS report of negligent treatment or maltreatment of a child, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.<sup>4</sup> This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo*. In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.<sup>5</sup> The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.<sup>6</sup> Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts and Conclusions of Law, regardless of whether any party has asked that they be reviewed.

5. An ALJ has jurisdiction to conduct a hearing only when granted such authority by law. Every decision maker must first determine whether he/she has jurisdiction to decide a matter before proceeding to hear and render a decision on the merits of a case. Jurisdiction cannot be waived and can be raised at any time.<sup>7</sup> "Even in the absence of a contest, where there is a question as to jurisdiction, [the] court has a duty to itself raise the issue."<sup>8</sup> Without

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<sup>3</sup> WAC 388-02-0220.

<sup>4</sup> WAC 388-02-0217(3).

<sup>5</sup> WAC 388-02-0600, effective March 3, 2011.

<sup>6</sup> RCW 34.05.464(5).

<sup>7</sup> *J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004).

<sup>8</sup> *Riley v. Sturdevant*, 12 Wn. App. 808, 810, 532 P.2d 640 (1975).

jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal.<sup>9</sup>

6. Any person named as an alleged perpetrator in a founded CPS report made on or after October 1, 1998, may challenge that finding.<sup>10</sup> CPS has the duty to notify the alleged perpetrator in writing of any such child abuse or neglect finding,<sup>11</sup> at least in part so the alleged perpetrator can challenge that finding. WAC 388-15-069(1), which has two sentences, authorizes two separate and distinct methods by which CPS may notify alleged perpetrators of a child abuse or neglect finding entered against them.<sup>12</sup>

7. WAC 388-15-069(1) states as follows:

CPS notifies the alleged perpetrator of the finding by sending the CPS finding notice via certified mail, return receipt requested, to the last known address. CPS must make a reasonable, good faith effort to determine the last known address or location of the alleged perpetrator.

8. The first sentence in WAC 388-15-069(1) establishes one notification method CPS may use, which is to mail its notice to the alleged perpetrator by certified mail, return receipt requested, to the alleged perpetrator's last known address. If CPS is successful in getting its notice to the alleged perpetrator via this method, then CPS can prove that fact by producing a postal certified mail receipt signed by the alleged perpetrator acknowledging that she received that notice.<sup>13</sup> Proof of service via this certified mail, return receipt requested method, is crucial for the Department as well as for the alleged perpetrator because the alleged perpetrator's 20-day period in which to appeal the CPS finding begins to run with the date she

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<sup>9</sup> *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App 121, 124, 989 P.2d 102 (1999).

<sup>10</sup> WAC 388-15-081.

<sup>11</sup> WAC 388-15-065.

<sup>12</sup> WAC 388-15-069(2) authorizes another method, personal service, which is irrelevant to this proceeding: "In cases where certified mailing may not be either possible or advisable, the CPS social worker may personally deliver or have served the CPS finding notice to the alleged perpetrator."

<sup>13</sup> WAC 388-02-0065, How does a party prove service, states: "A party may prove service by providing any of the following: (1) A sworn statement; (2) **The certified mail receipt signed by the recipient**; (3) An affidavit or certificate of mailing; (4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package; or (5) Proof of fax transmission." (Emphasis added).

receives that notice.<sup>14</sup> Because the alleged perpetrator's appeal period is specifically tied to the date she "receives the CPS finding notice," the undersigned concludes that perfected service under the first sentence of WAC 388-15-069(1) requires that the alleged perpetrator actually receive CPS' notice.

9. Because the Department cannot produce a certified mail receipt proving that the CPS finding notice was actually received by the Appellant, the Department was not successful in serving its finding notice to the Appellant pursuant to the certified mail, return receipt method authorized under the first sentence in WAC 388-15-069(1). The Appellant's 20-day period in which to appeal that finding under WAC 388-15-085(2) never began to run. This analysis is correct as far as it goes, but it does not go far enough. Deciding whether the Appellant received actual notice is not enough.

10. The second sentence in WAC 388-15-069(1) authorizes a second method the Department may use to get CPS' notice to an alleged perpetrator. This second method requires the Department to make a "reasonable, good faith effort" to get CPS' notice to the alleged perpetrator. This second-sentence method does not require that the Appellant actually receive the CPS notice. This second-sentence, good-faith-effort service method is separate and distinct from the first-sentence, actual-receipt-of-notice service method because there are two separate and distinct time periods during which the alleged perpetrator may appeal the CPS notice.

11. An alleged perpetrator has 20 days<sup>15</sup> from the date she actually receives the CPS notice, pursuant to the first sentence in WAC 388-15-069(1), to appeal it under

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<sup>14</sup> WAC 388-15-085, Can an alleged perpetrator challenge a CPS finding of child abuse or neglect, states as follows: "(1) In order to challenge a founded CPS finding, the alleged perpetrator must make a written request for CPS to review the founded CPS finding of child abuse or neglect. The CPS finding notice must provide the information regarding all steps necessary to request a review. (2) The request must be provided to the same CPS office that sent the CPS finding notice **within twenty calendar days from the date the alleged perpetrator receives the CPS finding notice** (RCW 26.44.125)." (Emphasis added).

<sup>15</sup> WAC 388-15-089, What happens if the alleged perpetrator does not request CPS to review the founded CPS finding within twenty days, states as follows: "(1) If the alleged perpetrator does not submit a written request within twenty calendar days for CPS to review the founded CPS finding, no further review or challenge of the finding may occur."

WAC 388-15-085(2), but she has 30 days<sup>16</sup> to appeal it under WAC 388-15-089(2) if the Department has only made a reasonable, good faith effort to get the CPS notice to her, under the second sentence in WAC 388-15-069(1). Thus, while the Appellant's 20-day appeal period under WAC 388-15-085(2) never began to run, her 30-day period under WAC 388-15-089(2), did begin running and ran out before the Appellant filed her request for an administrative hearing on April 4, 2013, because the Department did in fact use reasonable, good faith efforts to serve her with the CPS notice.

12. These two different methods of service of a notice to an alleged perpetrator of child abuse or neglect operate concurrently. That is, if the Department is able to actually get the CPS notice into the hands of the alleged perpetrator by mailing it by certified mail, return receipt, then the Department has used the WAC 388-15-069(1) first-sentence method. However, if the Department attempts to get its notice into the hands of the alleged perpetrator by mailing it certified mail, return receipt requested, but fails, then that mailing by certified mail, return receipt requested can turn into good service under the WAC 388-15-069(1) second-sentence method if the Department's mailing efforts constitute a reasonable, good faith effort at putting the notice into the alleged perpetrator's hands. In this case, the Department was not able to serve the Appellant under the first- sentence method, but it was able to do so under the second-sentence method because the steps it took to get its notice into the Appellant's hands were both reasonable and undertaken in good faith.

13. The undersigned has concluded that the Department made reasonable, good faith efforts at getting its CPS notice into the Appellant's hands because the notice was sent to the Appellant's address of record. Furthermore, this was the same address provided by the Appellant on her Review Request Form less than one week earlier, and the Appellant did not change her mailing address with the Department or the USPS.

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<sup>16</sup> (2) If the department has exercised reasonable, good faith efforts to provide notice of the CPS finding to the alleged perpetrator, the alleged perpetrator shall not have further opportunity to request a review of the finding beyond thirty days from the time the notice was sent.

14. The above analysis of the second sentence of WAC 388-15-069(1), wherein it is concluded that actual receipt of the CPS notice is not required before the 30-day period in which to appeal the notice under WAC 388-15-089(2) begins running where the Department has made reasonable, good faith efforts to serve the notice, is consistent with published case law in Washington State which establishes that a person who refuses to accept certified mail, return receipt requested, has constructively refused to accept notice.<sup>17</sup> In this matter, the U.S. Postal Service attempted delivery of the finding of negligent treatment or maltreatment of a child to the Appellant's address of record, on April 14, 2011, and on April 29, 2011. The Appellant failed to respond to each of these attempts and therefore constructively refused to accept the Department's notice of a founded finding of negligent treatment or maltreatment of a child.

15. The above analysis of the second sentence of WAC 388-15-069(1) is also consistent with the statutory scheme set out in chapter 26.44 RCW, wherein the Department's foremost obligation is the protection of children and where its obligation to serve alleged perpetrators with notice of its actions is of lesser priority. For example, the Department is required under RCW 26.44.115 only to take "reasonable steps" to notify parents that their children have been taken into protective custody; the Department is required under RCW 26.44.120 only to make "reasonable efforts" to notify non-custodial parents of the same information; and the Department is required under RCW 26.44.030 only to make "reasonable efforts" to identify the person alleging that child abuse or neglect has occurred. Notwithstanding the published case law's preference for merits adjudication versus default orders under Civil Rule 60(b), the Department's regulations do not require actual service of the CPS notice in all instances and the undersigned must apply those regulations as the first

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<sup>17</sup> *City of Seattle v. Foley*, 56 Wn. App. 485, 784 P.2d (1990); *McLean v. McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997); and *State v. Baker*, 49 Wn. App. 778, &45 P.2d 1335 (1987).

source of law.<sup>18</sup>

16. As stated above, an alleged perpetrator must request a review of a finding of abuse or neglect in writing, within twenty calendar days after receiving notice of the finding from the Department, or within thirty calendar days after the Department has made reasonable, good faith efforts at getting its CPS notice into the Appellant's hands. If a timely request for review is not made, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding.<sup>19</sup> This Appellant failed to timely request review of the finding of negligent treatment or maltreatment of a child after constructively refusing certified mail on April 14, 2011, and on April 29, 2011. Because this Appellant's request for hearing was not received by the Office of Administrative Hearings until after the regulatory and statutory time period for filing such a request, the founded incident of negligent treatment or maltreatment of a child became final and the ALJ lacked jurisdiction to hear the case on its merits. Therefore, the ALJ correctly dismissed this matter due to lack of subject matter jurisdiction.<sup>20</sup>

17. The undersigned has considered the *Initial Order*, the Appellant's *Petition for Review*, and the entire hearing record. The Initial Findings of Facts accurately reflected the evidence presented on this hearing record and they are adopted as findings in this decision, pursuant to the clarifying modifications outlined above. The initial Conclusions of Law cited and applied the governing law correctly and they are adopted and incorporated as conclusions for this decision.<sup>21</sup> The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

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<sup>18</sup> WAC 388-02-0220.

<sup>19</sup> RCW 26.44.125.

<sup>20</sup> *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App 121, 124, 989 P.2d 102 (1999).

<sup>21</sup> RCW 34.05.464(8).

#### IV. DECISION AND ORDER

1. There was no jurisdiction for the Administrative Law Judge to hold a hearing on the merits of this matter, because the Appellant failed to timely request an adjudicative hearing to contest the Department's founded finding of negligent treatment or maltreatment of a child.

2. The *Initial Order* on the Department's *Motion for Dismissal* is **affirmed**.

*Mailed on the 5<sup>th</sup> day of November, 2013.*

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THOMAS L. STURGES  
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT], Appellant  
Douglas J. Phelps, Appellant's Representative  
Mareen Bartlett, Department's Representative  
Sharon Gilbert, Program Administrator, MS: 45710  
Robert M. Murphy, ALJ, [CITY] OAH