STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 07-2009-L-0305
	)	
[APPELLANT'S NAME]	)	**REVIEW DECISION AND FINAL ORDER**
	)	
	)	Adult Protective Services

I. NATURE OF ACTION

1. The Department of Social and Health Services (Department or DSHS) Adult Protective Services (APS) program investigated a report of mental abuse of a vulnerable adult by [APPELLANT'S NAME] (Appellant). Based on the investigation, the Department determined that the Appellant mentally abused [NAME 1],[1] a vulnerable adult. The Appellant requested a hearing to contest the Department's finding.

2. Administrative Law Judge (ALJ) William J. Stewart of the Office of Administrative Hearings (OAH) in [CITY] held an administrative hearing on February 15, 2011.[2] During this hearing, the ALJ admitted the Department's exhibits marked as 1 through 9, as well as the Appellant's request for hearing, which the ALJ marked as exhibit 10.[3] Sworn testimony was taken from: (1) the Appellant; (2) Pakou Lee, Aging & Long-Term Care of [AREA] Washington (ALTCEW) case manager; (3) [NAME 1], the alleged victim; (4) [NAME 2], the Appellant's acquaintance; (5) Curt Crusch, APS investigator; (6) [NAME 3], the Appellant's acquaintance; and (7) [NAME 4], the Appellant's acquaintance. [NAME 5], an interpreter certified by the Office of the Administrator for the Courts, interpreted in the [LANGUAGE 1] language. During this

[1] WAC 388-71-01250 makes the alleged victim's name and personally identifying information confidential. To protect [NAME 1]'s confidentiality, the undersigned refers to her by first name only.

[2] A previous hearing was held on February 25, 2010, and an *Initial Order* was issued on March 16, 2010. ALJ Stewart concluded that the Department correctly determined the allegation of mental abuse was substantiated. The Appellant then submitted a late petition for review of ALJ Stewart's decision to the DSHS Board of Appeals (BOA). However, the March 16, 2010, *Initial Order* from that first hearing could not be reviewed by the BOA because the OAH's audio record of the February 25, 2010, hearing was not made available to the BOA. The case had to be remanded on July 15, 2010, to the OAH for another hearing with a complete audio record. Upon remand, the parties stipulated to Findings of Fact 1 through 7 and Conclusions of Law 1 through 7 in the March 16, 2010, *Initial Order* to shorten the time required for the second hearing.

[3] The Appellant's exhibit A, a DSHS background check for the Appellant, dated April 20, 2009, was admitted at the first hearing on February 25, 2010, and thus is included in the hearing record.

hearing, the Department was represented by Nicole E. Pippenger. The Appellant was represented by Dustin Deissner. Both parties submitted written closing arguments by the record closure date of February 23, 2011.

3. The OAH mailed an *Initial Order* on March 9, 2011. In this decision, the ALJ affirmed the Department's finding of mental abuse of a vulnerable adult by the Appellant because [NAME 1] was a vulnerable adult and the Appellant's actions, omissions, and speech met the statutory definition of mental and verbal abuse.

4. On March 30, 2011, the Appellant's representative filed a petition for review of the *Initial Order* with the DSHS Board of Appeals (BOA). He argued that an alleged victim must suffer harm greater than mere annoyance to constitute mental and verbal abuse, and that the evidence did not support a finding that the Appellant caused such harm. The Appellant's representative also asserted that the evidence does not support a finding that the Appellant acted willfully or that he knew, or should have known, that his actions were likely to result in harm to [NAME 1]. The Review Judge was directed to refer to the Appellant's written closing arguments for further support of the Appellant's position on review.

5. On April 13, 2011, the Department's representative filed a response to the Department's petition for review. She noted that the Appellant did not dispute any specific Findings of Fact or Conclusions of Law in the *Initial Order*, and that he argued the same points he unsuccessfully argued at the hearing.

II. FINDINGS OF FACT

To determine the adequacy and appropriateness of the ALJ's Findings of Fact[4] in this matter and to make any necessary modifications to those findings, the undersigned reviewed

[4] A finding of fact is an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect. *State v. Williams*, 96 Wn.2d 215, 221 (1981) and *State v. Neidergang*, 43 Wn. App. 656, 658-59 (1986). Findings of fact characterized as conclusions of law are reviewed as findings of fact. *Redmond v. Kezner*, 10 Wn. App. 332, 343 (1973) (citing *Estes v. Bevan*, 64 Wn.2d 869 (1964); *Ferree v. Doric Co.*, 62 Wn.2d 561 (1963); *Baltzelle v. Doces Sixth Ave., Inc*., 5 Wn. App. 771 (1971); and 2 Orland, Wash. Prac. § 308, at 334 n.28 (3d ed. 1972).

the entire record, including the available audio recordings or written verbatim transcripts of the proceedings, any documents presented as evidence, the *Initial Order*, any written arguments or objections submitted, the petition for review of the *Initial Order*, and any response to the petition. No ruling by the ALJ on the admissibility of proffered evidence is overruled or altered unless that is made explicit in this *Review Decision and Final Order.*

These Findings of Fact are based upon a careful consideration of the record, including the demeanor and motivations of the witnesses as observed and recognized by the ALJ and the undersigned, respectively; the reasonableness of the testimony and exhibits; the amount of time that has elapsed between when any particular incident occurred and when various individuals provided statements or evidence about that incident; and the totality of the evidence presented. Findings consistent with the testimony or exhibits of a particular witness or party indicate that the undersigned has found that testimony or those exhibits more credible than any to the contrary and better supported by substantial evidence in the record. If the evidence conflicted on certain material points, the undersigned made detailed credibility findings.

When making the Conclusions of Law found in this *Review Decision and Final Order*, the undersigned considered the following necessary and relevant facts, which are supported by substantial evidence in the record:

1. **Background**. [NAME 1] is the alleged victim in this matter. She was 60 years old at the time of the hearing, has had a diagnosis of multiple sclerosis (MS) for over 30 years, and must use a wheelchair to ambulate.[5] [NAME 1] receives in-home Medicaid personal care services and her case manager is Pakou Lee.[6]

2. [NAME 1] resides in her home with her [RELATIVE], [NAME 6], and other relatives.[7] Three of these other residents are persons with disabilities who have individual

[5] Appellant's Statement Re Stipulation to Findings, dated October 1, 2010. *See also* testimony of [NAME 1].
[6] *Id.*; testimony of Pakou Lee; testimony of Curt Crusch; and exhibit 3 at 3.
[7] Appellant's Statement Re Stipulation to Findings, dated October 1, 2010.

providers.[8] Two of the other individual providers in [NAME 1]'s home are [NAME 7] and [NAME 8].[9]

3. The Appellant is the alleged perpetrator in this matter. During the time of the incidents described below, he was [NAME 1]'s individual provider for approximately six months, from October 2008 through March 2009.[10]

4. [NAME 1] and the Appellant got along well for the first four to five months he was employed by her.[11] [NAME 1] considered the Appellant to be a good worker and provider until the last one to two months of his employment, which is when he became offensive.[12]

5. **APS Investigation**. On March 19, 2009, APS received a written referral about [NAME 1].[13] This referral noted that the Appellant made accusations against [NAME 1], hollered at her, and spoke down to her.[14] He was also demanding, used the word "bitch," and referred to women as "bitches" in [NAME 1]'s presence.[15] The referral included an allegation that the Appellant had a file on his phone of a child using "vulgar and racist words," which he played in [NAME 1]'s presence despite that she asked him to refrain from doing so.[16] There was also an allegation that the Appellant brought a male escort to [NAME 1]'s home because the Appellant felt she was "lonely and has needs."[17] Also included in the referral was information that the Appellant had unstable or volatile behavior, that his behaviors and beliefs were perceived as "strange," and that the Appellant was like a "stalker" and people were "cautious" around him.[18]

6. Following the referral to APS, Mr. Crusch was assigned to investigate the matter.[19] Mr. Crusch holds a degree in psychology, has worked as an APS investigator since

[8] *Id.*
[9] *Id.*; exhibit 2 at 3; and exhibit 8.
[10] Appellant's Statement Re Stipulation to Findings, dated October 1, 2010, and testimony of [NAME 1].
[11] Testimony of [NAME 1] and exhibit 7 at 1.
[12] *Id.*
[13] Exhibit 2. *See also* exhibit 8, a handwritten letter from [NAME 8], received by ALTCEW on March 17, 2009.
[14] Exhibit 2 at 1.
[15] *Id.* at 2.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Testimony of Curt Crusch.

November 2008, and was previously a case manager at [BUSINESS NAME 1] for 18 years.[20] Upon reviewing the file, Mr. Crusch contacted [NAME 1]'s caseworker, Pakou Lee, to inform her about the investigation and invite her to take part in the interview with [NAME 1].[21]

7. Mr. Crusch and Ms. Lee visited [NAME 1] on March 26, 2009.[22] During the March 26, 2009, visit, [NAME 1] was observed to have no cognitive defects and confirmed the information included in the March 19, 2009, referral, with additional details.[23] [NAME 1] also noted that the Appellant "…was being a butt, he was sexually harassing me…" and said "…stupid, immature, childish stuff that I don't need to hear."[24] [NAME 1] relayed an incident that took place in early- to mid-March, during which the Appellant either accused her of touching his "cock" or asked her if she wanted to talk to his cock, which shocked, embarrassed, and upset [NAME 1].[25] She confronted him about it.[26] [NAME 1] also talked about another incident that had taken place about a few weeks prior to the March 26, 2009, interview, in which the Appellant brought his [RELATIVE 2] to her bedroom unannounced and made comments about how [NAME 1] did not have a man but needed one.[27] After talking with [NAME 1] for 20 to 30 minutes, this young man shook her hand and told her he would "always be kind and gentle with her."[28] This upset [NAME 1] and she asked to speak with her [RELATIVE].[29] [NAME 1] was in the process of dissolution of her marriage during this time period. The Appellant made comments to her, such as "you need a man," "poor [NAME 1], she doesn't have a man," and she "has needs."[30] These comments were upsetting to her, because she believed her personal

[20] *Id.*
[21] *Id.* and exhibit 3 at 2.
[22] *Id.*
[23] Testimony of Curt Crusch; testimony of Pakou Lee; testimony of [NAME 1]; and exhibit 3 at 3. *See also* exhibits 5 through 8.
[24] Testimony of Curt Crusch and exhibit 3 at 3.
[25] *Id. See also* exhibits 6 through 8.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

life was none of his business.[31]

8. During the March 26, 2009 interview, [NAME 1] also spoke to Mr. Crusch and Ms. Lee about the file on the Appellant's cell phone, with the childish voice "talking nasty."[32] The Appellant played this file three or four times after [NAME 1] asked him to stop doing so and then he sent to file to his co-worker, [NAME 7], whom it also upset with its vulgarity and nastiness.[33] [NAME 1] stated that the Appellant often referred to women as "bitches," which she told him was "…insulting, disrespectful and rude."[34] During the March 26, 2009, interview, [NAME 1] stated that she was not afraid of the Appellant, he did not intimidate her, his behaviors had improved somewhat since she and her [RELATIVE] had spoken to him, and she hoped that he could continue to be her caregiver.[35]

9. Later in the day on March 26, 2009, [NAME 1] telephoned Mr. Crusch to tell him that she had decided to ask for another caregiver, based on the Appellant's attitude and behavior toward her.[36] [NAME 1] said that arguing with him made her overly tired.[37] During this telephone conversation, [NAME 1] also relayed that the Appellant recently refused to take her home after they had spent several hours at an eye doctor appointment, despite that [NAME 1] asked him three or four times to take her home because she was hungry and exhausted.[38] Instead, the Appellant took her shopping at [BUSINESS NAME 2] and to [BUSINESS NAME 3] for a meal.[39] [NAME 1] "almost had to have a fit" before he would finally take her home.[40] This made [NAME 1] feel very stressed-out, disappointed, upset, and worn-out.[41] The Appellant's actions made the day harder for her.[42] His obstinacy bothered and offended her, and she felt

[31] *Id.*
[32] Testimony of Curt Crusch and exhibit 3 at 3. *See also* exhibits 5 through 8.
[33] *Id. See also* testimony of [NAME 1] and testimony of Pakou Lee.
[34] *Id.*
[35] Exhibit 3 at 4.
[36] Testimony of Curt Crusch; testimony of [NAME 1]; and exhibit 3 at 4.
[37] *Id.*
[38] *Id.*
[39] *Id. See also* testimony of the Appellant and exhibit 7 at 2.
[40] Testimony of [NAME 1].
[41] *Id.* and exhibit 3 at 4.
[42] *Id.*

she was not in control of the situation.[43]

10. Mr. Crusch advised [NAME 1] that she had to discuss her wish to terminate the Appellant's employment as [NAME 1]'s caregiver with Ms. Lee.[44]

11. On March 31, 2009, Mr. Crusch interviewed the Appellant about the allegations made against him.[45] The Appellant had been advised that he could bring someone with him, but he arrived alone.[46] The Appellant did not request an interpreter and appeared to understand the questions asked of him.[47] The Appellant tried to mis-direct Mr. Crusch when confronted with the allegations by talking about other caregivers in the home or actions that [NAME 1] had allegedly taken against him.[48] The Appellant also admitted that he had accidentally played the offensive audio file on his cell phone while in [NAME 1]'s presence, but that he had been trying to delete it and accidentally sent it to [NAME 7].[49] The Appellant also admitted that he accidentally used bad language in [NAME 1]'s presence and that [NAME 6] had spoken with him about this, but he maintained that he would always stop whenever [NAME 1] asked him to do so.[50]

12. Also on March 31, 2009, Ms. Lee informed Mr. Crusch that [NAME 1] asked that the Appellant be terminated as her caregiver.[51] [NAME 1] told Ms. Lee that the Appellant had come to her home that day and said angrily, "you told, you told!"[52] The Appellant tried to persuade her to recant her narrative to Mr. Crusch.[53] [NAME 1] refused to do so and also

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[43] *Id.*
[44] Testimony of Curt Crusch and exhibit 3 at 4.
[45] Testimony of Curt Crusch; testimony of the Appellant; and exhibit 3 at 5.
[46] *Id.*
[47] Testimony of Curt Crusch (noting also that the Appellant and [NAME 1] understood each other without an interpreter during the Appellant's six months of employment) and exhibit 3 at 5. *See also* testimony of Pakou Lee (noting that the Appellant had never requested or needed an interpreter when communicating with her about [NAME 1]'s care).
[48] Testimony of Curt Crusch and exhibit 3 at 5.
[49] *Id.*
[50] *Id. See also* testimony of the Appellant (stating that he warned [NAME 1] and [NAME 6] when they hired him that he had worked for another client who used foul language and that he might accidentally slip and use it himself); exhibit 5 (stating that the Appellant's "…words were bad—he did a lot of bitch calling (females) we had words about this so he never said this again"); and exhibit 6 (stating that the Appellant "…was talking badly in front of and at my [NAME 1] calling her a bitch"). *But cf.* testimony of the Appellant (stating that he did not remember using the word "bitch" or other curse words in front of [NAME 1]).
[51] Testimony of Curt Crusch; testimony of Pakou Lee; and exhibit 3 at 6.
[52] *Id.*; testimony of [NAME 1]; and exhibit 7 at 1.
[53] *Id.*

refused to apologize to the Appellant.[54] Ms. Lee contacted the Appellant and instructed him that he was being terminated from providing services and not to return to [NAME 1]'s home.[55]

13. On May 12, 2009, Mr. Crusch returned to [NAME 1]'s home.[56] While there, he retrieved witness statements, signed under penalty of perjury, from [NAME 6], dated May 1, 2009, and from [NAME 1], dated May 7, 2009.[57]

14. The May 1, 2009, declaration from [NAME 6] reiterated that the Appellant used the word "bitch" a lot, but that she spoke with him about it and he never used it again. She also noted that he said "real bad things to [NAME 1]," [NAME 1] did not like it, the Appellant and [NAME 1] had "several fights" about this, and the Appellant stopped saying those things, but "they still had trouble (not compatible)."[58] [NAME 6] also referred to the cell phone file the Appellant had sent to [NAME 7], which she said, "shamed [[NAME 7]] and made her mad."[59]

15. The written declaration from [NAME 1], dated May 7, 2009, was more detailed and stated at the outset that her "…six months with [the Appellant] seemed to be pretty much all about [the Appellant]."[60] The first page is in [NAME 8]'s handwriting; she wrote the narrative while [NAME 1] dictated it to her and she also witnessed the first page.[61] [NAME 8] was [NAME 1]'s other individual provider in the home at the time of the investigation. The second page was prepared later, and is in [NAME 1]'s own handwriting. [NAME 1] reiterated that "his behavior was very inappropriate and often childish," and that "[h]e often said or did things that made me feel bad and/or angry or just taken advantage of."[62] [NAME 1] confronted the Appellant about these behaviors, but they did not change, he did "…whatever he wanted," and "[h]e never

[54] *Id.*
[55] Testimony of Curt Crusch and exhibit 3 at 6.
[56] Testimony of Curt Crusch and exhibit 3 at 8.
[57] *Id.*; exhibit 5; and exhibit 7.
[58] Exhibit 5.
[59] *Id.*
[60] Exhibit 7 at 1.
[61] *Id.*
[62] *Id.*

apologized for anything he did or said."[63] "[H]e would scold me and say 'you tell, you tell!'" whenever [NAME 1] said anything to anyone about what the Appellant said that upset her.

16. In her May 7, 2009, written statement, [NAME 1] again relayed the incident after her eye doctor appointment, noting that "…he wanted it all his way!" and "…had his own agenda."[64] She also reiterated that the Appellant had once accused her of touching his cock and that she told him she had not.[65] [NAME 1] confirmed once more that the Appellant had played the offensive cell phone file in her presence "…at least 3 times…" and that she told him to turn it off because the "…cartoonish baby… saying vulgar, nasty words and laughing… was awful!"[66] Finally, during [NAME 1]'s last encounter with the Appellant he told her that she had "hurt his balls."[67]

17. On May 19, 2009, Mr. Crusch telephoned [NAME 7] to ask her about the incident involving the cell phone file that the Appellant had sent to her.[68] She reported that the Appellant sent the "nasty talking with name calling and using the word Bitch a lot" file to her cell phone, along with some [LANGUAGE 1] music she had requested.[69] [NAME 7] is [AN ETHNIC] female who considered the file racially offensive in nature.[70] She was very upset about the incident.[71] When the Appellant realized she was upset, he sent her three text messages.[72] The first two text messages were sent on the same day; the third one was sent a day later.[73] In the first two, the Appellant tried to treat the incident as a joke.[74] In the third, he attempted to characterize his act of sending her the file as a mistake.[75] On May 20, 2009, [NAME 7] forwarded these three

[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Testimony of Curt Crusch and exhibit 3 at 9.
[69] *Id.*; testimony of [NAME 1]; testimony of the Appellant; testimony of Pakou Lee; exhibit 5; exhibit 6; and exhibit 8.
[70] *Id.*
[71] *Id.*
[72] Testimony of Curt Crusch; exhibit 3 at 9; and exhibit 4.
[73] *Id.*
[74] Exhibit 4 at 1 and 2.
[75] Exhibit 4 at 3.

text messages to Mr. Crusch's email address.[76]

18. On May 20, 2009, [NAME 7] also sent Mr. Crusch the audio file, which he transferred to a CD.[77] The voice on the file sounds like that of a very young child.[78] The 37-second file includes the following phrases and words: "you're a damn ho," "big ass bitch," "fucking bitch, asshole," "you tell fucking damn lies, bitch," "shit," "I going to kill you and your fat ass, bitch" "I'm gonna shoot your head off, bitch, shit," and "you've got me fucked up."[79] This is the same audio file that [NAME 1] told the Appellant three or four times to put it away at work, not to play it, and that he had other duties to perform.[80] However, the Appellant disregarded her instructions and continued to play it several times before stopping.[81]

19. In another written declaration, dated June 10, 2009, and signed under penalty of perjury, [NAME 6] noted that she "…was upset at [the Appellant] when I learned that he was talking badly in front of [NAME 1] calling her a bitch."[82] [NAME 6] instructed him to never use that word in their house again.[83] The Appellant acknowledged to her that he knew what the word meant because his previous client had called him bad names for seven years.[84] He calmly returned to work after this discussion, but then he sent the offensive audio file to [NAME 7] after he played it on his phone and "[NAME 1] told him to get rid of it."[85]

20. On June 24, 2009, Mr. Crusch presented his investigation findings to the three-member APS panel, which consists of other investigators and a supervisor. [86] The panel determined that the APS report of mental abuse was substantiated.[87] The panel determined that

[76] Exhibit 4.
[77] Testimony of Curt Crusch; exhibit 3 at 9; and exhibit 9.
[78] Testimony of Pakou Lee; testimony of [NAME 1]; testimony of Curt Crusch; exhibit 3 at 9; exhibit 5; exhibit 6; exhibit 8; and exhibit 9.
[79] Testimony of Curt Crusch; exhibit 3 at 9; and exhibit 9.
[80] Testimony of [NAME 1]; testimony of Curt Crusch; exhibit 3 at 4; exhibit 7 at 2;
[81] *Id.*
[82] Exhibit 6.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Testimony of Curt Crusch, and exhibit 3 at 1 and 10.
[87] *Id.*

the allegation of sexual abuse was inconclusive.[88]

21. Upon conclusion of the APS investigation, the Department sent notification of the substantiated mental abuse finding to the Appellant via certified and regular mail in a letter dated June 24, 2009.[89] This notice informed the Appellant of the allegations against him and the applicable law upon which the Department relied when making the substantiated finding.[90] The notice also notified him of his right to a hearing; that to exercise that right he needed to mail the enclosed hearing request form to the OAH; and that he must request the hearing in writing within 30 calendar days.[91] The Appellant did not deny or otherwise dispute his receipt of the Department's June 24, 2009, notice of the APS finding of mental abuse.

22. The Appellant filed a request for hearing with the OAH on July 10, 2009, stating that he "…did not abuse a vulnerable adult."[92]

23. [NAME 1] testified to many of the Findings of Fact related above, which are substantially based on [NAME 1]'s testimony, her statements during the APS investigation, and statements of the other individual providers in the home. [NAME 1] stated at the hearing and it is found that she felt "emotionally abused," "upset," "stressed-out," and "worn out," as well as "mentally and emotionally and physically exhausted," by the Appellant's above-described actions and words, to the extent that she feared her health might be sacrificed because her MS makes her more vulnerable to effects of stress.[93] She was fearful that the stressful situation was exacerbating her MS, and she felt she simply could not deal with the Appellant's behavior anymore.[94]

24. In contrast, the Appellant's testimony included attempts to misdirect cross-examination, and was often nonresponsive, vague, inconsistent, and confusing. For example, at

[88] Exhibit 3 at 1.
[89] Exhibit 1.
[90] *Id.*
[91] *Id.*
[92] Exhibit 10.
[93] Testimony of [NAME 1]; exhibit 3; and exhibit 7.
[94] *Id.*

the hearing he steadfastly denied ever saying the word "bitch" at or in the presence of [NAME 1]—despite also claiming that he warned [NAME 1] and [NAME 6] prior to accepting employment as [NAME 1]'s caregiver that he might slip and use foul language—and likewise denied ever playing the offensive audio file in her presence.[95] The Appellant did not deny that he failed to take [NAME 1] home after her eye appointment, despite her repeated requests that he do so, and instead took her to [BUSINESS NAME 3] and then [BUSINESS NAME 2] to look at flowers.[96] He seemed to believe that because he purportedly bought her meal at [BUSINESS NAME 3], it was permissible to simply ignore her requests to return home immediately when she told him she was exhausted and hungry.[97]

25. **Credibility Findings**. Credibility findings are necessary in this case due to the conflicting evidence on material points.[98] The undersigned gave due regard and deep consideration to the ALJ's subjective findings of what most likely happened based on his opportunity to observe the witnesses and their demeanor. The undersigned noted nothing in the hearing record that was inconsistent with the ALJ's credibility findings.

26. Many, if not all, of the conflicts in evidence presented were resolved in the Department's favor and against the Appellant for several reasons. In addition to the Appellant's obvious attempts to mis-direct questioning both during the investigation and at the hearing, as well as the inconsistency in his statements, the consistency of [NAME 1]'s statements to multiple people and at the hearing supports her version of events.

27. Further, the undersigned is more inclined to believe the Appellant's earlier, more contemporaneous statements made to the Department's investigator that the Appellant did

[95] Testimony of the Appellant.
[96] *Id.*
[97] *Id.*
[98] In deciding what testimony to believe, one should consider the witness's knowledge, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any interest the witness may have in the outcome or motives that the witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence you believe, and whether each witness is supported or contradicted by other evidence in the case. *S1-3 Modern Federal Jury Instructions-Criminal 3.04.*

swear in [NAME 1]'s presence and played the offensive audio file than his later, self-serving, and adamant denials at the hearing that either of these things ever took place. His initial statements against self-interest, as contained in Mr. Crusch's investigation report, which is a Department business record, should be afforded great weight. No evidence was presented or even alluded to that Mr. Crusch had any motive to lie. In addition, no evidence was presented or even alluded to that [NAME 1], her [RELATIVE], or any of the individual providers had any motive to lie about the Appellant's actions and words. However, the Appellant had every motivation to change his story at the hearing in order to avoid the consequences of a substantiated APS report of mental abuse of a vulnerable adult by the Appellant. This leads the undersigned to doubt the veracity of many of the statements he made at the hearing that were inconsistent with his earlier statements and with the other evidence presented.

28. For the foregoing reasons, the undersigned finds it more credible that Appellant engaged in the alleged actions and speech, and that he willfully verbally assaulted and harassed [NAME 1]. He did this, in part, by swearing, playing an audio file of a very offensive nature (including swearing) in her presence and against her will, limiting her control of her own actions and activities by refusing to take her home when she asked that he do so because she was exhausted, and making other inappropriate statements to her, all of which caused her undue stress that may have impaired her health.

III. CONCLUSIONS OF LAW[99]

1. **General Authority.** The Appellant's petition for review of the *Initial Order* was timely filed and is otherwise proper.[100] The ALJ had authority to hear and rule on whether APS's initial substantiated finding of mental abuse of a vulnerable adult was correct and to issue an

[99] Determinations made by a process of legal reasoning from the facts in evidence are conclusions of law. *Neidergang*, 43 Wn. App. at 658-59.
[100] WAC 388-02-0560 through WAC 388-02-0585.

Initial Order.[101] WAC 388-71-0100 through WAC 388-71-01280 implements Chapter 74.34 RCW, entitled "Abuse of vulnerable adults," and portions of Chapter 74.39A RCW. The authority to promulgate rules "…relating to the reporting, investigation, and provision of protective services in in-home settings…" is granted to the Department in RCW 74.34.165.[102] The authority to put forth rules about those who have "…final substantiated findings of abuse, neglect, financial exploitation, or abandonment of a vulnerable adults as defined in RCW 74.34.020…," as well as "…appeal rights and fair hearing requirements…" in those cases, is set forth at RCW 74.39A.056(3) (effective March 29, 2012).[103] Administrative hearings conducted pursuant to Chapter 388-71 WAC and subsequent administrative review of the ALJs' *Initial Orders* are subject to the statutes and regulations found at Chapter 34.05 RCW, Chapter 34.12 RCW, Chapter 10-08 WAC, and Chapter 388-02 WAC.[104] Authority exists to review the *Initial Order* and to enter the Department's *Review Decision and Final Order*.[105]

2. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the executive branch of government and neither the ALJ nor the Review Judge enjoys the broad equitable authority of a Superior Court Judge within the judicial branch of government. It is well settled that administrative agencies, such as the OAH and the BOA, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.[106] It is also well settled that an ALJ's or a Review Judge's authority to render a decision in an administrative

[101] *See generally* Chapter 34.05 RCW; Chapter 34.12; Chapter 10-08 WAC; and WAC 388-02-0215. *See also* Chapter 74.34 RCW; RCW 74.39A.056(3) (eff. March 29, 2012); WAC 388-71-01235; WAC 388-71-01240; WAC 388-71-01245; WAC 388-71-01255; and WAC 388-71-01260.
[102] *See also* WAC 388-71-0110 and WAC 388-71-0115.
[103] Prior to March 29, 2012, this authority could be found at RCW 74.39A.050(9). *See* 2009 Session Laws, Regular Session, Wa. Ch. 580 § 7.
[104] *See, e.g.,* WAC 388-71-01245.
[105] Chapter 34.05 RCW; WAC 388-02-0530(2); WAC 388-02-0570; and WAC 388-02-0600(1). *See also* WAC 388-71-01265 and WAC 388-71-01275(3).
[106] *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris,* 88 Wn.2d 586, 588 (1977). *See also* WAC 388-02-0216 (stating that "[t]he authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule… [t]he ALJ and the review judge do not have any inherent or common law powers").

hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).[107] "The power of an administrative tribunal to fashion a remedy is strictly limited by statute."[108] Again, the only discretionary authority afforded to ALJs and Review Judges is that which is set forth, either explicitly or implicitly, in statute or agency regulation.[109] As a result, the ALJ and the undersigned have extremely limited authority to grant equitable relief in this administrative forum.[110] Equity within the administrative hearing process generally comes from equal application of the law to the supported facts for all who appear before the tribunal. ALJs and Review Judges do not have the same opportunity as Superior Court Judges to fashion an equitable remedy.

3. In an adjudicative proceeding regarding APS findings, the undersigned has the same authority as the ALJ to enter Findings of Fact, Conclusions of Law, and Orders.[111] The Washington Administrative Procedure Act also states that the undersigned Review Judge has the same decision-making authority when deciding and entering the *Review Decision and Final Order* as the ALJ had while presiding over the hearing and deciding and entering the *Initial Order*, unless the Review Judge or a provision of law limits the issue subject to review.[112] RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ and in the same manner as if the undersigned had presided over the administrative hearing proceedings.[113] This includes the authority to make credibility determinations, weigh the evidence, and change or set aside the ALJ's findings of fact.[114] This is because

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[107] *Id.*
[108] *Skagit Surveyors,* 135 Wn.2d at 558.
[109] WAC 388-02-0216. *But see* WAC 388-02-0220(2) (stating that if there is no WAC provision that addresses a specific issue then the ALJ and the Review Judge must refer to "…the best legal authority and reasoning available").
[110] WAC 388-02-0495 (setting forth the only explicit equitable remedy of which the undersigned is aware in administrative hearings applying the Department's WAC provisions).
[111] WAC 388-02-0600(1) and WAC 388-02-0217(3). *See also* RCW 34.05.464(4); *Tapper v. Employment Security*, 122 Wn.2d 397 (1993); and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries,* 78 Wn. App 778 (1995).
[112] RCW 34.05.464(4). *See also* WAC 388-02-0600(1).
[113] *Kabbae v. Dep't of Soc. & Health Servs*., 144 Wn. App. 432, 443 (2008) (citing RCW 34.05.464(4) as the basis for invalidating WAC 388-02-0600(2)(e)—now repealed—which purported to limit the scope of the undersigned's decision-making authority when reviewing certain types of cases).
[114] *See Hardee v. Dep't of Soc. & Health Servs.,* 152 Wn. App. 48, 59 (2009), *aff'd,* 172 Wn.2d 1 (2011) (referring to

"…administrative review is different from appellate review."[115] The undersigned Review Judge does not have the same relationship to the ALJ as an Appellate Court Judge has to a Trial Court Judge or that a Trial Court Judge has to a Review Judge in terms of the level of deference owed by the Review Judge to the presiding ALJ's findings of fact.[116] The Review Judge's authority to substitute his or her judgment for that of the presiding ALJ on matters of fact as well as law is the difference.[117] However, if the ALJ specifically identifies any findings of fact in the *Initial Order* that are based substantially on the credibility of evidence or demeanor of the witnesses,[118] a Review Judge must give due regard to the ALJ's opportunity to observe the witnesses when reviewing those factual findings by the ALJ and making his or her own determinations.[119] This does not mean a Review Judge must defer to an ALJ's credibility findings, but it does require that they be considered.[120]

4. Review Judges must personally consider the whole record or such portions of it

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the court in *Regan v. Department of Licensing*, which "…held that a reviewing officer has the authority 'to modify or replace an ALJ's findings, including findings of witness credibility' and stated that the statute does not require a reviewing judge to defer to the ALJ's credibility determinations, but rather authorized the reviewing judge to make his or her own independent determinations based on the record"). *See also Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59 (2005) and *Hardee v. Dep't of Soc. & Health Servs.,* 172 Wn.2d 1, 18-19 (2011) (stating that:

> When reviewing the factual findings and conclusions of an ALJ,
>
> > "The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses."
>
> *Tapper*, 122 Wn.2d at 404 (emphasis omitted) (quoting RCW 34.05.464(4)); *see also* WAC 170-03-0620 (providing the Department's own definition of the Review Judge's authority). Regardless of whether "[i]t would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an officer who actually presided over a hearing," the legislature chose otherwise. *Tapper*, 122 Wn.2d at 405. "[I]t is not our role to substitute our judgment for that of the Legislature." *Id.* at 406. The findings of fact relevant on appeal are the reviewing officer's findings of fact – even those that replace the ALJ's. *Id.* Here, the Review Judge meticulously reviewed the evidence, as well as the ALJ's factual findings, and appropriately substituted her own findings when warranted…).

[115] *Kabbae*, 144 Wn. App. at 441 (explaining that this is because the final decision-making authority rests with the agency head). *See also Messer v. Snohomish County Bd. of Adjustment*, 19 Wn. App. 780, 787 (1978) (stating that "[t]he general legal principles which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations").

[116] *See, e.g., Tapper v. Employment Sec. Dep't.,* 122 Wn.2d 397, 404-05 (1993), *overruled on other grounds by Markam Group, Inc. v. Employment Sec. Dep't,* 148 Wn. App. 555, 562 (2009), and Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction,* 64 Wash. L. Rev. 781, 816 (1989).

[117] *Id.*

[118] RCW 34.05.461(3).

[119] RCW 34.05.464(4) and WAC 388-02-0600(1).

[120] *Hardee*, 152 Wn. App. at 59 (stating that RCW 34.05.464(4) permits a Review Judge to make his or her own independent credibility determinations and need not defer to the ALJ's as long as the ALJ's credibility findings are duly contemplated).

as may be cited by the parties.[121] Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts, Conclusions of Law, documents in the hearing file, including admitted evidence and any written arguments, and any previous proceedings and orders in this particular matter, regardless of whether any party has asked that they be reviewed. Because the ALJ is directed to decide the issues *de novo*,[122] the undersigned has also decided the issues *de novo*.[123] In accordance with RCW 34.05.464(4) and WAC 388-02-0600(1), the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.

5. **Standard & Burden of Proof.** The standard of proof refers to the amount of evidence needed to prove a party's position.[124] Unless a WAC provision, RCW provision, or published case law states otherwise, the standard of proof in a Department hearing is a preponderance of the evidence.[125] In APS hearings, the standard of proof is a preponderance of the evidence.[126]

6. A preponderance of the evidence means that it is more likely than not that something happened or exists.[127] The burden of proof[128] is borne by the party attempting to persuade the ALJ that his or her position is correct.[129]

7. **Applicable Law.** ALJs and Review Judges must first apply the Department rules adopted in the WAC to resolve an issue.[130] If there is no Department WAC governing the issue,

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[121] RCW 34.05.464(5). *See also* WAC 388-02-0560(4).
[122] WAC 388-02-0215(1).
[123] RCW 34.05.464(4) and WAC 388-02-0600(1). *See also Hardee*, 152 Wn. App. at 59.
[124] WAC 388-02-0485.
[125] *Id.*
[126] WAC 388 71 01255.
[127] WAC 388-02-0485.
[128] *Schaffer v. Weast*, 546 U.S. 49, 56 (U.S. 2005) (stating
> The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." 2 *J. Strong, McCormick on Evidence* § 342, p 433 (5th ed. 1999) (hereinafter McCormick). Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," i.e., which party loses if the evidence is closely balanced, and the "burden of production," i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)).

[129] WAC 388-02-0480(2).
[130] WAC 388-02-0220(1).

the ALJ and the Review Judge must resolve the issue based on the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.[131] The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* (anew) in a court of proper jurisdiction.[132]

8. During the course of this particular case, some of the applicable statutory and regulatory provisions were amended.[133] As clarified in WAC 388-02-0220(3),

> [w]hen applying program rules regarding the substantive rights and responsibilities of the parties (such as eligibility for services, benefits, or a license), the ALJ and Review Judge must apply the program rules that were in effect on the date the department notice was sent, unless otherwise required by other rule or law….[134]

In this matter, this means any substantive statutes and regulations that were in effect at the time of the Department's notice in this case are the rules that must be applied. Where the undersigned analyzed the facts of this case based on WAC and/or RCW provisions that have been amended since the Department's notice, the former WAC and/or RCW provisions are cited and noted.

9. "When applying program rules regarding the procedural rights and responsibilities of the parties, the ALJ and review judge must apply the rules that are in effect on the date the procedure is followed."[135] This generally means those procedural rules that were in place when the ALJ or the undersigned Review Judge followed them are those that must be applied rather than the procedural rules that were in effect at the time of the Department's action. The ALJ and Review Judge are required to apply the regulations in Chapter 388-02 WAC on the date each rule

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[131] WAC 388-02-0220(2).
[132] WAC 388-02-0225(1).
[133] *See, e.g.*, RCW 74.39A.056(2) and (3), which prior to March 29, 2012, could be found at RCW 74.39A.050(8) and (9). *See* 2012 Session Laws, Regular Session, Wa. Ch. 164 § 503, effective March 29, 2012, and 2009 Session Laws, Regular Session, Wa. Ch. 580 § 7. *See also* WSR 11-04-074 (noting amendments to various provisions of Chapter 388-02 WAC, effective March 3, 2011).
[134] *See also Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 900 (D.C.Cir.1992), *cert. denied* 511 U.S. 1068 (1994) (holding that the rights and responsibilities of the parties must be adjudicated as they were under the law prevailing at the time of the Department's conduct that gave rise to the hearing because "[i]t is the general rule that substantive statutory amendments do not apply to pre-amendment conduct").
[135] WAC 388-02-0220(4).

was effective, including WAC 388-02-0220 (effective March 03, 2011).[136]

10. **Evidence.** Review Judges decide "…whether or not to admit a proposed exhibit into the record…" and determine "…the weight (importance) of the evidence."[137] When deciding whether to admit evidence, the ALJ or Review Judge considers "…if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."[138] This may include evidence that would be inadmissible in a civil trial, such as hearsay evidence,[139] which is defined as "…a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[140] Findings of Fact may not be made solely "…on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence."[141] The applicable procedural rule in this matter states more narrowly that "[t]he ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it."[142]

11. In this case, the Department presented out-of-court statements from [NAME 1], her [RELATIVE], her providers, and the Department's investigator describing the alleged mental abuse by the Appellant. The sole question to determine admissibility is whether a reasonable person would rely on statements of an alleged victim, the alleged victim's providers and [RELATIVE], and the Department investigator to determine whether the alleged victim has been mentally abused. The only possible answer to this question is yes. This is the type of evidence that any reasonable person would use to determine whether abuse or neglect has occurred.

12. Further, written summaries of referrals and subsequent investigative reports by

[136] WAC 388-02-0220(6).
[137] WAC 388-02-0425(1) (granting ALJs this authority, as well as Review Judges via WAC 388-02-0600(1)). *See also* WAC 388-02-0475(6) (stating that the ALJ—and the Review Judge, via WAC 388-02-0600(1)—decides what evidence is more credible if evidence conflicts and decides the weight to be given to the evidence).
[138] RCW 34.05.452(1). *See also* WAC 388-02-0475(2).
[139] *Id.* and RCW 34.05.461(4).
[140] ER 801(c). *See also* WAC 388-02-0475(3).
[141] RCW 34.05.461(4).
[142] WAC 388-02-0475(3).

Department investigators and police officers are also the kind of records kept in the normal course of Department that are relied upon by reasonably prudent persons in conducting APS business.[143] The out-of-court statements found in the APS investigation report and witness statements satisfy the reasonable person test for admissibility and were correctly admitted in full at the hearing. Even if these statements may not have been admissible in a civil proceeding, they were admissible in this administrative proceeding. This does not mean that the statements contained in these documents are persuasive, sufficient, or necessary to support a Finding of Fact. It simply means that the statements are unquestionably admissible in a Department administrative proceeding. However, the undersigned has found that many of the statements are persuasive and sufficient to support the Findings of Fact in this *Review Decision and Final Order*

13. The undersigned cannot base a Finding of Fact solely on hearsay evidence unless the parties' opportunity to question or contradict it was not unreasonably circumscribed. Although WAC 388-02-0475(3) states that the ALJ may admit and consider hearsay evidence, the rule further states "[t]he ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it." RCW 34.05.461(4) likewise states

> Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

14. As such, the hearsay statements in this case would not be admissible in a civil proceeding and could not form the sole basis for a Finding of Fact unless they were corroborated by other, non-hearsay evidence or the Appellant had an opportunity to question or

[143] The Appellant's statements against self-interest, which he made to Detective Brooks, that the Appellant pushed his hands away when he touched her breasts and that he continued to touch her breasts on future occasions are not hearsay. Those statements constitute an "admission by party-opponent" and can serve as the basis for a finding of fact, even without corroboration. *See* ER 801.

contradict the statements. For each allegation that turns on hearsay evidence, the Department must either present some non-hearsay evidence to corroborate the hearsay evidence or the Department must prove that the Appellant's opportunity to confront witnesses and rebut evidence was not unduly abridged. The Department has done both in this matter. For example, statements by [NAME 1] about the Appellant's actions and words were corroborated by [NAME 1]'s own testimony, the Department investigator's report and testimony, [NAME 1]'s [RELATIVE], and an individual provider. The Appellant also testified on his own behalf and refuted [NAME 1]'s statements and the Department investigator's statements, and could have questioned the available witnesses about statements included in the declarations and investigation report that they may not have testified about. The Appellant thus had ample opportunity to rebut, question, and contradict the hearsay evidence, pursuant to both RCW 34.05.461(4) and WAC 388-02-0475(3).

15. [NAME 1]'s disclosures to others also bear some inherent indicia of reliability because they were made to individuals in a position to help [NAME 1] with her situation.[144] In addition, her disclosures are supported by corroborating evidence. As such, [NAME 1]'s statements to others can serve as the basis for Finding of Facts in this *Review Decision and Final Order*. The written statements from [NAME 1] and from her [RELATIVE] also bear some indicia of reliability as they were signed under penalty of perjury.

16. The Appellant's attorneys did not object to the admission of any of the hearsay statements offered at either of the two hearings. All proposed exhibits, including witness declarations, were admitted to the hearing record with no objection. "Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right."[145] The Appellant's failure to object to the

[144] *See, e.g., State v. Florczak*, 76 Wn. App. 55, 66-71 (1994) (citing *White v. Illinois*, 502 U.S. 346 (1992), questioned by *Crawford v. Washington*, 541 U.S. 36, 58 n. 8 and 60-1 (2004), for the proposition that "…a declarant's hearsay statement may be admissible even if the declarant is available as a witness but does not testify, as long as the statement's reliability is demonstrated") and ER 803(a)(4).
[145] *Florczak*, 76 Wn. App. at 72 (citing *State v. Lynn*, 67 Wn. App. 339, 342 (1992); *State v. Stevens*, 58 Wn. App.

admissibility of hearsay evidence does not involve manifest error affecting a constitutional right. By failing to object to the admission of hearsay evidence at the hearing, the Appellant waived any right to have the undersigned to consider this issue upon review of the *Initial Order*.

17. Because (1) the Appellant had the opportunity to contradict and question witnesses about the hearsay evidence at the hearing, (2) [NAME 1]'s disclosures were reliable and corroborated by other evidence, and (3) the Appellant did not object to admission of any of the hearsay statements, the undersigned concludes, pursuant to RCW 34.05.452, RCW 34.05.461(4), applicable case law, and WAC 388-02-0475(3), that it is appropriate to make Findings of Fact in this case based on the hearsay statements presented as evidence.

18. **Mental Abuse**. WAC 388-71-0105 sets forth various definitions applicable to the APS program. That WAC provision also incorporates by reference and makes applicable those definitions found in RCW 74.34.020, including the definitions for "mental abuse" and "vulnerable adult."[146] RCW 74.34.020(2)(c)[147] states:

> (2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings: …
>
> (c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

19. The APS finding against the Appellant was for mental abuse, which is a specific form of abuse that is defined at RCW 74.34.020(2)(c). The term "abuse," which is defined at

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478, 485-86, *review denied*, 115 Wn.2d 1025 (1990)).

[146] *See* WAC 388-71-0105.

[147] This statute was slightly amended by the Legislature in 2010, 2011, and 2012. *See* 2011 Session Laws, Regular Session, Wa. Ch. 170 § 1 (further defining the term "financial exploitation" and adding a category to the term "vulnerable adult"); 2011 Session Laws, Regular Session, Wa. Ch. 89 § 18 (adding a definition for the term "social worker," requiring re-numbering of the subsequent subsections); 2010 Session Laws, Regular Session, Wa. Ch. 133 § 2 (adding a definition for the term "financial institution," requiring re-numbering of the subsequent subsections); and 2007 Session Laws, Regular Session, Wa. Ch. 312 § 1 (adding definitions for the terms "incapacitated person" and "interested person," requiring re-numbering of the subsequent subsections). These changes have no bearing on the ultimate conclusions in this matter.

RCW 74.34.020(2) states that this general term means "…the willful action or inaction that inflicts injury…" The term "injury" is defined as "[t]he violation of another's legal right, for which the law provides a remedy…"[148] Contrary to the Appellant's assertion that [NAME 1] was only annoyed, and not injured per se, by the Appellant's actions and words, [NAME 1] had a legal right to be free of the harassment and verbal assault inflicted upon her by the Appellant, and the law provides a remedy for such actions. As such, the undersigned concludes that [NAME 1] was injured by the Appellant's actions and words.

20. However, it is not necessary to find that there was injury as a result of the Appellant's actions and words in order to conclude that mental abuse occurred. This is because the general definition of "abuse" in RCW 74.34.020(2) is modified by the more specific definition of "mental abuse" in RCW 74.34.020(2)(c), in accordance with the rule of statutory construction[149] known as *ejusdem generis* ("of the same kind or class"[150]). According to this rule, general statutory provisions appearing in connection with precise, specific provisions "shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms."[151] This means "...specific terms modify or restrict the application of general terms..."[152] In this case, the more specific definition of "mental abuse" does not require a showing of injury in order for the Department to meet its burden of proving by a preponderance of the evidence that the Appellant mentally abused [NAME 1].

21. In order to uphold a substantiated finding of mental abuse, as that term is defined in RCW 74.34.020(2)(c), the Department must show by a preponderance of the evidence that: (1) the alleged victim was a vulnerable adult as defined by RCW 74.34.020; (2) the alleged

[148] *Black's Law Dictionary* 789 (9th ed. 2009).
[149] Rules of statutory construction also apply to the interpretation of administrative rules and regulations. *See State v. Burke*, 92 Wn.2d 474, 478 (1979).
[150] *Black's Law Dictionary* 535.
[151] *See State v. Thompson*, 38 Wn.2d 774, 777 (1951) and *Beckman v. State Dept. of Social and Health Services*, 102 Wn. App. 687, 692 (2000).
[152] *See City of Seattle v. State*, 136 Wn.2d 693, 698 (1998).

perpetrator's actions or inactions of mental or verbal abuse were willful; and (3) the mental abuse included actions or inactions such as coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing. All three prongs must be met.

22. The first prong of the necessary analysis for determining whether mental abuse of a vulnerable adult occurred is satisfied. RCW 74.34.020(15)[153] stated that a person "[r]eceiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW" or "[r]eceiving services from an individual provider" is a vulnerable adult. During the period of time at issue in this case, [NAME 1] satisfied both of these criteria for qualifying as a vulnerable adult entitled to APS.

23. The second prong of the analysis for determining whether mental abuse of a vulnerable adult occurred is met. The term "willful" is defined as "…nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome."[154] Both the courts and the DSHS BOA have found actions that are protective, instinctive, reactive, and self-defensive (i.e., not aggressive) in nature are not "willful" actions and thus do not constitute abuse.[155] However, none of the Appellant's actions or words was shown to be protective, instinctive, reactive, or self-defensive. Whether the Appellant's actions or words were "willful" depends on the voluntariness of the acts and utterance of the words themselves, not on whether the Appellant actually intended to harm, injure, or cause a negative outcome for the Appellant. With extremely limited possible exceptions[156] that were not shown in this case, the Appellant's voluntary actions and words were willful because they happened several times, thus demonstrating that they were not

[153] At the time of the Department's action in this matter, the definition of the term "vulnerable adult" could be found in subsection 15 of RCW 74.34.020. *See* 2007 Session Laws, Regular Session, Wa. Ch. 312 § 1. This term is currently defined in subsection 17 of RCW 74.34.020.
[154] WAC 388-71-0105.
[155] *See, e.g., Brown v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 177, 178 (2008).
[156] *E.g.*, if the alleged perpetrator suffered from Tourette's syndrome or a similar condition, such behavior might be considered involuntary. However, such facts were not presented in this case.

accidental, and a reasonable person would understand that they could have negative results.

24. The third and final prong of the analysis for determining whether, by a preponderance of the evidence, mental abuse of a vulnerable adult occurred is also satisfied. The Appellant's repeated statements, which included swearing and the use of other offensive language, to [NAME 1] and in her presence, as well as his refusal to take her home when she asked and was exhausted, amounted to harassment and ridicule. This is particularly so when one considers that harassment is defined as "[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose."[157] The Appellant's actions and words annoyed, shocked, and created significant stress for [NAME 1], which was made more acute by her MS condition, for no good reason.

25. A substantiated finding of abuse, which includes mental abuse per RCW 74.34.020(2), against a provider requires placing that provider on the state registry.[158] Any provider placed on a state registry for abuse of a vulnerable adult is prohibited from being employed in a position involving the care of and unsupervised access to vulnerable adults.[159] It should be noted, however, that a substantiated APS report of sexual abuse is not analogous to a criminal or a civil tort determination of "guilt" or "civil culpability" for assaultive behavior. Rather, such APS reports are used by the Department's Background Check Central Unit to decide who should or should not care for or have unsupervised contact with children or vulnerable adults in the limited circumstances in which the Department licenses or pays the provider.[160] An APS registry listing is not intended as a punitive measure or some other form of personal judgment. It is part of a process established for the protection of vulnerable adults and children who receive care or services from Department-licensed or –contracted providers.

[157] *Black's Law Dictionary* 721.
[158] RCW 74.39A.056(3), eff. March 29, 2012 (prior to March 29, 2012, this authority could be found at RCW 74.39A.050(9). *See* 2009 Session Laws, Regular Session, Wa. Ch. 580 § 7). *See also* WAC 388-71-01280.
[159] RCW 74.39A.056(2) and (3), eff. March 29, 2012 (prior to March 29, 2012, this authority could be found at RCW 74.39A.050(8) and (9). *See* 2009 Session Laws, Regular Session, Wa. Ch. 580 § 7). *See also* WAC 388-71-01280.
[160] WAC 388-06-0010 and WAC 388-06-0100.

26. The undersigned has considered the *Initial Order* and the entire hearing record. Any arguments in the Appellant's petition for review that are not specifically addressed in this decision have been duly considered, but are found to lack merit or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

1. The ALJ's Order is ***affirmed*.**
2. The Department's substantiated final finding of mental abuse by the Appellant against a vulnerable adult is **sustained**.

Mailed on the 4th day of May, 2012.

DIAMANTA TORNATORE
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant
Dustin Deissner, Appellant's Representative
Nicole Pippenger, Department's Representative
Vicky Gawlik, Program Administrator MS: 45600
William J. Stewart, ALJ, [CITY] OAH