NO. 101736-7

SUPREME COURT OF THE STATE OF WASHINGTON

JEROME K. GREEN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

Treated as Answer to Petition for Review

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

As Mary[1] neared a century of life, the level of care necessary to maintain her life became increasingly important. She required a highly specialized diet and was at frequent risk of choking and aspirating. Her son, Appellant Jerome Green, lived with her but ignored her health and dietary needs.

The State has an interest in protecting vulnerable adults such as Mary. In January 2019, Mr. Green received an initial finding of neglect because he failed to thicken water that he provided to Mary. Administrative review affirmed the agency's finding.

This Court should deny review as Mr. Green does not raise an issue of substantial public interest. Mr. Green asserts that the admission of improper hearsay evidence led to an erroneous finding of neglect. However; hearsay is admissible at administrative hearings, and the neglect finding was affirmed by

[1] No disrespect is intended by not using Mary's full name; it is done only to protect her confidentiality.

Mr. Green's testimony, not the hearsay evidence. Mr. Green cannot meet the requirements of RAP 13.4(b) and review is therefore not warranted.

II. COUNTER STATEMENT OF THE ISSUE

A. Absent hearsay, does substantial evidence support an administrative finding of neglect where Mr. Green testified that he read signs saying that all liquids provided to his ailing mother must be thickened, but admitted he never thickened the water he gave to her?

B. Does Mr. Green present an issue of substantial public interest such that review by this Court is merited?

III. COUNTER STATEMENT OF THE FACTS

In October and November of 2018, Mr. Green lived in the home of his 98-year-old mother, Mary, and provided care for her.[2] CP 203. Mr. Green fed his mother and gave her water when she needed it. CP 204. Mary had difficulty swallowing, frequent choking episodes, and was at high risk of aspiration. AR 342-43 (Ex. 15). In September 2018, Mary aspirated twice and was taken to the emergency room on both occasions. AR 342 (Ex. 15); CP

[2] Mary passed away on September 6, 2020.

93. On one of those occasions, Mary turned blue and required life-saving intervention. AR 342 (Ex. 15). Mr. Green knew Mary choked and was taken to the hospital. AR 342 (Ex 15); CP 209-10. He claimed he was unaware of doctor's orders for caregivers to sit with Mary after she ate or to add thickener to liquids provided to Mary. CP 209, 216. He knew Mary required extensive in-home care and supervision. CP 153, 205-06. Mr. Green later testified that he never thickened Mary's water. CP 208, 216. Mr. Green could not recall Mary having trouble aspirating or choking. CP 206.

After the second emergency room visit, Mary's doctors placed her on a strict, limited diet of only soft foods, avoiding items like nuts, berries, and grapes. AR 343 (Ex. 15). Her food needed to be cut into small pieces, and she could only drink thickened liquids to reduce her risk of aspiration and choking. AR 343 (Ex. 15). Prominent signs were placed in the home mirroring the instructions from Mary's doctors that advised caregivers and family members to thicken liquids, cut all food into small pieces, and avoid giving her nuts, berries, and grapes. AR 317-19 (Ex.

12), AR 343 (Ex. 15); CP 107-08. One typed sign stated: "Care-givers and Family members: Continue thickening supplement to reduce risk for aspiration. Serve smaller portion and drink water to clear the throat, wait ten minutes and then serve another smaller portion until her meal is finished)…" AR 318 (Ex. 12). Directly above the typed sign, in very large handwritten letters is another sign which states "All Liquids Use –> Thicken–up Dr. Gleason Order." AR 318 (Ex. 12); CP 109. Mr. Green never thickened the water he gave to his mother, and even though he fed her, he did not watch her eat, and said he was not aware of the requirement to sit with Mary for 20-30 minutes after she ate. AR 317; CP 209, 216. Mr. Green stated that the information provided to him about his mother's condition was "cloudy," but admitted that he read the signs that were posted in the kitchen related to Mary's care and disregarded the instructions.[3] AR 317-19 (Ex. 12); CP 204, 206-08, 212.

[3] The hearing record does not establish the date the signs were posted.

The Adult Protective Services (APS) arm of the Department of Social and Health Services (DSHS) received an intake for neglect of Mary in October 2018 and began an investigation. AR 263-69 (Ex. 3). The investigator met with Mary and interviewed Mary's daughter Sherri Green on November 6. CP 105. The investigator photographed signs posted around the kitchen from Mary's occupational therapist and doctors which included directions to thicken liquids, not feed Mary bread or grapes, and ensure she is sitting up and not distracted while eating. CP 106, 108-10, 117. The investigator reviewed law enforcement records, which stated that the officer "noticed a cup of water in front of [Mary]." AR 353 (Ex. 17). The investigator was confident the water was unthickened because thickener is a powdered substance that changes the consistency of water making it appear gelatinous. CP 139. The investigator obtained records from Mary's primary care doctor and spoke with Mary's caregiver. CP 113-16. The investigator made several attempts to interview Mr. Green, but he refused to

meet with her. CP 130. The various records were admitted as exhibits 10-16 and Mr. Green did not object to any of them.[4] CP 70-72; AR 313-350.

On January 30, 2019, APS sent Mr. Green a letter by certified and regular mail notifying him that it had made an initial finding of neglect against him. AR 251-54 (Ex. 1). Mr. Green timely filed a notice of appeal. AR 258-60 (Ex. 2).

Following a hearing at which Mr. Green was represented by counsel, the administrative law judge (ALJ) found that Mr. Green did not thicken the water he provided for Mary in reckless disregard of her health and welfare and affirmed the initial finding of neglect. CP 5-14. Mr. Green appealed the ALJ's ruling to the Board of Appeals (BOA), and the review judge, in

[4] The only objections were to Exhibits 17 and 18 and were based on relevance, not hearsay. Exhibit 17 included a police report dated March 1, 2019, which was after the date the substantiated finding was made. CP 70-71. Exhibit 18 was an order that did not include the transcript of an oral ruling. CP 71-72. The other 16 exhibits were admitted with no objection. CP 70-72; AR 357-459

a Final Order, affirmed the ALJ and found that Mr. Green was aware of the medical directions to thicken Mary's water, never thickened any water he gave to Mary, and had provided unthickened water to her on several occasions. CP 15-32. On judicial review, the Spokane County Superior Court affirmed the findings of the BOA. CP 321-23. The Court of Appeals also upheld the finding of neglect against Mr. Green. *Green v. Washington Dep't of Soc. & Health Servs.*, No. 38275-3-III, 2022 WL 17850725 (Wash Ct. App. Dec. 22, 2022) (unpublished). Mr. Green now seeks further review.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Green has not met the criteria necessary for this Court to grant discretionary review. A petition for review will only be accepted by the Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Mr. Green argues only the last of the criteria, RAP 13.4(b)(4), but does not demonstrate how his case satisfies the required criteria. Pet. for Review at 16. In any event, substantial evidence supports the BOA's Order affirming the finding of neglect.

A. Mr. Green Is Precluded From Raising a Hearsay Objection Now, for the First Time, When Hearsay Evidence Was Not Objected To at the Trial Court or Court of Appeals

Mr. Green asserts that he objected to admission of his sisters' written statements at the administrative hearing, but the record contradicts this. While his counsel may have argued about the credibility of the statements in closing argument, he did not object to the admission of the statements as evidence. CP 70-72, AR 130; *contra* Pet. for Review at 17.

RAP 2.5(a) and case law are clear that with limited exceptions, not met here, claims of error cannot be raised for the first time on appeal. *State v. O'Hara*, 167 Wn.2d. 91, 94, 217 P.3d 756 (2009), *Peoples Nat. Bank of Washington v. Peterson*, 82 Wn.2d 822, 829, 515 P.2d 159, 164 (1973), *Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975).

Mr. Green's counsel did not object to admission of medical reports, photographs of signs directing Mary's care, or written statements made by the Green sisters at the administrative hearing. CP 70-72. He argued only in closing that the statements should not be considered because he was not given the opportunity to question the sisters. AR 130. Although the written statements were admitted as exhibits, they were not considered by the ALJ and nothing in the Initial Order references them. AR 117-24. Instead, the ALJ's findings reference Mr. Green's own statements that he read the signs posted around Mary's home, but did not follow the directions on how to care for her. AR 119, 123.

Similarly, Mr. Green did not raise issues of hearsay in his brief to the BOA, AR 38-47, and only in passing in his brief to the Court of Appeals. Appellant's Amended Br. at 10-11, 36. In fact, the amended brief favorably cites to the rule that allows hearsay at administrative hearings. Appellant's Amended Br. at 37.

This court should not review Mr. Green's petition because he raises the issue of hearsay for the first time on appeal. Additionally, hearsay was not considered by the lower courts and ample evidence supported DSHS's finding of neglect without relying on hearsay.

B. Substantial Evidence Supports the Order Affirming the Substantiated Finding of Neglect

Mr. Green, in essence, argues only that substantial evidence does not support the BOA's findings, because the court purportedly relied on written statements made by his sisters, Debra and Sherri Green, when it determined that he neglected his mother by giving her unthickened liquids to drink. To the contrary, substantial evidence, including Mr. Green's own

admissions, support the BOA's Final Order. The BOA properly followed administrative procedure and correctly applied the law to the facts of Mr. Green's case; this Court should deny review of the BOA's Order.

In a review of an administrative decision, the appellate court sits in the same position as the superior court and applies the Administrative Procedure Act (APA) to the administrative record. *Cornelius v. Washington Dep't of Ecology*, 182 Wn.2d 574, 584–85, 344 P.3d 199 (2015) (citing *Postema v. Pollution Control Hr'gs. Bd.,* 142 Wn.2d 68, 77, 11 P.3d 726 (2000)). The Court reviews only the final agency action. *Burnham v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003). Here, the order on review is the Final Order issued by the BOA. CP 15-32.

"Findings of fact are reviewed to determine if they are supported by substantial evidence and conclusions of law are reviewed de novo to determine if the reviewing judge correctly applied the law." *Morgan v. Dep't of Soc. & Health Servs.,* 99

Wn. App. 148, 151, 992 P.2d 1023 (2000). The substantial evidence test applies to the agency's findings of fact, in that the findings will be upheld if a fair-minded person would be persuaded by the evidence regarding the truthfulness or correctness of the order. *Crosswhite v. Washington State Dept. of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731 (2017). The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n,* 125 Wn.2d 805, 812, 888 P.2d 728 (1995). A reviewing court will not weigh the evidence or substitute its judgment regarding witness credibility for that of the agency. *Affordable Cabs, Inc. v. Dep't of Emp. Sec.,* 124 Wn. App. 361, 367, 101 P.3d 440 (2004). The party challenging the agency action carries the burden to show the decision was in error. RCW 34.05.570(1)(a). *Id.*

Mr. Green claims that the BOA improperly relied on the statements of Sherri Green and Debra Green, admitted as Exhibits

10 and 11,[5] to establish that Mr. Green neglected his mother. Pet. for Review at 16-19. The written statements made by the Green sisters detail accounts of Mr. Green's failure to cut up food prior to giving it to Mary, giving her foods that were dangerous for her to consume, and not thickening water before giving it to Mary to drink. AR 313-316. The statements were not signed and neither woman testified at the administrative hearing. Evidence, including hearsay evidence, is admissible in administrative hearings if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452. The two witness statements were admitted as the Department's exhibits; Mr. Green raised no objection to their entry at trial. CP 69-73. The APS investigator testified that she interviewed Sherri Green in person. CP 105. The investigator also reviewed a St. Luke's Rehabilitation letter directing that liquids should be thickened and Mary should

[5] Found at AR 313-16.

be given small portions and distractions limited while she ate. CP 106-08. The investigator photographed several large signs around the house that mirrored the orders of Mary's doctors. CP 107-10. The investigator asked Debra and Sherri Green to provide witness statements which they did. CP 118-20. In addition to the statements of the Green sisters, the investigator also reviewed police records, competing Powers of Attorney obtained by Jerome Green and Sherri Green, and relevant medical records. CP 114-16. She also spoke with caregiver Kathleen Coroto, who reiterated the statements of the Green women. CP 116-17.

Mr. Green acknowledged, at the administrative hearing, that he provided care for his mother "as a son" in October and November of 2018. CP 203-04. Mr. Green stated that he helped feed and hydrate his mother when she needed it. CP 204. Mr. Green claimed that his mother was doing "very well" and denied that she had any trouble aspirating or choking. CP 206. Mr. Green readily agreed that he had read signs posted in his mother's kitchen that detailed how Mary was to be provided food and he admitted

that he never thickened the water he provided to her. CP 207-08. Mr. Green also claimed he was not aware he was supposed to watch her eat and for 20-30 minutes after she ate. CP 209. Mr. Green knew his mother went to the hospital in September 2018 due to choking, and he knew that it was serious. CP 209-10, 219. While hearsay evidence was admitted at trial, Mr. Green's own admissions were the lynchpin to the BOA's finding that Mr. Green neglected his mother. CP 31. Mr. Green chose to give Mary unthickened water in direct violation of clearly posted directions which he acknowledged he read. While there was ample collateral information to support the written Green statements, neither the ALJ nor the BOA relied on them in their findings of fact. Instead, both relied on Mr. Green's testimony that he saw the posted signs, never thickened any water that he gave to Mary, and that he provided water to her on several occasions. *See* CP 7, 18, 28-29. A reviewing court is bound to honor an agency's decision unless it is clearly erroneous. *Campbell v. State Emp. Sec. Dept.*, 180 Wn.2d at 566, 571, 326 P.3d 713, 715 (2014). There was no error

in finding that Mr. Green did not thicken Mary's water; he knew that Mary had previously been taken to the hospital because she aspirated and that it was serious, he read the signs directing him to thicken her water, yet he never did so. Not properly caring for Mary put her in clear and present danger of serious harm since she could have choked and died due to her medical conditions.

C. This Case Does Not Present an Issue of Continuing and Substantial Public Interest.

Mr. Green's Petition for Review does not present an issue of substantial public interest. RAP 13.4(b)(4). Rather, Mr. Green's case involves a fact-specific determination of whether or not DSHS was correct in substantiating a finding of neglect against him. Although he admits he gave his mother untreated tap water and never thickened any water he gave to her, he complains that the BOA relied on inadmissible hearsay when it affirmed the initial finding of neglect made by DSHS. Pet. for Review at 16-19.

Whether an appeal is private in nature or a public dispute is itself a highly fact-specific inquiry. In *In re Marriage of Horner*, this Court reviewed a moot relocation order because a question of

statutory interpretation existed, the result of which could provide additional guidance to lower courts, and the issue was likely to reoccur given the frequency of divorce proceedings. 151 Wn.2d 884, 892-893, 93 P.3d 124 (2004). Similarly, review was granted where the Department challenged the court's authority to order the specific placement of a child pursuant to a voluntary placement agreement. *In re Placement of R.J.*, 102 Wn. App. 128, 132, 5 P.3d 1284 (2000). Clarifying the powers and authority of the court was determined to be in the public interest. *Id*.

When the appellate courts granted review in the aforementioned cases, they did so to provide clarity or to interpret the requirements of a statute for the first time. That is not necessary here. The facts of Mr. Green's case are specific to him and do not raise an issue of substantial public interest.

Admissibility of hearsay and factors establishing substantial evidence are well-settled law. *See Ingram v. Dept. of Licensing*, 162 Wn.2d 514, 173 P.3d 259 (2007) (administrative hearings proceed under significantly relaxed rules of evidence); *Pappas v.*

Emp. Sec. Dept., 135 Wn. App. 852, 146 P.3d 1208 (2006) (administrative hearing officer may rely on hearsay evidence if hearsay is not the sole basis for the decision); *Richardson v. Perales,* 402 U.S. 389, 402, 91 S.Ct. 1420, 1428 (1971) (substantial evidence may support a finding by the hearing officer adverse to the claimant when claimant has not exercised his right to subpoena the witness). The BOA correctly followed applicable administrative hearing rules and clearly set forth its findings of fact and explained its conclusions of law. While written statements made by Mr. Green's sisters were admitted, neither of these statements were considered by the court. *See* CP 15-32 (Review Decision and Final Order). Instead, the BOA relied on the testimony of Mr. Green to conclude that he was aware of Mary's special dietary needs and ignored clear directions from her medical providers by not thickening the water he provided to her. CP 17-18, AR 118-19. Mr. Green does not raise issues requiring clarification or direction from this court. Although he disagrees

with the conclusions of the BOA, his statements are disproved by the hearing record.

V. CONCLUSION

Mr. Green argues that because of hearsay statements written by his sisters, the BOA substantiated a finding of neglect against him. Although hearsay statements were admitted at trial, the BOA relied on Mr. Green's own testimony when it affirmed the initial finding of neglect. Because substantial evidence supports the agency's decision, Mr. Green cannot satisfy the criteria necessary to merit review by this Court under RAP 13.4(b). Mr. Green does not demonstrate how his claims rise to the level of public interest – administrative procedure and admission of hearsay evidence are well-settled law and there is no need for this court to provide further direction on these issues. For these reasons, DSHS respectfully asks this court to deny review.

¶¶ This document contains 3,373 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of June, 2023.

ROBERT W. FERGUSON
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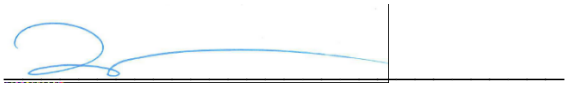

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Respondent Department of Social and Health Services to the following address:

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DATED this 14th day of June, 2023, at Spokane, Washington.

Deanna Marengo
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SPOKANE DIVISION - SHS / AGO

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