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NO. 95346-5

SUPREME COURT OF THE STATE OF WASHINGTON

DEIODE LEA CUNNINGHAM,

Appellant,

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
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FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

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I. INTRODUCTION

This case is a petition for review of administrative action pursuant to RCW 34.05.570. It involves the agency's denial of Ms. Cunningham's petition to vacate a dismissal for default of her hearing after she and her representative failed to appear. This matter originated with a request by Ms. Cunningham for a hearing to contest the termination of her Washington State Department of Social and Health Services (Department) benefits when she was living in California. When she failed to appear for her hearing on May 20, 2014, the Office of Administrative Hearings (OAH) entered an order of dismissal based on her default.

On review, the Department's Board of Appeals (Board) found that Ms. Cunningham had not shown good cause for her failure to appear and declined to vacate the order of dismissal. Both the Superior Court and Division I of the Court of Appeals affirmed the denial of Ms. Cunningham's request to vacate the dismissal. Because this case meets none of the considerations in RAP 13.4(b) for discretionary review, this Court should deny Ms. Cunningham's petition to review the decision of the Court of Appeals.

II. IDENTITY OF RESPONDENT

The Respondent is the Washington State Department of Social and Health Services. The Department asks this Court to deny Petitioner Deoid'e

Cunningham's petition for review of the decision of Division I of the Court of Appeals.

III. COURT OF APPEALS DECISION

The Unpublished Opinion of the Court of Appeals, filed October 9, 2017 (replacing an opinion issued on July 31, 2017, after granting the Department's motion for reconsideration), is attached to Ms. Cunningham's Petition for Review, as is the Court's Order Denying Appellant's Motion for Reconsideration, Granting Respondent's Motion for Reconsideration and Withdrawing and Substituting Opinion, filed October 9, 2017, and the Court's subsequent Order Denying Motion for Reconsideration, filed November 15, 2017.

IV. COUNTERSTATEMENT OF ISSUE ON REVIEW

Whether Ms. Cunningham is entitled to relief under RCW 34.05.570 from the Department's Review Decision and Final Order entered November 13, 2014, in Department Case #06-2014-A-0765.

V. COUNTERSTATEMENT OF THE CASE

Ms. Cunningham was formerly a client of the Department of Social and Health Services, Developmental Disabilities Administration. CP 2. She received written notice from the Department on March 4, 2013, that her eligibility for Department services was to be terminated, effective April 1, 2013, because the Department learned that Ms. Cunningham had been

living in California while pursuing her college degree and was not eligible to receive public benefits in Washington pursuant to WAC 388-823-0025(1). CP 2. She appealed this decision, and a hearing was set under Docket #06-2013-A-0805. CP 3, 23, 38, 41. Ms. Cunningham requested continued benefits pending the outcome of the eligibility hearing. CP 2. The request was denied by an Order Denying Continued Benefits on January 9, 2014, and the case proceeded to hearing on May 20, 2014. CP 2.

Neither Ms. Cunningham nor her non-attorney representative, Karl Olson, appeared at the May 20 hearing, either in person or by telephone. CP 3, 25. They made no attempt before the hearing to contact OAH or the Department regarding the hearing date. CP 25. As a result, an Order of Dismissal for default was issued on May 22, 2014. CP 3, 25. On June 4, 2014, Ms. Cunningham, through Mr. Olson, timely filed a petition with the Board to “reinstate the hearing,” CP 41, which was forwarded to OAH and set for hearing under Docket #06-2014-A-0765. CP 3. OAH found after that hearing that Ms. Cunningham and Mr. Olson had not shown good cause for the default and declined to vacate the Order of Dismissal. CP 6. Ms. Cunningham’s 2013 eligibility termination was affirmed by the Board of Appeals, the Skagit County Superior Court, and Division I of the Court of Appeals. The Court of Appeals issued a decision remanding the case for further fact-finding on the issue of continued benefits, but, after considering

the Department's motion for reconsideration, withdrew that decision and issued a substitute decision that affirmed without remand.¹ Ms. Cunningham now petitions for review by this Court.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) sets out four considerations which govern when the Supreme Court will accept a petition for review of a decision of the Court of Appeals. This Court will grant a petition for discretionary review only if (1) the Court of Appeals decision conflicts with a decision of this Court; (2) the Court of Appeals decision conflicts with a decision of another division of the Court of Appeals; (3) the petition presents a significant federal or state constitutional question; or (4) the petition presents an issue of substantial public interest that should be determined by this Court.

Ms. Cunningham, through her non-attorney representative, Mr. Olson, appears to argue that review should be accepted under any or all of RAP 13.4's factors, although she does not identify any published decision of the Court of Appeals with which this decision is in conflict.

¹ The Department's Motion for Reconsideration explained how the issue of continued benefits was moot under federal Medicaid law, so that no effective remedy was available on remand.

A. The Court of Appeals Decision Does Not Conflict with a Decision of the Supreme Court

Ms. Cunningham cites only three cases: *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996) (en banc); *State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010) (en banc); and *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed. 2d 287 (1970). *Manussier* and *Sieyes* are both criminal cases: *Manussier* deals with alleged constitutional violations of the “three strikes law,” and *Sieyes* deals with alleged constitutional violations related to a juvenile’s conviction of firearms possession. Neither of these cases shares any underlying factual similarity to the present case, which is a review under the Administrative Procedure Act (APA), Chapter 34.05 RCW, of an agency’s decision related to public benefits.

Indeed, Ms. Cunningham provides no argument about how these cases support her petition for review, unless it is to imply that this Court is required to grant review of any case that alleges a constitutional violation. *See* Petition at 12 (“Cases such as [*Sieyes*] and [*Manussier*] give the Supreme Court serious considerations into the government’s actions to violate the constitution.”); 18 (“Both US and WA state cases such as [*Sieyes*] and [*Manussier*] give additional scope and authority for this case to be reviewed by the Supreme Court.”); and 19 (“I also feel as a caregiver of nearly 28 years in homecare that this Supreme Court is very concerned

for our constitutional rights and the welfare of all who call Washington State Home” (citing *Sieyes*, *Manussier*, *Goldberg*, the Fourteenth Amendment to the U.S. Constitution, and Wash. Const. art. 1, sections 2, 3, 10, and 29). These references do nothing more than point out that this Court has previously reviewed cases that allege constitutional violations. Ms. Cunningham has not even alleged that the Court of Appeals has, in her case, made a decision that conflicts with *Sieyes* or *Manussier*

Ms. Cunningham does allege that the Court of Appeals decision conflicts with the U.S. Supreme Court’s decision in *Goldberg*. Specifically, she argues that the Court of Appeals failed to address the due process protections of the Fourteenth Amendment to the U.S. Constitution, as described in *Goldberg*, and that she was denied an attorney, an impartial decision-maker, and adequate notice of hearing. However, because Ms. Cunningham defaulted on her hearing, she failed to exhaust her administrative remedies with respect to the merits of her case, and the APA precludes judicial review of the merits of any issue other than whether Ms. Cunningham had good cause for missing her hearing. *See* RCW 34.05.534. *See also* *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) (court will not review an issue for which an administrative remedy is available where the administrative remedy was not exhausted); *Citizens for Clean Air v. City of*

Spokane, 114 Wn.2d 20, 33, 785 P.2d 447 (1990) (“failure to exhaust the available administrative remedy makes it unnecessary for us to consider the adequacy of the [challenged Environmental Impact Statement]”).

Ms. Cunningham defaulted on her hearing, and the issue before the Court of Appeals was the Department’s order denying Ms. Cunningham’s request to vacate the Order of Dismissal due to her failure to show good cause for missing her hearing. Ms. Cunningham offers new arguments in her Petition for Review, not previously raised: that she was terminally ill in 2014 when she defaulted (offered without any evidence in the record of a terminal illness); that she was intentionally denied notice of the May 20, 2014, hearing at which she failed to appear (offered without any supporting evidence); that she was denied an impartial decision maker (because of the way OAH is funded); and that she was denied an attorney (even though she never asked for an attorney). None of these arguments raised for the first time here warrant this Court’s review.

Nor would any of these arguments merit review had they been properly raised. For example, her argument that she was denied an attorney is without merit because *Goldberg* does not require appointment of counsel for administrative hearings, *see Goldberg*, 397 U.S. at 270, and because Ms. Cunningham not only never requested an attorney, but actually asked the Court of Appeals to grant her an accommodation under GR 33 to retain

the assistance of Mr. Olson in lieu of a licensed attorney, over the Department's objection. *See* Notation Ruling dated September 23, 2015. *See* Appendix 1.

Similarly, the fact that the Department contracts with OAH to conduct its administrative hearings is not an inherent conflict of interest that violates an appellant's right to due process. OAH exists to provide a more impartial hearing than might otherwise be available if conducted directly by the state agency, and the Administrative Procedure Act clearly contemplates that state agencies may conduct adjudicative proceedings when required by law or constitutional right. *See* RCW 34.05.413.

The only issue properly before the Court is whether Ms. Cunningham failed to demonstrate, at any stage of judicial review, good cause for not appearing at her hearing in 2014. *See* RCW 34.05.570(1)(a). Her efforts to inject new issues and argument should be rejected. Ms. Cunningham has not shown that the decision of the Court of Appeals conflicts with *Sieyes*, *Manussier*, *Goldberg*, or any other Supreme Court decision, and RAP 13.4(b)(1) does not support granting her petition for review merely because she now alleges unsupported due process concerns.

///

B. The Court of Appeals Decision Does Not Conflict with a Published Decision of the Court of Appeals

Ms. Cunningham cites RAP 13.4(b)(2) on page 19 of her Petition for Review, but she cites no decision of the Court of Appeals with which the present decision might conflict. RAP 13.4(b)(2) does not support granting her Petition for Review.

C. This Case Does Not Involve a Significant Question of Law Under the Washington or U.S. Constitutions

The arguments Ms. Cunningham makes about *Goldberg* are substantially similar to her arguments about the Fourteenth Amendment's due process protections, and should be rejected for the same reasons set out in Section VI.A., above.

Ms. Cunningham also cites the Washington State Constitution, article I, sections 2, 3, 10, and 29, but she fails to actually articulate any question under those provisions that she considered to be "significant." See Petition at 14-15. See *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) ("Where a petitioner makes a due process challenge, naked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.") (alterations and internal quotation marks omitted). She refers to the right to adequate notice of hearing and cites the state constitutional provisions alongside the Fourteenth Amendment and *Goldberg*, Petition at 16 and 18, suggesting that her argument is essentially

the same as her other due process arguments and—like those other arguments—it does not relieve her of her burden under the APA of demonstrating that the agency’s dismissal of her hearing was invalid at the time it was dismissed when she failed to demonstrate good cause for missing her hearing. RCW 34.05.570(1)(a)-(b).

Because Ms. Cunningham failed to exhaust her administrative remedies as to any issue other than whether she has shown good cause for failing to appear at her May 20, 2014 hearing, these questions are not properly before this Court on review and do not support granting her petition for review under RAP 13.4(b)(3).

D. This Case Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court

Ms. Cunningham argues throughout her petition that this Court must grant review in order to address the alleged abuses and violations by the Department and OAH. Most of Ms. Cunningham’s petition focuses on alleged due process violations which the Court of Appeals found to have “no basis in fact.” Pet. for Review, Appx. A (*Cunningham v. Dep’t of Social & Health Servs.*, No. 73713-9-I, slip op. at 8 (Sept. 23, 2015) (unpublished decision)). Further, these alleged violations are not properly before this Court on judicial review under the APA, which is limited to whether Ms. Cunningham demonstrated good cause for failing to appear at her

hearing such that the Department's dismissal was invalid at the time it was taken. RCW 34.05.570(1)(a)-(b). Ms. Cunningham's request for relief goes well beyond the limited appellate authority of a court reviewing an agency action under RCW 34.05.570, and these alleged violations, which are outside the scope of the decision before this Court, do not involve an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

VII. CONCLUSION

Ms. Cunningham does not challenge any specific findings of fact or conclusions of law of the Department's final order denying her petition to vacate its Order of Dismissal. She does not argue that the Board erred when it found she lacked good cause for default. Instead, she makes numerous due process arguments, none of which address the sole issue preserved for review: whether to invalidate the Department's decision, pursuant to

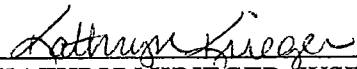
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RCW 34.05.570, that there was no good cause for her failing to appear at her hearing on the merits. None of her arguments support granting review under RAP 13.4(b). This Court should deny review.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

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CERTIFICATE OF SERVICE

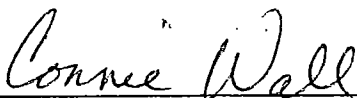
I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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TO:
Karl I. Olson, Appellant's Representative
2714 "J" Ave
Anacortes, WA 98221

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 16th day of January, 2018 at Tumwater,
Washington.



CONNIE WALL, Legal Assistant

APPENDIX 1

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 73713-9-I

Deoide Lea Cunningham, Appellant v. State of WA., DSHS, Respondent
Skagit County No. 14-2-02007-7

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on September 23, 2015, regarding court's motion to determine appealability:

NOTATION RULING
Cunningham v. DSHS
No. 73713-9-I
September 23, 2015

This matter involves a challenge to a decision of the Developmental Disabilities Administration (DDA), a division of the Department of Social and Health Services, terminating disability benefits of Deiode Cunningham. Ms. Cunningham lives with her long-time partner and caregiver, Karl Olson. Cunningham received a written notice that her eligibility for benefits and services was to be terminated. She appealed the decision, and a hearing date was set. Prior to the hearing, the officer issued an order requiring Ms. Cunningham to appear in person (as opposed to by telephone). Neither Ms. Cunningham nor Mr. Olson appeared. Their position is that they were unable to appear due to emergent medical issues. The Department's position is that they provided insufficient evidence that they could not appear. The Department issued an order of dismissal for default. Ms. Cunningham appealed/moved to vacate the default dismissal. The Office of Administrative Hearings (OAH) initially denied her motion. The Board of Appeals issued a review decision and final order, affirming the default dismissal. Ms. Cunningham filed a petition for review of the administrative decision and then filed a list of motions. The superior court denied the motions, effectively dismissing review, and subsequently denied reconsideration. Ms. Cunningham, through her representative Mr. Olson, filed a notice of appeal.

This court set a hearing to determine whether the challenged decisions are appealable as of right under RAP 2.2(a). Mr. Olson and counsel for the Department filed written responses addressing appealability, and both appeared at the hearing.

Mr. Olson takes the position that the decision or decisions are appealable under RAP 2.2(a)(1) (final judgment) or (a)(3) (decision determining the action). The Department takes the position that the decision or decisions are appealable under RAP 2.2(a)(3). It is unnecessary to determine which subsection applies, as under either (a)(1) or (a)(3), Ms. Cunningham has an appeal as of right.

The Department also seeks an order striking the notice of appeal, removing Mr. Olson as Ms. Cunningham's representative, and allowing time for Ms. Cunningham to obtain an attorney. The Department relies on case law that Mr. Olson, who is not an attorney, may not practice law and represent Ms. Cunningham in this court. See RCW 2.48.170, GR 24. The Department acknowledges that it is raising this issue for the first time in this court.

The Department is correct that Mr. Olson may not hold himself out as attorney nor provide legal representation for Ms. Cunningham. Based on his remarks at oral argument, Mr. Olson acknowledges this and he does not appear to be doing either. He does appear to be serving as Ms. Cunningham's representative in part because she apparently is unable to appear in person due to her medical conditions. Keeping in mind GR 33, which provides for accommodation for persons with disabilities, at this point I decline to prevent Mr. Olson from

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73713-9-I, Decide Lea Cunningham v. State of WA, DSHS

September 23, 2015

acting to assist Ms. Cunningham in pursuing her appeal. I also note that proof of service was filed by "Emily L Cunningham Representative." Nothing in the materials before me indicates the relationship between Emily Cunningham and appellant Deiode Cunningham.

I note that all parties agree that Ms. Cunningham may reapply for disability benefits at any time, and at this point she may have done so. If this appeal is to go forward, the next step is for Ms. Cunningham to take steps to prepare the record, which can be costly. Before setting a due date for Ms. Cunningham to do so, I suggest the parties confer.

By October 21, 2015, Ms. Cunningham should inform this court in writing whether she intends to go forward with this appeal. If Ms. Cunningham chooses to have Mr. Olson act in some capacity as her representative, she must clearly indicate in writing her wishes in this regard.

Mary S. Neel
Commissioner

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

c: The Hon. John M. Meyer

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Good Morning:

Please find the attached Answer to Petition for Discretionary Review for the Respondent, Department of Social & Health Services, and Certificate of Service.

Case Name – Cunningham v. Department of Social & Health Services
WSSC Cause No. 95346-5
By Kathryn Krieger, WSBA No. 47037
Assistant Attorney General, Social & Health Olympia, OID No. 91021

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