NO. 96740-7

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

NO. 347541

IN THE COURT OF APPEALS OF THE STATE OF WASINGTON

DIV. III

DARLENE A. TOWNSEND, PhD

Petitioner

STATE OF WASHINGTON DEPARTMENT OF HEALTH

Respondents

REPLY TO RESPONDENT'S ANSWER

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I. INTRODUCTION

As stated in Dr. Townsend's Petition for Review, Rule of Appellate Procedure 1.2 (RAP 1.2) provides "these rules will be liberally construed to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or non-compliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)." RAP 1.2(a). The Rules of Appellate Procedure make it clear that fundamental fairness is more important than compliance with technicalities, and one must assume that all of Washington's court rules, including those applicable to administrative proceedings, must demand the same standard.

The State of Washington Department of Health ("State") has responded in it's Answer to Petition for Review much as it has in every brief since Dr. Townsend appealed her license action – with a tone of exasperation that Dr. Townsend expects and asks for fairness and due process in her case. The State uses words like "egregious" in reference to Dr. Townsend's conduct, but implies that her case is so unimportant as to not be a matter of substantial public interest. To the contrary, the deprivation of any citizen's rights to fairness and due process, the deprivation of a professional license and hence the means to practice a profession and to earn a living – that is always a matter of substantial public interest.

II. RESPONSE TO COUNTERSTATEMENTS

Dr. Townsend's responses to the State's counterstatements are set out above and discussed below.

III. ARGUMENT

A. ADA and State Law Disability Discrimination. The Americans with Disabilities Act and its counterpart Washington Law Against Discrimination are not passive laws. Rather, each law contains an affirmative duty on the part of, here, a governmental entity to "be afforded the full enjoyment of places of public accommodation to the greatest extent possible". WAC 162-26-080. "Greatest extent possible" means more than the minimum that can be done. It means that the governmental entity needs to do more than wait around for a disabled person to make a specific request for an accommodation – the purpose of the laws

and the point of the process is to assure that a disabled person is not prevented from fully enjoying a place of public accommodation (or a service, or the ability to exercise a right, such as appeal a license suspension and meaningfully participate in the pursuit of that appeal.

Dr Townsend was already injured in July 2013 when investigation of the complaint against her started. The record of the investigation indicates numerous instances where Dr Townsend was unable to even make copies of records for submission to the investigator. Medical records submitted from Northwest Orthopaedic Specialists, P. S. her physicians, detail the extent of her injuries, as well as her other extensive problems, and records from Heart Clinics Northwest, PS detail the problems which supported her application for disability status with the Department of Licensing. The State's response, however, appears to be that since Dr. Townsend did not request a specific accommodation for her injuries and limitations, that the State was free to simply ignore it. (See page 10 of Answer.) Further, documentation of the injuries and health issues were ignored by the Office of Administrative Hearings and the hearing judge in setting the case for hearing in a building with at least five floors and no instructions to the parties – at least Dr. Townsend – as to where the hearing was being held. The State points out, correctly, that there was an elevator in the building where Dr. Townsend's hearing was held, but fails to note that the elevator was in the central core of the building, and the hearing room selected was in one of the wings of the building, at some distance from the elevator. Dr. Townsend, how has been required to use crutches to ambulate for several years, found it very challenging to get herself and her papers for the hearing to the actual hearing room, even after having used the elevator. She was late – and admonished by the ALJ – because she crept around on her crutches trying to find the hearing, the location of which nobody seemed to know. See TAH, p 25 lines 8-14.. She was given minimal breaks to get to the bathroom and criticized for wasting the time of the prosecutor and the ALJ. Because much of the testimony – in particular the State's expert witness – was by telephone, Dr. Townsend struggled to hear the proceedings and to manage information in an unfamiliar and relatively hostile setting. See TAH testimony of Harriet Cannon starting page 99 on the 2nd day of hearing. If the State had made even a minimal effort to have interactions with Dr. Townsend about

what would have constituted reasonable accommodations, it would have actually provided reasonable accommodations, and not merely begrudgingly made minimal efforts, claiming "oh, she didn't ask."

Washington State Court General Rules, specifically GR 33, outline requests for accommodation by person with disabilities and the means for requesting, reviewing and granting accommodations. It references the Americans With Disabilities Act and Washington civil rights laws. The comments to the Rule provide that "access to justice for all persons is a fundamental right" and that "persons with disabilities have equal and meaningful access to the judicial system." Washington Court Rules GR 33. The Court of Appeals did not review the circumstances around disability accommodation and hence failed to adequately assure Dr. Townsend's rights were met.

B. Testimony of DOH Expert Witness. It must be noted that the State cites two cases for the proposition that pro se litigants are not exempt from procedural rules, which appears to be the State's implied if not stated excuse for any instance in which Dr. Townsend was ignored, cut off, rebuked and otherwise treated punitively for not knowing the rules of procedure, evidence, or in some cases the specifics of law or regulations. The two cases the State cites, *Kelsey v. Kelsey*, and *In re Marriage of Olsen*, both involve situations in which the pro se litigants behaved in ways that were fundamentally inconsistent with the orderly process of law – in *Kelsey* the pro se party waited about two years into litigation before even raising the issue of her prose status. *In Marriage of Olsen* the litigant tried to delay proceedings, was accused of submitting false evidence, and other behaviors the court found inappropriate, and being pro se was simply no excuse. In this case the State is trying to justify running roughshod over Dr. Townsend's rights, before, during and after the administrative hearing, by essentially holding her to the standard of a lawyer in knowing and complying with procedural and substantive rules. As noted in the Petition, the were numerous instances where the DOH expert witness in numerous instances simply drew conclusions or interpreted statutes, regulations and standards without documentation to suit her own opinions. Further, neither the Assistant Attorney General ("AAG") DeFreyn allowed Dr. Townsend any leeway that a pro se person should have been permitted in attempting to defend her professional behavior, her professional license and her

livelihood. Dr. Townsend was interrupted by AAG DeFreyn regularly when Dr. Townsend would attempt to present a point of argument or present a question to the Hearing Officer. AAG DeFreyn also chastised Dr. Townsend for trying to ask questions of witnesses or make a point of argument, stating to her that she had to follow the "rules of procedure". Dr. Townsend was in many cases not allowed to refer to her own documents, and not permitted to even have copies of numerous documents the alleged expert relied on in her testimony (further, the expert witness testified by cellphone, which prejudiced Dr. Townsend in not only not being to see and assess the witness in person, but in being able to adequately cross examine an "invisible witness".) AAG DeFreyn more than once expounded on her own knowledge of mental health issues, effectively acting as her own witness, and the Hearing Officer did not stop her.

Dr. Townsend was not treated fairly by the administrative process, or by the AAG or the Hearing Officer. There was no due process. The question must be asked – if a pro se litigant is expected to know the rules of evidence and procedure in the same way a lawyer does, then is the system not effectively telling a litigant that he or she has to do more – learn how to practice law, in effect – before he or she can even try to protect his or her rights?

C. Dr. Townsend's Expert Witness. Dr. Townsend was denied the right to call Donald Brockett, a witness whose name she submitted to the hearing officer, but who was rejected because his name was apparently not presented "timely". See TAH pp 6 and 23. His name was in fact presented prior to the hearing, and the hearing officer and prosecutor were not delayed or prejudiced, because Mr. Brockett was present and ready to testify on the day of the hearing. See TAH p 121, lines 10-14. His testimony, as Dr. Townsend tried to explain, would have established Dr. Townsend's extensive involvement in family and marital therapy and the law. There was no reasonable basis to deny Dr. Townsend fundamental fairness and to have her witness testify. The Court of Appeals simply glossed this issue over and ignored the implications of leaving Dr. Townsend without a witness of her own. Yes, as the State asserts in its Answer, the Court of Appeals was within its authority to ignore Dr. Townsend's unfairness, but in the interests of fairness and due process, the Court of Appeals should have done more. It should have not effectively echoed the tone

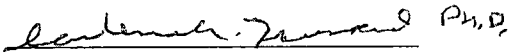
of condescension and exasperation of the State, but instead should have tried just a little harder to afford Dr Townsend a fair chance to defend herself and her license. The denial of Dr. Townsend request for Mr. Brockett's testimony characterized the entire pre-hearing and hearing process as procedurally unfair to a pro se party – indeed any party.

IV. CONCLUSION

To read the transcript of Dr. Townsend's administrative hearing is much like reading Kafka. The hearing officer several times noted to Dr. Townsend that being pro se did not give her special privileges, but he never acknowledged that a duty of any court is to provide fundamental due process, and that a party representing herself to defend her livelihood and reputation deserves better than being hobbled by procedural technicalities. See eg TAH pp 135-136. The Hear5ing Officer allowed the AAG free range to treat Dr. Townsend in a way that was not objective. The abiding tone of the administrative hearing is that AAG DeFreyn was "out to get" a "bad" practitioner, and that being a pro se party seemed to make it all the more likely that Dr. Townsend was a "bad practitioner".

Requiring a pro se and disabled party no leeway in presenting her case – a case on which her livelihood depends – and further failing to accommodate her disabilities – violates the fundamental premise of access to justice as recognized and incorporated into Washington Court Rules and Washington court proceedings. For the reasons set out above, Dr. Townsend respectfully replies to the State's Answer and renews her petition for review.

Respectfully submitted this 11th day of April, 2019.



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PROOF OF SERVICE

I, Darlene A. Townsend, certify that I caused a copy of this document, Reply to Respondent's Anser, to be served on all parties or counsel of record to:

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

DATED this 11th day of April, 2019 at Spokane, Washington.

Darlene A. Townsend, Ph.D

Darlene A. Townsend, Ph.D

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Reply to Respondent's Answer - Darlene A. Townsend

Attached is Dr. Townsend Reply in atter No 96740-7, a copy of which has also been mailed.

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