

NO. 676423-I

---

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

SUE HONG,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

DIANE L. DORSEY  
Assistant Attorney General  
WSBA #21285

Attorney for Respondent  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-7045

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 MAR 23 PM 1:31

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUES.....2

III. COUNTERSTATEMENT OF THE CASE .....2

    A. Procedural History .....2

    B. Statement Of Facts .....5

IV. ARGUMENT .....12

    A. Substantial Evidence Supports The DSHS Review  
    Judge’s Decisions Affirming The Revocation Of Ms.  
    Hong’s Adult Family Home License .....12

        1. Standard Of Review .....12

            a. Review Of Factual Matters .....13

            b. Review Of Questions Of Law.....14

            c. Review Of Order As Arbitrary And Capricious .....15

        2. Substantial Evidence In The Record And Applicable  
        Law Support The Finding That Ms. Hong Violated  
        Adult Family Home Regulations, Warranting Stop  
        Placement Of Admissions And License Revocation.....15

    B. The DSHS Review Judge Did Not Exceed Her Authority  
    In Affirming The Revocation Of Ms. Hong’s Adult  
    Family Home License.....17

    C. Ms. Hong Failed To Provide Direct Supervision To Theo  
    LaFargue.....20

    D. Repeated Or Uncorrected Deficiencies Need Not Pertain  
    To The Same Staff Member.....26

E. There Is No Basis To Change The Review Decision And  
Final Order Issued On September 22, 2010 Or The Order  
Denying Reconsideration Issued On November 22, 2010.....28

F. Ms. Hong Is Not Entitled To Attorney’s Fees And Costs. ....29

V. CONCLUSION .....31

## TABLE OF AUTHORITIES

### Cases

<i>ARCO v. Util. &amp; Transp. Comm'n</i> , 125 Wn.2d 805, 812, 888 P.2d 728 (1995).....	15
<i>Bond v. Dept. of Social &amp; Health Svcs.</i> , 111 Wn. App. 566, 572, 45 P.3d 1087 (2002).....	passim
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Board</i> , 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).....	14
<i>Costanich v. DSHS</i> , 138 Wn. App. 547, 156 P.3d 232 (2007).....	23, 24
<i>Costanich v. DSHS</i> , 164 Wn.2d 925, 194 P.3d 988 (2008).....	23
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 383, 932 P.2d 139 (1997).....	15
<i>In Re Griswold</i> , 102 Wn. App. 29, 15 P.3d 153 (2000).....	14
<i>Sunderland Family Treatment Serv. v. City of Pasco</i> , 127 Wn.2d 782, 788, 903 P.2d 986 (1995).....	14
<i>Tapper v. Employment Sec. Dep't</i> , 122 Wn.2d 397, 402, 858 P.2d 494 (1993).....	13
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 411, 914 P.2d 750 (1996).....	14

### Statutes

RCW 34.05.464(4).....	13
RCW 34.05.510 <i>et seq</i> .....	13

RCW 34.05.558 .....	13
RCW 34.05.570(1)(a) .....	13
RCW 34.05.570(3)(d) .....	14
RCW 34.05.570(3)(e) .....	13
RCW 34.05.570(3)(i) .....	15
RCW 4.84.340(5).....	30, 31
RCW 4.84.350 .....	29
RCW 4.84.350(1).....	30
RCW 70.128.160(1)(a) .....	15
RCW 70.128.160(2)(a) .....	15

**Other Authorities**

WAC 388-02-0600(1).....	24
WAC 388-112-0245(3).....	16
WAC 388-76-10020.....	28
WAC 388-76-10135(4).....	16
WAC 388-76-10135(6).....	16
WAC 388-76-10160.....	3
WAC 388-76-10160(1).....	16
WAC 388-76-10160(2).....	16
WAC 388-76-10160(3).....	16
WAC 388-76-10160(4).....	16

WAC 388-76-10175(3)..... 3, 16  
WAC 388-76-10670..... 25  
WAC 388-76-10670(3)..... 25  
WAC 388-76-10670(4)..... 25  
WAC 388-76-10940..... 15

**Rules**

RAP 10.3(h)..... 13  
RAP 14.1..... 29, 31  
RAP 14.2..... 31

## I. INTRODUCTION

The Department of Social and Health Services (DSHS) requests that this court uphold the stop placement of admissions and revocation of Sue Hong's adult family home license for Heritage House #1.

In October 2008, Sue Hong employed a caregiver, Theo LaFargue, and allowed him to provide unsupervised care to residents prior to obtaining a clear criminal background check on him. Mr. LaFargue verbally abused one resident, Ms. K.<sup>1</sup> Even after being informed of Mr. LaFargue's inappropriate verbal and sexual behaviors, Ms. Hong allowed Mr. LaFargue to continue living and working in the adult family home and providing unsupervised care to residents for several more days to give him an opportunity to find another job and place to live.

Ms. Hong failed to ensure that her caregivers were qualified and trained and that they had passed background checks prior to providing unsupervised care to residents. She failed to ensure that her residents were protected from abuse. Ms. Hong's actions demonstrate that she lacks the understanding and ability to meet the needs of her adult family home residents. Therefore, the Department properly issued a stop placement of admissions and revocation of her adult family home license.

---

<sup>1</sup> The resident who was the victim of the verbal abuse and sexually inappropriate behavior by staff member Theo LaFargue will be referred to as Ms. K, in order to protect her privacy.

## II. ISSUES

A. Was there substantial evidence to uphold the DSHS Review Judge's decisions affirming the revocation of Ms. Hong's adult family home license?

B. Did the DSHS Review Judge act within her authority when she affirmed the revocation of Ms. Hong's adult family home license?

## III. COUNTERSTATEMENT OF THE CASE

### A. Procedural History

Appellant Sue Hong was the owner of Heritage House #1, a licensed adult family home. On November 18, 2008, the Department of Social and Health Services notified Ms. Hong that it was issuing a stop placement of admissions and revoking her adult family home license. AR 116-19, 166.<sup>2</sup> The Department's stop placement and revocation were based upon its findings that Ms. Hong failed to understand her responsibility to protect residents from abuse by staff; that she failed to ensure a staff member was qualified prior to providing care to residents; that she failed to have a criminal history background check completed on a new staff member before allowing him to have unsupervised access to

---

<sup>2</sup> The transcript from the administrative hearing and the Administrative Record are all contained within Sub No. 6, the Certified Appeal Board Record, which consists of 1100 pages. The Administrative Record comes after the transcript. The pages of the Administrative Record are each stamped with a Bates number in the lower right hand corner. Citations to the Administrative Record will be given as "AR \_\_\_\_" with the specific Bates page number identified.

residents; and that she failed to protect residents from abuse after being made aware that a staff member had verbally abused a resident and exhibited sexually inappropriate behavior. Ms. Hong allowed this unqualified staff member, Theo LaFargue, to continue residing in her adult family home and providing care to residents for approximately 8 days after she was made aware of the abuse. AR 116-17.

The Department issued an amended stop placement of admissions and revocation letter to Ms. Hong on April 20, 2009. This amended notice added an additional finding to support the revocation and stop placement: namely, that the adult family home failed to ensure that one staff member updated her required safe food handlers training. In addition, the amended notice cited some additional subparagraphs of WAC 388-76-10160 pertaining to Ms. Hong's failure to ensure that results were received on a staff member's criminal background history check before he or she was allowed to have unsupervised access to residents. AR 133-35.

Ms. Hong requested an administrative hearing, and one was conducted before Administrative Law Judge Rynold C. Fleck on May 18, 19, and 20, 2009 and June 9 and 10, 2009. AR 82. On June 10, 2009, the Department served Ms. Hong with a second amended notice of stop placement and revocation, which merely added an additional WAC citation, WAC 388-76-10175(3), regarding Ms. Hong's failure to provide

direct supervision for a new employee whose criminal history background check results had not yet been received. AR 177-79.

Ms. Hong appeared and was represented by attorney Samuel S. Chung at the five day long administrative hearing. The Department of Social and Health Services appeared and was represented by Diane L. Dorsey, Assistant Attorney General. ALJ Fleck issued an Initial Order on January 27, 2010, which held that the Appellant's adult family home license for Heritage House #1 is hereby revoked. AR 82-93.

Ms. Hong then filed a petition for review of the Initial Order. On September 22, 2010, DSHS Review Judge Marjorie R. Gray issued a Review Decision and Final Agency Order, affirming the Initial Decision. AR 43-65.

Ms. Hong subsequently sought reconsideration by the DSHS Review Judge. On November 22, 2010, Review Judge Gray issued a Decision Denying Reconsideration. AR 1-13. The Review Judge and the Administrative Law Judge both found that Ms. Hong violated all seven of the adult family home rules or WACs cited by DSHS. The Review Judge noted that "[e]ach rule violation is sufficient grounds for revocation of her license." AR 11.

Ms. Hong timely filed a petition for judicial review in King County Superior Court. CP 1-44.<sup>3</sup> A hearing was held before the Honorable Brian Gain, Superior Court Judge, on July 29, 2011. Judge Gain issued an order the same day, denying Ms. Hong's petition for judicial review and affirming the DSHS Review Judge's orders. CP 270-21. Ms. Hong then timely filed a Notice of Appeal to the Court of Appeals. CP 273-78.

**B. Statement Of Facts**

Appellant Sue Hong owned and operated Heritage House #1, an adult family home. Tr. Vol. I (05/18/09), p. 28.<sup>4</sup> On October 8, 2008, Ms. Hong hired Theo LaFargue as a live-in caregiver for Heritage House #1, and he moved into the adult family home the same day. Tr. Vol. I (05/18/09), pp. 28-29. Ms. Hong did not submit a background check form to DSHS for Mr. LaFargue prior to him beginning work. Tr. Vol. II (05/19/09), pp. 20-22; AR 140.<sup>5</sup> Ms. Hong admitted that sometimes she left the adult family home and Mr. LaFargue was the only caregiver there for the residents. Tr. Vol. I (05/18/09), p. 49. Mr. LaFargue was observed by a Group Health employee and a hospice volunteer to be the only

---

<sup>3</sup> References to the Clerk's Papers, excluding Sub No. 6, will be given as "CP \_\_\_\_" with the specific page number identified.

<sup>4</sup> References to the transcript of proceedings at the administrative hearing will provide the volume number, date of proceedings, and specific page number. The transcript of proceedings is included within Sub. No. 6 of the Clerk's Papers.

<sup>5</sup> The Background Authorization form for Mr. LaFargue was stamped received by DSHS on November 10, 2008, AR 140, which was after Mr. LaFargue was no longer working at Heritage House #1.

caregiver on duty at various times during October 2008. Tr. Vol. II (05/19/09), pp. 115-16 and 160.

There were four residents at Heritage House #1 in October 2008. Tr. Vol. I (05/18/09), p. 28. This included a resident named Ms. K, who moved into Heritage House #1 on October 18, 2008. Tr. Vol. III (05/20/09), pp. 13 and 158. Ms. K was in extreme pain and quite sick when she moved in, and she was receiving hospice services. Tr. Vol. III (05/20/09), pp. 13 and 157. However, after a few days, Ms. K's condition improved, and she was able to do some things by herself, including administering her own insulin shots. Tr. Vol. III (05/20/09), pp. 13 and 161.

Mr. LaFargue was providing care to Ms. K in October 2008. As Ms. K improved, she no longer needed the level of care that Mr. LaFargue had been giving to her, and Ms. K wanted some privacy. Mr. LaFargue was not able to make the transition to providing a lower level of care and respecting Ms. K's request for privacy when she administered her own insulin shots. Tr. Vol. III (05/20/09), pp. 162-63. When the hospice nurse, Calista Pollack, spoke with Mr. LaFargue about this on October 22, 2008, he became angry and out of control and yelled very loudly. Mr. LaFargue stated that Ms. K needed to leave the adult family home. Tr. Vol. III (05/20/09), pp. 163-64 and 168. Ms. Hong overheard most of this

conversation between the nurse and Mr. LaFargue. Tr. Vol. III (05/20/09), pp. 16-18 and 165-68; Tr. Vol. II (05/19/09), p. 33. Ms. Hong told Ms. Pollack that she was going to have a long talk with Mr. LaFargue, that Ms. K would definitely not be the one leaving, and that she (Ms. Hong) had some tough decisions to make. Tr. Vol. III (05/20/09), pp. 165-68; Tr. Vol. II (05/19/09), p. 33.

On October 23, 2008, Ms. Hong gave Mr. LaFargue notice that he was not going to work at her adult family home anymore. He asked to stay on through November 15, 2008. Tr. Vol. I (05/18/09), p. 59. Ms. Hong let him stay and continue to work through October 31, 2008, so that he could find another job and another place to live. Tr. Vol. I (05/18/09), pp. 59 and 110; Tr. Vol. II (05/19/09), pp. 44-45 and 140. Ms. Hong fired Mr. LaFargue in part because he said Ms. K should move out of the adult family home and it wasn't his decision. Tr. Vol. I (05/18/09), pp. 58-60. Ms. Hong told Lisa Foster, the DSHS Adult Family Home/Boarding Home Complaint Investigator, that she terminated Mr. LaFargue because he yelled at the nurse and he yelled at her (Ms. Hong). Tr. Vol. II (05/19/09), p. 39. Ms. Hong informed Ms. Pollack on October 23, 2008 that she had dismissed Mr. LaFargue. Tr. Vol. II (05/19/09), p. 169.

Ms. Nathan Dabney was a volunteer with Group Health Hospice, who visited with Ms. K six hours per week while Ms. K resided at

Heritage House #1. Tr. Vol. II (05/19/09), pp. 102-04. The first night that Ms. Dabney visited with Ms. K at Heritage House #1, Mr. LaFargue came into Ms. K's room without knocking and became very agitated. His agitation continued to grow until at the end of an hour, he was an inch from Ms. K's face, telling her that he was the boss and her so-called psychological problems were not going to manipulate him. Tr. Vol. II (05/19/09), p. 105. Mr. LaFargue remained in Ms. K's room for 90 minutes and did not provide any care to her during that time. Tr. Vol. II (05/19/09), pp. 105-07. He repeatedly got in Ms. K's face, telling her, "I'm the boss here. You're not the boss. If you don't know that now, you're going to learn it." Tr. Vol. II (05/19/09), p. 107. Several times, Ms. Dabney interposed her body between Ms. K and Mr. LaFargue, asking him to sit down or leave the room if he couldn't calm down, but he would neither leave the room nor calm down. Tr. Vol. II (05/19/09), pp. 105-07. Mr. LaFargue was sweating profusely, running his hands through his hair, pounding on the table with his fists, and pacing back and forth. Tr. Vol. II (05/19/09), pp. 109-11. He complained that nurses were telling him what to do, and he stated that Ms. K had a problem with men and she needed to grow up. Tr. Vol. II (05/19/09), pp. 106 and 109.

Ms. Dabney was very concerned for Ms. K's safety. Tr. Vol. II (05/19/09), p. 109. Ms. K appeared to be afraid of Mr. LaFargue during

this 90 minute tirade. Ms. K. stiffened in her chair and backed up in her chair when Mr. LaFargue came toward her. She held Ms. Dabney's hand. Tr. Vol. II (05/19/09), p. 117. At one point, Ms. Dabney left Ms. K's room and went to the bottom of the stairs to call for help, but no one responded. Tr. Vol. II (05/19/09), p. 116. These events occurred on Friday, October 24, 2008. Tr. Vol. III (05/20/09), p. 113.

Ms. Dabney reported this incident to Group Health staff. Ms. Dabney received a call back from Group Health staff on the same day, reporting that Ms. Hong had let Mr. LaFargue go. Tr. Vol. II (05/19/09), pp. 111-14. The Group Health staff members were under the impression that Mr. LaFargue had been fired, effective October 23, 2008. AR 258-59; *see* Tr. Vol. II (05/19/09), pp. 35, 114, 170, and 205-06. However, Group Health staff subsequently learned that Mr. LaFargue was still in the adult family home and was providing care to Ms. K, because when they called Ms. K's room, Mr. LaFargue answered the phone. Tr. Vol. II (05/19/09), pp. 112-13, 133, and 138-40. Group Health weekend charge nurse Dori Papke called in a complaint to DSHS on October 25, 2008, because Ms. Hong was allowing Mr. LaFargue to continue working in the adult family home until the end of the month. AR 259; *see* Tr. Vol. II (05/19/09), pp. 29-30 and 144-45.

Ms. Hong acknowledged to Lisa Foster that she (Ms. Hong) was aware on October 25, 2008 of the verbal issues with Mr. LaFargue that occurred in front of Nathan Dabney. Tr. Vol. II (05/19/09), pp. 41 and 67; *see* Tr. Vol. II (05/19/09), p. 118.

On October 27, 2008, Group Health staff members met with Ms. Hong at Heritage House #1 and expressed concerns regarding sexually inappropriate behavior by Mr. LaFargue, including touching and scratching his private area and having his pants zipper down in Ms. K's presence.<sup>6</sup> Tr. Vol. I (05/18/09), pp. 60-61; *see* Tr. Vol. II (05/19/09), pp. 177-79 and 205-08; Tr. Vol. III (05/20/09), pp. 23-24 and 68. Mr. LaFargue's verbal confrontation of Ms. K in front of Ms. Dabney was also discussed at this meeting. Tr. Vol. III (05/20/09), pp. 61-62, 70 and 87. Ms. Hong decided that Mr. LaFargue wouldn't take care of Ms. K directly anymore; rather, Ms. Hong herself would provide care to Ms. K; and she told the Group Health staff members this. Tr. Vol. I (05/18/09), p. 71; Tr. Vol. II (05/19/09), pp. 13-14 and 171; *see* Tr. Vol. II (05/19/09), p. 181; Tr. Vol. III (05/20/09), pp. 51 and 71. Ms. Hong told Mr. LaFargue that she would take care of Ms. K herself and he did not need to. Tr. Vol. III (05/20/09), p. 28. Even after learning of the allegations of sexually

---

<sup>6</sup> Allyson Palmeter, Ms. K's daughter, saw Mr. LaFargue scratching his private area with his zipper unzipped in front of her mother on at least seven occasions, and she told Ms. Hong about this. Tr. Vol. I (05/18/09), pp. 75-77.

inappropriate behavior on October 27, 2008, Ms. Hong did not consider requiring Mr. LaFargue to leave her adult family home sooner than October 31, 2008. Tr. Vol. III (05/20/09), p. 53.

Despite Ms. Hong's decision not to have Mr. LaFargue provide care to Ms. K, he continued providing care to Ms. K., such as bringing her food and medicine. *See* Tr. Vol. I (05/18/09), p. 85; Tr. Vol. II (05/19/09), pp. 114-15 and 171. Ms. Hong acknowledged that she left the home between October 23 and 31, 2008 for short periods of time. Tr. Vol. III (05/20/09), pp. 52-53. Mr. LaFargue also yelled at Ms. K in the kitchen in front of others after he was not supposed to be providing care to her. This was embarrassing and uncomfortable to Ms. K. Tr. Vol. II (05/19/09), p. 12. Ms. K also told Lisa Foster that Mr. LaFargue blamed her (Ms. K) for his being terminated. He yelled at Ms. K that she ruined his reputation. Tr. Vol. II (05/19/09), p. 52.

Ms. Hong also had prior violations for failure to submit criminal background check forms regarding her employees in March 2008 and July 2008. AR 143-45, 147-49; Tr. Vol. IV (06/09/09), pp. 45-47 and 54-59. Also in July 2008, before receiving the results of one staff member's background check, Ms. Hong allowed that staff member to provide care to residents without direct supervision. AR 149; Tr. Vol. IV (06/09/09), pp. 56-57. The adult family home licensor talked with Ms. Hong on July 10,

2008, about the need for her staff member Elizabeth to be supervised all the time by a qualified caregiver since her background check had not yet cleared. Tr. Vol. IV (06/09/09), p. 58.

In March 2009, Ms. Hong had a staff member named Veronica at Heritage House #1 who did not have a criminal background clearance and who did not have a safe food handler's certificate. Tr. Vol. IV (06/09/09), p. 11. The adult family home licensor, Lisa Cramer, had Ms. Hong write a statement that Veronica would not have unsupervised access to residents until her criminal background check was cleared. Tr. Vol. IV (06/09/09), p. 12. Yet, on April 7, 2009, Veronica was alone with three residents at Heritage House #1, before the results of her background check had been received. Tr. Vol. IV (06/09/09), pp. 16-17. When Ms. Cramer told Ms. Hong that she could not leave Veronica alone with residents, Ms. Hong responded, "Not even for ten to fifteen minutes?" Ms. Cramer said, "No, not at all." Tr. Vol. IV (06/09/09), p. 17.

#### **IV. ARGUMENT**

##### **A. Substantial Evidence Supports The DSHS Review Judge's Decisions Affirming The Revocation Of Ms. Hong's Adult Family Home License**

###### **1. Standard Of Review**

Judicial review of DSHS's decision below is governed by Washington's Administrative Procedure Act (APA). RCW 34.05.510 *et*

*seq.* “In reviewing administrative actions, [the appellate] court sits in the same position as the Superior Court, applying the standards of the APA directly to the record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The appellate court applies its review directly to the final administrative decision of the agency, rather than the underlying initial order. *Tapper*, 122 Wn.2d at 404-06 (citing RCW 34.05.464(4)).

Ms. Hong has the burden of establishing the invalidity of agency action. RCW 34.05.570(1)(a). Under the Rules of Appellate Procedure, Ms. Hong must set forth a separate concise statement of each error which she contends was made by DSHS in its final order dated September 22, 2010 and the order denying reconsideration dated November 22, 2010. RAP 10.3(h).

**a. Review Of Factual Matters**

Review of factual findings must be based solely on the administrative record. RCW 34.05.558. Unchallenged findings of fact are treated as verities on appeal. *Tapper*, 122 Wn.2d at 407. The Court will affirm challenged findings that are supported by “evidence that is substantial when viewed in light of the whole record before the court.” *Bond v. Dept. of Social & Health Svcs.*, 111 Wn. App. 566, 572, 45 P.3d 1087 (2002); *see also* RCW 34.05.570(3)(e). Substantial evidence is that

which is sufficient “to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citations omitted); *see also In Re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000).

The Court must give deference to the party who prevailed in the administrative proceeding below and must accept “the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Sunderland Family Treatment Serv. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

**b. Review Of Questions Of Law**

In reviewing a question of law, the reviewing court is restricted to the determination of whether the agency has “erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). Issues of law are subject to *de novo* review by the Court. *Bond*, 111 Wn. App. at 572. The Court may substitute its judgment for that of the agency; however, where interpretation of law is in the agency’s area of expertise, the Court accords substantial deference to the agency on review. *City of Redmond*, 136 Wn.2d at 46.

**c. Review Of Order As Arbitrary And Capricious**

Washington's APA allows a reviewing court to reverse an agency decision when the decision is arbitrary or capricious. *Bond*, 111 Wn. App. at 572; RCW 34.05.570(3)(i). This standard is highly deferential, and the Court "will not set aside a discretionary decision absent a clear showing of abuse." *ARCO v. Util. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (citations omitted). Action by an agency is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). "Where there is room for two opinions," a decision reached after due consideration is not arbitrary and capricious even if the reviewing court believes it to be in error. *Hillis*, 131 Wn.2d at 383.

**2. Substantial Evidence In The Record And Applicable Law Support The Finding That Ms. Hong Violated Adult Family Home Regulations, Warranting Stop Placement Of Admissions And License Revocation.**

DSHS has the statutory authority to impose a stop placement of admissions and revoke an adult family home license where the provider has failed or refused to comply with state laws governing adult family homes. RCW 70.128.160(1)(a) and RCW 70.128.160(2)(a); WAC 388-76-10940.

Ms. Hong has not challenged the facts that she violated several of the minimum licensing requirements, including WAC 388-76-10135(4) and WAC 388-76-10135(6); WAC 388-76-10160(1), WAC 388-76-10160(2), WAC 388-76-10160(3), and WAC 388-76-10160(4); WAC 388-76-10175(3); and WAC 388-112-0245(3).<sup>7</sup> Instead, Ms. Hong has made legal arguments, unsupported by applicable law, that she should not be held responsible for the some of the violations because she alleges that the Department failed to prove actual abuse to Ms. K and she alleges that she was not aware of the purported abuse. Appellant’s Brief at p. 18-19.

Importantly, Washington’s Court of Appeals has found that, “[w]hen balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to the safety of these vulnerable adults.” *Bond*, 111 Wn. App. at 575. In *Bond*, the Court considered a summary suspension and revocation of an adult family home license. *Bond*, 111 Wn. App. at 566, 574. The Court in *Bond* determined that the licensee placed her five developmentally disabled residents at imminent risk of harm by failing to ensure the very vulnerable residents were cared for by a fully qualified caregiver when the licensee was absent for a six

---

<sup>7</sup> See Appellant’s Brief at p. 20.

hour period. *Bond*, 111 Wn. App. at 572-74. Because of the serious risk posed to residents in that case, the Court reasoned that DSHS was not required to allow the licensee a reasonable opportunity to correct. *Bond*, 111 Wn. App. at 577 (citing former WAC 388-76-705(2)(a)).

Here, as in *Bond*, Ms. Hong may have had every intention to provide for her residents. However, she failed to ensure that her residents would be safe, despite being faced with information that her residents, especially Ms. K, were at a very real and significant risk of harm. Also, Ms. Hong should have been aware of Mr. LaFargue's behavior, because she should have been providing direct supervision for him, since his background check had not been cleared. DSHS must rely on licensed adult family home providers to take action to prevent harm. In meeting its statutory obligation to enforce adult family home regulations, DSHS need not wait until a resident is harmed before taking licensing action. Given the evidence of violations in this matter, DSHS's action against Ms. Hong's license was amply supported.

**B. The DSHS Review Judge Did Not Exceed Her Authority In Affirming The Revocation Of Ms. Hong's Adult Family Home License.**

The Department issued a stop placement of admissions and revoked Ms. Hong's adult family home license based upon her violation of seven different Washington Administrative Code regulations. AR 177-79.

The Administrative Law Judge and the Review Judge both found that DSHS proved by a preponderance of the evidence that Ms. Hong violated all seven of those administrative regulations. AR 11. Accordingly, both the ALJ and the Review Judge affirmed the revocation of Ms. Hong's license.

Ms. Hong alleges that the ALJ exceeded his authority by affirming the remedy of revocation, which is the very same remedy that DSHS selected and imposed. Her argument makes no sense. In support of her spurious argument, Ms. Hong presents segments of Janice Schurman's testimony taken out of context. (Ms. Schurman was the adult family home compliance specialist for DSHS.) First, Ms. Hong quotes Ms. Schurman's testimony where she acknowledged that if Ms. Hong had not actually been notified on October 23, 2008 that Theo LaFargue had yelled at Ms. K, then the "results may have been different." Tr. Vol. IV (06/09/09), pp. 120-21. *See* Appellant's Brief at p. 12. Ms. Hong then takes another segment of Ms. Schurman's testimony out of context, when Ms. Schurman was speaking generally about the Department's ability to impose a civil fine as a remedy. Ms. Schurman stated:

We have the authority to do \$100 per violation, up to \$100 per violation. That would be something like Criminal History Background Checks where some provider has failed to ensure her caregivers have Criminal History Background Checks. They have generally been cited one

time and they haven't fixed it. We cite them again and we impose a civil fine. Because that's easily within the provider's ability to fix at that time.

Tr. Vol. IV (06/09/09), pp. 93-94; *see* Appellant's Brief at p. 13.

Based upon these segments of Ms. Schurman's testimony, Ms. Hong apparently leaps to the conclusion that if Ms. Hong was not in fact notified of the verbal abuse on October 23, 2008, then the Department would have merely imposed a civil fine against her for the failure to obtain the results of a criminal background check. However, this was not the Department's position at all. As Janice Schurman further testified, Ms. Hong did not learn from the prior litigation regarding the revocation of her other adult family home license at Heritage House #2. Tr. Vol. IV (06/09/09), p. 96. Ms. Hong showed a tremendous lack of judgment and lack of understanding that her first priority obligation was to protect her residents from abuse, not to ensure that an abusive caregiver had housing. *Id.* Ms. Hong had been repeatedly cited for having unqualified caregivers who lacked criminal history background checks, proper tuberculosis testing, and valid CPR training. Ms. Schurman further testified that it was as if Ms. Hong did not understand that it was her responsibility to ensure that her caregivers were qualified and that it was her responsibility to ensure that her residents were protected from abuse. *Id.* at 99. Ms. Schurman also found it disturbing that while Ms. Hong was litigating the

revocation of her current adult family home license at Heritage House #1, she was cited again at a monitoring visit for failure to have a criminal background check completed on another caregiver. *Id.* at 100. Finally, Ms. Schurman testified that if the background check issue had been standing alone for Ms. Hong, the Department might have issued a civil fine. However, that issue was just one part of the whole picture and Ms. Hong's lack of judgment. *Id.* at 102.

The Department never changed its enforcement action of imposing a stop placement of admissions and revocation of Ms. Hong's adult family home license. The Department presented seven different WAC violations that supported its enforcement action. Both the ALJ and the Review Judge found that Ms. Hong violated all seven WACs and affirmed the Department's chosen remedy of revocation. The Review Judge did not exceed her authority and did not impose a different remedy.

**C. Ms. Hong Failed To Provide Direct Supervision To Theo LaFargue.**

Ms. Hong attempts to argue that she did not have knowledge of Theo LaFargue's alleged verbal abuse of the resident Ms. K until she was served with the revocation letter on November 18, 2008. However, this is not borne out by the evidence. The collective testimony of the witnesses established that Ms. Hong knew of Mr. LaFargue's verbal abuse of Ms. K

at least by October 25, 2008. *See, e.g.*, Tr. Vol. II (05/19/09), pp. 41, 67, and 118; Tr. Vol. III (05/20/09), p. 130. Ms. Hong also was informed of the verbal abuse and allegations of inappropriate sexual behavior on Mr. LaFargue's part by October 27, 2008. However, despite all of this information, Ms. Hong allowed Mr. LaFargue to continue residing and working at her adult family home through October 31, 2008. Mr. LaFargue continued having unsupervised contact with Ms. K, even after Ms. Hong informed Ms. K that she (Ms. Hong) would provide all of Ms. K's care.

Ms. Hong failed to submit a criminal background check on Mr. LaFargue when he was first hired on October 8, 2008. She did not submit the background check to DSHS until November 10, 2008, after Mr. LaFargue had been terminated. AR 140. Until Ms. Hong received the results of Mr. LaFargue's criminal background check (which she never did), Ms. Hong was required to provide direct supervision over all of Mr. LaFargue's interaction with residents. This Ms. Hong clearly failed to do. Ms. Hong admitted that there were times when she left the adult family home and Mr. LaFargue was the only caregiver present. Tr. Vol. I (05/18/09), p. 49.

The fact that Mr. LaFargue had worked for Ms. Hong 10 years earlier and had a background check at that time does not excuse Ms.

Hong's failure to obtain a current criminal history background check on Mr. LaFargue when she reemployed him in October 2008. As the ALJ noted, "[t]he fact that Mr. LaFargue had been at work for her ten years prior to this hire does not mean that in the intervening ten years he has not done something that would jeopardize his ability to have unsupervised access. That is the purpose of a background check." AR 89.

If Ms. Hong had been providing the direct supervision over Mr. LaFargue that the WACs required, she would have been present when Mr. LaFargue gave his 90 minute tirade at Ms. K and the hospice volunteer Nathan Dabney. Presumably, Ms. Hong would have intervened to stop this verbal abuse and would have acted to protect her resident. *See* AR 63-64. However, because Ms. Hong failed to provide direct supervision to Mr. LaFargue, she was not there to intervene on her resident's behalf during the tirade. Ms. Hong cannot claim ignorance of this verbal abuse when her own failure to provide direct supervision to Mr. LaFargue is what allowed the verbal abuse to happen in the first place. As the Review Judge noted in her Decision Denying Reconsideration,

There is a disconnect in the Appellant's analysis of the legal effect of her lack of supervision of an employee whose background check has not been approved, and whose specialty training for mental health has not been provided. The Appellant was required to provide direct supervision of this employee. The Appellant is responsible for the actions of such an employee. It is not a defense to

argue that she was not aware of the behavior—that is precisely her failure—she should have been aware of the behavior and protecting her resident. If she was not aware of the one and one-half hour tirade by Theo against Ms. K., she is still responsible, because she left him unsupervised.

AR 10.

Ms. Hong knew that Mr. LaFargue had yelled at her and that he had yelled at the Group Health Nurse. Yet, she apparently did not bother to inquire as to whether Mr. LaFargue was also yelling at her residents. *See* Tr. Vol. III (05/20/09), p. 130. This failure to inquire, as well as her failure to provide direct supervision for an employee who did not have a cleared background check, demonstrates that Ms. Hong lacked the understanding or ability to provide appropriate care to her residents.

Ms. Hong points out that the Administrative Law Judge found that Mr. LaFargue's actions did not rise to the level of verbal abuse. Appellant's Brief at p. 17; *see* CP 89. She then attempts to argue that the Review Judge abused her discretion when the Review Judge determined that Mr. LaFargue's 90 minute harangue at Ms. K was verbal abuse. Appellant's Brief at p. 17 and n. 10; *see* CP 64. However, Ms. Hong misinterprets *Costanich v. DSHS*, 138 Wn. App. 547, 156 P.3d 232 (2007),<sup>8</sup> in making this argument. *Costanich* involved a CPS finding of

---

<sup>8</sup> The *Costanich* case was appealed to the State Supreme Court only on the issue of attorney fees under the Equal Access to Justice Act. *Costanich v. DSHS*, 164 Wn.2d 925, 194 P.3d 988 (2008). The State Supreme Court reversed the Court of Appeals on

emotional abuse against Ms. Costanich, as well as the revocation of her foster care license. Former WAC 388-02-0600, which was in effect at the time, established different levels of authority for the review judge for the two different types of cases (CPS finding and foster care licensing action). The standard of review that applied to CPS findings was more deferential and provided that the review judge could not change the ALJ's hearing decision unless there were irregularities; the findings of fact were not supported by substantial evidence based on the entire record; the decision included errors of law; the decision needed to be clarified before it could be implemented; or findings of fact needed to be added because the ALJ failed to make an essential finding of fact. *Costanich*, 138 Wn. App. at 554-55; former WAC 388-02-0600(2). However, Ms. Hong fails to appreciate that her case is not governed by former WAC 388-02-0600(2), but rather it is governed by WAC 388-02-0600(1), which applies to licensing cases and states that the Review Judge has the same decision-making authority as an ALJ.<sup>9</sup>

Even if this court were to determine that there was not substantial evidence to support the finding that Mr. LaFargue's 90 minute tirade

---

the issue of attorney fees. The State Supreme Court did not review the rest of the Court of Appeals decision.

<sup>9</sup> The Review Judge in Hong found that Mr. LaFargue's actions constituted verbal abuse toward Ms. K. The Review Judge did not find that Ms. Hong verbally abused Ms. K. Also, DSHS did not make a substantiated finding of verbal abuse of a vulnerable adult against Ms. Hong.

constituted verbal abuse of Ms. K, Ms. Hong's license should still be revoked. WAC 388-76-10670 provides in relevant part:

The adult family home must:

...

(3) Protect each resident who is an alleged victim of abandonment, verbal, sexual, physical and mental abuse, exploitation, financial exploitation, neglect, and involuntary seclusion; and

(4) Prevent future potential abandonment, verbal, sexual, physical and mental abuse, exploitation, financial exploitation, neglect, and involuntary seclusion from occurring.

WAC 388-76-10670(3) and WAC 388-76-10670(4) (emphasis added).

Once Ms. Hong became aware of the alleged verbal and alleged sexual abuse of Ms. K, she had an obligation to take affirmative action to prevent Ms. K from suffering any future potential abuse. This she failed to do, because she still allowed Mr. LaFargue to have unsupervised access to Ms. K, even after Ms. Hong had stated that she herself would provide care to Ms. K. Thus, Ms. Hong was in violation of WAC 388-76-10670(3) and WAC 388-76-10670(4) whether or not Mr. LaFargue's tirade constituted verbal abuse.

It was not arbitrary and capricious for the Administrative Law Judge to uphold the revocation when the ALJ found that Mr. LaFargue's 90 minute tirade did not constitute verbal abuse. Likewise, it was not

arbitrary and capricious for the Review Judge to uphold the revocation when the Review Judge found that Mr. LaFargue's behavior did constitute verbal abuse. Regardless of whether Mr. LaFargue's actions were abusive, Ms. Hong's adult family home license should be revoked, because she violated seven different Washington Administrative Code provisions. As the Review Judge noted, "[e]ach rule violation is sufficient grounds for revocation of he license." AR 11.

Ms. Hong's action of repeatedly allowing Mr. LaFargue to have unsupervised access to residents prior to receiving the results of his background check was a significant factor in most of these seven WAC violations.

**D. Repeated Or Uncorrected Deficiencies Need Not Pertain To The Same Staff Member.**

Ms. Hong asserts that the references to "repeat or uncorrected deficiency" is incorrect, because the prior citations concerned other caregivers and she asserted that they had all been corrected. *See* Appellant's Brief at page 16, n. 9. The Department's second amended notice listed several WAC violations that were repeat or uncorrected deficiencies. AR 178. These deficiencies included Ms. Hong's failures to ensure that staff members were qualified and that they had criminal background history results. There is no requirement that a prior deficiency

like this pertain to the very same staff member. Rather, the deficiency reflects on Ms. Hong (the provider), not the staff member, because it is the provider's responsibility to ensure that her staff members have had criminal background checks and are otherwise properly trained and qualified. Janice Schurman testified that she found it particularly disturbing, because even while this case was in litigation, Ms. Hong had yet another failure to send in a criminal background check on a new staff member. Tr. Vol. IV (06/09/09), p. 100. Lisa Cramer also testified that she performed a monitoring visit of Ms. Hong's adult family home in March 2009. At that time, Ms. Hong did not have criminal background check results on a caregiver Veronica, and Ms. Cramer had Ms. Hong write a statement that Veronica would not have unsupervised access to residents until her criminal background check results were received. Tr. Vol. IV (06/09/09), pp. 11-12. Yet, on April 7, 2009, Ms. Cramer found Veronica alone as the sole caregiver at the adult family home when her criminal background check results had not yet been received. Ms. Hong was absent for at least 25 minutes, leaving Veronica unsupervised with the residents. When Ms. Cramer told Ms. Hong that she could not leave Veronica alone with the residents, Ms. Hong said, "Not even for 10 or 15 minutes?" Tr. Vol. IV (06/09/09), pp. 16-17. This further demonstrates that Ms. Hong lacked the understanding and ability necessary to meet the

psychosocial, personal, and special care needs of vulnerable adults and thus she was in violation of WAC 388-76-10020. Both the ALJ and the Review Judge clearly found that Ms. Hong lacked this necessary understanding and was in violation of this WAC.

**E. There Is No Basis To Change The Review Decision And Final Order Issued On September 22, 2010 Or The Order Denying Reconsideration Issued On November 22, 2010.**

Ms. Hong has failed to demonstrate that she is entitled to relief under the Administrative Procedure Act. There is substantial evidence in the record to support the Review Judge's findings of fact. Even if there may be a question about the date on which Ms. Hong became aware of the allegations of verbal abuse of Ms. K by Theo LaFargue, that does not demonstrate that Ms. Hong has the understanding necessary to protect residents from abuse by staff. It was Ms. Hong's failure to provide direct supervision to Mr. LaFargue (who had not passed a criminal background check) which allowed Mr. LaFargue to verbally abuse Ms. K by yelling at and berating her for 90 minutes. Substantial evidence clearly supports the Review Judge's and the ALJ's findings that Ms. Hong lacked the necessary understanding to care for residents and that she violated WAC 388-76-10020.

The Department proved and the ALJ and Review Judge found that Ms. Hong violated seven different adult family home regulations. As the Review Judge noted, any one of those seven was sufficient to justify revocation of Ms. Hong's adult family home license.

Because Ms. Hong has failed to demonstrate a basis for relief under the APA and because the findings of fact are supported by substantial evidence, the revocation of her adult family home license should be affirmed.

**F. Ms. Hong Is Not Entitled To Attorney's Fees And Costs.**

Ms. Hong requests attorney fee's fees pursuant to RCW 4.84.350, as well as costs pursuant to RAP 14.1. This request should be denied.

RCW 4.84.350 provides in relevant part:

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.

RCW 4.84.350. "Qualified party" is defined to mean:

(a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association.

RCW 4.84.340(5).

The Department anticipates that this court will affirm the Review Decision and Final Order, as well as the Order Denying Reconsideration. If this occurs, then Ms. Hong cannot be considered a “qualified party that prevails,” as required in RCW 4.84.350(1).

Ms. Hong’s adult family home license was properly revoked, because she violated the requirements of seven different WACs, as explained above. The Department’s action in revoking her license was entirely justified, not just substantially justified.

In the unlikely event that Ms. Hong does prevail in this appeal, she still may not be entitled to attorney’s fees, if this court ultimately determines that the agency action was substantially justified. If the agency action was substantially justified, then that will preclude an award of

attorneys' fees for Ms. Hong. Also, if Ms. Hong were to prevail, she must establish that she is a "qualified party" and meets the financial criteria set forth in RCW 4.84.340(5) before she may be awarded any attorney fees.

Ms. Hong will not be entitled to costs incurred on appeal, if she does not substantially prevail in this appeal. *See* RAP 14.1 and RAP 14.2. The Department respectfully requests that this court deny Ms. Hong's request for attorney's fees and costs.

#### V. CONCLUSION

For the above stated reasons, the Department respectfully requests this court to affirm the DSHS Review Decision and Final Order issued on September 22, 2010 and the Order Denying Reconsideration issued on November 22, 2010. The stop placement of admissions and revocation of Ms. Hong's adult family home license should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of March, 2012.

ROBERT M. MCKENNA  
Attorney General

By,   
DIANE L. DORSEY  
Assistant Attorney General  
WSBA #21285