

NO. 69938-5-I

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

FYODOR AND PELAGEYA KLIMOVICH,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

DIANE DORSEY
Assistant Attorney General
WSBA #21285
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
(206) 464-7045
OID 91016

ORIGINAL

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STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

The Respondent Department of Social and Health Services (“DSHS” or “Department”) requests that this court uphold the Review Decision and Final Order issued by the DSHS Board of Appeals on October 6, 2011. The Board of Appeals determined that the Department properly terminated Ivan Kozorezov and Larisa Kozorezova¹ as paid care providers for Fyodor and Pelageya Klimovich. Ivan and Larisa had been paid by the Department to provide Medicaid Personal Care services to the Klimovichs, who had complex medical needs.

Ivan and Larisa failed to notify DSHS when Pelageya and Fyodor Klimovich moved to a new residence in June 2009. The Department did not learn of the move until July 29, 2009. When Department case manager, Elena Bruk, contacted Larisa by telephone to inquire where Mr. and Mrs. Klimovich were residing on July 14, 2009 and July 29, 2009, Larisa provided false information.

Ivan’s and Larisa’s failure to notify the Department of the move impeded the Department’s ability to provide oversight for the Klimovichs’ complex medical needs and jeopardized the Klimovichs’ health, safety, and well-being. Ivan’s and Larisa’s actions demonstrated that they lacked the requisite judgment to satisfactorily meet the Klimovichs’ needs.

¹ For ease of reference, Ivan Kozorezov and Larisa Kozorezova will be referred to by their first names.

Therefore, the Department appropriately terminated Ivan's and Larisa's Individual Provider contracts, and the Review Decision and Final Order must be affirmed.

II. ISSUES

A. Did the DSHS Review Judge properly conclude that Ivan's and Larisa's failure to truthfully communicate with the Department about the Klimovichs' move jeopardized the Klimovichs' health, safety, and well-being?

B. Was there substantial evidence to uphold the DSHS Review Judge's Finding of Fact 38 that Ivan's and Larisa's failure to notify the Department of the Klimovichs' move deprived the Department of the ability to monitor the Klimovichs' health, safety, and well-being?

C. Did the Department act within its authority when it terminated the Individual Provider contracts for Ivan and Larisa?

D. Did the DSHS Review Judge act within his authority when determining the credibility of witnesses?

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

On November 19, 2009, the Department of Social and Health sent Planned Action Notices to Fyodor and Pelageya Klimovich, informing them that Ivan and Larisa would be terminated as their Individual

Providers effective November 30, 2009. AR 5, 524-27.² On November 20, 2009, the Klimovichs requested an administrative hearing. AR 5.

On April 5, 2010, the Department sent Amended Planned Action Notices to Mr. and Mrs. Klimovich, providing them with additional details to explain why the Department had terminated Ivan and Larisa as their Individual Providers. AR 938-42, 944-49, 951-55.

An administrative hearing was held before Administrative Law Judge Jason H. Grover on October 25-27, 2010 and February 7-9, 11, 14-15, and 17-18, 2011. AR 1. ALJ Grover issued a Corrected Initial Order on May 4, 2011, upholding the Department's decisions to terminate Ivan and Larisa as Individual Providers for Fyodor and Pelageya Klimovich. AR 65-91.

The Klimovichs then filed a request for review of the Initial Order. AR 41-63. On October 6, 2011, Review Judge Thomas L. Sturges issued a Review Decision and Final Order, affirming the Initial Order. AR 1-17.

The Klimovichs then timely filed a petition for judicial review in King County Superior Court. CP 1-49.³ On January 25, 2013, King

² The Administrative Record is contained within Sub No. 5, Certified Appeal Board Record, which consists of 1584 pages. 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. Please note that sections of the Bates page numbers are out of order within Sub No. 5: AR 1-200 is followed by AR 601-800, which is followed by AR 1401-1585, which is followed by AR 1201-1400, which is followed by AR 201-600, which is followed by AR 801-1200.

County Superior Court Judge Theresa Doyle entered an order denying the Klimovichs' petition for judicial review and affirming the DSHS Board of Appeals Review Decision and Final Order dated October 6, 2011. CP 144-45.

The Klimovichs then timely filed a Notice of Appeal to the Court of Appeals, Division I. CP 146-47.

B. Statement Of Facts

Fyodor Klimovich and Pelageya Klimovich were husband and wife until Mr. Klimovich's death in February 2011. AR 2, 167. Fyodor Klimovich became a DSHS client in January 2005 and received Medicaid Personal Care services from the Department in amounts ranging from 80 to 155 hours per month. AR 1. Pelageya Klimovich became a DSHS client in March 2005 and received Medicaid Personal Care services from the Department in amounts ranging from 35 to 77 hours per month. AR 2. Both Mr. and Mrs. Klimovich had complex medical needs. AR 1-2.

Larisa Kozorezova is the daughter of Pelageya Klimovich and step-daughter of Fyodor Klimovich. Ivan Kozorezov is the husband of Larisa Kozorezova. AR 3.

In September 2009, Larisa and Ivan signed contracts as Individual Providers with the Department. Their contracts took effect on November

³ Citations to the Clerk's Papers will be listed as "CP ____" with the specific page number identified.

1, 2009. AR 782-807. Prior to November 1, 2009, Larisa and Ivan were employed through Home Care Agencies, providing in-home care for Fyodor and Pelageya Klimovich, as well as for Mrs. Pelageya's sister, Aleksandra Myachina.⁴ AR 3.

Due to a change in the law in May 2009, the Department could no longer pay Home Care Agencies for in-home services provided by family members. Instead, family members had to contract with the Department if they wanted to continue working as paid caregivers. AR 3.

In June 2009, the Department's case manager, Elena Bruk, attempted to contact the Klimovichs to notify them of the change in the law and find out if they wanted Ivan and Larisa to continue to provide services to them as Individual Providers. On June 22, 2009, Ms. Bruk spoke by telephone with Ivan and Larisa, who indicated that they were willing to become Individual Providers. Larisa also informed Ms. Bruk that the Klimovichs wanted to hire Ivan and Larisa as their Individual Providers. AR 4, 659, 684-85.

On May 26, 2009, Ms. Bruk went to the Klimovich home at 17503 Fifth Avenue NE, Shoreline, Washington 98155 to conduct annual reassessments of both Mr. and Mrs. Klimovich. VRP Vol. IV, pp. 40, 42,

⁴ Due to Aleksandra Myachina's death in December 2009, she is not a party to this action. AR 2.

46, 48; ⁵ *see* AR 528-54, 570-95; *see also* AR 6. Ms. Bruk met with Fyodor and Pelageya Klimovich and Larisa Kozorezova that day. VRP Vol. IV, p. 42. No one informed Ms. Bruk on May 26, 2009 that there was a plan for the Klimovichs to move to a different residence. VRP Vol. IV, p. 43.

In early July 2009, Ms. Bruk mailed copies of the reassessments to the Klimovichs at their Fifth Avenue address in Shoreline. *See* AR 660, 686. On July 14, 2009, Ms. Bruk received the documents back in the mail, indicating that the Klimovichs had moved to a new address, 206 NE 175th Street, Shoreline, Washington 98155. *See* AR 661, 686; VRP Vol. IV, pp. 44-45; *see also* AR 6. Ms. Bruk called Larisa on July 14, 2009. Larisa stated that the Klimovichs' mail was getting lost or stolen, so she changed their mailing address to Larisa's home address. However, Larisa confirmed that Mr. and Mrs. Klimovich were still living in their same residence on Fifth Avenue. AR 661, 686; VRP Vol. IV, pp. 45-46. Ms. Bruk then changed the Klimovichs' mailing address in the Department's data base. AR 661, 686; VRP Vol. IV, p. 47.

On July 27, 2009, Ms. Bruk drove to the Klimovichs' home on Fifth Avenue and discovered that the home was empty, except for a few

⁵ The transcript of the administrative hearing, which consists of eleven volumes and a total of 1333 pages, is contained within Sub No. 4, Certified Appeal Board Record. Citations to the transcript, or Verbatim Report of Proceedings, will be made as "VRP" followed by the volume number and the specific page number.

gallons of paint and some ladders. The drapes were open, and she was able to see that there was no furniture in the home. Ms. Bruk then called the Klimovichs' home telephone number and discovered that it had been disconnected. AR 661, 687; VRP Vol. IV, p. 43.

On July 29, 2009, Ms. Bruk spoke with Larisa by telephone. Larisa said that the Klimovichs moved to a new place at 208 NE 175th Street, Shoreline, Washington 98155, which was next door to Larisa and Ivan's home. Larisa also apologized to Ms. Bruk for not reporting changes in the clients' address, referencing her "fear of spies, who are watching them all the time, like in Russia." AR 663, 688-89; VRP Vol. IV, pp. 49-50. Ms. Bruk then changed the Klimovichs' physical address in the Department's data base.⁶ AR 663, 689; VRP Vol. IV, p. 51.

Ivan and Larisa did not notify the Home Care Agencies of any change in the Klimovichs' address until August 1, 2009.⁷ AR 7-8. During a home visit on that date, Chesterfield case manager, Hanna Hatalskaya, was informed by Mr. and Mrs. Klimovich that they were residing with

⁶ The Klimovichs assert in their Petitioner's Brief at page 8 that "Ms. Bruk knew of the location of Mr. and Mrs. Klimovich as early as May 2009." However, there is no such evidence. The Department did not know of the move until late July 2009 when Ms. Bruk discovered the move herself.

⁷ Although Ivan and Larisa claimed that they sent notification of the address change to the Home Care Agencies, Hanna Hatalskaya testified that the Chesterfield files did not contain and she had never seen the letters that Ivan and Larisa claimed to have sent. VRP Vol. VI, pp. 95, 101; *see* AR 907-09.

Ivan and Larisa because the house for them next door was not yet ready. VRP Vol. VI, pp. 93-94.

On November 19, 2009, the Department sent Planned Action Notices to Mr. and Mrs. Klimovich, informing them that Ivan and Larisa would be terminated as their Individual Providers effective November 30, 2009. AR 5, 524-27. On November 20, 2009, the Klimovichs requested an administrative hearing. AR 5.

On April 5, 2010, the Department sent Amended Planned Action Notices to Mr. and Mrs. Klimovich, providing them with additional details to explain why the Department had terminated Ivan and Larisa as their Individual Providers. AR 938-42, 944-49, 951-55. The reasons for terminating the contracts included the fact that Ivan and Larisa did not notify the Department or the Home Care Agency that the Klimovichs had moved to a new address, which greatly impeded the Department's ability to oversee the Klimovichs' care. AR 940, 946-47. In addition, Larisa had provided false information to the Department regarding where the Klimovichs were living. AR 946. The Department determined that Ivan's and Larisa's inadequate performance was jeopardizing the Klimovichs' health, safety, or well-being and that Ivan and Larisa were not qualified to provide care based on character, competence, and suitability. AR 438-42, 944-49, 951-55. The Amended Planned Action Notices also included the

following WACs as authority for the actions taken: WAC 388-71-0515, WAC 388-71-0546, WAC 388-71-0551, and WAC 388-71-0556. AR 938, 944, 951.

IV. ARGUMENT

A. Standard Of Review

Judicial review of DSHS's decision below is governed by Washington's Administrative Procedure Act ("WAPA" or "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 WAPA directly to the record before the agency." *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993), *superseded by statute on other grounds*, Laws of 1993, ch. 483, § 1; *see Brighton v. Washington State Dep't of Transp.*, 109 Wn. App. 855, 861-62, 38 P.3d 344 (2001). 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)).

The Klimovichs have the burden of establishing the invalidity of agency action. RCW 34.05.570(1)(a). Under the Rules of Appellate Procedure, the Klimovichs must set forth a separate concise statement of each error which they contend was made by DSHS in its final order dated October 6, 2011. RAP 10.3(h).

1. 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. Department of Social & Health Servs.*, 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 Bd.*, 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 Servs. 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).

In other words, the court is to review the whole record and if there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld. This is so even if the reviewing court would make a different finding from its reading of the record. *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 675-76 and n. 9, 929 P.2d 510, *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

2. 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.

3. 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). The arbitrary and capricious test is a very narrow standard and the one asserting it “must carry a heavy burden.” *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). 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. Department 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; *Heinmiller v. Department of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995), *opinion amended*, 909 P.2d 1294, *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *Pierce Cy. Sheriff*, 98 Wn.2d at 695.

Harshness is not the test for arbitrary and capricious action. *Heinmiller*, 127 Wn.2d at 609 (court upheld agency’s indefinite suspension of therapist’s license upon a finding of unprofessional conduct); *In re Discipline of Brown*, 94 Wn. App. 7, 16-17, 972 P.2d 101 (1998), *review denied*, 138 Wn.2d 1010, 989 P.2d 1136 (1999) (agency sanction that is challenged as harsh will be upheld if the sanction was imposed after party had an adequate opportunity to be heard). To be

overturned, a discretionary agency decision must be manifestly unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510, 837 P.2d 647 (1992), *aff'd*, 122 Wn.2d 801, 863 P.2d 64 (1993).

4. Relief Is Only Available Under The Requirements Of RCW 34.05.570(3)

When awarding relief, other than affirming the agency action, the restrictions of RCW 34.05.570(1)(d) must be applied. This provision requires that relief can be granted only if the party seeking relief has been “substantially prejudiced” by the action being reviewed. RCW 34.05.574 expressly sets forth the types of relief a court can award in a review conducted under RCW 34.05.570. RCW 34.05.574(1) provides:

In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

RCW 34.05.574(1).

RCW 34.05.570(3) provides in relevant part:

Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(d) The agency has erroneously interpreted or applied the law;

- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

... or

- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).⁸ Each will be addressed in turn.

B. The Department Correctly Interpreted And Applied The Law

RCW 74.39A.095 provides in relevant part:

(7) If the department or area agency on aging case manager finds that an individual provider's inadequate performance or inability to deliver quality care is jeopardizing the health, safety, or well-being of a consumer receiving service under this section, the department or the area agency on aging may take action to terminate the contract between the department and the individual provider. If the department or the area agency on aging has a reasonable, good faith belief that the health, safety, or well-being of a consumer is in imminent jeopardy, the department or area agency on aging may summarily suspend the contract pending a fair hearing. The consumer may request a fair hearing to contest the planned action of the case manager, as provided in chapter 34.05 RCW. The department may by rule adopt guidelines for implementing this subsection.

(8) The department or area agency on aging may reject a request by a consumer receiving services under this section to have a family member or other person serve as his or her individual provider if the case manager has a reasonable, good faith belief that the family member or

⁸ These are the three bases for relief asserted by Fyodor and Pelageya Klimovich in their brief before the Court of Appeals. See Petitioner's Brief at p. 17, n. 9.

other person will be unable to appropriately meet the care needs of the consumer. The consumer may request a fair hearing to contest the decision of the case manager, as provided in chapter 34.05 RCW. The department may by rule adopt guidelines for implementing this subsection.

RCW 74.39A.095. The Department's actions of terminating Ivan and Larisa as Individual Providers for Fyodor and Pelageya Klimovich were authorized under RCW 74.39A.095(7) and RCW 74.39A.095(8).⁹

The Department has adopted rules to implement this statute. They are codified in Chapter 388-71WAC of the Washington Administrative Code. Several WAC provisions are of particular relevance to this case.

Former WAC 388-71-0515 provides:

An individual provider or home care agency provider must:

(1) Understand the client's plan of care that is signed by the client or legal representative and social worker/case manager, and translated or interpreted, as necessary, for the client and the provider;

(2) Provide the services as outlined on the client's plan of care, as defined in WAC 388-106-0010;

⁹ The Klimovichs suggest that the Department could have taken less serious disciplinary action than termination of the Individual Provider contracts. *See* Petitioner's Brief at 20-24. However, in making this argument, the Klimovichs mistakenly rely on a statute that does not apply to Individual Providers. RCW 74.39A.080 authorizes the Department to take the listed actions, up to and including revoking or refusing to renew a contract, against "a provider of assisted living services, adult residential care services, or enhanced adult residential care services." The definitions of "adult residential care," "assisted living services," and "enhanced adult residential care" establish that these services are provided by an assisted living facility, not an Individual Provider. *See* RCW 74.39A.009.

(3) Accommodate client's individual preferences and differences in providing care;

(4) Contact the client's representative and case manager when there are changes which affect the personal care and other tasks listed on the plan of care;

(5) Observe the client for change(s) in health, take appropriate action, and respond to emergencies;

(6) Notify the case manager immediately when the client enters a hospital, or moves to another setting;

(7) Notify the case manager immediately if the client dies;

(8) Notify the department or AAA immediately when unable to staff/serve the client; and

(9) Notify the department/AAA when the individual provider or home care agency will no longer provide services. Notification to the client/legal guardian must:

(a) Give at least two weeks' notice, and

(b) Be in writing.

(10) Complete and keep accurate time sheets that are accessible to the social worker/case manager; and

(11) Comply with all applicable laws and regulations.

(12) A home care agency must not bill the department for in-home medicaid funded personal care or DDD respite services when the agency employee providing care is a family member of the client served, unless approved to do so through an exception to rule under WAC 388-440-0001. For purposes of this section, family member

means related by blood, marriage, adoption, or registered domestic partnership.

Former WAC 388-71-0515 (emphasis added). Ivan and Larisa violated former WAC 388-71-0515(6) during the summer of 2009 when they were home care agency providers for Fyodor and/or Pelageya Klimovich. Both Ivan and Larisa failed to notify the Department that the Klimovichs were moving to another residence. When Elena Bruk, the case manager, contacted Larisa by phone on July 14, 2009 because mail she sent to the Klimovichs had been returned indicating that the address had changed, Larisa lied. Larisa stated that she had only changed their mailing address and that the Klimovichs were still residing at their Fifth Avenue address. AR 661, 686; VRP Vol. IV, pp. 46-47. This was untrue. On July 27, 2009, Ms. Bruk drove to the home on Fifth Avenue and discovered that it was empty of furniture and no one was living there. AR 661, 687; VRP Vol. IV, pp. 48-49.

On July 29, 2009, Ms. Bruk spoke with Larisa by telephone again. Larisa then stated that the Klimovichs moved to a new place at 208 NE 175th Street, Shoreline, Washington 98155, which was next door to Larisa and Ivan's home. AR 663, 688; VRP Vol. IV, pp. 49-50. This also turned out to be untrue, because Chesterfield case manager, Hanna Hataalskaya, learned on August 1, 2009 that the Klimovichs were actually residing with

Ivan and Larisa at 206 NE 175th Street, Shoreline, Washington 98155, because the residence at 208 NE 175th Street was not ready for them. *See* VRP Vol. VI, pp. 93-94.

For at least the month of July 2009, the Department and Chesterfield did not know the whereabouts of Mr. and Mrs. Klimovich. This impeded the Department's ability to monitor the health, safety, and well-being of these elderly clients, to maintain accurate Plans of Care to meet the Klimovichs' needs, and to ensure that their care needs were being met. AR 10; testimony of Karen Heeney (*see, e.g.*, VRP Vol. VII, pp. 67-69), Elena Bruk (*see, e.g.*, VRP Vol. IV, p. 57), and Vincent Guerra (*see, e.g.*, VRP Vol. VI, pp. 45-46).

Former WAC 388-71-0540 outlines reasons when the Department will deny payment for services of a home care agency provider or an individual provider. It further states: "In addition, the department, AAA, or department designee may deny payment to or terminate the contract of an individual provider as provided under WAC 388-71-0546, WAC 388-71-0551, and WAC 388-71-0556." WAC 388-71-0540.

Former WAC 388-71-0546 provides:

The department, AAA, or managed care entity may reject a client's request to have a family member or other person serve as his or her individual provider if the case manager has a reasonable, good faith belief that the person will be unable to appropriately meet the client's needs.

Examples of circumstances indicating an inability to meet the client's needs could include, without limitation:

- (1) Evidence of alcohol or drug abuse;
- (2) A reported history of domestic violence, no-contact orders, or criminal conduct (whether or not the conduct is disqualifying under RCW 43.43.830 and 43.43.842;
- (3) A report from the client's health care provider or other knowledgeable person that the requested provider lacks the ability or willingness to provide adequate care;
- (4) Other employment or responsibilities that prevent or interfere with the provision of required services;
- (5) Excessive commuting distance that would make it impractical to provide services as they are needed and outlined in the client's service plan.

Former WAC 388-71-0546 (emphasis added). The Department properly rejected the Klimovichs' request to have Ivan and Larisa serve as their Individual Providers, because the Department case managers had a reasonable, good faith belief that Ivan and Larisa would be unable to appropriately meet the Klimovichs' needs. This was based primarily upon Ivan's and Larisa's failure to communicate with the Department about changes in the Klimovichs' residence and Larisa's active deceit regarding the Klimovichs' residence. In addition, the actions of Ivan and Larisa in August 2008 resulted in a delayed assessment for Ms. Klimovich's sister,

Ms. Myachina, when they attempted to record the assessment without permission. AR 13.

In addition, WAC 388-71-0556 provides:

The department, AAA, or managed care entity may take action to terminate an individual provider's contract if the provider's inadequate performance or inability to deliver quality care is jeopardizing the client's health, safety, or well-being. The department, AAA, or managed care entity may summarily suspend the contract pending a hearing based on a reasonable, good faith belief that the client's health, safety, or well-being is in imminent jeopardy. Examples of circumstances indicating jeopardy to the client could include, without limitation:

(1) Domestic violence or abuse, neglect, abandonment, or exploitation of a minor or vulnerable adult;

(2) Using or being under the influence of alcohol or illegal drugs during working hours;

(3) Other behavior directed toward the client or other persons involved in the client's life that places the client at risk of harm;

(4) A report from the client's health care provider that the client's health is negatively affected by inadequate care;

(5) A complaint from the client or client's representative that the client is not receiving adequate care;

(6) The absence of essential interventions identified in the service plan, such as medications or medical supplies; and/or

(7) Failure to respond appropriately to emergencies.

Former WAC 388-71-0551 (emphasis added). The Department properly took action to terminate Ivan's and Larisa's Individual Provider contracts, because their inadequate performance or their inability to deliver quality care was jeopardizing the Klimovichs' health, safety, or well-being. The Department did not have to prove actual harm to the Klimovichs, just that their health, safety, or well-being was in jeopardy. As Ms. Bruk and Ms. Heeney testified, the Klimovichs were at risk when their whereabouts were unknown to the Department. The Klimovichs' home telephone number was disconnected, which indicated that they could not have called for help in an emergency. Without knowing the physical setting where the Klimovichs' resided, the Department could not assess whether they were safe, whether their care plans currently met their needs, or whether they were receiving all of the services listed in their care plans.

In addition, WAC 388-71-0556 provides:

The department, AAA, or managed care entity may otherwise terminate the individual provider's contract for default or convenience in accordance with the terms of the contract and to the extent that those terms are not inconsistent with these rules.

WAC 388-71-0556.

The Department correctly interpreted the statutes and the WACs when it acted to terminate Larisa's and Ivan's Individual Provider contracts. The Department could not trust that these care providers would appropriately meet the needs of the Klimovichs. This was especially

indicated by Larisa's and Ivan's failure to keep the Department informed of the Klimovichs' current residence, as well as Larisa's acts of providing false information to the Department.

The Department did not act arbitrarily or capriciously in terminating Ivan's and Larisa's Individual Provider contracts. There was no credible evidence presented that Elena Bruk bore ill will toward the Klimovichs or their caregivers. There was certainly no evidence in support of the Klimovichs' assertion that Ms. Bruk "may have engineered the miscommunication that ultimately led to the termination of Ivan and Larisa's Individual Provider contracts with DSHS." Petitioner's Brief at 11. Rather, the evidence clearly establishes that Ivan and Larisa failed to notify the Department of the Klimovichs' address and that Larisa provided false information to the Department on two separate occasions. These inactions and actions by Ivan and Larissa impeded the Department's ability to provide oversight to the Klimovichs' complex medical needs and jeopardized the Klimovichs' health, safety, and well-being. AR 16. The Department's decision to terminate Ivan's and Larisa's Individual Provider contracts was supported by WAC 388-71-0515, WAC 388-71-0546, and WAC 388-71-0551 and RCW 74.39A.095(7) and RCW 74.39A.095(8).

The Klimovichs have been provided with due process throughout the course of the administrative hearing and subsequent appeals.

The Klimovichs attempt to excuse Ivan's and Larisa's failure to notify the Department of the move by asserting that DSHS had alternative

means of finding out where the Klimovichs were living, such as by asking Ivan and Larisa or asking Chesterfield. Petitioner's Brief at 22. First of all, Ivan and Larisa were required to immediately notify the Department of when the Klimovichs moved to another setting. Former WAC 388-71-0515(6). Secondly, Elena Bruk did ask Larisa where the Klimovichs were living on July 14, 2009, the very day that Ms. Bruk received returned mail indicating a change of address. Larisa then lied about where the Klimovichs were living. When Ms. Bruk asked Larisa again on July 29, 2009, Larisa provided untruthful information again. Third, the Department could not have learned the Klimovichs' whereabouts by asking Chesterfield, because Chesterfield did not know of the move until August 1, 2009. Thus, Ivan and Larisa clearly violated Former WAC 388-71-0515(6).

The Klimovichs next try to argue that the Department must not have been that concerned for the Klimovichs' health, safety, and welfare, because Elena Bruk did not come to visit the Klimovichs in person until October 22, 2009 and because the Department did not terminate Ivan's and Larisa's Individual Provider contracts until November 19, 2009. Petitioner's Brief at 22-23. This does not change the fact that it was the caregivers' responsibility to immediately notify the Department of the Klimovichs' move or that Larisa actively deceived the Department on two occasions in July 2009 regarding the Klimovichs' residence. The Department was justified in forming a "reasonable, good faith belief that the family member . . . will be unable to appropriately meet the care needs

of the consumer.” RCW 74.39A.095(8). The Department was also justified in determining that Ivan’s and Larisa’s inadequate performance was jeopardizing the health, safety, or well-being of the Klimovichs. RCW 74.39A.095(7).

The Klimovichs have cited no authority to suggest that if the Department doesn’t conduct a home visit within a certain amount of time, then the caregivers’ failure to notify the Department of a client’s move should be excused. Elena Bruk attempted to visit the Klimovichs on July 27, 2009 when she drove to the house on Fifth Avenue and discovered it empty. AR 661, 687; VRP Vol. IV, p. 43. Also, Elena Bruk knew that Hanna Hatalaskaya had seen the Klimovichs in Ivan’s and Larisa’s home on August 1, 2009, so the immediate issue of determining their whereabouts was apparently resolved. Finally, the Department cannot be chastised for not terminating Ivan’s and Larisa’s contracts sooner, because the contracts did not even take effect until November 1, 2009. *See* AR 4.

C. The Review Decision And Final Order Is Supported By Substantial Evidence

As discussed above, this court is to review the whole record and, if there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, then this court must uphold the agency’s finding. This is so even if the reviewing court would make a

different finding from its reading of the record. *Callegod*, 84 Wn. App. at 675-76 and n. 9.

In conducting its review, the Court must give deference to the party who prevailed in the administrative proceeding and must accept “the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Sunderland*, 127 Wn.2d at 788; *William Dickson Co.*, 81 Wn. App. at 411.

The Klimovichs only assign error to the Review Judge’s Finding of Fact 38. Petitioner’s Brief at 25. Unchallenged findings of fact are treated as verities on appeal. *Tapper*, 122 Wn.2d at 407. The Klimovichs assert that there was not substantial evidence to support the finding that Ivan’s and Larisa’s failure to notify the Department of the Klimovichs’ move deprived the Department of the ability to monitor the health, safety, and well-being of the Klimovichs. Petitioner’s Brief at 25. However, the Klimovichs ignore an additional part of Finding of Fact 38 made by the Review Judge. Specifically, the Review Judge found that “[t]he Kozorezovs’ failure to notify the Department of the Appellants’ move to the 206 address deprived the Department of the ability to monitor the health, safety, and well-being of the Appellants and to ensure that their care plan was accurate and that their care needs were met.” AR 10 (emphasis added).

For the month of July 2009, the Department and Chesterfield did not know Mr. and Mrs. Klimovichs' whereabouts. This impeded the Department's ability to monitor the health, safety, and well-being of these elderly clients, to maintain accurate Plans of Care to meet the Klimovichs' needs, and to ensure that their care needs were being met. AR 10; testimony of Karen Heeny (*see, e.g.*, VRP Vol. VII, pp. 67-69), Elena Bruk (*see, e.g.*, VRP Vol. IV, p. 57), and Vincent Guerra (*see, e.g.*, VRP Vol. VI, pp. 45-46). These three Department employees testified regarding the importance of knowing where the client resides in order to ensure that the client is receiving proper care and having his or her needs met. In addition, Elena Bruk discovered on July 29, 2009 that the Klimovichs' home telephone number was disconnected. Thus, there was substantial evidence to support Finding of Fact 38 that Ivan's and Larisa's failure to notify the Department of the Klimovichs' move deprived the Department of the ability to monitor the Klimovichs' health, safety, and well-being and to ensure that their care plans were accurate and their needs were being met.

D. The DSHS Review Judge's Standards In Weighing Testimony Were Not Arbitrary And Capricious

The record reflects that there was conflicting testimony on a number of issues. These included whether Ivan and Larisa told the Department that the Klimovichs were moving and whether Ivan and Larisa provided any

letters to Chesterfield regarding the Klimovichs moving. The Review Judge determined that the Department witnesses were more credible than the Appellants' witnesses. The Department witnesses, including Elena Bruk, made contemporaneous notes regarding their interactions with the Klimovichs, Ivan, and Larisa. The Review Judge took into consideration Ms. Klimovich's testimony, because it is mentioned in Finding of Fact 27. AR 7. The Review Judge then concluded that "[t]he Appellants were unable to produce any additional evidence proving that any notice of a change of address was provided to the Department prior to July 29, 2009." AR 8. The Review Judge found that the Department witnesses were more credible than the Appellants' witnesses including Pelageya Klimovich. *See* AR 8.

Ivan Kozorezov testified that he had provided three letters to the Home Care Agency Chesterfield (dated May 1, 2009; June 1, 2009; and July 2, 2009), notifying the agency that Mr. and Mrs. Klimovich had moved. AR 7-8; AR 1522-24 (letters in Russian); AR 97-99 (English translation). However, three Chesterfield employees testified that they did not receive these letters, and the letters were not in the Klimovichs' Chesterfield files. AR 8. Hanna Hatalaskaya specifically testified that she had never seen the letters that the Appellants claimed had been sent. VRP Vol. VI, p. 101. The Review Judge found Ivan's testimony unpersuasive, because if the notice had actually been provided to Chesterfield in May 2009, the

additional notices that were allegedly provided in June and July 2009 would have been unnecessary. AR 8.

The Klimovichs suggest that the Review Judge was arbitrary and capricious in the test he used for discerning the truth. They assert that the Review Judge gave Elena Bruk the benefit of the doubt when he found that there was no logical reason why she would place her employment at risk by fabricating her case notes. Petitioner's Brief at 29. The Klimovichs further assert that there was no logical reason for Larisa to lie about the Klimovichs' move so the Review Judge should have given Larisa the benefit of the doubt. Petitioner's Brief at 29-30.

As the Review Judge noted, "[b]ecause the testimony of the parties conflicted on material points, the ALJ was required to make a credibility finding. The ALJ, having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony, and the totality of the circumstances presented, resolved the conflicting testimony in favor of the Department's testimony." AR 8. The Review Judge further stated,

The ALJ and Review Judge, having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony, and the totality of the circumstances presented resolves this conflicting testimony in favor of the Department's testimony. Although it is unclear why Larisa Kozorezov misrepresented the address of the

Appellants to the Department, it is more likely than not that she did.

AR 10. If the Review Judge had given both Elena Bruk and Larisa the benefit of the doubt, he could not have resolved this material point regarding conflicting evidence. WAC 388-02-0520 requires that the ALJ “[f]ind the facts used to resolve the dispute based on the hearing record” and “[e]xplain why evidence is credible when the facts or conduct of a witness is in question.” WAC 388-02-0520(3); and WAC 388-02-0520(4). The Review Judge has the same decision-making authority as the ALJ. However, in reviewing findings of fact, the review judge must give due regard to the ALJ’s opportunity to observe witnesses. WAC 388-02-0600; AR 15. Thus, the ALJ and the Review Judge had a duty to make findings of fact, to make credibility determinations, and to resolve conflicting evidence on material points. The ALJ and the Review Judge did not act arbitrarily or capriciously in resolving conflicting evidence in favor of the Department’s witnesses.

After Larisa told Ms. Bruk that the Klimovichs still resided at the Fifth Avenue address on July 14, 2009, Ms. Bruk verified that the Fifth Avenue home was empty on July 27, 2009. When Ms. Bruk confronted Larisa with this information by telephone on July 29, 2009, Larisa actually apologized for providing false information. However, Larisa then provided more false information, stating that the Klimovichs were currently residing at

208 NE 175th Street, Shoreline, Washington 98155. On August 1, 2009, Hanna Hatalaskaya learned that the Klimovichs were living at 206 NE 175th Street in Shoreline, because the 208 house was not yet ready.

Thus, there is substantial evidence to support the Review Decision and Final Order. The evidence clearly establishes that Ivan and Larisa failed to notify the Department of the Klimovichs' address and that Larisa provided false information to the Department on two separate occasions. There was also substantial evidence to support the Review Judge's finding that Larisa's and Ivan's failure to notify the Department of the Klimovichs' move deprived the Department of the ability to monitor the health, safety, and well-being of the Klimovichs and to ensure that their care plan was accurate and their needs were being met. Accordingly, the Department's actions in terminating Ivan's and Larisa's Individual Provider contracts were justified.

E. Interpreter Issues Did Not Affect The Fairness Of The Hearing

The Appellants suggest that the fairness of the superior court hearing may have been affected by translator issues, because an unidentified speaker stepped in at one point to correct the interpreter's efforts. Petitioner's Brief at 16; Superior Court VRP at 11. However, this minor incident had no effect on the outcome of the proceeding, because the Court of Appeals "sits in the same position as the superior court,

applying the standards of the WAPA directly to the record before the agency.” *Tapper*, 122 Wn.2d at 402; *see Brighton*, 109 Wn. App. at 861-62. Thus, there was no prejudice to the Klimovichs at the superior court hearing.

The Klimovichs then hint that their right to a qualified, accurate interpreter was compromised at the administrative hearing, because Ms. Bruk complained of the quality of the translator during the first day of her testimony. Petitioner’s Brief at 16, n. 8. The interpreter in question on that day (October 27, 2010) was Ms. Lebow, who was attempting to provide interpreter services by telephone. Very little testimony had been elicited from Ms. Bruk when counsel for both parties asked that this interpreter not be used. VRP Vol. III, pp. 38-43. The same testimony was elicited from Ms. Bruk again when she next testified on February 7, 2011, and a different interpreter, Nikolay Kvasnyuk, was used. VRP Vol. IV, pp. 2, 32-33. Ms. Lebow was not used as a translator again during the administrative hearing. Victor Byjkoff was the Russian interpreter on October 25 and 26, 2012. VRP Vol. I, p. 2; VRP Vol. II, p. 2. Nikolay Kvasnyuk was the Russian interpreter on February 7, 8, 9, 11, 14, 15, 17, and 18, 2011. VRP Vol. IV, p. 2; VRP Vol. V, p. 2; VRP Vol. VI, p. 2; VRP Vol. VII, p. 2; VRP Vol. VIII, p. 2; VRP Vol. IX, p. 2; VRP Vol.

X, p. 2; VRP Vol. XI, p. 2. Thus, there was no error, and the Klimovichs were not deprived of their right to have qualified, accurate interpreters.

F. The Review Judge Considered The Decision To Terminate Ivan's Contract Separately From Larisa's Contract

The Review Judge concluded that both “the Kozorezovs moved the Appellants to a different home and address, and **intentionally** failed to notify the Department of the change.” AR 16 (emphasis in original). The Review Judge resolved conflicting evidence in favor of the Department’s witnesses. In addition, the Review Judge found that Larisa’s testimony that she provided at least one notice to Elena Bruk was not confirmed by testimony or notes of Ms. Bruk or any fax confirmation or other written proof. AR 8. The Review Judge also determined that Ivan’s testimony regarding his alleged delivery of three separate letters to Chesterfield was not credible, because if Ivan had provided notice of the move in May 2009, additional notices of the move in June and July 2009 would have been unnecessary. *See* AR 8.

That the Review Judge considered Ivan’s and Larisa’s contracts separately is borne out by the Review Judge’s determination that “more likely than not . . . Mr. Kozorezov did not misrepresent the address to Ms. Won.” AR 9. The Review Judge believed that there was simply a

miscommunication between Ivan and Ms. Won based on the similarity of the 206 and 208 addresses. AR 9.

Ivan and Larisa each had a responsibility to notify the Department immediately when the Klimovichs moved. Former WAC 388-71-0515(6). This they both failed to do, which warranted the termination of each of their contracts. In addition, Larisa provided false information to the Department on two occasions regarding the Klimovichs' residence. This was another basis for terminating Larisa's contract. The evidence was weighed against each provider separately, and the Review Judge came to the justifiable and proper conclusion that Ivan's and Larisa's Individual Provider contracts should each be terminated. *See* AR 17.

The Klimovichs have failed to establish any basis for relief pursuant to RCW 34.05.570(3). The Department correctly interpreted the law; the Review Decision and Final Order is supported by substantial evidence; and termination of the Individual Provider contracts was not arbitrary or capricious.

As noted above, the Department is authorized to terminate Individual Provider contracts for a variety of reasons, including but not limited to violation of the express contract terms. RCW 74.39A.095(7); former WAC 388-71-0540; former WAC 388-71-0551; WAC 388-71-0556. In addition, the Department is authorized to reject a client's choice

of Individual Provider for a variety of reasons. RCW 74.39A.095(8); former WAC 388-71-0546. The Department ultimately reviewed all of its concerns regarding Ivan and Larisa that had developed in the summer and fall of 2009 and decided to take action in early November 2009. The Department determined that Ivan and Larisa did not demonstrate the appropriate character, competence, and suitability to provide the Klimovichs' Medicaid Personal Care services. The Department further determined that Ivan and Larisa would not be able to appropriately meet the Klimovichs' needs and that Ivan's and Larisa's actions jeopardized the Klimovichs' health, safety, or well-being. Thus, the Department appropriately terminated the Individual Provider contracts.

The Klimovichs cannot prevail on appeal. The Review Decision and Final Order issued by the DSHS Board of Appeals on October 6, 2011 should be affirmed by this court.

V. CONCLUSION

For the above stated reasons, the Department respectfully requests this court to affirm the Review Decision and Final Order issued by the DSHS Board of Appeals on October 6, 2011.

RESPECTFULLY SUBMITTED this 9th day of August, 2013.

ROBERT W. FERGUSON
Attorney General

By 
for DIANE L. DORSEY WSBA #27109
Assistant Attorney General
WSBA #21285

NO. 69938-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FYODOR AND PELAGEYA
KLIMOVICH,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

DECLARATION OF SERVICE

I, Patricia Kelley, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On August 9, 2013, I sent a copy of: **Brief of Respondent; and Declaration of Service via email** to:

1. Aaron V. Roche, D. James Davis, and Mark Symington, Roche Law Group PLLC, 101 Yesler Way Ste. 603, Seattle, WA 98104-2580.
aaron@rockelaw.com; www.rockelaw.com; sarah@rockelaw.com

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 9th day of August, 2013 at Seattle, Washington.


PATRICIA KELLEY
Legal Assistant OID #91016

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