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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JOYCE TASKER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

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**RESPONDENT WASHINGTON STATE DEPARTMENT OF  
HEALTH'S RESPONSE BRIEF**

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## I. ISSUE

A Health Law Judge (HLJ) for the Department of Health (Department) conducted an RCW 34.05 adjudicative proceeding, and decided under RCW 18.130.190 that Appellant Joyce Tasker had engaged in the “unlicensed practice” of medicine and veterinary medicine. The decision was upheld on judicial review. Ms. Tasker now brings a second action to “void” the decision by arguing the Department erred by using a Department HLJ to decide her case. Ms. Tasker failed to raise this argument in the first action. This appeal presents the following issues:

1. May Ms. Tasker bring a second action under RCW 7.24?
2. Is Ms. Tasker’s second action barred by res judicata because it arises out of the same facts reviewed in the first action?
3. Did the Department have subject matter jurisdiction over the first action against Ms. Tasker, such that her second action cannot be characterized as a challenge to the Department’s subject matter jurisdiction?
4. Did the Secretary of Health have statutory authority to designate a Health Law Judge to decide the unlicensed practice case against Ms. Tasker?

## II. STANDARD OF REVIEW

The superior court held Ms. Tasker could not bring an action under RCW 7.24 and her claims are barred by res judicata. This Court reviews such questions of law de novo. Sunnyside Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The superior court also upheld the Department's determination that, under RCW 18.130.190, a Department HLJ may decide unlicensed practice cases. Courts give "substantial weight" to an agency's interpretation of the law it administers, particularly when the agency has expertise in a particular area. Department of Labor and Industries v. Granger, 159 Wn.2d 752, 794, ¶ 20, 153 P.3d 839 (2007); Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982). The Department's interpretation of the unlicensed practice of law, RCW 18.130.190, is entitled to substantial weight by this Court.

## III. STATEMENT OF CASE

This case involves RCW 18.130.190, which authorizes the Secretary of the Department to issue Cease and Desist Orders and impose fines against persons who practice a health care profession without having the license required by state law.

**A. Original Litigation**

In March 2005, the Department, under RCW 18.130.190, issued a Notice of Intent (NOI) to Issue a Cease and Desist Order against Appellant Joyce Tasker. CP 24-29. The Department alleged Ms. Tasker practiced “medicine” (RCW 18.71.011) and “veterinary medicine” (RCW 18.92.010) without having the license required by those chapters. Ms. Tasker had charged patients fees for performing “Electrodermal Testing” (EDT) on humans and animals, claiming she could identify many diseases and health conditions by detecting “electromagnetic signatures” in the body. She claimed the EDT results allowed her to prescribe healing remedies, which she sold to her patients. She had no license to practice medicine, veterinary medicine, or any other type of health care.

Ms. Tasker requested an adjudicative proceeding to contest the Department’s NOI. She contended that EDT did not fall within the definition of the practice of “medicine” or “veterinary medicine,” and, therefore, she could perform EDT without being licensed either as a physician or veterinarian. CP 37-38. In January 2006, the Department HLJ<sup>1</sup> found that, in performing EDT, Ms. Tasker had engaged in the

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<sup>1</sup> The Administrative Procedure Act (RCW 34.05) uses the term “presiding officer” to describe the official who conducts adjudicative proceedings under the chapter. “Health Law Judge” is a term used by the Department of Health for its presiding officers. Other agencies, including of Office of Administrative Hearings (RCW 34.12), commonly use the term “administrative law judge.”

“unlicensed practice” of medicine and veterinary medicine. CP 35-58. Under RCW 18.130.190(3), the HLJ entered a Cease and Desist Order (Order). CP 56-58. He also fined Ms. Tasker \$10,000, with \$6,000 suspended so long as she timely paid the fine and refrained from further violations of the unlicensed practice law. CP 58.<sup>2</sup>

Ms. Tasker filed a Petition For Judicial Review. In July 2006, the superior court upheld the Order. CP 60-61. Ms. Tasker filed a Notice of Appeal, and in July 2007, the Washington Court of Appeals, Division II, upheld the Order. CP 63-79. Ms. Tasker filed a Petition for Review, which the Washington Supreme Court denied in May 2008. CP 81.

**B. Current Litigation.**

Ms. Tasker sought to challenge the Department’s January 2006 Order through a Complaint for Declaratory Relief under RCW 7.24. CP 3-7. She argued the Order was invalid because the HLJ lacked statutory authority to decide the case.<sup>3</sup> This argument was never raised in the original litigation. The superior court dismissed Ms. Tasker’s

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<sup>2</sup> Under WAC 246-10-605, the HLJ, as the presiding officer, issues a “final” order that is not subject to further administrative appeal.

<sup>3</sup> In her Amended Brief, Ms. Tasker makes factual assertions (at 6-9) and legal arguments (at 25-28) that challenge the HLJ’s finding that she had engaged in the unlicensed practice of medicine and veterinary medicine. This issue was decided against Ms. Tasker in the original litigation, and the Department’s brief will not address this issue, as it is clearly outside the scope of the current litigation.

complaint. CP 179-180. It found that the complaint could not be brought under RCW 7.24; was barred by res judicata; and in any event, her argument that the Health Law Judge lacked statutory authority to decide her case failed on the merits. Id.

Ms. Tasker seeks direct review by the Supreme Court. The Department has opposed direct review.

#### IV. ARGUMENT

##### A. The Department's Order Is Not Reviewable Under RCW 7.24

In her second complaint, Ms. Tasker collaterally attacks the Department Order by claiming the HLJ lacked authority to issue the Order, which found she had engaged in the unlicensed practice of medicine and veterinary medicine and imposed a fine against her. Her complaint is solely for declaratory relief under RCW 7.24 (Uniform Declaratory Judgment Act). CP at 3-7.

The Order constituted "agency action" as defined by RCW 34.05.010(3), since the Order "imposed sanctions" against Ms. Tasker. RCW 34.05.510 states the provisions of RCW 34.05 are the "exclusive means" for obtaining judicial review of "agency action."<sup>4</sup> Thus, under RCW 34.05.510, Ms. Tasker's only means for seeking review

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<sup>4</sup> The rule makes three limited exceptions that do not apply to Ms. Tasker's case. Ms. Tasker does not argue otherwise.

of the Order was through the judicial review provisions in RCW 34.05. Moreover, the declaratory judgment provisions of RCW 7.24 are expressly inapplicable when someone is contesting “agency action” that is reviewable by a court under RCW 34.05. RCW 7.24.146; Northwest Ecosystems Alliance v. Department of Ecology, 104 Wn. App. 901, 919, 17 P.3d 697 (2001).

In defending her right to declaratory relief, Ms. Tasker fails to even mention RCW 34.05.510 and RCW 7.24.146. Amended Brief at 23-25. To avoid application of those statutes, she contends that, under RCW 18.130.165, her case involves a “pending controversy over enforcement of the \$10,000 fine” imposed by the HLJ. Amended Brief at 24.

Ms. Tasker had the right to appeal the Order in the first case, but no right to collaterally attack the Order in a second case using RCW 18.130.165. That statute has limited application: it allows a “disciplinary authority” to bring an action in superior court to enforce payment of a fine. It has no application to this case because no disciplinary authority<sup>5</sup> has filed an action under RCW 18.130.165 against

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<sup>5</sup> A “disciplinary authority” is an agency, board, or commission without authority to take disciplinary action against a licensee holder or an applicant for a license. RCW 18.130.020(6). The term does not include the Secretary of Health when she is taking an unlicensed practice action under RCW 18.130.190 against a person who is neither a license holder nor an applicant for a license.

Ms. Tasker to enforce a fine. Moreover, even if a disciplinary authority had filed an action under RCW 18.130.165, under the express terms of the statute, the action would not allow Ms. Tasker to contest the “validity” of the Order.

Ms. Tasker also relies on RCW 7.24.020 which allows a person to obtain a declaration of rights regarding written instruments, statutes, and ordinances. Amended Brief at 24-25. This statute has no applicability to this case. Both RCW 34.05.510 and RCW 7.24.146 provide that “agency action” – such as the Department took against Ms. Tasker – may be contested in court only under the judicial review provisions in RCW 34.05 and not under RCW 7.24. RCW 7.24.020 does not override these two statutes.

The superior court properly concluded that it lacks subject matter jurisdiction under RCW 7.24 over Ms. Tasker’s declaratory judgment action contesting January 2006 Order. This Court should affirm the superior court’s dismissal.

**B. Ms. Tasker’s Complaint Should Be Dismissed Under The Doctrine Of Res Judicata**

Ms. Tasker’s complaint is that the HLJ, as an employee of the Department, lacked authority under RCW 18.130.095(3) to decide the case. She argues that the case, instead, should have been decided by an

administrative law judge from the Office of Administrative Hearings (OAH) appointed under RCW 34.12. Assuming, for argument's sake, that a superior court has jurisdiction under RCW 7.24, Ms. Tasker's complaint was properly dismissed by the superior court under the doctrine of res judicata.

Res judicata bars an action when there is identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) quality of persons for or against whom the claim is made. Hayes v. City of Seattle, 131 Wn.2d 706, 711-12, 934 P.2d 1179 (1997). Also known as "claim preclusion, the doctrine prevents a person from filing a second action asserting claims that should have been raised in an earlier action. Robertson v. Perez, 156 W.2d 33, 42, 123 P.3d 844 (2005). In re the Estate of Black, 153 Wn.2d 152, 171, ¶ 29, 102 P.3d 796 (2004). The doctrine prevents piecemeal litigation and ensures the finality of judgments. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 99, ¶ 20, 117 P.3d 1117 (2005).

As stated above, Ms. Tasker's first case against the Department contested the Order finding that she had engaged in "unlicensed practice" in performing EDT. Ms. Tasker never raised the issue of whether the HLJ had authority to enter the Order. Now, in a second lawsuit against the

Department – again seeking to contest the validity of the Order – Ms. Tasker attempts to raise that issue for the very first time.

The elements of res judicata preclude Ms. Tasker from litigating this new issue in a second case: the exact same parties are involved and the validity of same Order is at issue. The second action is based on the exact same facts as the first action. Ms. Tasker surely could have raised her new “HLJ” argument in the first case.<sup>6</sup> Thus, under the above-cited case law, res judicata bars all her from raising this new argument in a second case. Allowing Ms. Tasker to first raise this argument for the first time in a second case would open the door to piecemeal litigation, the very result that the doctrine of res judicata aims to prevent.

**C. In A Second Action, Ms. Tasker Cannot Challenge The Health Law Judge’s Authority To Decide Her Unlicensed Practice Case Under The Guise Of Challenging His Subject Matter Jurisdiction**

Seeking to overturn the Department’s Order that was upheld on appeal, Ms. Tasker argues that the Department’s HLJ lacked subject matter jurisdiction to decide her case, making his Order “void.” Amended Brief at 23.

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<sup>6</sup> At the adjudicative proceeding, Ms. Tasker could have contested the HLJ’s authority to decide her case. If the HLJ rejected her argument, Ms. Tasker could have raised the issue in her petition for judicial review of the Order. If the superior court agreed with her argument, it could have reversed the Order on procedural grounds. RCW 34.05.570(3)(c).

Ms. Tasker notes that subject matter jurisdiction may be raised at any time, including in a new proceeding that seeks to have declared a previous Order “void.” Amended Brief at 22-23; Marley v. Department of Labor and Industries, 125 Wn.2d 533, 538, 886 P.2d 2d 189 (1994). However, an agency lacks subject matter jurisdiction only in the limited circumstance when “it attempts to decide a type of controversy over which it has no authority to adjudicate”; other alleged errors do not implicate subject matter jurisdiction. Id. An agency’s alleged errors of law should not be “transformed into jurisdiction flaws” to allow a party to relitigate cases that already have been decided. Id. at 541.

Ms. Tasker’s argument that the HLJ lacked authority to decide her case is not one of subject matter jurisdiction. The Department, through its Secretary, has statutory authority under RCW 18.130.190 to decide unlicensed practice cases. As allowed by the statute, the Secretary may delegate this authority to an HLJ. As an employee of the Department, the HLJ does not himself acquire subject matter jurisdiction over the case. If, as Ms. Tasker argues, the HLJ should not have been the person designated by the Secretary to decide the case for her, this argument is one of procedure and statutory interpretation, and not one of subject matter jurisdiction.

**D. In Any Event, As The Secretary's "Designee," The Health Law Judge Had Authority Under RCW 18.130.190 To Decide Ms. Tasker's Case.**

Ms. Tasker argues that the HLJ lacked statutory authority to decide her case. Even if this argument is one of subject matter jurisdiction that may be considered by this Court in a second action, the argument should be rejected because the HLJ did have authority under RCW 18.130.190 to decide the case.

The Secretary of Health may issue charges against a person for the "unlicensed practice" of a profession for which a license is required by law. RCW 18.130.190(2). A charged person may request an adjudicative proceeding to contest the charges, and the "Secretary" makes a final determination. RCW 18.130.190(2)-(3). If the person is found to have engaged in unlicensed practice – as in Ms. Tasker's case – the "Secretary" may issue a Cease and Desist Order and impose a fine against the person. RCW 18.130.190(3).

RCW 18.130.020(10) defines "Secretary" as the Secretary of Health or her "designee." The HLJ entering the Order against Ms. Tasker, Arthur E. DeBusschere, has been designated in writing by the Secretary of Health to make "final decisions" for her in adjudicative proceedings under RCW 18.130. CP 83. Thus, acting through HLJ DeBusschere, the

Department plainly had authority to decide the unlicensed practice case against Ms. Tasker.

**E. Ms. Tasker's Arguments Challenging The Health Law Judge's Authority To Decide Her Case Lack Merit**

**1. RCW 18.095(3) Does Not Render The Health Law Judge's Order Void**

Ms. Tasker argues the HLJ lacked subject matter jurisdiction to enter the Order against her, because RCW 18.130.095(3) states in part:

Only upon authorization of a disciplining authority identified in RCW 18.130.040(2)(b), the secretary [of the Department of Health] or his or her designee may serve as the presiding officer for any disciplinary proceedings of the disciplinary authority authorized under this statute.

(Emphasis added.) Brief at 15-21. Ms. Tasker's reasoning is that since no "disciplinary authority" authorized the Secretary or her designee to decide her case, the HLJ's Order is "void." As stated above, RCW 18.130.190 grants the Secretary or her designee (the HLJ) authority to decide unlicensed practice cases. Ms. Tasker's argument – that a disciplinary authority failed to authorize the Secretary to decide the case – is one of procedure and legal interpretation and not subject matter jurisdiction. Accordingly, even if the argument were correct, the Order is not void for lack of subject matter jurisdiction.

In any event, Ms. Tasker's argument lacks merit, as it fails to recognize the difference under RCW 18.130 between a "disciplinary" action and an "unlicensed practice" action.

The term "disciplinary authority" in RCW 18.130.095(3) is defined by RCW 18.130.020(6) to include entities such as the Medical Quality Assurance Commission and the Veterinary Board of Governors, which are statutorily authorized to "take disciplinary action against a holder" of a health profession license.<sup>7</sup> Under RCW 18.130.095(3), the Secretary cannot act as the presiding officer in an adjudicative proceeding in disciplinary proceeding of a disciplinary authority without authorization from the disciplinary authority. Contrary to Ms. Tasker's argument, RCW 18.130.095(3) was inapplicable to her case because the action against her was not taken by a disciplinary authority in a disciplinary proceeding.

Instead, the action against Ms. Tasker was an unlicensed practice action taken by the Secretary under RCW 18.130.190. An unlicensed practice action is brought against someone who is not a licensee of a health care profession. An unlicensed practice action is not a "disciplinary

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<sup>7</sup> A disciplinary authority may charge a licensee with "unprofessional conduct" as defined in RCW 18.130.180. Upon a finding of unprofessional conduct or inability to practice, a disciplinary authority may impose a range of sanction against a licensee. RCW 18.130.160.

action” taken by a “disciplinary authority,” and therefore is not subject to the requirements of RCW 18.130.095(3). Hence, no “disciplinary authority” is needed to authorize the Secretary under RCW 18.130.095(3) to conduct Ms. Tasker’s adjudicative proceeding in the unlicensed practice case against her under RCW 18.130.190. That authority was granted to the Secretary by the legislature under RCW 18.130.190.

**2. RCW 34.05.425(1) Does Not Render The Health Law Judge’s Order Void**

As stated above, under RCW 18.130.190, an HLJ, employed by the Department and designated by the Secretary, conducted Ms. Tasker’s hearing. Ms. Tasker argues that RCW 34.05.425(1) precluded anyone other than an administrative law judge from the Office of Administrative Hearings from conducting the hearing. Amended Brief at 15. RCW 34.05.425(1) states that the presiding officer in an administrative hearing shall be:

- (a) The agency head or one or more members of the agency head;
- (b) If the agency had authority to do so, a person other than the agency head or an administrative law judge designated by the agency head to make a final decision and enter the final order; or
- (c) One or more administrative law judges assigned by the office of administrative hearings in accordance with RCW 34.12.

First of all, Ms. Tasker claims that, under RCW 34.05.425(1)(c), an OAH administrative law judge should have heard her case is not a subject matter jurisdiction claim. Under RCW 34.12.040, OAH judges merely “conduct” hearings for other agencies that have subject matter jurisdiction over the case; OAH itself does not acquire subject matter jurisdiction. Even if, as Ms. Tasker alleges, an OAH judge should have heard her case, the error would be one of procedure and statutory interpretation. It would not deprive the Department of subject matter jurisdiction and allow Ms. Tasker to “void” of Order in a second legal proceeding.

In any event, Ms. Tasker’s claim that an OAH judge should have decided her case is without merit. As explained above, the Secretary, under RCW 18.130.190, had authority to designate an HLJ to decide the unlicensed practice case against Ms. Tasker. She authorized HLJ DeBusschere to issue the “final” decision in this type of case. CP 83. Because use of the Department HLJ was authorized under RCW 34.05.425(1)(b), the Department was not required to use an administrative law judge from the OAH under RCW 34.05.425(1)(c). This conclusion is further supported by the OAH statute itself:

Whenever a state agency conducts a hearing which is not presided over by officials of the agency who are to render

the final decision, the hearing shall be conducted by an administrative law judge assigned [by OAH under RCW 34.12]

RCW 34.12.040. (Emphasis added.) RCW 34.12.040 impliedly recognizes that decision-makers in adjudicative proceedings may be authorized to issue two different types of decisions: an “initial” decision under RCW 34.05.461(1)(a) or a “final” decision under RCW 34.05.461(1)(b). RCW 34.12.040 states that an agency must use OAH judges only when the decision-maker at the hearing is authorized to make an initial decision, as opposed to a final decision. HLJs are authorized to issue final decisions for the Department. WAC 246-10-102 (defining “presiding officer”). In Ms. Tasker’s case, the HLJ, in fact, did render a final decision for the Department. CP 35-58. Since the HLJ rendered the final decision, RCW 34.12.040 did not require the Department to have assigned an OAH judge to conduct Ms. Tasker’s unlicensed practice hearing.

#### V. CONCLUSION

In June 2006, the Department HLJ entered an Order under RCW 18.130.190 finding that Ms. Tasker engaged in the unlicensed practice of medicine and veterinary medicine. The superior court and court of appeals upheld the Order, and the Supreme Court denied review. In a new putative declaratory judgment action under RCW 7.24,

Ms. Tasker now challenges the Order on grounds that he allegedly lacked authority to hear the case. Her lawsuit should be dismissed for four reasons:

(1) Declaratory relief under RCW 7.24 is not available to challenge the Order;

(2) Res judicata bars Ms. Tasker from now litigating the HLJ's authority to decide the case, since the issue could have been raised in the earlier action;

(3) Because the issue of whether the HLJ had authority to decide the case is not one of subject matter jurisdiction, Ms. Tasker cannot maintain a second action to "void" the Order; and

(4) In any event, as the Secretary's designee, the HLJ under RCW 18.130.190 had authority to decide the case and enter the Order

against Ms. Tasker.

RESPECTFULLY SUBMITTED this 16 day of December,  
2008.

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