

FEB 15 2010
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

No. **39681-5-II**

THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

David Stanzak,
Appellant

v.

State of Washington Department of Health,
Respondent

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____

Appeal of Order Dismissing Claim of Unlawfully
Conducted Hearing held by DOH
Appellant's Reply Brief

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I. Introduction

Mr. Stanzak posed a straightforward contention to the court below: The Department of Health's order suspending Mr. Stanzak's license is void because the DOH lacked subject matter jurisdiction to conduct the related disciplinary hearing and in so doing, violated the statutory mandates adopted by the State Legislature.

For some reason, the Department of Health has mischaracterized or misunderstood this to be an attempt to get this body to review the findings of the DOH hearing that resulted in the issuance of the order of suspension of Mr. Stanzak's license. The fact is, that is not an option that is fully available to him because Mr. Stanzak's attorney at the time missed the deadline for filing that appeal. Petitioning now for such a review would not likely be successful. However, Mr. Stanzak is entitled to have the question of the legality of the hearing reviewed by a Superior Court because the Superior Courts have the constitutional mandate to do so.

At this point, the relevance the DOH order has to the lawsuit that Mr. Stanzak filed in Thurston County Superior Court, is that the order was issued after a hearing by a body that did not have subject matter jurisdiction, is arguably void, and is a violation of Mr. Stanzak's right to due process. The fact that it exists is what gives Mr. Stanzak standing to

sue for failure to abide by the statutory mandates that direct the DOH to refer disciplinary hearings involving licensed social workers to the Office of Administrative hearings – with the exception of hearings involving sexual misconduct. But the merits of the actual findings of the hearing conducted by the DOH are irrelevant to the lawsuit that Mr. Stanzak filed in the court below. The question before this Court, as it was in the court below, remains: Was the hearing that led to the order legally conducted, and if not, is Mr. Stanzak entitled to have the hearing mandated by the State Legislature, and if so, what remedy is appropriate at this point?

The remedies that Mr. Stanzak seeks here are ones that are contemplated by the Washington State Constitution. Wash. Const. art. IV § 6 gives superior courts the inherent power to review administrative decisions. The review that Mr. Stanzak seeks is a review of the authority of the DOH to conduct the hearing to determine whether the accusations made against Mr. Stanzak were sustainable under the appropriate evidentiary standard. Wash. Const. art. IV, § 4 allows the issuance of a writ to compel the performance of an existing duty, and Mr. Stanzak seeks such an order to compel the DOH to abide by state law.

Additionally, Mr. Stanzak seeks declaratory relief, which is appropriate in this case as there is a justiciable controversy - an actual, present and existing dispute between parties having genuine opposing

interests which were direct and substantial, for which a judicial determination would have been final and conclusive.

II. Argument

A. The Washington State Constitution provides remedial avenues to Mr. Stanzak other than those provided by the APA.

The trial court has inherent power to review administrative decisions for illegal or manifestly arbitrary and capricious acts. This inherent power arises out of Wash. Const. art. 4, § 6. This review by "constitutional" or "common law" certiorari is not full appellate review on the merits. It is limited to a review of the record below to determine whether the decision or act complained of was or involved arbitrary and capricious or illegal actions thus violating an appellant's fundamental right to be free of such action.

Bridle Trails Cmty. Club v. Bellevue, 45 Wn. App. 248, 251-52, 724 P.2d 1110 (Div. I, 1986).

Additionally, Wash. Const. art. IV, § 4 provides Mr. Stanzak with a way to ensure that DOH performs its duty to refer the fact-finding hearing to the Office of Administrative Hearing as required. He is allowed to petition a superior court for the issuance of a writ of mandamus. This is not a remedy that is subsumed by the Administrative Procedure Act nor is it a remedy

that would entail a review of the merits of the findings of fact by the DOH.

Our original jurisdiction to issue a writ is both nonexclusive and discretionary ... the remedy of mandamus contemplates the necessity of indicating the precise thing to be done ...

Walker v. Munro, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994).

Mr. Stanzak notes that review under the court's inherent powers may not be impinged either by the Legislature or by Administrative Agencies, and therefore contends that the APA cannot impede his ability to bring a lawsuit for review of the agency's procedures, a writ of mandamus, and the violation of his right to due process. *See, North Bend Stage Line, Inc. v. Dep't of Pub. Works*, 170 Wn. 217, 228, 16 P. 2d 206 (1932).

B. The court below incorrectly found that Mr. Stanzak failed to state a claim on which relief could be granted.

When the pleadings are sufficient to raise the issue of the court's inherent power to review, at least to the extent that that basis for review should have been explicitly ruled on by the trial court, it is an error for the court not to so. When no such formal ruling was made, and the Appellate Court cannot determine from

the record whether the trial court considered exercising its inherent power of review, then the case should be remanded to the trial court for a decision of whether to grant such a review. *See, Bridal Trails Cmty Club*, 45 Wn. App. at 254.

At the very least, Mr. Stanzak asks for remand to the court below. However, given that he has sought additional remedies of a writ of mandamus and a finding that his constitutional right to due process have been violated, it is not necessary that the court below be asked to rule on all matters that were before it. Mr. Stanzak asks this court to issue a writ of mandamus to the DOH to compel the DOH to refer the disciplinary hearing to the Office of Administrative Hearings, as required by state law.

C. The function of Secretary of the DOH as the “disciplinary authority” for issues related to the license of a clinical social worker is separate from the Secretary’s authority to hold disciplinary hearings.

Mr. Stanzak has never asserted that the Secretary of the DOH does not have disciplinary authority over Licensed Clinical Social Workers. The Secretary’s disciplinary authority is clearly stated in RCW 18.130.010 *et seq.* Mr. Stanzak is, however, contending that the the DOH does not have the authority conduct a hearing intended to adjudicate whether a Licensed Clinical Social Worker

committed professional misconduct. To determine whether the DOH has such authority, it is necessary to interpret the relevant statutes.

The DOH is correct in its conclusion that the rules of statutory interpretation require consistency and require that no portion of a statutory provision become irrelevant by the proposed interpretation. In fact, when the rules of statutory interpretation advocated by the DOH are applied to RCW 18.130.050(10), they actually prove Mr. Stanzak's contention that the Secretary does not have the authority to hold disciplinary hearings involving licensed social workers.

The DOH has an interesting interpretation of RCW 19.130.050(10), which states:

To use a presiding officer as authorized in RCW 18.130.095(3) or the office of administrative hearings as authorized in chapter 34.12 RCW to conduct hearings. The disciplining authority shall make the final decision regarding disposition of the license unless the disciplining authority elects to delegate in writing the final decision to the presiding officer. Disciplining authorities identified in RCW 18.130.040(2)(b) may not delegate the final decision regarding disposition of the license or imposition of sanctions to a presiding officer in any case pertaining to standards of practice or where clinical expertise is necessary;

The DOH contends that the provision gives the Secretary the authority to use the OAH, but does not compel the Secretary to do so; in other words, giving the secretary authority to do something does not make it mandatory that he/she do so. Therefore, under this interpretation, it is optional for the Secretary to use a presiding officer as authorized under RCW 18.130.095(3) when there is a board or commission that oversees a particular health care profession. Such an interpretation would undoubtedly surprise the boards and commissions.

Additionally, the DOH has proffered no authority for its conclusion that one portion of RCW 18.130.050(10) is mandatory and the other portion is permissive, other than the fact that a WAC provision has been adopted that would support its contention. The fact that the DOH adopted regulations in support of such an interpretation does not qualify as supporting authority for the DOH's interpretation of a statute, and it is the court's ultimate responsibility to see that an administrative agency's rules are applied consistently with legislative policies underlying the regulations. *See e.g., Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 971 P.2d 591 (1999). WAC 246-10-101(1) states "This chapter shall apply to adjudicative proceedings authorized to

be conducted under the authority of the department of health.” And WAC 246-10-101(5)) states “Where a provision of this chapter conflicts with a provision of the Revised Code of Washington, the statute shall prevail.”

The fact is, the DOH is explicitly not authorized to conduct the hearing by any state statute, and those two DOH regulations are, therefore, the only DOH regulations relevant to this proceeding. At best, this inconsistent interpretation of the term “authority” renders the provision ambiguous, and therefore this Court should consider the legislative history in order to render a finding in this matter. Since the legislative history is quite conclusive, Mr. Stanzak respectfully submits that the Secretary does not have the authority to act as the presiding officer in a disciplinary hearing regarding the license of a social worker unless it is a hearing to decide whether the social worker has committed sexual misconduct.

D. The fact that the DOH is statutorily prohibited from conducting the disciplinary hearing in the Stanzak matter means that the DOH lacked subject matter jurisdiction.

The DOH incorrectly interprets Mr. Stanzak’s argument to be that the DOH used the wrong presiding officer to conduct the

hearing in the matter of the disciplinary charges brought against him. That is not the argument that Mr. Stanzak is making here. The issue before this Court is whether the DOH had the statutory authority to conduct the disciplinary hearing. The UDA, as evidenced in the statutory language and the legislative history, very specifically denies the DOH this authority. Therefore, *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994) is on point..

The DOH misquotes RCW 18.130.100 and RCW 18.130.110 when it refers to these statutes as support for its contention that the Secretary has the authority to conduct disciplinary hearings regarding the charges against Mr. Stanzak. The statutes do not say the Secretary must hold a hearing and issue a final order under the APA. The two statutes say that the disciplinary authority must compile the “founded” facts and report them to appropriate bodies. To ascertain the Secretary’s role in that process it is necessary to review the entire statute. At times it may be the Secretary who is charged with ascertaining the facts, such as all cases of charges of sexual misconduct and when the Board or Commission votes to allow the Secretary to conduct the hearing in order to determine the facts. But it does not say that the Secretary himself or herself,

or the disciplinary authority, has the authority to conduct the hearing in all cases. In the case of sexual misconduct allegations, for instance, the usual disciplinary authority may be the Board or Commission that was established to govern members of particular health care professions, but the usual board or commission is not the entity that will conduct the hearings, because the statute requires that the Secretary do so.

The UDA is obviously complex, and to be understood must be examined in its entirety. When it is so examined, there is an undeniable separation of functions except when the charge is sexual misconduct. Unless a board or commission authorizes the secretary to act as presiding officer, or the charge against a license holder is one of sexual misconduct, the Secretary is not the proper presiding officer. When the charges are not sexual misconduct, and there is no disciplinary board or commission with authority over members of a health care profession – as is the case with licensed clinical social workers – the DOH does not even have the statutory authority to conduct the hearings at all.

E. Given that the DOH lacked subject matter jurisdiction over the hearing in the matter of the disciplinary action against Mr. Stanzak, it failed to honor Mr. Stanzak's right to due process when it suspended his license.

The failure of DOH to abide by restrictions placed upon its conduct by the legislature was a violation of Mr. Stanzak's right to due process. The Secretary of the DOH has the right to decide the appropriate sanctions that are to be imposed upon him based on the findings of a hearing conducted in accordance with statutory requirements. The DOH lacked subject matter jurisdiction to conduct the hearing and therefore the findings are void.

Essentially, Mr. Stanzak's license was suspended without a proper hearing. Therefore, Mr. Stanzak has been deprived of his license in violation of his due process rights.

III. CONCLUSION

The Secretary of the DOH has the authority to decide whether certain conduct warrants the suspension or revocation of the license of a Licensed Clinical Social Worker based on factual determinations made by an officer of the Office of Administrative Hearings. The fact that the Secretary of the DOH suspended Mr. Stanzak's license without following statutory procedures arguably

renders the order of suspension void, null, invalid, and a violation of Mr. Stanzak's constitutional right to due process. The remedies available to Mr. Stanzak under the Washington State Constitution include review of the process by a superior court and obtaining other equitable remedies that include a writ of mandamus and declaratory relief. Because Mr. Stanzak is not appealing the merits of the findings or the merits of the disciplinary order other than its invalidity, the APA does not provide the means by which Mr. Stanzak can obtain redress or corrections. In fact, only the judicial branch of our government can perform that function. Mr. Stanzak is seeking relief based on the unauthorized, *ultra vires* actions of an administrative agency.

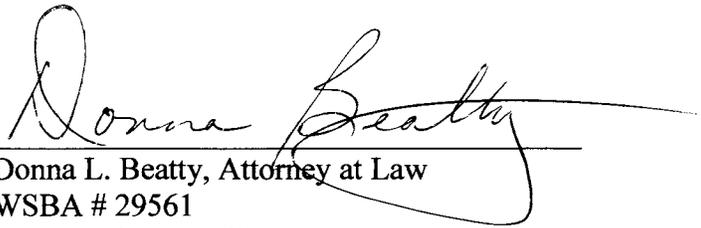
The court below had subject matter jurisdiction over the issues raised in Mr. Stanzak's complaint, and based its dismissal of his complaint on an erroneous interpretation of the action as well as erroneous interpretations of statutory and case law as presented by the DOH.

Mr. Stanzak respectfully requests that this Court – at the very least – remand this case to the lower court for further consideration. Ideally, Mr. Stanzak asks that the lower court's ruling that the Secretary of the DOH has the authority to conduct

hearings in the matter be overturned, and the entire matter be sent back to the DOH so that a proper hearing can be conducted by the Office of Administrative Hearings.

February 11, 2010

Respectfully submitted,

A handwritten signature in cursive script that reads "Donna Beatty". The signature is written in black ink and is positioned above a horizontal line.

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COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON

DAVID STANZAK, APPELLANT,)	NO.: 39681-5-II
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v.)	
)	DECLARATION OF SERVICE
STATE OF WASHINGTON, DEPARTMENT)	
OF HEALTH, et al., RESPONDENTS)	
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I, DONNA L. BEATTY, counsel for Appellant David Stanzak, do hereby declare, under penalty of perjury:

On February 11, 2010, I mailed a copy of the foregoing Appellant's Reply Brief to Counsel for Defendant/Respondent, Gail S. Yu, Assistant Attorney General to the following address:

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Dated this 11th day of February, 2010


DONNA L. BEATTY