

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC HEALTHCARE SERVICES II, LLC; GALINA BAIDA
Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF
WASHINGTON
Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a license revocation case involving an adult family home (“AFH”) located in Centralia and licensed to Appellant Olympic Healthcare Services II, LLC (“Olympic”). The Department of Social and Health Services (“Department”) ordered the license to be revoked after conducting an inspection (“survey”) of the home on November 2 and 13, 2009, and based upon some of the alleged violations of licensing standards in the survey.

While there were many issues at the hearing, the three critical ones are: (1) what standard of proof applies to revocation of an adult family home license, (2) did Olympic operate the home at “over-capacity,” as defined in the Department’s AFH rules, and (3) did the Review Judge violate the appearance of fairness doctrine?

The Department’s revocation decision was based upon the preponderance of evidence standard, rather than the higher “clear, cogent and convincing” standard. If this Court determines the latter standard to be the proper one, the decision must be reversed.

The Department conceded that it would not have revoked Olympic’s license but for the claimed over capacity operation under WAC 388-76-10960. The ALJ found that the people at the AFH whom the Department considered caused an “over capacity” for Olympic’s

license were actually just visitors, high functioning residents of an affiliated AFH across the street who made their own decisions and came and went as they pleased. Consequently there was no violation of the rule because there were only 6 “residents,” as mandated by the regulations. The ALJ also rejected all of the Department’s minor allegations.

Ultimately another issue has surfaced, whether the Olympic received a fair decision from the Review Judge, because the Review Judge went beyond the issues presented to her and acted as an advocate for the Department, not as a fair and impartial decision-maker.

II. ASSIGNMENTS OF ERROR

This Court reviews the decision of the Department’s Review Judge upholding the decision to revoke Olympic’s license. The Assignments of Error are made as to that Decision. The Review Decision and Final Order of the Department revoking Olympic’s adult family home license (“Final Decision”) must be reversed because:

1. The Review Judge applied the wrong standard of proof.

Statement of Issue: In administrative review of an adult family home license revocation, do the State and U.S. Constitutions require that the burden on the Department to establish that the

revocation is supported by clear, cogent and convincing evidence?

2. The Department's Final Decision errs because Olympic's adult family home did not exceed its licensed capacity of 6 residents, under the standards in WAC Ch. 388-76.

Statement of Issue: Does WAC chap. 388-76 require that person who were the residents of another licensed adult family also be considered residents at Olympic's home?

Statement of Issue: Is the claimed violation as to licensed capacity the only regulation named by the Department that could be the basis for revocation of Olympic's license?

3. The conclusions of licensing deficiencies in Olympic's AFH found in Conclusions of Law:

21-22 (Olga's dental care),
23 (John's blood glucose testing),
24-27 (Access to medications),
28-29 (Alleged swallowing problem of Don),
30-34 (Timing of Don's assessment upon admission),
35-36 (Medication organizer),
37-38 (CPR/First aid card),
39-40 (Resident care management),
43-47 (Negotiated Care Plans),
50- (Meals and food),
55-56 (Emergency lights),
57-58 (Posting of Inspection Results),
59-61 (Understanding of Requirements),
62-71 (Remedies),
73-74 (Investigation);

and the findings of fact upon which they purport to be based are not supported by substantial evidence and violate the regulations upon which they purport to be based.

Statement of Issue: Must each finding and conclusion be reversed based upon the record?

Statement of Issue: Does any of the claimed violations in Conclusions 21 through 74 support revocation of Olympic's license?

4. The Review Judge had an obligation to recuse herself because of the appearance of fairness doctrine.

Statement of Issue: Does the appearance of fairness doctrine prohibit a Review Judge from acting as an advocate for the administrative agency for which she works?

III. STATEMENT OF THE CASE

A. Procedural.

As the result of an inspection that occurred on November 2 and 13, 2009 (AR 720-35), on December 16, 2009, the Department issued an order revoking Olympic's AFH license. (AR 715-19). Olympic appealed this order.

This appeal went through two stages of administrative review, first by Erika Lim, an Administrative Law Judge from the Office of Administrative Hearings, an independent agency. The case was tried for

5 days with 20 witnesses, including 6 family members or friends who had regularly observed the care at Olympic's licensed adult family home ("AFH"). The family members and friends of the residents of the home testified that Olympic and its owner, Galina Baida, provided good care to the residents, who ranged in age from 82 to 101. They found the care, lodging and food to be excellent. The ALJ rendered an Initial Decision (AR 185-265) that rejected the contentions of the Department, found no violations of the AFH regulations and ordered reinstatement of the Olympic's license.

The Department sought review of the Initial Decision, to the Department's Board of Appeals. The Department in its Petition for Review challenged just 9 of the 123 findings of fact in the Initial Decision (AR 164; Initial Decision FF 4.16, 4.24, 4.25, 4.27, 4.146, 4.149, 4.146 4.161 and 4.221). The Petition for Review also challenged the 14 of the 15 conclusions of law. (AR 165).

Olympic responded to the challenges to the 9 Initial Decision Findings of Fact (See quotation in Final Order, AR 16-19). Olympic had no notice at any time that any other Findings in the Initial Decision were being challenged or subject to revision and no opportunity respond to any challenges that were posed by the Review Judge. Nevertheless, the Department's Review Judge re-wrote nearly all of the Initial Decision's

Findings of Fact, even though 114 of them were not contested by the Department. She also reversed all but one of the ALJ's conclusions of law, as well as the decision of the ALJ reversing the Department's revocation order. (AR 132-33)

The Department's revocation letter of December 16, 2009 cited only one regulation for the authority to impose a revocation remedy: WAC 388-76-10960(16). (AR 717) That regulation pertains only to the allegation that the AFH was "over capacity," that is, that it had more than the 6 residents allowed by its license.¹

Olympic only had 6 residents, consistent with its license.

The Review Decision and Final Order, AR 1 through 135 ("Final Order"), errs both as to the standard of proof applicable to license revocation cases and in the interpretation of the Adult Family Home rules in WAC chap. 388-76.

IV. STANDARD OF REVIEW/PROOF

Olympic contests Conclusions of Law 4-5 and Conclusions of Law 9-14, as to the standard of proof in a license revocation hearing for an adult family home.

¹ This was the only regulation that authorized the revocation that pertained to the allegations against Olympic (Tr. II:108)

The State Constitution and case law from our and the U.S. Supreme Courts require that the standard of proof for revocation of this license must be evidence that is clear, cogent and convincing.

In general, the Administrative Procedure Act governs the matter before this Court. The Department agrees that it has the burden of proof, but the initial question is: Is that burden by a mere preponderance of the evidence or by clear, cogent and convincing evidence? Both standards have been applied in different types of license revocation matters.

The general standards were recently summarized in *Hardee v. Department of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339, (2011):

The Administrative Procedure Act (APA) governs judicial review of administrative agency decisions. RCW 34.05.510; see also *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The party challenging an agency decision has the burden of demonstrating the invalidity of the agency's action. RCW 34.05.570(1); see also *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008). The APA provides nine bases on which to challenge an agency decision, two of which involve instances where "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied" and where "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(a), (e); see also *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. When reviewing an administrative agency decision, we stand in the same position as the superior court. *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. Whether an agency order, or the statute supporting the order, violates constitutional provisions is a question of law and "[w]e review

issues of law de novo.” *Id.*; *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). An agency order is supported by substantial evidence if there is “ ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’ ” *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38 (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

Whether an administrative decision complies with constitutional due process is a question of law that the court reviews de novo. *Hardee v. Department of Social and Health Services*, *supra*; *Thurston County v. W. Wash. Growth Mgmt. Hr’gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008).

In *Nguyen v. State Department of Health Medical Quality Assurance*, 144 Wn.2d 516, 29 P.3d 689 (2001), the Court overturned a revocation of a physician’s license because it was based upon proof by a mere preponderance of the evidence. The Court held that constitutional due process requires a clear, cogent and convincing evidentiary standard because:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of “life, liberty, or property, without due process of law.” The “right” is due process, Dr. *Nguyen’s* interest is his property, his liberty, or both.

At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’

interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). A medical license is a constitutionally protected property interest which must be afforded due process. *Painter v. Abels*, 998 P.2d 931, 940 (Wyo.2000); *Johnson v. Bd. of Governors*, 913 P.2d 1339, 1345 (Okla.1996); see also *Wash. State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983) (“A professional license revocation proceeding has been determined to be ‘quasi-criminal’ in nature and, accordingly, entitled to the protections of due process.”).

This decision in turn is based upon the prior holding of the Court that a professional license is a property interest for which revocation requires due process. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 732, 818 P.2d 1062 (1991).

The Supreme Court followed up on *Nguyen* with a case involving revocation of a nursing assistant’s registration in *Ongom v. Department of Health*, 159 Wn.2d 132, 134, 148 P.3d 1029 (2006). The Court found *Nguyen* indistinguishable and reversed the revocation, which applied the based upon a preponderance of the evidence test. Courts of Appeal were called to apply these decisions to other types of licenses and came to differing results, depending on the type of license involved, ranging from exotic dancers (preponderance) to licensed engineers (clear cogent and convincing evidence). *Hardee*, 172 Wn.2d at 9.

Hardee involved a child care license. In upholding the revocation based upon a preponderance of the evidence, the Court

created a dichotomy and stated that “not all state-granted credentials constitute a professional license.” *Id.*; emphasis in original. *Hardee* overrules *Omgon*, based upon its analysis of the characteristics of that license under the constitutional tests, but it did not overrule *Nguyen*.

No case has determined whether the license at issue in this case, that of an adult family home, is within the *Nguyen* analysis or that of *Hardee*. Thus, this Court must determine the applicable standard from the constitutional principles and three tests accepted as the basis for both *Nguyen* and *Hardee*, which are found in *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) and *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Nguyen, at 522; *Hardee*, 172 Wn.2d at 10.

A. First Mathews Test – Private interest

Applying these three tests, we first look at the nature of the private interest involved in these proceedings, a license to operate an adult family home (AFH). We follow the three-step analysis course that the *Hardee* court stated, while at the same time recognizing that

substantial differences exist between that type of license and the one at hand.

The distinguishing factor between *Nguyen* and *Hardee* is whether there is a “personal interest that compels a standard of proof beyond a preponderance of the evidence.” *Id.* The personal interest is determined from the statutory scheme and effects of a license revocation. *Id.* In the present case there is just such a personal interest.

WAC 388-76-10005(2) provides: “(2) No person or entity may provide personal care, special care, and room and board for more than one resident without a license.” The revocation of a license has a devastating effect for both the entity holding the license and those who own and operate it. The Department must deny a license to an applicant where:

“It has been less than twenty years since the applicant surrendered or relinquished an adult family home license after receiving notice that the department intended to deny, suspend, not renew or revoke the license.”

WAC 388-76-10120(2); emphasis added. This applies not just to the entity that holds the license but also to its owners and providers,

WAC 388-76-10115:

In making a determination of whether to grant an adult family home license, the department must consider:

(1) Separately and jointly each person and entity named in an application, including each person or entity affiliated with the applicant;

(2) Information in the application;

(3) Other documents and information the department deems relevant which may include, but not be limited to:

(a) Inspection and complaint investigation findings in each facility or home in which the applicant, person affiliated with the applicant, or owner of five percent or more of the entity provided care or services to children or vulnerable adults; and

(b) Credit information.

(4) The history of convictions and other circumstances described in WAC 388-76-10120 and 388-76-10125 for each individual listed on the application including, but not limited to the following:

(a) Applicant;

(b) Person affiliated with the applicant;

(c) Entity representative;

(d) Caregiver;

(e) An owner who:

(i) Exercised daily control over the operations; or

(ii) Owns fifty-one percent or more of the entity.

(f) Any person who may have unsupervised access to residents in the home; and

(g) Any person who lives in the home and is not a resident.

Therefore, the revocation of the license of Olympic Healthcare II, LLC also prevents its 100% owner, Galina Baida, from being an applicant, an owner, an entity representative, a person affiliated with an applicant, or a caregiver. Ms. Baida owned and controlled the Olympic in these proceedings. She owns another limited liability company that operates a second adult family home across the street from the home at issue in this case. She is fighting not just for an entity or a particular site but for her personal ability to be licensed and her continued involvement in the industry for the next twenty years.

Moreover, she is a nurse (LPN) and that license can be affected by actions taken by the Department against the adult family home. The license is the result of study and examination by the Board of Nursing, WAC 246-840-050 and WAC 246-840-025 (quoted in Appendix A hereto). LPNs perform their work in both routine and complex medical situations. WAC 246-840-705.

Like doctors, lawyers and other professionals, nurses' licenses are also subject to continuing education requirements to remain valid. WAC 246-840-203 (531 hours of practice and 45 hours of continuing education each 3 years). Thus, the license of Galina Baida as a nurse is like the physician license in *Nguyen* and the engineer license in *Nims v. Wash. Bd. of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002), as to

which the higher burden of proof is applicable under due process. It is not like a dancer's license or a child care agency.

Baida's nursing license is also jeopardized by these proceedings and the revocation order of the Department, if the Board of Nursing finds from the Final Order that she has engaged in unprofessional conduct. RCW 18.130.050(15) and 18.130.130, Uniform Disciplinary Act for Professionals. She is subject to discipline by the Board of Nursing, Department of Health. See RCW 18.130.080-.120 and 18.130.180 (Unprofessional Conduct).

To summarize, the first element of Mathews is met. An important set of personal rights and private interests is at stake in these proceedings, including the ability of Ms. Baida to practice her medical profession. As the Court said in *Nguyen*, at 522:

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution.”

The following quote from *Nguyen*, in turn quoting from *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)), sums up the situation as to the medical licenses involved in this case:

The interest of the medical practitioner in a professional disciplinary proceeding is obviously much greater than that which would be implicated by the mistaken rendition of a mere money judgment against him. It is much more than the loss of a specific job. It involves the professional's substantial interest to practice within his profession, his reputation, his livelihood, and his financial and emotional future. That the public has an interest in the competent provision of health care services lends even greater importance to the assurance against erroneous deprivation which a higher standard would promote, as ultimately the public is dependent upon the provision of such services, not their elimination. An inadequate standard of proof increases the risk of erroneous deprivation and, therefore, requires recognition, as so many other courts have, that the constitutional minimum standard of proof in a professional disciplinary proceeding for a medical doctor must be something more than a mere preponderance.

This is equally applicable to nurses and every other professional license for the medical care of the public. The Final Order is based upon the preponderance of the evidence standard, Conclusions 9-14, (AR 94-97), and refused to apply the higher evidentiary standard, even as it recognized that the license is a constitutionally protected right. Conclusion 11 (AR 97); *Conway v. DSHS*, 131 Wn. App. 406, 418, 120 P.3d 130 (2005). The interest at stake is the professional licenses of both the AFH operating company and the nursing license of its owner, Galina Baida. The revocation of the AFH license is a prohibition on providing any AFH care for twenty years, and it may also result in the revocation of the license of Galina Baida to be a nurse. *Hardee* is entirely distinguishable, because the Court there observed, 172 Wn.2d at 16:

In the present case, the Department's revocation of *Hardee's* license is not an absolute prohibition that terminates her right to provide child care of any sort. Rather, the revocation is a withdrawal of the State's endorsement and certificate of approval.

The Court also said that the focus must be on "objective measures to determine the value of the property interest that the State seeks to take away – i.e., the license." *Id.*

Applying the objective measures listed by the *Hardee* Court, the longtime of the effect of the revocation – twenty years, the expense of the specialty courses to qualify for the AFH license and the requirement and expense of a nursing education place this case in the *Nguyen* category with the higher standard of proof.

The first Mathews test requires the standard of clear, cogent and convincing evidence.

B. Second Mathews Test: Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards

The present case is an excellent example of why additional safeguards are necessary. The ALJ rejected the Department's contentions after listening to and observing the witnesses. The Review Judge did not have such a benefit and took the side of the Department 100%, reversing or modifying every finding and conclusion. Olympic and Ms. Baida had no notice even of who would be the Review Judge

and certainly no ability to appraise the bias against them that is shown in the Final Order. If they had known, they could have filed an affidavit of prejudice, since the Review Judge was exercising all of the same power as the ALJ. RCW 34.05.425. Olympic and Ms. Baida need a higher standard of proof to protect their interests from the same arbitrary treatment they received from the Department's operations people.

Contrary to the conclusion of the *Hardee* Court, the 2-step administrative process in this case does not provide the procedural safeguards of an unbiased hearing, because the determinations of the independent decision-maker, the ALJ, can be ignored by an employee of the Department, the Review Judge. In fact that is what happened in this case and why the second Mathews test is failed.

C. Third Mathews Test: Government Interest.

Contrary to the situation in *Hardee*, no children are involved and no physical or sexual abuse was even alleged in this case. The primary allegation has to do with "over-capacity," which the Department itself allowed when the Centralia floods occurred. There is no "paramount" interest at stake in this case. It is simply a matter of a good provider suffering from the Department's erroneous interpretation of the law. We submit that the interest of the residents in maintaining their home and getting the care they so enjoyed far outweighs the convoluted logic that

is offered in support of the Department's revocation. The *Mathews* third test is not met in this case.

Therefore, we submit that the first reason the decision of the Department must be reversed is that it is based upon an unconstitutional standard of proof, and errs as a matter of law. RCW 34.05.570(3)(a) and (c). It also violates WAC 388-02-0485, because there are requirements of the constitution that require a different standard of proof. cf. Final Decision, (AR 97, Concl. 14).

This Court has authority to review the imposition of the revocation sanction.

This Court reviews the Review Decision and Final Order in this case on the record of the administrative tribunal, not of the superior court. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

To determine the propriety of a revocation the Court in this case should also take into account whether, if there were any violations actually proven by the appropriate standard, they could justify the remedy of revocation, rather than some lesser remedy such as a condition on the licensee's license, as well as the testimony regarding the extraordinary level of care provided by the Appellant and the impact that revocation would have on the residents.

WAC 388-76-10970 authorizes the Department to impose reasonable conditions on the adult family home license, within a specified time, training related to the deficiencies, limits on the type of residents the provider may admit or serve, discharge of any resident when the Department finds discharge is needed to meet the resident's needs or for the protection of other residents, change in license capacity, and prohibition of access to residents by a specified person. Department witnesses Corey and Hildreth stated that the Department discussed conditions on the license but only in connection with the overcapacity claim. (Tr. II:105-07; III:175-77) The silence on all other claims speaks volumes as to the lack of a need for any remedy whatsoever other than the correction of any actual deficiencies within a specified period of time.

V. "OVER-CAPACITY" - OLYMPIC DID NOT OPERATE IN VIOLATION OF WAC 388-76-030 AND ASSOCIATED REGULATIONS

In Conclusions of law 15 through 20 (AR 97-102) the Review Judge found a violation of WAC 388-76-030 and the basis for license revocation in WAC 388-76-10960(16). The Conclusions contain findings of fact based upon the record and the following conclusions: (1) the provisions WAC 388-76-030 "do not preclude counting persons who resided in another AFH (House 1) on a full-time basis toward the total

number of ‘...persons in need of personal or special care...’ present at House 2 (AR 99);” and (2) an appendix to a federal regulation provides authority to interpret the requirements of WAC 388-76-030 (AR 100); and (3) Olympic violated a regulation, WAC 388-76-10195(1), that did not exist at the time of the alleged incidents (AR 101). The internal findings are not based upon substantial evidence in light of the entire record and the conclusions of law are erroneous.

1. WAC 388-76-030 pertains only to the “residents” residing at the licensed AFH.

License capacity is defined in WAC 388-76-10030, which provides:

- (1) The Department will only issue an adult family home license for more than one but not more than six residents.
- (2) In determining the home’s capacity, the Department must consider the:
 - (a) structural design of the house;
 - (b) number and qualifications of staff;
 - (c) total number of people living in the home who require personal or special care, including:
 - (i) Children; and
 - (ii) other household members
 - (d) The number of people for whom the home provides adult day care; and
 - (e) The ability for the home to safely evacuate all people living in the home.

(Emphasis added.) The plain meaning of the regulation is that license capacity is addressed to the people living in the AFH other than staff, and receiving care. When it issued the license to Olympic the

Department determined under this standard that 6 residents was the licensed capacity of the AFH.

The term “resident” is defined in WAC 388-76-10000 to mean:

“any adult unrelated to the provider who lives in the adult family home and who is in need of care and for decision-making purposes, the term “resident” includes the resident’s surrogate decision-maker following state law or at the resident’s request.”

In short, the license capacity means not more than six persons living in the home, that is, persons who dwell there permanently or for a considerable period of time and who receive care. It does not include people who live elsewhere and happen to visit at the adult family home, even if they receive personal care where they live. WAC 388-76-10030(2)² specified that the licensed capacity will be listed on the license:

- (1) The resident capacity number will be listed on the adult family home license and the home must ensure that the number of residents in the home does not exceed the resident capacity.

Thus, the number on the license is conclusive.

Olympic’s home had only 6 “residents,” as defined in WAC 388-76-10000, because only 6 people other than staff were living there. The error of the Final Order is that it includes in its count as “residents” people not living at the AFH, if those people were in need of personal or

special care. (AR 102, Concl. 20). WAC 388-76-030, as in effect in November 2009, had nothing about including people who were residents of other adult family homes in the capacity count. The regulation requires that a person to be counted must both be living at the AFH and that the person needs personal or special care. *HJS Development, Inc. Pierce County*, 148 Wn.2d at 473, fn.95 (“Statutory phraxes separated by the word ‘and’ generally should be construed in the conjunctive.”)

There is no evidence that the House No. 1 residents ever lived at House No. 2, or that any stayed overnight at House No. 2, except during the floods when the Department approved moving residents from House No. 1 over to House No. 2 on a temporary basis, because House No. 1 was under 4 feet of water. (AR 33-4; Finding 9). Finding 6 states that there were 6 residents at House No. 2: Mildred, Lola, Olga, John (also known as Les), and Don (AR 32). Thus, this finding itself precludes any conclusion that House No. 2 was “over-capacity.”³ The Final Order rewrites the regulation, in violation of established principles of statutory construction.

² As noted in the Final Order (AR 100, fn. 568), this regulation was modified in February 2010, WSR 10-03-064, after the revocation order in this case.

³ Each of House No. 1 and House No. 2 was separately licensed for 6 residents. (AR 30-31; Finding 1).

The basic rules are summarized in *Odyssey Healthcare Operating BLP v. Washington State Dept. of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008):

The rules of statutory construction “apply equally to administrative rules and regulations.” *Children’s Hosp. and Med. Ctr. v. Wash. State Dep’t of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999), (quoting *State v. McGinty*, 80 Wn. App. 157, 160, 906 P.2d 1006 (1995)), review denied, *Children’s Hosp. and Med. Ctr. v. Wash. State Dep’t of Health*, 139 Wn.2d 1021, 994 P.2d 847 (2000). Where statutory language is plain and unambiguous, courts derive the statute’s meaning from the wording of the statute itself. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). But we must also examine the context of the “statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.” *Wash. Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). [145 Wn. App. at 141-2]

.....

We must avoid interpretations that are unlikely or absurd. *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963). A reviewing court should construe agency rules in “a rational, sensible” manner, giving meaning to the underlying policy and intent. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003) (*Cannon v. Dep’t. of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002)). [145 Wn. App. At 143-44]

The Final Order’s error comes in its ignoring the definition of a “resident” in WAC 388-76-10000 and the regulation’s dual requirement that to be a “resident,” the person (a) must actually live at the AFH and (b) be a person needing personal care. Instead, the Final Order focused solely on the nature of the House No. 1 residents to erroneously conclude

that the House No. 1 residents were also residents at House No. 2.
Concl. 20.

2. Federal Rules provide no authority for interpretation of WAC chapter 388-76.

Olympic disputes that the House No. 1 residents were also residents at House No. 2, because (a) they lived only at House No. 1 and (b) they visited with their friends across the street and were not receiving “personal care.” The first point is made by the Findings and discussion above.

As to the second point, the Final Order cannot find any basis in state law or regulations a definition of “personal care,” so it reaches for a definition in an Appendix to regulations governing a federal program (AR 100; Concl. 18) for its definition of “day care services – adults” to decide if the House No. 2 might have been giving “adult day care” to residents of House No. 1.

The error is obvious; the phrases are different, “personal care” vs. “adult day care.” Moreover, there is no authority that we have found that allows a tribunal to refer to a federal program’s definition related to its particular regulations to define a state requirement. If the Review Judge needed a definition, she should have resorted to a dictionary, as the courts of this state do, if there is an ambiguity in the first place. When a

statutory term is undefined, the court may look to a dictionary for its ordinary meaning. *State v. Gonzalez*, 168 Wash.2d 256, 263, 226 P.3d 131, cert. denied, — U.S. —, 131 S.Ct. 318, 178 L.Ed.2d 207 (2010).

In the absence of an ambiguity, there is no room for judicial interpretation or resort to extrinsic aids to interpretation. *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011) (“Where the language used...is plain and unambiguous and well understood in its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.”)

3. The Final Order erroneously ignores half of the qualifying requirements for a “resident.”

Finally, the Final Order’s focus solely on “personal care” misses the point of capacity, which is simple: Were there more than 6 people living at the House No. 2 who also needed “personal care”?

There is no evidence that any number of actual residents greater than six ever lived at House No. 2. At a minimum, this means that the number must be greater than 6 people who sleep at the AFH. There is no evidence that any of the House No. 1 residents ever stayed overnight at House No. 2, except during the floods.

That residents of House No. 1 would come over and visit with friends or check in with Galina Baida before going off on one of their ventures does not make House No. 2 “overcapacity.”

The residents of each House were two different kinds of resident populations, with the Appellant’s population being quite elderly and in need of geriatric care, and the people from House 1 being highly functional developmentally disabled persons. Galina Baida testified that House 1 residents came to House Two because they wanted to visit with people across the street, or if she happened to be over at House Two, they would check in with her before going on to other places. In each case, it was their choice.⁴

There is no evidence that Ms. Baida ever forced them to come to House No. 2 from House No. 1. Neither of the Department’s witnesses, Smith and Shumake, testified that they were at House No. 1 and in a position to make any judgments about the circumstances under which the House No. 1 residents decided to come over to visit their friends at House No. 2. See, e.g., Smith’s admission she was not at House No. 1

⁴ Though both Thilynn Smith and Tami Shumake testified, neither corroborated the alleged statement attributed to one of them that two House I residents had been at House II since 7 a.m. on one of the days of the DSHS inspection. There is no evidence that House No. I residents get up that early, much less go visiting. This is another of the inaccuracies and uncorroborated statements in the Statement of Deficiencies.

and could not testify to the circumstances that caused the House No. 1 residents to come over to House No. 2. (Tr. II:32-33). She did testify that Walter from House No. 1 liked visiting with Mary at House No. 2. (Tr. III:34.) She also testified that the House No. 1 residents would just show up at House No. 2, unaccompanied. Tr. I:92. Conclusion 19 errs, among several reasons, because it is not supported by substantial evidence. Ms. Baida testified she never required the 5 House No. 1 residents to go to House No. 2.

Gary Otterness, a caregiver and the residential care manager, testified to the voluntary nature of the visits, when he said that one of the residents at House No. 1 (Walter) was very unhappy because Mr. Otterness would not let him come in and visit at House No. 2, following the Department's actions in this case. No one contradicted these statements. In summary, the Appellant honored the resident rights of House No. 1 residents and allowed them to come over and visit with their friends across the street, at least until prevented from doing so by the Department.

Pam Hildreth, the DSHS supervisor who made the revocation decision, admitted: "...there is a concern for resident rights, that there is nothing wrong with someone, for a short period of time, choosing to visit and then turning around and going home." Tr. III:176. Ms. Hildreth

conceded that the Department cannot prohibit a resident such as Walter from going over to House No. 2 to visit Mary, because that would impinge on resident rights. *Id.* Ms. Hildreth made it clear that the Department's position on overcapacity was based upon people needing care and services as the only indicator of who is a resident. Tr. II:177. This is plain error under the regulations.

The Final Order errs as a matter of law in holding that visitors from the adult family home across the street, House No. 1, were in fact "residents" in excess of the license capacity of Olympic's adult family home. Mr. Otterness, the Resident Care Manager since November 2009 and a worker at the AFH before that, testified without equivocation that there were never more than 6 residents at the House No. 2. (Tr. IV: 282)

Accordingly, this Court must determine that the Appellant never exceeded its license capacity, and it has never refused to comply with the regulations, nor failed with respect to WAC 388-76-10030. Conclusions 15 through 20 are in error.

Because the residents of House No. 1 (a) did not live at House No. 2, (b) were "generally less frail and higher functioning than the House 2 residents," (AR 33; Finding 6), (c) were capable of independently going any place they chose (Tr. II:170), (d) liked to visit with their friends at House No. 2 (Tr. II:165-169) and received the same

courtesies afforded to other visitors to Olympic's AFH, the Final Order's conclusions of overcapacity are simply erroneous.

No remedy under WAC 388-76-10960(16) is available to be applied to justify revocation of the Appellant's license, because there was no operation of the AFH in excess of the licensed capacity of 6. There is no evidence that the House No. 1 residents ever lived at House No. 2 or received personal care at Olympic's house No. 2.

VI. CLAIMED ERRORS AS TO CAREGIVING

Olympic contests the following Conclusions of Law and their underlying fact assertions as inconsistent with RCW 34.05.570(3)(b), (3)(d), (3)(f), (3)(g) and (3)(i) and in the Findings of Fact as not supported by substantial evidence, as challenged in the discussion below. None of the following claimed violations is a justification for a license revocation, because not one of them is listed in the regulation upon which the Department relied in imposing the revocation remedy, WAC 388-76-10960, and the Department conceded that they would not have resulted in license revocation without the "capacity issue. (AR 47; Finding 42)

1. Conclusions of Law 3 through 6, as to the scope of Authority of the ALJ and Review Judge.

The Final Order recognizes that the ALJ and the Review Judge do not have broad equitable powers but also recognizes that this Court

does have such powers to correctly decide this case. AR 91. Olympic concurs and commends this principle to the Court.

Conclusion of Law 6 errs, because it admits that the Final Order decides issues posed by the Review Judge and not by the parties. (AR 93) The enabling authorities cited in the Final Order do not grant to the Review Judge the authority to be both prosecutor and decision-maker. Elemental due process requires that the revocation order be based only upon those claimed deficiencies in the operation of House No. 2 that are cited by the Department in the revocation order, Exhibit D-1 (AR 715-19).

Olympic has been denied elemental due process of a fair and impartial decision-maker by this proactive, biased approach. See also the discussion below as to advocacy of and creation by the Review Judge of issues not litigated by the parties and the appearance of fairness.

Conclusion No. 4 (AR 91-92) holds that recitation of the testimony in the Initial Decision's findings of fact means that the findings were not supported by a preponderance of the evidence. This makes no sense and is a new issue created by the Review Judge. The recitation repeats the evidence. The Initial Decision resolves all conflicts of testimony in its conclusions, and the Review Judge has re-written

nearly all of the Findings to support the Department's case. Again, this is violative of due process and unfair to Olympic.

Conclusion No. 5 (AR 92) is an assertion that the Review Judge can do whatever she wishes in the decision-making process. Actually, RCW 34.05.464(4) requires her to give due regard to the ALJ's opportunity to observe the demeanor of the witnesses at the hearing. We note the statement in Conclusion 6 that the Review Judge gave "due regard to the ALJ's opportunity to observe the witnesses," but Olympic can find no evidence in the Final Order that this is anything more than lip service to the statute. Plainly, the Final Order follows the Review Judge's erroneous assertion and commits error.

2. Conclusion of Law 22, WAC 388-76-10400(2) regarding resident Olga's dental care.

The Department's revocation order, Ex. D-1, does not refer to a violation of the care and services regulation, WAC 388-76-10400, as to the dental care for resident Olga. Consequently, Conclusion 22 (AR 102-3) is not a basis for any revocation order.

The Statement of Deficiencies, Ex. D-2 (AR 720-35) does refer to Resident 3 (Olga) and her gradual dental decline. If this allegation is to be considered at all as part of a review of the Final Order, the Final Order fails to take into account all of the evidence, including the

testimony of Olga's dentist and staff persons concerning her combativeness and refusal to have dental care at times. Dr. Kerry O'Connor testified to a gradual decline from 2004 through 2009 because of Olga's refusal of dental care or inability to understand what to do with her dental care. (Tr. 144-151, 153). The dentist did not think he could do tooth restorations because of Olga's uncooperative attitude and refusal to follow orders. He would not push Olga to the point of fighting in order to get her the care she needed, because there is a risk of injury to either the resident or the caregiver if pushed too far. (Tr. 154-55). Ms. Baida tried to find out what she could do to make Olga's oral health better and explained to Dr. O'Connor the problems they were having in trying to get Olga's teeth brushed. His advice was to try to do the best they can. (Tr. 150). Olga continued to consume at night the sweets her husband brought her each day.

Conclusion of Law 22 also errs in concluding that there was some fault of the AFH in Olga not getting the care that ideally she would have had. (AR 103) First, Olympic did not admit that it failed to recognize that Olga could not brush her own teeth. Rather the testimony was that Olga refuses oral care. Caregiver Tami Shumake testified that Olga would refuse care and even threw her toothbrush, breaking it 2 times, (Tr. I:115), as did Mr. Otterness (Tr. II:153). Consequently,

between the testimony of the Department's witnesses, it was clear that Olga made choices to not have the dental care that she needed, and her decline was based upon those choices and her choice to eat sweets brought to her by her husband, leaving sugars in her mouth, despite attempts by AFH staff to have her husband stop bringing them to her. (Tr. II:154.) As the Initial Decision, Conclusion 5.8 (AR 254) correctly finds, "[t]here was no evidence in the record that the caregivers did not provide oral health care or did not try to provide oral health care."

3. Conclusion of Law 23, Testing for John's Blood Glucose Levels.

Conclusion 23 is based upon Findings 68-71 (AR 58-60), but they are inconsistent with the evidence. There is no substantial testimonial evidence that resident John had started eating before his blood glucose test or that there was any violation of the physician orders. Mr. Otterness observed what happened and testified, (Tr. II:151-52) that: On November 13, 2009, he saw a caregiver wheel John to the lunch table. Before John ate anything, Ms. Baida pulled his chair back from the table and told him that they had to check his blood glucose. Ms. Baida then took a blood glucose reading. The Department's witness, Candace Corey, testified that she was at the AFH that day finishing the investigation process. (Tr. I:214) She did Candace Corey did not testify

that she was in a position to see Ms. Baida give John the blood glucose test or, more importantly, the sequence of blood glucose testing and commencement of eating. Further, as the Initial Decision found, there is no evidence in the record as to when on that day the blood glucose reading was to be taken. (AR 255) Even if it was before the meal, it was timely done before John had his meal. There was no violation established by the Department, nor any showing that the alleged violation was a basis for the license revocation.

Findings 69 through 71 deal with an issue made up by the Review Judge, whether the readings for John were high. Nothing in the revocation letter, Ex. 1, says that the revocation was related to high blood glucose readings. There is no testimony as to what John's doctor thought were normal or abnormal blood glucose levels for John. John's son Lawrence Ray testified that his father always had high blood glucose levels, because he was diabetic, even when he was being treated with insulin for the condition. (Tr. IV: 144.) John's blood sugar levels fluctuate, and Mr. Ray testified he did not know what was normal for his father. (*Id.*) The doctor had discontinued John's insulin on September 1, 2009. (Ex. 2, AR 717; Tr. IV:143)).

The Final Order speculates as to the effect on health levels of high blood glucose levels, even as it fails to recognize that there was no

evidence of what was high or not for John. (AR 59; Finding 69) Ray also observed that low sugar alternatives were available for his Dad. (Tr. IV: 146) The Review Judge is not a doctor, and this Conclusion 23 is plain error and fails for lack of substantial evidence. The Department failed to carry its burden of proof.

4. Conclusions of Law 24-27, Access to Medications.

The Department failed to prove that any resident did not have access to medications that were prescribed for him/her when the resident needed them. Conclusion of Law 5.9 in the Initial Decision (AR 255-56) correctly summarizes the errors in both the Department's charges against Olympic and in the Final Order.

Two of the residents did not have prescriptions for the claimed drug that they did not get and the third, Don, got an effective non-narcotic medication, Diclofenac. The Final Order, Conclusion 24, dismisses the lack of evidence to support the revocation order with the conclusion that Ms. Corey made a mistake and mixed up the residents. But the issue that the Department presented and failed to prove is whether the measures that Ms. Baida took to secure narcotics resulted in the residents not getting medications when they needed them. There is absolutely no evidence that Lola or Mildred either failed to get appropriate medications when they needed them. Finding 78 (AR 62)

concedes that there is no evidence that Mildred ever requested Ativan/lorzepam. As found in Finding 77 (AR 62), Lola's family was satisfied with the care provided to her. Lola told Ms. Baida when asked that she was not in pain. (Tr. I:99.) Mildred improved while at Olympic's AFH. (Finding 79, AR 63) There was evidence that the provider tried to use non-addictive PRN (as needed) medications such as Tylenol, instead of Vicodin, a Class III narcotic. As to Mildred the Conclusion 26 speculates without that Mildred was unable to get her medications when needed. AR 105.

Finally, the record is clear that Ms. Baida did give a non-narcotic pain medication, Diclofenac, in case Don wanted something. See Initial Decision, AR 255. Finding 80 (AR 63) states that Don did not request Vicodin. Conclusion 27 (AR 105) concedes that Don regularly refused pain medication (Vicodin), then finds a violation if Ms. Baida had Vicodin with her or that it was in a locked narcotic cabinet. There is no evidence that (1) Don ever asked for Vicodin or (2) the available and provided Diclofenac was not sufficient to meet his needs. See Exhibit 12, Statement of Shumake (AR 438). Ms. Shumake testified that Ms. Baida always "made sure we had pain pills available for him [Don]. (Tr. I:98) In fact Don refused to take Vicodin. (Tr. I:98, 116.)

There was no violation of the rule regarding the resident's receiving care and services in a manner that supports, maintains and improves each resident's quality of life.

The Final Order errs in Conclusions 24 through 27 (AR 103-05), and the Department failed to carry its burden of proof of a violation of WAC 388-76-10400(3)(a), care and services in a manner and in an environment that: "(a) Actively supports, maintains or improves each resident's quality of life." A more specific regulation, WAC 388-76-10430(2)(d), requires only that the AFH ensure that the resident "(d) Receives medications as required;..." There was no evidence that any resident did not receive medications when required. There was evidence that Tami Shumake never called Galina Baida to request a medication. (Tr. II:176.) Also, Tami Shumake testified that the Vicodin for Don was discontinued because the "doctor said it wasn't needed." (Tr. I:114.) The Department failed in its burden of proving a violation, and the Final Order errs.

5. Conclusions of Law 28-29, Allegations of swallowing problems with resident Don.

Don came to the AFH as a resident in his last days on earth. The Final Order's Conclusions 28 and 29 (AR 105-6) that the AFH violated WAC 388-76-10400(2) and (3)(b) as to Don are not based upon evidence

in the record because neither his negotiated care plan nor his assessment was in the record. The Conclusions claim that the AFH did not appropriately address Don's "swallowing problem" and convert testimony about his tendency to cough while eating into "choking." Actually neither of these is accurate.

WAC 388-76-10400(2) is a general regulation requiring the AFH to give the resident the care and services he needs to be at his highest level of physical, mental and psychosocial well-being. The citation relates to Don's alleged "swallowing problem," which Conclusion 28 claims was stated in his assessment. However the Conclusion also concedes that the assessment is not in the record. (AR 105)

Don did not have a swallowing problem. He had an eating problem due to his advanced state in the dying process. Ms. Shumake testified that Don refused to eat, despite efforts of her and Ms. Baida to try to get him to eat. (Tr. I:116-17 "He would not open his mouth to eat.") Mr. Otterness testified that Don's "swallowing problem" was that he did not want to eat and for that reason did not want to swallow. (Tr. II:159.) He said unequivocally that he never saw Don choke on his food, though he had seen him cough at times while eating. (Tr. II:148.) Based upon consulting with Don's physician when Don was admitted on

October 16, 2009, they did not have him formally assessed as to swallowing, because the physician said there was no need. (Tr. II:160).

Olympic did take measures to encourage Don to get the food into him to keep up his strength. These included (a) offering him the food in small bites (*Id.*) and (b) offering him liquids in the form of water, juice and a health shake and (c) having his wife encourage him to eat while visiting daily, all without success, but the physician felt that “due to his [Don’s] condition and what he had assessed him at, that there was nothing further that we could do. (Tr. II:159-160) Don’s daughter also testified that he would take a bite or two, then he would hold the food in his mouth and refuse to eat. (Tr. IV: 113.) Ms. Kelly also said that Don was offered alternatives such as Ensure when he would not eat. She felt that Don’s needs were met. *Id.*

Mr. Otterness also testified how the staff daily encouraged residents to eat and offered them bananas, ice cream or anything else that would help get calories into the residents. The Conclusions of Law that the AFH did not adequately address Don’s swallowing problems is unsupported in, and in fact contradicted by, the record. The AFH did all it could for this resident, as was confirmed by Don’s physician.

6. Conclusions of Law 30-34, Don's assessment upon admission.

Conclusions 30-34 (AR 106-109) err in their interpretation of WAC 388-76-10330 as applied to the facts at the hearing. The rule allows an AFH to admit a resident without a formal assessment "in cases of genuine emergency." Don was admitted to the AFH on a Friday from the hospital without first receiving a formal assessment because David Robinson, the assessor, was not available and Ms. Baida thought that there was a genuine medical emergency. Mr. Robinson thought that Olympic could give Don the care he needed. (Tr. III:126) He testified that the hospital had done an assessment upon discharge of Don and felt it appropriate for Don to be discharged to Olympic on that Friday afternoon. (Tr. III:126-7)⁵

Ms. Baida believed that Don's admission on that Friday afternoon was an emergency because his life, health and safety were at risk, because he could become homeless and not have his care needs met upon discharge from the hospital that afternoon. She tried to get an assessment done the day of admission, but when Mr. Robinson, the assessor, was unable to come until the following Monday, Ms. Baida

⁵ He also testified on cross-examination that hospitals sometimes do not discharge if they feel the new facility is inappropriate. (Tr. III:136-7)

deemed it a true emergency for Don but that they could take care of Don.
Tr. II:141.

The testimony from Ms. Baida, Mr. Otterness, David Robinson and Don's wife, Doris, support this judgment of a medical emergency. Don was going to be discharged from the hospital on that day, a Friday. (Tr. II:146.) The AFH tried to get Mr. Robinson, the assessor, to do a needs assessment for Don when they learned Don was coming to the AFH at about 5:00 p.m. *Id.* He was brought to House No. 2 in an ambulance after an overnight stay in the hospital emergency room. (Tr. IV: 92.) Contrary to the statement in Conclusion 33, there was evidence that Don had to be admitted. He could not stay at the hospital. Mr. Robinson was familiar with the needs of Don and the ability of Olympic to meet those needs. Don's wife was unable to care for him at home, due to her own condition. (Tr. IV: 93-4.) Don had to go to a place where he could get long term care, and Doris chose House No. 2 because Ms. Baida is a nurse and other alternatives did not have a nurse, as Don would need. (Tr. IV: 94.) Mr. Robinson had no ability to get the assessment done on a Friday afternoon. Monday was the earliest it could be done.

So, Olympic admitted Don. Mr. Otterness testified that he and Ms. Baida took care of Don over the weekend, without any problems.

(Tr. II:143) In the face of no alternatives for Don and no ability to get an assessment done at that late hour, this was a reasonable judgment of an emergency and really the only course of action. Thus, there was no requirement to have a prior assessment, and the Olympic complied with the rule by getting it done as soon as possible the following Monday.

7. Conclusions of Law 35-36, medication organizer.

The allegations with regard to WAC 388-76-10480, Conclusions of Law 35-36 (AR 109-10) involve the medication and organizer for Don. The regulation provides the following requirements:

- (4) Medication organizer labels clearly show the following:
 - (a) The name of the resident;
 - (b) A list of all prescribed and over-the-counter medications;
 - (c) The dosage of each medication;
 - (d) The frequency which the medications are given.

The Initial Decision determined that a label for Don's organizer had been printed out but not stuck to the organizer itself. (AR 258) Finding 91 reflects the testimony of Ms. Baida and Caregiver Shumake that the label was printed but upstairs or had fallen off the organizer. (AR 68) Don's medication kit did not have labels on it as of November 2, 2009, but that was not the basis on which medications were given to him. Ms. Shumake testified that she would check the MAR (Medication Administration Record) each time to verify the medications and the

doses. (Tr. I:118; A. Ex. 12-1, AR 438). She also checked the pills in the organizer against the original pill bottles to verify that the pill being given was the pill that was prescribed. (Tr. I:137). Therefore, whether or not the label was affixed to the medication organizer box, the label was done and the caregiver who gave medication to Don verified each of his pills to the labeled bottles as to the resident name, the medication, the dosage and the frequency of administration. There was no violation of the rule.

8. Conclusions of Law 37-38, CPR/First Aid.

The Final Order (AR 110-11) concludes that Olympic violated WAC 388-76-10135(6) and 10260(3)(b), which require that the AFH ensure that each caregiver has a valid CPR and first aid card. The Conclusions are based upon FF 93-98, which incorrectly reflect the testimony and are not based upon substantial evidence.

Ms. Shumake, whose card was at issue, testified that Ms. Baida asked Ms. Shumake for verification of her card. (Tr. I:121) The record is clear that Ms. Shumake had a card when she was hired, but when asked for a copy of it, could not produce it because her purse was stolen. (Tr. I:122) She showed Ms. Baida a copy of the police report to verify the theft of the purse. (Tr. I:123; Ex. 1-11, AR 360) She did not know when it would expire. (*Id.*) She did not testify that she told Ms. Baida

that the card was expired (FF 95, AR 69), but that “I did not know when it expired.” (Tr. I:121) She also said that she did not know if her card was expired in the fall of 2009 when the inspection was done. (Tr.I:122) Nevertheless, the Review Judge made a credibility finding adverse to Olympic in FF 95 (AR 70). The determination is not based upon substantial evidence, and there was no conflict between Ms. Shumake and the testimony of Ms. Baida and Mr. Otterness on this subject.

The Final Order focuses on the word “ensure” in the regulation, claiming a violation because Ms. Baida could not ensure that the card was current because she did not see a copy of it. (Conclusion 38, AR 111). The Initial Decision determined that there was no violation because there is no standard in the rules for how one “ensures” that the caregiver has a card. The ALJ concluded that Ms. Baida’s verbal determination ensured that Ms. Shumake had a card and was sufficient compliance with WAC 388-76-10135(6). (AR 251).

The Initial Decision also concluded that the proper interpretation of WAC 388-76-10135(6) was that the requirement was on the caregiver actually have a valid CPR card, not the licensee. *Id.*

There is no evidence that Ms. Shumake was not competent, and Ms. Shumake testified that she had a card until it was stolen along with

her purse in October 2008. (Tr. I:123) She was told on numerous occasions that she had to have the CPR card. (Tr. II:138-39)

Conclusions 37 and 38 err because Ms. Shumake had a valid CPR card at the time of her hire, though Ms. Baida was unable to obtain a copy of it because Ms. Shumake's purse had been stolen in October of 2008. Ms. Baida took the steps available to her to ensure that Ms. Shumake had a valid card. The Final Order's Conclusions of Law err in their interpretation of WAC 388-112-10260(3)(b) and WAC 388-76-10135.

9. Conclusions of Law 39-42, Resident Care Manager.

The Department's Final Order (AR 111-114) applies a narrow and incorrect interpretation of the rule requiring a resident care manager to be at the adult family home. In this case, Olympic had a resident care manager, Thilynn Smith, who terminated her employment on October 23, 2009 (AR 71, FF 101). Ms. Smith gave her notice of quitting "a week and a few days" before October 23. (Tr. III:50) Ms. Baida tried to get her to stay on as a part-time employee in the role of resident care manager, and she initially agreed to do so. (Tr. III:49) Later she told Ms. Baida that she "can't" extend her employment. (Tr. III:28 -29) She went off to her other job. (Tr. IV:244)

The evidence was not contested but omitted in the findings of fact that Ms. Smith wanted a \$3.00 per hour increase in her wages. (Tr. III:49) When Ms. Baida offered something less, she gave her termination notice a day or two later. (*Id.*)

Mr. Otterness took and passed all of his classes for his RCM credentials on November 2 or 3, 2009, which was the first time that he could get the classes. (Tr. II:137) and was issued the certificate on November 7 (Ex. 1-24; AR 373), so at the time of inspection on November 2, 2009 he was qualified as an RCM though the qualification documentation was not issued until 5 days later. That was as soon as a replacement could be put in place.

The Conclusion of Law errs, because even as it concedes that there is flexibility and the ability of the Department to grant an exception to the resident care rule, it refuses to grant that exception. The refusal is both a misinterpretation of the rules, which must be reasonably interpreted, and abuse of discretion, which is also arbitrary and capricious. It refuses to take into account all of the facts and to apply the rule sensibly and to avoid absurd results.

10. Conclusions of Law 43-47, Negotiated Care Plans.

These Conclusions err in finding that the care plans were inadequate. Conclusion of Law 5.7 in the Initial Decision details

correctly how the care plans were in conformity with regulations requirements. AR 252-54. The requirements of WAC 388-76-10355 were met by Olympic.

The Final Order's Conclusions fail to take into account admissions and testimony by Department and Olympic witnesses and speculate as to facts. Conclusion 43 states that the care plans were not given to Ms. Corey, even though Mr. Otterness said she asked for them and he reached into the office desk and gave them to her on November 13, 2009. (Tr. II:146) Ms. Corey also testified that the care plans were incomplete (Tr. I:244), but then she testified that they contained what she was looking for in care plans. (See. e.g., Tr. I:248-49). Mr. Otterness testified that Ms. Corey asked for the care plans. The Department's witness and former resident care manager Thilynn Smith testified that she created the negotiated care plans with Ms. Baida, (Tr. III:59-65), so they were in existence and available at least by October 23, 2009,⁶ one to three weeks before Ms. Corey did her inspection visits. (Tr. III:60).

WAC 388-76-10315(1)(g), WAC 388-76-10350 and WAC 388-76-10380 were not cited as deficiencies that supported the revocation order in the Department's revocation letter, Exhibit D-1 (AR 715-19). Apparently, the reliance and discussion of these regulations in

Conclusions 45 and 46 are efforts by the Review Judge to find new violations as to matters that were not litigated. This is plain error and also deprives Olympic of due process by not having been given a chance to litigate the matter.

Finally, as these claimed violations, the claim of violation of WAC 388-76-10355, Conclusion 47 (AR 116), is not supported by substantial evidence, as the witnesses all testified to providing John with small bites and taking other measures to get him to eat. There is no evidence that John was ever at any risk of choking, and Mr. Otterness denied that he ever did choke. (Tr. II:148) The caregivers had the information needed to properly care of John's feeding needs. As with John, the Initial Decision correctly summarizes the facts and the lack of proof by the Department. (AR 252-254).

11. Conclusion of Law 50, Meals and Food.

Conclusion 54 (AR 119) finds WAC 388-76-10420 was not met because of inadequate quantity and quality of food at Olympic's AFH. This conclusion is not based upon substantial evidence and ignores the testimony of witnesses who were actually at the AFH and ate the food. As the Initial Decision determined, there was ample food, and there was ample evidence that it was good, nutritious and adequate to meet the

⁶ Ms. Smith quit on October 23, 2009.

needs of the residents. The family member witnesses spoke glowingly of the food that was served to the residents and to them when they visited; e.g., Roger Ledbetter (son of sometime resident Bob), Tr. IV: 168-69; Doris (wife of Don), Tr. IV: 96; Exh. 11-2; John's son Ray, Tr. IV: 146-47.

The Final Order fails to take into account the testimony that John went off of insulin because he was getting the proper diet at the adult family home. Tr. IV: 143.

The Final Order concludes that the food at House No. 2 was insufficient. (AR 117). This conclusion is not in conformity with substantial evidence offered by the witnesses named above and merely reflects that the Final Order was unwilling to recognize that the Department's investigator, Ms. Corey, failed to observe the food in storage and as served, and this contributed to erroneous conclusions. Mr. Otterness described the hallway food storage areas for both regular food and emergency food at House No. 2 (Tr. II:176-77). See also App. Exh. 6-3 (list of emergency food).

The investigator did not look at the two storage areas in the hallway or anywhere else, confining her investigation to asking to see a can of refried beans in the storage in the kitchen, so she could verify the "use by" date. She looked at the date when the can was given to her,

noted the date and said the beans were expired, without looking at anything else. Tr. II:178. Neither Mr. Otterness nor Ms. Baida, the only two people who purchased food for House No. 2, had never purchased the beans and could not understand how they got in the cabinet. (Tr. II:177-78) Refried beans were never on the House menu and were never served to residents.

Finally, the last basis for the food claim was that there was an “expired” bottle of Vegenaïse. There was no evidence that the Vegenaïse had spoiled, nor that it had been actually used in food preparation.

The substantial evidence demonstrated that the AFH was in conformity with WAC 388-76-10420 and 388-76-10840. There was no evidence that any resident was not served the three meals a day, snacks, and other items listed in WAC 388-76-10420. There was ample food for both regular and emergency supplies in House II and in the affiliated House I across the street. There was no evidence of any expired food being served to any resident, even if the interpretation of the label by the State’s investigator as “expired” was correct. The rules were not violated.

12. Conclusions of Law 55-56, emergency lights.

These Conclusions are based upon speculation and not upon the facts adduced at the hearing, which show that there were at least two flashlights that were working.

The AFH had 3 flashlights, two regular battery-powered and one rechargeable. Tr. II:192. The rechargeable was working, but would not stay on very long. One of the regular battery flashlights was fully functional, and one needed the batteries replaced from the supply just below where the flashlights were stored. *Id.* All of them were stored in the office, which is central to the AFH floor plan. Usually, there was only one staff person on duty most of the time, so the person had an emergency light to use.

WAC 388-76-10740 requires the AFH to have: “(2) Emergency lighting, such as working flashlights for staff and residents that are readily accessible.” (Emphasis added) The accessibility of the emergency lighting is not at issue. The Initial Decision (AR 261) notes that the provider could also have used her car headlights to provide emergency lighting. The Conclusions of Law speculating about people fumbling in the dark, such as in Concl. 56 (AR 120), do not support a violation. The evidence is unrefuted that the facility had two flashlights that worked and one (rechargeable) that worked part of the time, as well

as the backup car lights. There was no violation of WAC 388-76-10740 that is supported by substantial evidence.

13. Conclusions of Law 57-58, Posting of Inspection Results.

Again, the Initial Decision is correct in Conclusion 5.13 on this allegation under WAC 388-76-10585 (AR 260). The Final Order finds a violation because the Department inspection results on the bulletin board were partially obscured by a newspaper article extolling Olympic's AFH. However, the rule requires that the notice of any inspection citation be posted in a "visible location." The Initial Decision Conclusion 5.13 is correct, because the notice was on the bulletin board in an open and visible area of the office. The wording of the rule was met.

14. Conclusions of Law 59-61, Understanding of the Requirements.

The Final Order (AR 122) finds a violation of one of the most general regulations in the licensing regulations chapter, WAC 388-76-00020, which requires the licensee, Olympic, to have "the understanding, ability, emotional stability and physical health suited to meet the personal and special care needs of vulnerable adults. Conclusions 59-60 (AR 122-23) find violations of this rule because Olympic contested the citations as *valid*. This interpretation of the regulation is error for several reasons.

First, the Department has determined in issuing the license that this rule is met by Olympic and its staff, including Ms. Baida, Thilynn Smith, Tami Shumake and others. Second, Ms. Baida, the owner of Olympic and a nurse with specialty training, demonstrated at the hearing and in operating her home a thorough understanding of the requirements. See testimony of Baida, Tr. IV: 184 *et seq.* She is a licensed practical nurse and recited back and answered questions as to what was required under each rule. *Id.*; see also cross-examination, commencing Tr. IV: 229. Third, the family members have described how they chose Olympic's AFH because of the good care, special layout of the floor plan designed for care, food that was delicious, involvement of the staff with the residents, that the residents were happy with the care that they were getting and that residents improved (e.g. John, who no longer needed insulin because of the food given to him) and that the residents all had their needs met. Testimony of the Halls, Ray, Spogen, Ledbetter, Brosnan and Kelly (Tr. Vol IV). There was no violation of WAC 388-76-10020.

15. Conclusions of Law 62-71, Remedies.

The Final Order is correct in stating, Concl. 62 (AR 123-24), that RCW 70.128.160(1) delegates discretionary authority to the Department to impose remedies where there is a violation of the RCW chapter

70.128 or WAC chapter 388-76. The Department codified this authority in WAC 388-76-10960, as to revocation of licenses. The revocation action of the Department against a license must be in accord with the regulation. Of course, this also means that the Department must actually and lawfully determine that there were violations that came within the itemized list of bases for revocation in the regulation and that they were severe enough to justify imposing the harshest remedy possible, revocation of Olympic's license. Even if there are actual violations, the Department must not impose remedies that are unauthorized or arbitrary or capricious.

As noted previously, the only one of the claimed violations that is listed in WAC 388-76-10960 is subsection (16), "Exceeded licensed capacity in the operation of an adult family home;..." The conclusions of the Department with regard to whether Olympic operated in excess of its licensed capacity are clearly erroneous and unsupported by substantial evidence. WAC 388-76-10960(16) cannot be the basis for revocation.

Moreover, the discretion that the Department has to impose a remedy, even if there was a violation, is clear. The Department considered imposition of a condition on the license, which is the least severe remedy for its claims of violations, and then only for its erroneous determination of overcapacity. (Tr. II:105, 107-8). Pam Hildreth, a

supervisor, testified the Department considered doing the “minimal level of enforcement action,” a condition. *Id.* The condition would have had only two elements: “the number of residents that are allowed to be in the home and the number of residents that were observed in the home.” (Tr. II:106). This meant that they would concentrate only on the number of residents from House No. 1 who would come over to House No. 2. Tr. II:107. Ms. Hildreth would not consider using a visitor log to determine whether there would be compliance with a condition on the license related to capacity, claiming it was impossible to monitor, even though she conceded that there were also other methods of monitoring compliance with a condition on the license. (Tr. III:189-191).

This was arbitrary and capricious. Even if the Department came up with a definition of a “resident” that the ordinary person would consider to be outside the scope of the rules as written, it has a responsibility to either amend the rules in accord with the APA or give fair notice of its interpretation of the current rules. In this case it did neither. It rejected the condition remedy, which would be one way that fair warning could be given and imposed economic capital punishment upon the provider.

Contrary to Conclusions 62-71, there was no proof of any impact related to the care provided at the adult family home. As noted above,

the family members uniformly testified that the residents received good care. Lola would refer to Ms. Baida as “Mama.” The Department’s license revocation was not mandatory, but was subject to its soundly applied discretion, even if there had been any violations of the rules. However, in the present case the license revocation was contrary to the law and arbitrary and capricious, that is, without consideration of the facts and circumstances.

16. Conclusions of Law 73-74, Investigation.

The Final Order (AR 129-30) correctly notes that Ms. Corey, the investigator, made several mistakes in conducting her investigation. The fact that her investigation was reviewed by a supervisor does not rectify the fact that the mistakes existed in her investigation, which led to improper conclusions of law and fact and improper review. These Conclusions are in error.

There is no evidence in the record of the claimed events in Conclusion 74 (AR 130).

In any event, these conclusions are surplusage, because they are the department’s employee expounding on how great her agency is, in her opinion. The issues are discussed above, and the character of the Department’s investigation cannot change the fact that no violations

occurred, and certainly none that justify any revocation of Olympic's license.

VII. APPEARANCE OF FAIRNESS

The creation of new arguments by the Review Judge to support the Department's revocation order implicates the appearance of fairness doctrine. This Court in *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009) summarized the doctrine:

The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. See *State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230 (citing *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)), review denied, 126 Wn.2d 1026, 896 P.2d 64 (1995). Evidence of a judge's actual or potential bias is required. *Post*, 118 Wn.2d at 619, 826 P.2d 172. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013, 902 P.2d 163 (1995).

[Emphasis added]

Skagit County v. Waldal, 163 Wn. App. 284, 287, 261 P.3d 164 (2011) quotes with approval the above rulings and adds:

Judges must recuse—that is, disqualify themselves from hearing a case—if they are biased against a party or if their impartiality may reasonably be questioned.

Certainly in the present case the impartiality of the Review Judge must be questioned. As noted above, she modified the bases for the revocation order by adding Findings 69-71 and Conclusions of Law 4, 6

and 22. She has tried to use a federal definition of adult day care as a substitute for “personal care.” She admits she went beyond the role of decision-maker by reviewing Findings, Conclusions and admitted evidence, “regardless of whether any party has asked that they be reviewed.” (Conclusion 6, AR 93). Only 9 of the Initial Decision Findings were challenged by the Department, but the Review Judge re-wrote all 123 and added more in order to reverse all of the Initial Decision’s conclusions of law.

We submit that the Review Judge had an obligation to recuse herself, and her actions have presented unfair surprise and inability of Olympic to address the issues. A review judge has no role in being an advocate for her employer, but that is exactly what happened in this case.

VIII. CONCLUSION

The Initial Decision assessed the situation correctly. There were no violations of the licensing regulations in WAC chapter 388-76. The Department’s Final Order is contrary to law, unsupported by the evidence and continues the arbitrary and capricious revocation of the Petitioner’s license. It creates new bases for the revocation that were not asserted by the Department representatives, and violates due process of the Petitioner.

The Department's action has put a good provider out of business, but this Court can rectify the errors of the Final Order by reversing the Final Order and ordering the Department to fully reinstate the Petitioner's license, with an award of fees and costs pursuant to the Equal Access to Justice Act, RCW 4.84.340 - .360.

Respectfully submitted this 20th day of April, 2012.

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DECLARATION OF SERVICE

I declare that on the 20th day of April, 2012, I caused to be filed with the Court, as addressed below the following documents:

APPELLANT'S OPENING BRIEF

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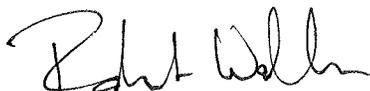
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Dated: April 20, 2012

Place: Seattle, WA



Robert Walker

APPENDIX A

Appendix A:

WAC 246-840-050

(1) The current series of the National Council of the State Boards of Nursing Registered Nurse (NCSBN) Registered Nurse or Practical Nurse Licensing Examination (NCLEX-RN or NCLEX-P) shall be the official examinations for nurse licensure.

(2) In order to be licensed in this state, all nurse applicants shall take and pass the National Council Licensure Examination (NCLEX-RN or NCLEX-PN).

(3) Only applicants who complete the education, experience, and application requirements of WAC 246-840-025, 246-840-030, 246-840-035 or 246-840-045 will be eligible for the examination.

(4) The commission will notify applicants who have filed the required application documents and met all qualifications of their eligibility to take the examination.

(5) Applicants must file an examination application directly to the testing service, along with the testing service's required fee.

(6) The executive director of the commission shall negotiate with NCSBN for the use of the NCLEX.

(7) The examination shall be administered in accord with the NCSBN security measures and contract. All appeals of examination procedures and results shall be managed in accord with policies in the NCSBN contract.

WAC 246-840- 025:

Registered nursing and practical nursing applicants' educated in a commission approved Washington state nursing education program and applying for initial licensure must:

(1) Successfully complete a commission approved nursing education program. For applicants from a commission approved registered nurse program who are applying for a practical nurse license:

(a) Complete all course work required of commission approved practical nurse programs as listed in WAC 246-840-575(2). Required courses not included in the registered nurse program may be accepted if the courses were obtained through a commission approved program.

(b) Be deemed as capable to safely practice within the scope of practice of a practical nurse by the nurse administrator of the candidate's program.

(2) Complete seven clock hours of AIDS education as required in chapter 246-12 WAC, Part 8.

(3) Successfully pass the commission approved licensure examination as provided in WAC 246-840-050. Testing may be allowed upon receipt of a certificate of completion from the administrator of the nursing education program.

(4) Submit the following documents:

(a) A completed licensure application with the required fee as defined in WAC 246-840-990.

(b) An official transcript sent directly from the applicant's nursing education program to the commission. The transcript must include course names and credits accepted from other programs. Transcripts must be received within ninety days of the applicant's first taking of the examination. The transcript must show:

(i) The applicant has graduated from an approved nursing program or has successfully completed the prelicensure portion of an approved graduate-entry registered nursing program; or

(ii) That the applicant has completed all course work required in a commission approved practical nurse program as listed in WAC 246-840-575(2).

(c) Applicants from a commission approved registered nurse program who are applying for a practical nurse license must also submit an attestation sent from the nurse administrator of the candidate's nursing education program indicating that the applicant is capable to safely practice within the scope of practice of a practical nurse.