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

ANA GARCIA; CARMEN PACHECO-JONES; and NATALYA
SEMENENKO

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON; SECRETARY OF THE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

DSHS's opposition to allowing public comment on this issue violates the spirit and letter of the APA. Petitioners seek a reasonable and appropriate remedy to the fact that not all people who receive a founded finding of abuse or neglect should be banned for life from work with vulnerable adults and children. The legislature granted DSHS significant leeway to design and promulgate a regulatory scheme to manage findings of abuse or neglect. Instead, DSHS did not promulgate rules about the permanence of findings. This created a lifelong sanction from employment for the petitioners. DSHS needs to promulgate rules on retention and give the public an opportunity to comment regarding this issue and potential remedies.

The major flaw in DSHS's reasoning is its reliance on RCW 74.39A.056. DSHS relies on that statute to repeatedly argue that it lacks authority to do anything other than maintain findings permanently. Yet, RCW 74.39A.056 by its own terms only applies to long-term care workers. DSHS's maintenance of findings prejudices other employment fields, such as early education or institutional care. DSHS offers no explanation why the sanction of a founded finding should be permanently imposed without rulemaking against these workers too. This is because DSHS gave it no

thought or the consideration that is due. This flaw shows why a rule is necessary to justify permanently imposing founded findings on the background checks of workers throughout the state.

II. ARGUMENT

A. **RCW 74.39A.056 does not disqualify a person when their finding is not “entered into” a database or registry**

DSHS argues that, regardless of whether it maintains findings or not, RCW 74.39A.056 permanently disqualifies people with CPS findings from long-term care employment. Dep’t Brief at 29. This interpretation is inconsistent with the plain language, DSHS’s actual practice and policies, and legislative intent.

RCW 74.39A.056 is in effect a licensing statute because it imposes conditions on the right of a person to work. Licensing statutes should be construed narrowly because they are in derogation of the common law. *Kilthau v. Covelli*, 17 Wn. App. 460, 463 (1977). The Court should also compare language across similar statutes to understand the intent of the law.

1. RCW 74.39A.056 only applies to long-term care work

DSHS’s argument that RCW 74.39A.056 is dispositive of the petitioners’ claim ignores the fact that the law only covers one area of

employment. DSHS would have the Court believe that its ability to maintain findings is preempted by a statute regulating one area of employment, even though DSHS's policies impact findings for people who are seeking work other than long-term care. This includes early learning, as former Petitioner Christine Nixon sought, nursing care, and other regulated professions.

RCW 74.39A.056, by contrast, only regulates the employment of "long term care workers". RCW 74.39A.056 (1). RCW 74.39A.056 also does not refer specifically to DSHS's founded findings, but generally to findings "entered into a state registry". Because of this language, it does not mandate permanent retention. Nor could it restrict the authority granted to DSHS in RCW 26.44.031 to determine for itself how long founded findings must be maintained. This leads to the conclusion that RCW 74.39A.056 merely bars findings when DSHS has decided to maintain them in a registry. This is the most reasonable reading of the statute, and the only one that is consistent with other authority granted to DSHS by the Legislature.

2. Findings are not "entered into" a database after they are expunged by DSHS

To support its argument that RCW 74.39A.056 mandates permanent disqualification, DSHS argues that even if Petitioners expunged their findings they would still be disqualified. Dep't Brief at 27. This is not supported by the record. The administrative record reflects that, since 2009,

DSHS's goal has been to move toward electronic expungement of records under the retention policies. SR 238-40. DSHS's own policies currently address destruction of all records—paper or electronic—after the expiration of the retention period. SR 125-27. And, if no reason exists to maintain the record at the end of the retention period, such as a litigation hold or a public records request, DSHS will destroy that record and expunge it from FamLink. SR 229-30. Even assuming the truth of DSHS's argument that its BCCU database is a registry, once the finding no longer appears in the BCCU record it is not entered into any registry—just like the pre-1999 findings that DSHS argues are not disqualifying. *See* CP 832 (argument of DSHS at trial that its BCCU database is a “registry”).

If a finding is removed from FamLink, DSHS does not report it to BCCU. The applicant would still answer question 12 on the BCCU application form, indicating “yes” or “no” to the question of whether she has “ever” had a finding. SR 435. However, that response would not trigger automatic disqualification. If the self-disclosure in question 12 did not match the FamLink database, the applicant would have an opportunity to clarify with BCCU that her finding was expunged. SR 375, 377, 399. RCW 74.39A.056, therefore, would not apply because the finding is no longer “entered” into a registry.

DSHS argues that the record supports its “long-standing” interpretation that findings are permanent. Dep’t Brief at 27. But the citations to the administrative record or the WACs cited in DSHS’s brief do not support this argument. These citations merely support the truism that if a background check shows that a person has a finding, RCW 74.39A.056 bars their employment as a long-term care worker. SR 280-83 (“As long as we receive a final background check result ... we will not move forward with the contract.”). There is no citation in the record that the Department has adopted any formal policy or rule interpreting RCW 74.39A.056 requiring permanent retention. DSHS has provided no policy or guidance of any kind that suggests it has a long-standing interpretation. The “record” that DSHS refers to was created by the petitioners through discovery in the underlying litigation. Nothing in the rule-making file for any challenged WAC supports this interpretation, nor in the language of any WAC.

DSHS knows how to clearly implement a policy stating that an administrative finding is permanent. It has not done this with CPS findings. DSHS created a rule that says APS registry findings are permanent and when they may be removed. DSHS clearly stated in that WAC: “A final finding [from APS] is permanent, except under the circumstances described in subsection (3) of this section.” WAC 388-97-0780. By contrast, DSHS did not create a similar rule for CPS findings, although it could have done

so. Instead, DSHS has created a confusing maze of subregulatory retention schedules and program policies that allow some people with erroneous findings to expunge them and others to wonder how long they might be disqualified.

Finally, the supplemental record reflects that DSHS considered a 35-year employment penalty appropriate for a person around the age of 18. This period would give a hypothetical person the time needed to rehabilitate so they could be safely employed in their 50s. If DSHS’s reasoning is to be believed—and it was under oath and based on a 30(b)(6) deposition—then its current argument is not consistent. Either the person is permanently barred, or she is barred for 35 years. The record supports the latter argument. Only DSHS’s legal briefing supports the former. The Court should decline to adopt this litigation strategy in lieu of the record on review.

3. DSHS’s interpretation of permanent disqualification is inconsistent with legislative intent

DSHS claims the intent of RCW 74.39A.056 is to protect vulnerable populations. Dep’t brief at 9. In fact, that is not the sole intent of this law. The legislative intent of the entire chapter is to provide a “balanced array” of long-term care services that promote individual choice, dignity, and independence. RCW 74.39A.007. While retaining some nursing home care, the legislature intended to develop, expand, or maintain home and

community-based services to meet the needs of consumers and save limited state resources. Permanent employment disqualification could keep thousands of qualified workers out of the job market. The record reflects the concerns of employers of these workers. SR 000133 (“I am very concerned that the addition of relatively minor crimes might disqualify otherwise qualified workers FOR LIFE.”). The statute reflects several intents, all of which are aimed at creating an array of accessible, quality long-term care options.

DSHS’s statement of the legislative history that lead to RCW 74.39A.056 is also misleading. DSHS cites to S.B. Rep. on Engrossed Second Substitute H.B. 1850 to suggest an extremely broad interpretation of RCW 74.39A.056(2). Dep’t Brief at 26. Nothing in the quote from the bill report mentions the permanence of findings. It merely repeats the truism that a person with a finding on their background is prohibited from employment. This is not a new idea.

Subsequent bill reports show that nothing in the legislative history supports this argument. H.B. Rep. on Engrossed Second Substitute H.B. 1850, at 7-8, 55th Leg., Reg. Sess. (Wash. 1997); H.B. Historical Rep. on Engrossed Second Substitute H.B. 1850, at 7, 55th Leg., Reg. Sess. (Wash. 1997); H.B. Final Rep. on Engrossed Second Substitute H.B. 1850, at 7, 55th Leg., Reg. Sess. (Wash. 1997). The final statutory language includes

“entered into a state registry”, “final” and “substantiated.” These words are not defined by the bill reports or the statute. Nothing in the legislative history supports DSHS’s argument that RCW 74.39A.056 should be interpreted so expansively.

The Court should interpret RCW 74.39A.056 to find that neither the language of the statute, DSHS’s current practices, or the intent of the Legislature demonstrate that RCW 74.39A.056 enacts a permanent barrier to employment even if a finding is expunged. DSHS should engage in rulemaking and define these terms along with an appropriate retention period for findings.

B. DSHS’s failure to engage in rulemaking impairs benefits or privileges of the public, including those enjoyed by the petitioners

DSHS argues that retaining founded findings and reporting them to FamLink for 35 years or more does not implicate a benefit or privilege. Dep’t Brief at 32. No Washington case has interpreted RCW 34.05.010 to require “benefit or privilege” to mean that the petitioners must have a substantive benefit protected by state law. The case law interpreting this requirement does not require that the benefit run to the petitioning party, so long as they otherwise have standing to show they are harmed by the state’s failure to engage in rulemaking. Thus, there are at least two bases on which this Court can find that DSHS’s action implicated a “benefit or privilege”:

the rights of Medicaid recipients to choose their providers, and the rights of the Petitioners to contract for employment as personal care providers.

Failor's Pharmacy v. DSHS held that a benefit to a nonparty can support a finding of an unpromulgated rule. 125 Wn.2d 488, 496 (1994). That case concerned DSHS's action, without rulemaking, to set provider payment rates by contract. DSHS also argued there that providers of Medicaid services were not entitled to rulemaking because their reimbursement methodology wasn't a "benefit or privilege". *Failor's Pharmacy*, 125 Wn.2d at 496. The Washington Supreme Court rejected this argument. The Court noted that the ultimate benefit to Medicaid patients caused the reimbursement schedules to Medicaid providers to be a benefit or a privilege enjoyed by the public. *See Failor's Pharmacy*, 125 Wn.2d at 497. Only Medicaid providers, not recipients of care, were litigants in that case. *Id.* at 488. This did not matter, and the *Failor's Pharmacy* Court invalidated DSHS's action based on a failure to engage in rulemaking.

The result is the same in this matter. Although Medicaid recipients are not participants to this action, they nonetheless benefit from having their providers of choice. Ms. Garcia's son, for example, is a Medicaid recipient who cannot select his mother as a personal care provider because of her finding. CP 10 at ¶18; SR 407. This alone satisfies the requirement of the APA, even if the person to whom the benefit runs is not the real party in

interest. The fact that the rulemaking “relates” to their enjoyment of this privilege is what matters. RCW 34.05.010. In addition, a reduction in the number of eligible care providers through action by DSHS impacts the ability of the public to choose from otherwise qualified workers. SR 133. The impact on the availability of their provider of choice to Medicaid recipients is a benefit or privilege under state law enjoyed by the public.

Further, Appellants have a right to have their applications for caregiver positions accepted and reviewed by the state, and in the context of their liberty interests to pursue their profession. If DSHS’s argument is right on this point, then it can establish policies without rulemaking that interfere with the employment of long-term caregivers with impunity.

Because DSHS’s failure to engage in rulemaking impacts the ability of Medicaid recipients to hire their provider of choice, it relates to a benefit or privilege enjoyed by the public. There is no requirement in the APA that the benefit or privilege conferred by law is a requirement greater than what the Appellants seek. The Court should reject DSHS’s argument that there is no benefit or privilege of the public implicated by its failure to engage in rulemaking.

C. DSHS has authority under RCW 26.44.031 to impose a less-severe disqualification period

Contrary to DSHS's arguments, RCW 74.39A.056 does not mandate permanent disqualification. Further, RCW 26.44.031 and RCW 43.43.832 grant DSHS the authority to determine for how long founded findings must be reported out on a background check. DSHS could conceivably create rules that permitted a person with a founded finding to expunge their record after six years. It has not done so, but retains the authority to do this.

1. DSHS has authority to adopt rules setting the duration of an employment penalty, but it must follow the APA

As DSHS points out at page 16 of its brief, an agency's powers are not limited to those expressly granted by the legislature in the words of the statute. An agency's powers include those necessarily implied by the statutory grant. *Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). Agency rules may fill gaps in an existing statute. *Pierce Cty. v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). A court will presume that a rule adopted under a legislative grant of authority is valid if it is "reasonably consistent with the statute being implemented." *Brannon v. Dep't. Labor & Industries*, 104 Wn.2d 55, 60, 700 P.2d 1139

(1985). RCW 26.44.031 and RCW 43.43.832 grant DSHS the authority to regulate the permanence of findings.

Although DSHS claims that the plain language of RCW 74.39A.056 absolutely prohibits it from anything but permanent disqualification, DSHS's actions show that it believes it has authority to impose a less permanent outcome. For example, DSHS adopted an interpretation and rules carving out an exception for people with pre-1999 findings. DSHS tries to justify this by posing a definition of "final" finding to shoehorn the regulatory exception into the law, without any showing that DSHS ever created or adopted any policy stating this. The statute remains silent as to any such distinction or duration, leaving it up to DSHS to adopt appropriate rules. Neither the statute nor BCCU makes such a distinction. The background authorization form does not ask or allow space for an applicant to provide the year of her finding. SR 435-437. DSHS's actions show that it can regulate around the impact of RCW 74.39A.056 when it chooses to do so.

The legislature explicitly delegated to DSHS the authority to determine how long to retain (and therefore report to employers) founded findings in RCW 26.44.031(3). The legislature clearly leaves the duration of how long DSHS will keep and use CPS findings up to DSHS, to be

determined by rule. DSHS's policy expertise and public input, through formal rulemaking, could be brought to bear on this subject.

2. Expungement is both legally permitted and reasonable

DSHS argues without citation to authority that even after removal from the "registry," it would still disqualify Petitioners from employment. DSHS bases this argument on its BCCU background check form that asks if a person has "ever" had a finding made against them. Dep't Brief at 9. But there is no evidence or authority to support this result, which contradicts DSHS policy and practice and would lead to absurd and unjust results. Expungement is permitted and a reasonable exercise of authority by DSHS.

DSHS's argument that a history of a finding mandates disqualification ignores the analogous process of vacating criminal records. Like for founded findings, a person is required to disclose whether they've been convicted of a crime under RCW 43.43.834. However, a person may vacate a criminal record. Under DSHS's reasoning, this person would still be disqualified, regardless of the expungement of their criminal record. This is not a reasonable or accurate interpretation of the law.

DSHS's proposed interpretation would yield absurd results—requiring disqualification for findings that were overturned (on appeal or by DSHS) or expunged from another state's registry. Other states permit

expungement of founded findings of child abuse from their registries.¹ DSHS permits expungement of a record from FamLink when the subject of the finding is erroneously identified. SR 55-56. Simply stating that this statute imposes a lifetime, irreversible disqualification is not consistent with the law or its application in practice.

DSHS has an internal process to expunge erroneous information from a CPS case record. DSHS testified at its deposition that, for a subject who is erroneously identified in a finding or for some other error, a case supervisor can remove that finding from a person's record. SR 55-56. Once the record is removed, the person no longer has a finding in the FamLink database, or on their background check report. DSHS's position in this litigation would have that person permanently disqualified from employment, since they would have to answer honestly that they did have a finding against them at one time. However, it is unlikely DSHS intended this result when it devised this interpretation to respond to Petitioners' complaint.

Further, DSHS or a judicial officer may also reverse findings after a hearing or judicial review. Like former petitioner Christine Nixon, this

¹ See U.S. Dep't. Health and Human Svcs., Characteristics of State Child Abuse Registries, at <https://aspe.hhs.gov/dataset/characteristics-state-central-child-abuse-registries>; see also, e.g., MASS. GEN. LAWS. ch. 119, § 51F (permitting expungement of finding from registry after child's 18th birthday in Massachusetts).

person must still disclose that she “ever” had a finding, as indicated in the BCCU background check form. Yet DSHS does not argue that Ms. Nixon must still be disqualified from employment. Thus, the disclosure on a BCCU background check form—a subregulatory paperwork requirement—cannot itself disqualify a person. DSHS does not have authority to disqualify people from employment based on them “ever” having had a finding against them.

Petitioners agree they are required to disclose their findings. They also agree the current consequence of this is disqualification. Dep’t Brief at 8-9. However, a permanent disqualification regardless of whether DSHS’s database retains a record of a finding lacks any statutory authority. No statute links the self-disclosure requirement to any outcome. RCW 43.43.834 requires a person to disclose whether a finding has been made against her, but does not mandate an outcome of disqualification if the finding is removed from a registry. A requirement to disclose past events does not mandate or logically lead to a conclusion that the result of self-disclosure must be permanent disqualification. This post-hoc interpretation has untenable results and should be rejected by the Court.

D. The Records Retention Committee's authority does not preclude DSHS's authority to determine the time for which findings must appear on background checks

DSHS suggests it lacks power to influence records retention schedules because the Records Retention Committee is the entity that acted. Dep't Brief at 17. The retention of agency records is not usually an issue of concern to the public and unlikely to be a "rule." However, the statutory and regulatory scheme at issue makes retention of founded findings an issue of great public concern. Petitioners are just some of the many persons with founded findings of abuse and neglect, and each Petitioner's ability to work in employment of her choosing is impacted by DSHS's retention scheme. As Petitioners note below, and the record reflects, the issue of banned caregivers impacts the availability of suitable caregivers for Medicaid patients throughout the state.

DSHS holds almost all the power regarding the retention of founded findings. DSHS defines what a founded finding is. DSHS defines whether a founded finding is "final" at inception, at entry into FamLink, or when it continues to exist in FamLink on the day of application. DSHS may gather a committee of staff and decides to change the retention period of founded findings from 6 years to 35 years. SR 22. All of those actions have an impact on Petitioners' rights and are subject to the APA.

The State Records Committee adopted DSHS's recommended retention period but has no power to determine what a founded finding is, no power to determine when a founded finding is final, and no expertise to determine how a founded finding will impact Petitioners, vulnerable adults and children. Furthermore, the State Records Committee cannot change the retention period or modify the proposal from DSHS without agreement from DSHS. RCW 40.14.050.

DSHS is engaging in a shell game by suggesting it has no authority to promulgate a rule due to the existence of the State Records Committee. Dep't Brief at 18-19. DSHS has power and the State Records Committee has limited power; the two are not mutually exclusive.

E. The Department's decision is arbitrary and capricious because it didn't consider the full impact of its retention decision

DSHS states that its decision to retain and report findings for 35 years is not arbitrary or capricious. Dep't Brief at 37. In support, DSHS states that "passing consideration cannot show, however, that the recommendation is arbitrary or capricious because the record does not specify whether the Department was referring to employment implicated by RCW 74.39A.056 (2)." *Id.* The APA requires DSHS to consider the implications of its decisions. It fails to do this when it considers a material issue "without regard to attending facts and circumstances." *Probst v. State*

Dep't of Retirement Systems, 167 Wn. App. 180, 192 (2012). Failing to consider the impact on employment, or considering it in an oddly limited manner about 18-year old workers, is a failure to fully consider the implication of its decision.

In *Hayes v. City of Seattle*, the Supreme Court noted that a conclusory statement supporting a decision cannot be a full and fair consideration of the facts of a decision. 131 Wn.2d 706, 718 (1997). The Court found an agency acted arbitrarily when it failed to explain the nexus between its conclusion and the facts it considered. And in *Children's Hospital v. Dep't of Health*, this Court found agency action arbitrary where the agency did not use any "specialized knowledge and expertise" to reach its decision. 95 Wn. App. 858, 873 (1999). The issue there concerned a decision of the Department of Health to not make a determination about the need for a particular hospital service. When the agency decided no action was necessary, it failed to take into account the evidence before it or to appropriately interpret its duties under the statute. The Court reversed that decision as arbitrary and capricious. *Id.*

Here, DSHS unreasonably limited its review of the impact of its decision to that of an 18-year old person with a founded finding, instead of considering the statutory and regulatory impacts of increasing the retention period. Increased retention has potential impacts on many professions and

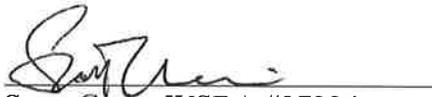
institutions regulated by DSHS. But DSHS gave little or no consideration to this point. DSHS's argument is that DSHS solely considered the impact on its Children's Administration. Failing to consider the impact of a decision on a wide swath of activities regulated by DSHS is itself unreasoning in light of the circumstances. The Court should find that DSHS acted arbitrarily when it determined there was no impact on employment of its decision to retain founded findings.

III. CONCLUSION

The Court should determine that DSHS's decision to maintain findings and report these on background checks is a rule and that its decision is arbitrary and capricious and unconstitutional. DSHS must proceed with rulemaking to justify imposing a 35-year retention policy on Petitioners' founded findings.

DATED this 14th day of June, 2018.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 14, 2018, I cause the foregoing to be served on the persons below via the Court of Appeals' e-filing electronic service delivery portal:

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