

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 323099

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ANNA CARLSON, *Appellant*

v.

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

BRIEF OF APPELLANT, ANNA CARLSON

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III. ASSIGNMENTS OF ERROR

Issues Pertaining to Appellant's Assignments of Error

1. *Was dismissal of Carlson's Petition for Judicial Review for failure to exhaust administrative remedies appropriate?*
 - a. Did Carlson fail to exhaust administrative remedies?
 - b. Was exhaustion of administrative remedies required?
 - i. Was the only issue in the case one of statutory interpretation?
 - ii. Does fairness or practicality outweigh the bases to require exhaustion of remedies?
 - c. Did the Department waive the requirement of exhaustion of administrative remedies?

IV. STATEMENT OF THE CASE

Anna Carlson is the daughter of George and Marjorie Carlson. George Carlson has had MS for 46 years, and has been on Medicaid for now more than 12 years. Administrative Record (AR) at 41. In 2007, Marjorie Carlson's health declined to the point where she was no longer able to take care of her financial affairs. AR at 41. To assist her parents, Ms. Carlson put her personal plans on hold. AR at 42. Eventually, Ms. Carlson was

able to move herself and her parents to Ellensburg in January, 2009. AR at 42. The Carlson's mobile home was sold and the proceeds were used to finance Marjorie's care at an assisted living facility. AR at 42.

Marjorie's assisted living facility hosted a presentation by Veteran Financial Affairs, a private company, not affiliated with the Veteran's Administration. AR at 42. Veteran Financial Affairs advised Ms. Carlson that Marjorie was eligible for Veteran's Benefits in the amount of \$900.00 to \$1000.00 per month. AR at 42. This amount would enable Ms. Carlson to keep Marjorie at the then current assisted living facility, rather than needing to move Marjorie to a different assisted living facility across town that accepted Medicaid. AR at 42. The assisted living facility agreed to accept a reduced payment pending an award from the VA, but would charge the full amount when back payment from the VA was received. AR at 43.

Unfortunately, Veteran Financial Affairs was incorrect, and gave Ms. Carlson bad advice on the availability of Veteran's Benefits for Marjorie. AR at 43. When the VA award was received, the award was only \$232.00 per month, and further, the award went to George Carlson, which he was required to pay to the facility where he resided. AR at 43-44. The back payments owed to the assisted living facility amounted to \$20,000.00 by

the time Ms. Carlson learned of the VA decision and was able to move Marjorie to another facility and get her on Medicaid. AR at 44.

As Ms. Carlson had put her life on hold attending to her parents' needs and administering their financial affairs, Ms. Carlson needed assistance with her own bills in order to remain in Ellensburg. AR at 44. George Carlson agreed to assist Ms. Carlson with her bills during that time period. In 2009, Ms. Carlson received \$8,075.00 from her parents. AR at 44. In 2010, she received \$4,825.00 from her parents. AR at 44. And in 2011, Ms. Carlson received \$4,825.00 from her parents. AR at 44.

Both George and Marjorie Carlson executed durable powers of attorney, appointing Anna Carlson as their agent, which authorized Ms. Carlson to make gifts to herself from their assets, and further, one version of the power of attorney expressly granted Ms. Carlson the right to reasonable compensation and reimbursement for costs expended. AR at 45. When the more than \$18,000.00 bill to the assisted living facility was not paid in full, a complaint was filed with Adult Protective Services. AR at 45.

On November 22, 2011, Tedman Sams, Legal Benefits Advisor of Adult Protective Services (APS) of the Washington State Department of Social and Health Services (the Department) sent a letter to Anna Carlson (Ms. Carlson), Appellant herein, advising her that APS had determined

that Ms. Carlson financially exploited a vulnerable adult. Administrative Record (AR) at 101. Pursuant to RCW 74.34, the name of the vulnerable adult and the reporting party were not disclosed in the notification letter. AR at 101. Ms. Carlson filed a timely appeal, requesting a hearing with the Office of Administrative Hearings. AR at 100.

On April 24, 2012, OAH received Ms. Carlson's Motion for Summary Judgment, supported by the six (6) page Declaration of Ms. Carlson with more than thirty (30) pages of exhibits. AR at 34-79. In response to Ms. Carlson's Motion for Summary Judgment, APS, via Ms. Sams, filed a three (3) page response with no supporting affidavits or declarations and no exhibits. AR at 31-33. On May 30, 2012, OAH filed and mailed the Initial Order of ALJ Blas, granting Ms. Carlson's Motion for Summary Judgment and finding that Ms. Carlson had not committed financial exploitation of a vulnerable adult. AR at 23-30.

APS filed a Petition for Judicial Review with the DSHS Board of Appeals on June 20, 2012. AR at 16-22. Ms. Carlson timely filed a response on July 2, 2012. AR at 11-14. On January 31, 2013, Review Judge Marjorie Gray of the DSHS Board of Appeals issued a Review Decision and Order of Remand, finding the Initial Order erroneous and vacating the same.

Ms. Carlson timely filed a Petition for Judicial Review in Kittitas County Superior Court. CP at 1-3.

On November 21, 2013, the Department filed a motion to dismiss the petition for judicial review for failure to exhaust administrative remedies. CP at 20-49. After denying Ms. Carlson the opportunity to conduct discovery (CP at 92-93), Judge Frances P. Chmelewski entered an Order of Dismissal Without Prejudice on February 11, 2014, finding that Ms. Carlson failed to exhaust her administrative remedies and failed to establish any grounds that would relieve her of the requirement to so exhaust. CP at 94.

Ms. Carlson timely filed her Notice of Appeal to this Court on March 6, 2014. CP at 95-96.

V. ARGUMENT

A. The Department Has Waived the Requirement that Ms. Carlson Engage in Further Administrative Proceedings Before Judicial Review

1. *An Agency may waive the requirement of exhaustion of remedies*

It is possible for an Agency to waive the requirement that an aggrieved party exhaust administrative remedies. See, e.g., *Weinberger v. Salfi*, 422

U.S. 749, 763-767, 95 S. Ct. 2457, 2465-68, 45 L. Ed. 2d 522 (1975) and *Mathews v. Eldridge*, 424 U.S. 319, 326-28, 96 S. Ct. 893, 899, 47 L. Ed. 2d 18 (1976), holding that an agency may waive the requirement that an aggrieved party exhaust the administrative remedies prescribed by the agency.

2. *DSHS Waived Further Administrative Proceedings*

The DSHS Board of Appeals is made up entirely of DSHS employees and acts on behalf of the Department. The DSHS Board of Appeals webpage indicates that the BOA is one of the Department's liaisons to the Office of Administrative Hearings and formulates Department-wide rules and policies on hearings. BOA maintains the Department's official record for each adjudication, ensures that legal notices are prepared and processed to meet legal requirements for cases being reviewed, receives petitions for judicial review, and files hearing records with superior court. <http://dshs.wa.gov/boa/index.shtml>. Pursuant to its own webpage, the DSHS BOA is an arm of the Department, is authorized to make rules for the Department, and is authorized to provide legal notices for the Department. Thus, the DSHS Board of Appeals has the authority to speak for the Department.

Included in the Review Judge's decision was a notice of rights to Ms. Carlson which read as follows:

If You Disagree With the Judge's Review Decision or Order and Want it Changed, You Have the Right to: (1) Ask the Review Judge to reconsider (rethink)(the decision of order (10 Day deadline); (2) File a Petition for Judicial Review (start a Superior Court Case) and ask the Superior Court Judge to review the decision (30 day deadline).

AR at 9. To the extent that there were further administrative remedies available to Ms. Carlson after the Review Decision, the Department waived any requirement that she exhaust those remedies before filing a petition for judicial review in Superior Court. The notice to Ms. Carlson directed her to file a Petition for Judicial Review if she disagreed with the Judge's Review Decision and wanted it changed. Ms. Carlson disagreed with the review decision and wants it changed. The Department cannot direct her to file a petition for judicial review and then later decide that it wants to change its position on which Ms. Carlson has already relied.

The Department has waived the requirement of exhaustion of administrative remedies and the matter should proceed to judicial review before the Superior Court.

B. The Question on Review is One of Statutory Interpretation

If there has been an initial determination that only legal issues are in dispute, administrative proceedings may be averted. Where the only

question in a case is the interpretation of a statute, claimants need not resort to the administrative agency because the agency has no special competence over the controversy. This is a well-recognized exception to the doctrine of primary jurisdiction. However, the exception implicitly requires an initial determination that only legal issues are in dispute. *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn. 2d 761, 772 (1992).

The initial order reviewed Ms. Carlson's actions under durable powers of attorney and concluded that she did not breach her fiduciary duties and that there were no illegal or improper transfers. The initial order on Summary Judgment found that there were no facts in dispute, largely in part due to the Department's failure to file any statement of facts, affidavits, declarations, or documentary evidence in response to Ms. Carlson's motion for summary judgment.

The Review Decision reversed the order granting summary judgment, concluding that the ALJ's finding that Ms. Carlson did not breach her fiduciary duties was not dispositive of the allegation of financial exploitation. This is a matter of statutory interpretation and presents the question of whether a person acting under a durable power of attorney who does not breach his or her duties may still be found guilty of financial exploitation. The ALJ and Ms. Carlson assert that the proper

interpretation of the statute is that for actions under a durable power of attorney, financial exploitation may not be found when there is no breach of fiduciary duty. As this is merely a question of statutory interpretation, the requirement of exhaustion of administrative remedies is not imposed on Ms. Carlson and the matter should proceed for review in the Superior Court.

C. Fairness and Practicality Outweigh the Policies in Favor of Exhaustion of Administrative Remedies

Ms. Carlson is accused by the Department of having financially exploited her parents. The Department has proposed to put Ms. Carlson's name on a list of those who have financially exploited and/or abused vulnerable adults. The list is consulted by employers who provide services to vulnerable adults or children when considering applicants for employment. Ms. Carlson is a school teacher. Having her name on the Department's list would significantly impact her ability to obtain employment as a school teacher. Ms. Carlson received gifts from her parents via a durable power of attorney that specifically authorized her to make gifts to herself, and further, authorized compensation and reimbursement for out of pocket expenses. The Administrative Law Judge who reviewed the matter found in Ms. Carlson's favor, reversing the initial finding by APS.

It has been held that the doctrine requiring exhaustion of administrative remedies is not absolute.

Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality.

S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King Cnty., 101 Wn. 2d 68, 74 (1984).

Here, Ms. Carlson is faced with the potential of a determination that would render her ability to obtain employment in her field extremely difficult. She has no remedy to recover her attorneys' fees and out of pocket costs should she prove to be ultimately successful and to clear her good name. She has already obtained a favorable decision, dismissing the matter from an independent Administrative Law Judge, but the Department's own, in-house review judge has reversed that decision and remanded the matter for further proceedings which will cost Ms. Carlson additional attorneys' fees and out of pocket costs for which she will never have any opportunity to recover, regardless of the merits the Department's charges against her.

Fairness and practicality demand that Ms. Carlson is afforded the opportunity for judicial review of the independent ALJ decision finding in

her favor, now, prior to any further administrative proceedings. Further proceedings with the Administrative Law Judge may result in yet another decision, reversed and remanded by the Department's own in-house review judge—potentially a recurring and never ending cycle, as there is nothing that prevents the Department's own in-house review judge from continually reversing and remanding. If Ms. Carlson is not entitled to judicial review at this time, then under the logic that requires her to endure additional administrative proceedings prior to judicial review, she could be eternally stuck in the administrative process. Fairness and practicality demand judicial review of a decision against the Department by the independent Administrative Law Judge before further administrative proceedings.

VI. CONCLUSION

The Department waived the requirement of further administrative proceedings by advising Ms. Carlson that she had the right to petition to the Superior Court for Judicial Review if she disagreed with the review judge's decision. Ms. Carlson timely filed a Petition for Judicial Review, and the Department's waiver should be enforced.

As the Initial Order was an order granting summary judgment, it was found by the independent Administrative Law Judge that there were no

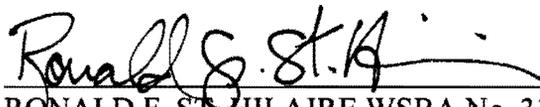
material facts in dispute and that the issues could be decided as a matter of law. The review judge reversed and remanded based on statutory interpretation. When there are no disputed facts and the matter is merely one of statutory interpretation, the requirement that administrative remedies be exhausted is not enforced.

Finally, fairness and practicality demand that Ms. Carlson is entitled to have the ALJ's summary judgment decision reviewed by the Courts, rather than being forced through timely and costly administrative proceedings.

Ms. Carlson respectfully requests that the Order of Dismissal Without Prejudice be vacated and that this matter proceed to judicial review of the ALJ's summary judgment decision.

DATED this 2nd day of June, 2014.

LIEBLER, CONNOR,
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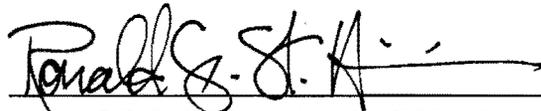
VII. CERTIFICATE OF SERVICE

I certify that I mailed a copy of the BRIEF OF APPELLANT ANNA CARLSON to the following, postage prepaid, on the 2nd day of June, 2014:

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