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Division III
State of Washington

NO. 32309-9-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ANNA CARLSON,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

Anna Carlson appeals the trial court's dismissal of her Petition for Judicial Review of an administrative order (Petition). Ms. Carlson was the attorney-in-fact for her mother Marjorie. In 2011, following an investigation, the Department of Social and Health Services made a substantiated finding of financial exploitation against Ms. Carlson, based upon her alleged misuse of Marjorie's funds. Ms. Carlson requested an administrative hearing before the Office of Administrative Hearings ("OAH") to challenge the Department's finding. She then moved for summary judgment. She argued that because her mother had given her a power of attorney, her actions could not be financial exploitation.

OAH granted Ms. Carlson's motion for summary judgment. It agreed with Ms. Carlson's argument that she had not committed financial exploitation because she acted with the scope of her power of attorney. The Department's Board of Appeals ("Board") reversed and remanded for an administrative hearing. The Board reasoned OAH failed to apply the required statutory definition of financial abuse, and that financial abuse could have occurred under that definition even if a power of attorney were involved. Ms. Carlson petitioned for judicial review of the Board's decision.

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The trial court dismissed the Petition without prejudice because Ms. Carlson failed to exhaust her administrative remedy of a hearing before OAH. Because Ms. Carlson has not exhausted her available and adequate administrative remedy, and because none of the exceptions to the exhaustion requirement stated in RCW 34.05.534(3) are applicable, the Department respectfully requests that this Court affirm the order dismissing Ms. Carlson's Petition.

II. ISSUES PRESENTED

1. Should the order dismissing the Petition under RCW 34.05.534 be affirmed because Ms. Carlson failed to exhaust her available and adequate administrative remedies?
2. Are there any applicable exceptions to the exhaustion requirement that would allow Ms. Carlson to obtain judicial review when she failed to exhaust her administrative remedies?
3. Did the Department waive the exhaustion requirement by including a statement of appeal rights in the decision issued by the Department's Board of Appeals?

III. STATEMENT OF THE FACTS

This case arises from an Adult Protective Services finding of financial exploitation. The Department's Adult Protective Services (APS) division is authorized to investigate the alleged financial exploitation of

vulnerable adults. WAC 388-71-0110(1). APS is also authorized to make substantiated findings of financial exploitation against alleged perpetrators. WAC 388-71-01210. In November 2011, APS notified Ms. Carlson of its finding that she exploited a vulnerable adult. Clerk's Papers 4. APS alleged that while Ms. Carlson was acting in the capacity of attorney-in-fact for her mother Marjorie, Ms. Carlson improperly retained Marjorie's income and resources for her own benefit. CP 4; CP 5.

Ms. Carlson timely requested a hearing to dispute the Department's finding. CP 4. Before any hearing was scheduled, Ms. Carlson filed a motion for summary judgment. CP 4. After considering briefing from both parties, OAH issued an order granting Ms. Carlson's motion. CP 4-9. The Department timely filed a request for review of the order granting summary judgment before the Board.¹ CP 11. The Department argued summary judgment was not appropriate because there were disputed issues of fact. *Id.*

On review, the Board concluded OAH erred in granting summary judgment both "as a matter of law" and "because there are disputed issues

¹ The Board is an entity within the Department. WAC 388-71-0105 (defining the acronym "BOA" as it applies to Adult Protective Services). The Board has authority to review the decisions of OAH administrative law judges, and the Board's review is a necessary prerequisite to any "appeal to the court system." *Id.*; *see also* WAC 388-02-0600 (discussing authority of Board review judges); RCW 34.05.464(2) (generally authorizing an "agency head" to "appoint a person to review initial orders and to prepare and enter final agency orders.").

of fact.” CP 17. It vacated the order granting summary judgment, and ordered the case remanded to OAH for “a pre-hearing conference on Ms. Carlson’s appeal.” CP 17. The prehearing conference ordered by the Board of Appeals was never held. On February 4, 2013, less than a week after the Board of Appeals issued its decision, Ms. Carlson filed her Petition. CP 1-3.

On November 21, 2013, the Department filed a motion to dismiss the Petition for failure to exhaust administrative remedies. CP 20-49. The Department argued that the Board of Appeals had remanded Ms. Carlson’s case for a hearing before OAH, and that Ms. Carlson must exhaust this administrative remedy before seeking judicial review. CP 20-21. In her response to the Department’s motion, Ms. Carlson argued the Department had waived the exhaustion requirement because the Board decision included a notice of appeal rights stating that Ms. Carlson had the right to file a petition for judicial review. CP 86. She also argued exhaustion was not required because the only question on review was the interpretation of the statute defining financial exploitation. CP 87; CP 90. Finally, Ms. Carlson argued exhaustion was not required because the bias of Board judges would render further administrative proceedings futile. CP 90.

The Superior Court, after considering briefing and argument from both parties, issued an order granting the Department’s motion to dismiss.

The Superior Court concluded that Ms. Carlson failed to exhaust her administrative remedies, as required by RCW 34.05.534. CP 94. The Superior Court also concluded Ms. Carlson had “failed to establish any grounds pursuant to RCW 34.05.534(3) which would relieve her of the requirement to exhaust all administrative remedies.” CP 94. The Superior Court granted the order of dismissal without prejudice. It stated that the matter “shall be” remanded to OAH “so that further administrative hearings may be held.” CP 94.

Ms. Carlson now appeals the Superior Court order dismissing her Petition. She reiterates her arguments that the Department waived the exhaustion requirement, and that exhaustion is not required because the only issue is one of statutory interpretation. Appellant’s Opening Br. at 6-9. She also argues that considerations of “fairness and practicality” should “outweigh” the exhaustion requirement in this case. *Id.* at 9.

IV. ARGUMENT

A. Standard of Review

Ms. Carlson seeks review of the lower court’s determination that she is required to exhaust administrative remedies. Exhaustion presents a question of law, and questions of law are reviewed de novo. *Cost Mgmt.*

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Servs., Inc. v. City of Lakewood, 178 Wn.2d 635, 641, 310 P.3d 804 (2013).

B. The Administrative Procedure Act Generally Requires Petitioners to Exhaust All Available Administrative Remedies

The Washington State Administrative Procedure Act, Chapter 34.05 RCW, states that a person may file a petition for judicial review “only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review....” RCW 34.05.534. RCW 34.05.534 requires petitioners to pursue all “exclusive or adequate” administrative remedies. *Evergreen Wash. Healthcare Frontier LLC v. Dep’t of Soc. & Health Servs.*, 171 Wn. App. 431, 446, 287 P.3d 40 (2012) (citations and internal quotations omitted). The petitioner must pursue available administrative remedies even if those remedies are thought to be “unavailing.” *Dils v. Dep’t of Labor & Indus.*, 51 Wn. App. 216, 219, 752 P.2d 1357 (1988) (citation omitted).

RCW 34.05.534 provides for certain exceptions to the exhaustion requirement. RCW 34.05.534(1)-(3); *Northwest Ecosystem Alliance v. Wash. Forest Practices Bd.*, 149 Wn.2d 67, 75, 66 P.3d 614 (2003). However, in the absence of an applicable exception, “it is the general rule that when an adequate administrative remedy is provided, it must be

exhausted before the courts will intervene.” *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974) (citations omitted). The exhaustion requirement furthers the purposes of:

(1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

King Cnty. v. Wash. State Boundary Rev. Bd., 122 Wn.2d 648, 669, 860 P.2d 1024 (1993).

C. Ms. Carlson Has Not Exhausted Her Administrative Remedy of a Hearing Before OAH

Here, Ms. Carlson has an available administrative remedy. The Board issued an order remanding Ms. Carlson’s case for a hearing before OAH. An administrative hearing before OAH could yet provide Ms. Carlson with full relief. If OAH decides Ms. Carlson did not financially exploit a vulnerable adult, and if the Department does not appeal the decision, she will have nothing further to litigate. Moreover, even if OAH decides against Ms. Carlson, Ms. Carlson may still prevail on an appeal brought with the benefit of a fully developed factual record. Because an administrative hearing before OAH could provide Ms. Carlson with the

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relief she seeks, Ms. Carlson is required to exhaust that remedy before filing a petition for judicial review.

It is uncontested that Ms. Carlson has not exhausted her available and adequate remedy of a hearing before OAH. Ms. Carlson filed her Petition less than a week after the Board of Appeals issued its decision. Although the Board of Appeals ordered her case remanded to OAH for a pre-hearing conference, no pre-hearing conference or hearing was ever scheduled before OAH.

In her opening brief to this Court, Ms. Carlson does not dispute she has an adequate administrative remedy available to her. Nor does she argue the remedy has been exhausted. Instead, she argues the exhaustion requirement should not apply in this case.

D. The Exceptions Listed in RCW 34.05.534(3) Are Not Applicable To This Case

RCW 34.05.534(3) provides that a court can decline to apply the exhaustion requirement only in very limited circumstances. The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that remedies would be “patently inadequate,” that exhaustion would be “futile,” or that exhaustion would result in “grave irreparable harm” that outweighs the public policy requiring exhaustions. RCW 34.05.534(3)(a)-(c).

The first of these three exceptions, which excuses exhaustion when remedies would be “patently inadequate,” applies when “the agency lacks legal authority to remedy the problem.” *See, e.g., State v. Tacoma–Pierce Cnty. Multiple Listing Serv.*, 95 Wn.2d 280, 283–84, 622 P.2d 1190 (1980) (excusing exhaustion when action involved alleged violations of the Consumer Protection Act, and claims were not actionable at the agency level). The second exception, which excuses exhaustion when the administrative remedy would be futile, is based on the principle that courts will not require “vain and useless acts.” *Stafne v. Snohomish Cnty.*, 174 Wn.2d 24, 34, 271 P.3d 868 (2012). The possibility a remedy is futile is not enough; futility must be proven. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 33, 785 P.2d 447 (1990). The third and final exception requires the petitioner to show that “grave irreparable harm” would result from having to exhaust administrative remedies, and that this harm outweighs the public policy in favor of exhaustion. *Dioxin/Organochlorine Ctr. v. Dep’t of Ecology*, 119 Wn.2d 761, 778, 837 P.2d 1007 (1992).

As the Superior Court concluded, none of these three exceptions are applicable here. First, Ms. Carlson’s administrative remedy is adequate. The Board has remanded Ms. Carlson’s case to OAH for a hearing. OAH indisputably has legal authority to apply the relevant

statutory provisions to determine whether or not Ms. Carlson committed financial exploitation, and to reverse the Department's finding if it concludes she has not financially exploited a vulnerable adult. Second, Ms. Carlson's remedy is not futile. Ms. Carlson has not presented any evidence that a hearing before OAH would be a vain or useless act. On the contrary, as discussed above, a hearing may give Ms. Carlson complete relief. Finally, Ms. Carlson has not made any showing that exhaustion will cause her irreparable harm, or that any potential harm outweighs the public policy requiring exhaustion. Thus, Ms. Carlson has not met the plain statutory requirements necessary to permit relief from the exhaustion requirements.

E. Fairness and Practicality Considerations Do Not Excuse Ms. Carlson From the Exhaustion Requirement

Instead of discussing the statutory exceptions in RCW 34.05.534(3), Ms. Carlson makes various other arguments as to why she should not be required to exhaust administrative remedies. She first argues that general fairness considerations should relieve her of the exhaustion requirement. Appellant's Opening Br. at 10. However, there is no general fairness exception to the exhaustion requirement. Even if there were, it is not unfair to require that Ms. Carlson exhaust her
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administrative remedies. For both these reasons, Ms. Carlson's fairness argument should be rejected.

1. There Is No General Fairness Exception to the Exhaustion Doctrine

The sole basis for Ms. Carlson's fairness argument is a quote from *South Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King Cnty.*, 101 Wn. 2d 68, 74, 677 P.2d 114 (1984) that there are "recognized exceptions" to the exhaustion requirement "in circumstances in which these policies are outweighed by considerations of fairness or practicality." Appellant's Opening Br. at 10 (quoting *South Hollywood Hills*, 101 Wn. 2d at 74). However, the quote is taken out of context. *South Hollywood Hills* involved a disputed neighborhood plat. 101 Wn.2d at 71. Certain individuals who opposed the plat did not appeal the hearing examiner's recommendation approving the plat, and instead brought a petition for judicial review. *Id.* at 72. The trial court dismissed the petition, concluding that the individuals had failed to exhaust administrative remedies by not appealing the hearing examiner's recommendation. *Id.* On review, the Washington Supreme Court applied the three statutory exhaustion exceptions to exhaustion, while taking note of the fact that the exceptions are based upon fairness and practicality considerations:

Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality. For example, if resort to the administrative procedures would be futile, exhaustion is not required. Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived. Also, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused.

Id. at 72 (emphasis added) (internal citations omitted). When read in its entirety, *South Hollywood Hills* thus indicates that the “recognized exceptions” to the exhaustion requirement are in fact the statutory exceptions listed in RCW 34.05.534(3). While *South Hollywood Hills* describes these exceptions as being based upon fairness and practicality concerns, it does not state or imply that there is a general fairness exception to the exhaustion doctrine, outside of the three specific statutory exceptions.

Other Washington cases support the proposition that there is no general fairness exception to the exhaustion doctrine, outside of the exceptions listed in RCW 34.05.534(3). See, e.g., *Fallon v. City of Leavenworth*, 42 Wn. App. 766, 769, 710 P.2d 208 (1985) (stating, “Washington recognizes exceptions to the exhaustion requirement in circumstances where these policies are outweighed by consideration of

fairness or practicality[.]” and citing cases that illustrate the three statutory exceptions); *Ackerley Commc’n., Inc. v. City of Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979) (stating, “the state’s Administrative Procedure Act (APA), however, provides for *specific exceptions* to this exhaustion requirement.”) (emphasis added). Because there is no general fairness exception to the exhaustion doctrine, Ms. Carlson’s argument as to fairness should be rejected as a matter of law.

2. It Is Not Unfair or Impractical to Require That Ms. Carlson Exhaust Administrative Remedies

Even if there were a general fairness exception to the exhaustion requirement, requiring exhaustion here is not unfair. Ms. Carlson argues an unfavorable administrative decision could make it “extremely difficult” for her to secure employment. CP 10. She also argues she will incur additional attorney’s fees if she is required to exhaust administrative remedies. CP 10. However, if costly proceedings or the potential for an unfavorable decision could be grounds for an exception to exhaustion, the exception would swallow the rule. Allowing an exception to exhaustion on these grounds would also be contrary to the stated purpose of the doctrine. Exhaustion would not further judicial efficiency or discourage the flouting of the administrative process if a litigant may evade the requirement merely by arguing administrative proceedings would be costly or ineffective. *See, e.g., George F. Alger Co. v. Peck*, 74 S.Ct. 605,

606 (1954). (requiring appellants to exhaust adequate administrative remedy, and stating, “[t]he fact that such procedures cause inconvenience and expense, and that appellants may eventually prevail are not controlling.”)

Ms. Carlson asserts she “could be eternally stuck in the administrative process” because “there is nothing that prevents the Department’s own in-house review judge from continually reversing and remanding.” Appellant’s Opening Br. at 9. However, remand for further fact-finding is a common result both in the administrative process and in the court system. It does not foreshadow an endless cycle of remands and appeals. On the contrary, remand gives Ms. Carlson the opportunity to prove her version of events to the appropriate fact-finder. Moreover, to accept Ms. Carlson’s argument would undermine the stated purpose of the exhaustion doctrine. Exhaustion cannot serve its purpose of protecting agency autonomy and promoting the development of facts, if parties whose cases are remanded for agency fact-finding may circumvent exhaustion by speculating that the remand will result in an appeal.

F. Alleged Issues of Statutory Interpretation Do Not Preclude the Court From Requiring Ms. Carlson to Exhaust Administrative Remedies

Ms. Carlson also argues she should not be required to exhaust administrative remedies because her case presents an issue of statutory

interpretation. Appellant's Br. at 7-8. Specifically, she argues there is a dispute as to "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." Appellant's Br. at 8.

1. Ms. Carlson's Statutory Interpretation Argument Should Be Rejected Because She Did Not Raise It Either Before the Agency Or In Her Petition for Judicial Review.

To address Ms. Carlson's statutory interpretation argument, it is necessary to discuss the definition of financial exploitation and the issues that were raised before the agency. Under RCW 74.34.020, "financial exploitation" is defined as follows:

(6) "Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage.

RCW 74.34.020(6). In its order granting summary judgment to Ms. Carlson, OAH concluded there were no disputed issues of material fact. CP 7. It then reasoned Ms. Carlson had not committed financial exploitation as a matter of law, because her actions were authorized under the power of attorney she held. CP 8-9. OAH did not discuss the definition of financial exploitation in RCW 74.34.020(6).

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On review, the Board explained that the question presented was whether Ms. Carlson committed financial exploitation under RCW 74.34.020(6). CP 15. Specifically, the question was whether Ms. Carlson “made an improper use of the property, income, or resources of the vulnerable adult” CP 15. The Board accordingly concluded that OAH erred as a matter of law when it framed the issue as whether or not Ms. Carlson breached her fiduciary duty as power of attorney. CP 16. The Board reasoned Ms. Carlson’s actions could meet the definition of financial exploitation under RCW 74.34.020(6), regardless of whether the actions were authorized by the power of attorney document. *See* CP 16. The Board also concluded there were material facts in dispute regarding whether or not Ms. Carlson committed financial exploitation. CP 17.

In her Petition, Ms. Carlson did not dispute the interpretation of RCW 74.34.020(6) in the order issued by the Board. *See* CP 1-3. Specifically, she did not challenge the Board’s conclusion that conduct may meet the definition financial exploitation under RCW 74.34.020(6), even if the conduct is authorized pursuant to a power of attorney. Instead, Ms. Carlson’s sole argument was that Board review judges are biased because they are employed by the Department. CP 2-3. She requested an order “disqualifying” the Board review judges on constitutional grounds. CP 3.

In her response to the Department's Motion to Dismiss, Ms. Carlson argued for the first time that the Board erred in its interpretation of financial exploitation under RCW 74.34.020(6). CP 90. She specifically argued that the "proper interpretation [of RCW 74.34.020(6)] is that for actions under a durable power of attorney, financial exploitation may not be found when there is no breach of fiduciary duty." CP 90. Ms. Carlson's attempt to re-characterize the disputed issue as one of statutory interpretation should be rejected. First, arguments not raised in a petition for judicial review should generally not be considered, either on review or on appeal. *See, e.g., Sorenson v. Pyeatt*, 158 Wn. 2d 523, 543, 146 P.3d 1172 (2006) ("we adhere to the general rule that this court will not address an argument raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition.") (citation and internal quotation omitted). In addition, however, allowing Ms. Carlson to obtain judicial review by raising a legal issue for the first time in her response to the Department's motion to dismiss would undermine the stated purpose of exhaustion. Agency autonomy would not be "protect[ed]," and the "flouting" of administrative procedure would be encouraged rather than discouraged, if litigants could evade the exhaustion requirement by raising a statutory

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dispute at any point in the proceedings. *See Wash. State Boundary Rev. Bd.*, 122 Wn.2d at 669.

2. Even If the Statutory Interpretation Issue Is Properly Raised, Ms. Carlson Should Be Required To Exhaust Her Administrative Remedies

The exhaustion doctrine is “particularly appropriate where the questions involve matters within the expertise of the agency[.]” *Schreiber v. Riemcke*, 11 Wn. App. 873, 874, 526 P.2d 904 (1974) (citations omitted). However, where questions raised are both “purely legal” and “beyond the authority and expertise of an administrative agency to resolve,” and when “it appears administrative proceedings would be ineffective or useless,” the court may in its discretion apply the futility exception to “relax” the exhaustion requirement. *Schreiber*, 11 Wn. App. at 875; *see also, e.g., Tacoma–Pierce County Multiple Listing Serv.*, 95 Wn.2d at 283–84 (1980) (determining it would be futile to require exhaustion when issue was alleged violation of Consumer Protection Act, and issue was therefore “not cognizable” by the relevant agencies).

The mere presence of a legal issue will not excuse a Petitioner from exhausting administrative remedies. For the court to relax the exhaustion requirement, the “fundamental issue” must be a legal issue the agency has no authority to resolve. *Higgins v. Salewsky*, 17 Wn. App. 207, 562 P.2d 655 (1977) (excusing exhaustion when

fundamental issue was whether city had established a valid civil service exam for fire captain applicants; reasoning city did not have authority to decide validity of legislation requiring it to establish the exam); *see also*, *e.g.*, *Schreiber*, 11 Wn. App. at 906 (excusing exhaustion requirement when issues raised on appeal questioned constitutionality of county assessor's reappraisal of property; reasoning issue could not be resolved by Board of Tax Appeals).

Here, even if the interpretation of RCW 74.34.020(6) is at issue, it is not the sole issue before the agency. The ultimate issue is whether Ms. Carlson committed financial exploitation. As the Board recognized, this issue involves questions of both law and fact. CP 17. There are disputed issues of fact that would have to be resolved, even if the power of attorney could excuse some of Ms. Carlson's conduct. CP 6. For example, there is a factual issue as to whether the vulnerable adult's "bills were not paid in a timely fashion because the Appellant had taken money from the vulnerable adult's account, leaving the account with insufficient funds...." CP 6. Moreover, there is no evidence further administrative proceedings would be vain or useless. On the contrary, OAH may yet give Ms. Carlson full relief. Specifically, it may find that Ms. Carlson has not committed financial exploitation. For all of these reasons, the Court should not exercise its discretion to relax the exhaustion requirement. Ms.

Carlson should be required to participate in administrative proceedings that may give her full relief.

G. The Department Has Not Waived the Requirement That Ms. Carlson Exhaust Administrative Remedies

The Board's decision included a statement of appeal rights. CP 19.

The Board's decision stated:

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 or 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).

CP 19 (emphasis added). Ms. Carlson now argues this language in the Board's decision should be considered a waiver of the exhaustion requirement. She alleges the Department has waived exhaustion by informing her of the right to file a petition for judicial review. However, the exhaustion requirement is a statutory prerequisite to review that cannot be waived by a party. Moreover, there is no authority for the proposition that a formulaic statement of appeal rights may waive exhaustion. For both of these reasons, Ms. Carlson's waiver argument should be rejected.

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1. The Exhaustion Requirement in the Washington State Administrative Procedure Act Is a Statutory Prerequisite to Review That Cannot Be Waived by a Party

The exhaustion requirement of the Washington State Administrative Procedure Act is considered a statutory prerequisite to judicial review. It must be satisfied in order for the Court to review the merits of a petition for judicial review. *Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 215, 114 P.3d 1233 (2005) (addressing question of whether Land Use Petition Act petitioner exhausted administrative remedies under Administrative Procedure Act; stating, “under all of [Petitioner’s] statutory theories of recovery, then, superior court jurisdiction is conditioned on the exhaustion of administrative remedies.”). When a petitioner fails to exhaust administrative remedies, a court may do “nothing other” than enter an order of dismissal pursuant to Civil Rule 12(b)(1). *Inland Foundry Co., Inc. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999).

Because exhaustion is a statutory prerequisite to judicial review, it cannot be waived by a party’s action or inaction. If a petitioner has failed to exhaust administrative remedies under the Administrative Procedure Act, the Court may do “nothing other” than dismiss the petition, regardless of whether one or both parties has allegedly waived the requirement.

Inland Foundry, 98 Wn. App. at 123-24. Ms. Carlson's waiver argument should thus be rejected as a matter of law. Exhaustion is a statutory requirement that neither the Department nor any other party may waive by its action or inaction.

2. A Formulaic Statement of Appeal Rights in an Agency Decision Should Not be Held to Waive the APA Exhaustion Requirement

Even assuming *arguendo* the Administrative Procedure Act exhaustion requirement could be waived, the Department did not waive exhaustion with its boilerplate notice of appeal rights. Ms. Carlson's argument is analogous to the petitioner's argument in *Cunningham v. R.R. Retirement Bd.*, 392 F.3d 567 (3rd Cir. 2004). In *Cunningham*, the Railroad Retirement Board denied the petitioner's motion to reopen a claim for unemployment and sickness insurance benefits, because the petitioner did not file a timely administrative appeal. 392 F.3d at 569. At issue was whether the petitioner had exhausted her administrative remedies pursuant to the Railroad Unemployment Insurance Act. *Id.* The petitioner argued the Railroad Retirement Board waived its exhaustion of administrative remedies argument when it:

[M]ailed a cover letter, along with a copy of the Board's April 23, 2003 decision, inadvertently advising Cunningham that she "*may seek judicial review of the Board's opinion by filing a petition for review with an appropriate United States court of appeals.*"

Id. at 578 (emphasis added).

The Third Circuit rejected this argument. It reasoned the Railroad Unemployment Insurance Act imposed a jurisdictional requirement that petitioners must exhaust their administrative remedies. *Id.* It was therefore “not in a position to ignore the jurisdictional prerequisite . . . on account of the cover letter mailed by the RRB.” *Id.* The court further reasoned that the cover letter did not place the petitioner in any “Catch-22” situation by “forcing her to choose between two unenviable options or otherwise prejudice her administrative or judicial remedies.” *Id.* at 579. For example, it did not request that the petitioner submit additional information evidence, which would have put her in the “impossible position” of having to decide whether to submit new evidence to the agency or to file a suit in federal court. *Id.* Instead, the cover letter was a “standard form cover letter” “prepared by the secretary to the Board as part of her ministerial duties.” Its purpose was “solely to inform Cunningham of the deadline for filing with the Court.” *Id.* at 579-80. At most, it may have created “a false sense of hope in her right to appeal” *Id.* at 579. In light of all these circumstances, the court reasoned it was not appropriate to find waiver. *Id.*

Like the agency’s cover letter in *Cunningham*, the statement of appeal rights in the Board decision is plainly formulaic. CP 19. It does

not mention Ms. Carlson by name and does not otherwise indicate it took into account the specific facts or circumstances of Ms. Carlson's case. Also like the cover letter at issue in *Cunningham*, the statement of appeal rights in the Board's decision was a standard form whose purpose was to inform a petitioner of his or her appeal rights. To the best of the Department's knowledge, this same form is attached to all decisions issued by the Board, regardless of whether a decision is interlocutory or final. Finally, like the cover letter at issue in *Cunningham*, the Board's statement of appeal rights did not force Ms. Carlson to choose between two unenviable options or otherwise prejudice her ability to obtain review. The Board did not, for example, demand additional evidence from Ms. Carlson such that she would be forced to choose between submitting evidence and meeting an appeal deadline.

The boilerplate language in the statement of appeal rights could have been misleading to a layperson, who might have read it to give a false sense of hope that she could appeal. However, Ms. Carlson was represented by an attorney both at the time she received the Board decision and at the time she filed her petition for judicial review. Ms. Carlson has not alleged she was misled by the statement of appeal rights, or that she was unaware of the Administrative Procedure Act exhaustion requirement when she filed her petition for judicial review. Under these

circumstances, where the Board's statement of appeal rights was plainly formulaic, where it did not prejudice Ms. Carlson, and where Ms. Carlson was represented by counsel throughout the proceedings, the statement of appeal rights should not be interpreted as a waiver of the exhaustion requirement.

3. The *Weinberger* and *Mathews* Decisions Are Distinguishable

In support of her argument that the Department has waived the exhaustion requirement, Ms. Carlson relies without explanation upon *Weinberger v. Salfi*, 422 U.S. 749, 763-67, 95 S. Ct. 2457 (1975) and *Mathews v. Eldridge*, 424 U.S. 319, 326-28, 96 S. Ct. 893 (1976). Appellant's Opening Br. at 6. Both *Weinberger* and *Mathews* involved exhaustion of administrative remedies under the Social Security Act. See 422 U.S. at 763-67; 424 U.S. at 326-28. The Social Security Act does not expressly require petitioners to exhaust administrative remedies. It states only:

“[A]ny individual, *after any final decision of the Secretary* [of the Social Security Administration] made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision

Weinberger, 422 U.S. at 763 (quoting 42 U.S.C. § 405(g)) (emphasis added).

Weinberger and *Mathews* applied the above language in the Social Security Act to conclude that the Secretary may waive the Social Security Act exhaustion requirement in certain circumstances. In *Weinberger*, the Court concluded the Secretary implicitly waived the Social Security Act exhaustion requirement, when the only issue was the constitutionality of a statutory requirement, and when the Secretary “did not raise any challenge” to the allegations of exhaustion in the appellee’s Federal Court complaint. 422 U.S. at 763. Similarly, in *Mathews*, the Court concluded the Social Security Administration had improperly defined the term “final decision,” and that under the correct definition, there had been a final decision of the Secretary from which the petitioners could request review. *See* 424 U.S. at 330-32.

By contrast to the Social Security Act, whose language only requires a “final decision of the Secretary” in order for an individual to obtain judicial review, the exhaustion doctrine of the Washington State Administrative Procedure Act expressly requires petitioners to “exhaust all administrative remedies available within the agency . . .” before obtaining judicial review. RCW 34.05.534. Neither *Weinberger* nor *Mathews* considered exhaustion under a federal or state Administrative Procedure Act. Nor did they hold that an agency may waive the express exhaustion requirement of such an act. On the contrary, *Weinberger* expressly

declined to consider whether the petitioners exhausted their administrative remedies under the federal Administrative Procedure Act. 424 U.S. at 332 n.12. Because *Weinberger* and *Mathews* consider waiver in the context of Section 405(g) of the Social Security Act only, and because they do not address an agency's ability to waive the express exhaustion requirement of a state Administrative Procedure Act, *Weinberger*, *Mathews* and other Social Security Act cases are inapplicable to this case. They should not govern this Court's analysis of whether the Administrative Procedure Act exhaustion requirement has been waived.

Even assuming the legal analysis in *Weinberger* and *Mathews* is applicable, the circumstances of this case are distinguishable. In contrast to the agency in *Weinberger*, the Department has “[raised] a challenge” based upon the exhaustion requirement. The Department filed a motion to dismiss for exhaustion of administrative remedies before the trial court. Unlike in *Weinberger*, the exhaustion requirement therefore cannot be waived on the grounds that the agency has failed to challenge it. And in contrast to *Mathews*, where exhaustion was considered waived because there was a final agency decision, here it is undisputed that there has been no final agency decision. The Board's decision denied summary judgment and remanded to the Office of Administrative Hearings for further proceedings. It was plainly not the final decision of the agency.

V. CONCLUSION

Ms. Carlson has not exhausted her administrative remedy of a hearing before the Office of Administrative Hearings. None of the exceptions to the exhaustion requirements stated in RCW 34.05.534 apply to her case, and Ms. Carlson's attempts to broaden the three stated exceptions is unpersuasive. Ms. Carlson's argument that the Department has waived the exhaustion requirement is also without merit, because exhaustion is a prerequisite to subject matter jurisdiction that cannot be waived by an agency. For all these reasons, the Department respectfully asks this Court to affirm the order dismissing Ms. Carlson's Petition for Judicial Review.

RESPECTFULLY SUBMITTED this 3rd day of July, 2014.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

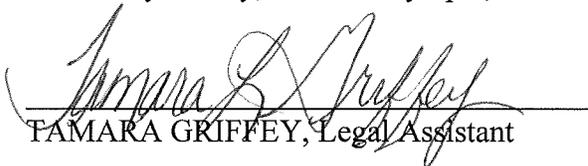
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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

EXECUTED this 3rd day of July, 2014 at Olympia, WA.


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