

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

2006 JAN 31 PM 4:25

FILED
COURT OF APPEALS
JAN 31 2006

DAVID J. JENKINS,)
)
Respondent,) No. 574116
)
v.) RESPONDENT'S SUR-
) RESPONSE TO MOTION TO
) INCLUDE ILLUSTRATIVE
STATE OF WASHINGTON) EXHIBITS IN APPENDIX TO
DEPARTMENT OF SOCIAL AND) BRIEF
HEALTH SERVICES,)
)
Appellant.)

On January 30, 2006, the Appellant filed a reply to our objection to its request for including illustrative exhibits in the appendix to its brief.

According to Appellant, its request to include "illustrative examples" in the appendix to its brief will allegedly assist the Court's ability to resolve the issues. Appellant suggests that Respondent "misses the point . . . these documents do not set forth "new facts" . . . the documents at issue are *Illustrative* exhibits . . ." Appellant's Reply at 2 (emphasis in original).

Appellant's attempt, however, to try to distinguish "illustrative exhibits" from "new facts" is merely a matter of form over substance. Appellant has not provided Respondent with any opportunity to review Appellant's new "illustrative exhibits." At this point, Respondent has absolutely no idea as to the truth or falsity, or of the content of the information that Appellant now plans to furnish in its "illustrative

exhibits.” Respondent will be forced into the discovery mode to determine the merits and/or relevance of Appellant’s “illustrative exhibits.” Respondent, however, has no way to conduct discovery at this stage of the proceedings.

Appellant has had multiple opportunities at the agency level and at the trial court level to develop the record. The fact that it now wants to supplement the record through its characterization of new “illustrative exhibits” should not be permitted. Respondent will have absolutely no way to verify the new information contained in Appellant’s appendix. Appellant has not attempted to contact Respondent to explain the new information that it wants to provide in its brief.

In addition, Appellant claims that it now needs an appendix to describe hypothetical examples because “they do not fit within the type and spacing requirements for pages in the brief.” Appellant’s Reply at 2. Appellant says that “it would be awkward at best to include the illustrative calculation in the brief itself.” *Id.* Appellant, by this statement, admits that it is providing new facts in its brief by its reference to “calculations.” In addition, it is disingenuous to think that the pertinent information cannot be reformatted and/or summarized to fit within its brief. Appellant was able to explain how it calculated program benefits in its brief at the trial court level. Why can’t Appellant do the same thing at this level?

Respondent does not have any objection to Appellant explaining it its brief, just like it did at the trial court level, how benefits are determined under the COPES program. Respondent, however, objects to Appellant providing new facts at this point of the proceedings in appendix format. The place to bring in new facts is not on appeal.

Appellant will now have 75 pages to provide analogies or examples assuming the Court grants its motion to file an over-length brief. Appellant agrees that it can provide information within 75 pages. Appellant's Reply at 3. Provided that Appellant stays within the record, Respondent believes that Appellant will have more than ample opportunity to provide the necessary information within its brief. As stated earlier, Appellant should not be provided a blank check to provide whatever information that it wants in Appendix format. Its attempt to try to distinguish "illustrative exhibits" with "new facts" is just form over substance.

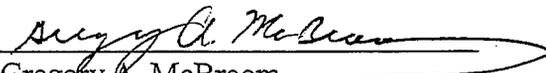
Appellant has not contacted Respondent about the new information that it now plans to provide. Respondent has no idea of what this new information will contain. Respondent will not have any way to verify the truth or falsity, or the content of the information provided. Respondent should not have to perform discovery at this stage of the proceedings. Appellant was able to explain workings of the COPES benefits in its trial

brief. There is absolutely no reason Appellant cannot do the same thing at this level. Appellant will have 75 pages to provide necessary information in its over-length brief. The record below was developed through a lot of time and effort by the parties and Appellant should not be permitted to supplement the record by a cursory request to infuse new information in appendix format.

For the foregoing reasons, Appellant's motion should be denied.

DATED this 31st day of January, 2006.

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Court Administrator/Clerk

The Court of Appeals
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CASE #: 57411-6-I
David J. Jenkins, Res. v. State of WA., DSHS, App.

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 3, 2006, regarding appellant's motion to include illustrative exhibits in appendix to brief:

Appellant's motion to include illustrative exhibits in the appendix to its brief is passed to the panel that considers the appeal on the merits, as it will be in a better position to determine for example, whether or not the appendices improperly include new facts.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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