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Superior Court # 09-2-07787-0 KNT

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE SHARON ARMSTRONG

KATHLEEN HARDEE,

Appellant

vs.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS)/
DEPARTMENT OF EARLY LEARNING (DEL),

Respondent

BRIEF OF APPELLANT

Carol Farr
WSBA 27470
Law Offices of Leonard W. Moen
947 Powell Ave SW, Suite 105
Renton, WA 98057
(425) 227-4260
Attorney for Respondent

ORIGINAL

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I. INTRODUCTION

Ms. Hardee asks this Court to reverse the DSHS/DEL[1] revocation of her daycare license. This case is governed by the Administrative Procedure Act ("APA"), RCW 34.05.

The Administrative Law Judge ("ALJ") who conducted the hearing on the evidence hearing ruled in favor of Ms. Hardee, but DSHS/DEL entered a decision against Ms. Hardee.

The ALJ's Initial Order found there was no evidence to support the DSHS/DEL allegations against Ms. Hardee: (1) "there is nothing in the evidence" that indicated she had ever allowed her son William unsupervised or unattended contact with daycare children, (2) "there is no evidence that supports" the proposition that unauthorized persons were living in the home, (3) and that Ms. Hardee's day of unlicensed daycare was due to a "misunderstanding" between Ms. Hardee and her licensor. The ALJ did not base his decision on the credibility of witnesses.

DSHS/DEL reviewed and entered the Final Order against Ms. Hardee. The DSHS/DEL review judge decided that the ALJ had not given proper weight to the reports from state employees and that the ALJ should

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[1] DEL, the Department of Early Learning, was split away from DSHS, which originally oversaw daycare. The state employees in this case worked either for DEL or DSHS, as DEL was new during this period. This brief refers to the state agency here as

have based his findings on credibility. The DSHS review judge decided that Ms. Hardee was not a credible witness made findings based upon speculation and uncorroborated DSHS/DEL reports. The review judge found that (1) Ms. Hardee left William unsupervised many times, that (2) an unauthorized person lived in the home, and that (3) Ms. Hardee did unlicensed daycare. The DSHS review decision is based upon on the "more likely than not" standard of proof.

Superior court affirmed. Superior court did not address any of Ms. Hardee's legal or factual challenges to the decision. Superior court did not address whether the State may revoke a citizen's daycare license with less than clear and convincing evidence, as the Ongom decision holds. Ongom vs. Department of Health, 159 Wn. 2nd, 132, 141(2006)

Ms. Hardee asks this Court to reverse the superior court decision, to reverse the DSHS order and to reinstate the ALJ's Initial Order. Ms. Hardee asks the Court to award her attorney fees under the Equal Access to Justice Act and to direct superior court to likewise award her fees for the review by that court.

DSHS/DEL for convenience.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED.

Assignments Of Error

1. DSHS/DEL violated Ms. Hardee's fundamental due process by revoking her license without clear and convincing evidence of culpable conduct.

2. DSHS/DEL violated Ms. Hardee's right to a fair hearing by rejecting the ALJ's findings for ms. hardee and by adopting contrary findings based upon the review judge's view of the evidence and credibility of witnesses.

3. DSHS/DEL erred by ignoring the ALJ's decision in favor of Ms. Hardee and by entering a decision against her based on the review judge's view of the evidence and of the credibilty of witnesses.

4. The findings are not based upon substantial evidence: (1) the finding that Ms. Hardee left William unsupervised ignores the evidence and the definition of supervision which includes sight or hearing; (2) there is no evidence that an unauthorized person lived in the home, and (3) Ms. Hardee's one day of unlicensed daycare was undisputedly authorized by her DEL licensor.

5. Superior court erred in affirming the DSHS/DEL decision where it is contrary to the law.

Issues Pertaining to Assignments of Error

1. Whether DSHS/DEL may revoke a daycare license with less than clear and convincing evidence.

2. Whether a review judge who rejects an ALJ's findings for a citizen and enters findings for the agency, based upon the agency's view of the evidence and the credibilty of the witnesses, violates a citizen's fundamental right to a fair hearing.

3. Whether RCW 34.05 authorizes a review board judge to reject an ALJ's decision in favor of a citizen and conduct a de novo review of the evidence to reach a decision for itself.

4. Whether the DSHS/DEL findings of fact are supported by substantial evidence when (1) there is only speculation that William was beyond Ms. Hardee's hearing range; (2) there is only speculation that an unauthorized person was living in Ms. Hardee's home; (3) the DEL licensor admitted she gave Ms. Hardee permission for the one day of unlicensed daycare she provided.

5. Whether fees should be awarded to Ms. Hardee under the Equal Access to Justice Act, RCW 4.84.350, for this review and for the review by superior court.

III. STATEMENT OF THE CASE

A. MS. HARDEE IS AN OUTSPOKEN ADVOCATE FOR DAYCARE PROVIDERS

1. Ms. Hardee has been providing daycare for over 23 years. In 23 years, there have been two problems in her daycare, both related to her adopted son William's impulsive behavior. CP 550. There is no allegation that William harmed any child in the daycare.

2. Ms. Hardee was one of twelve South King County daycare operators who pushed and bargained for union representation for daycare operators. She was present when Governor Gregoire signed the law granting daycare operators SEIU925 union representation. Ms. Hardee is on union steering committees, on rule making committees and is staff member of C.A.R.E. (Childcare Advocates, Resource and Education for Providers). Ms. Hardee teaches other daycare owners about the law, about their rights. Her classes are titled "*What To Do When The Licensor Arrives At Your Child Care*" and "*Protecting Your Business And Rights.*" CP 1115-1117.

3. Ms. Hardee's parents advocated for her in the administrative hearing and continue to advocate for her. Some parents have had children in Ms. Hardee's daycare for 10 years, some have known her for 20 years. They are managers, nurses, teachers. Per the parents, Ms. Hardee provides a safe, loving, and caring environment for their children. She is an excellent provider, and takes care of some children with special needs. She even learned sign language to better communicate with a child with Downs syndrome. CP 505-514, CP 1112-1114, CP 1118-1132. There is no allegation to the contrary, no evidence to the contrary. Her license was suspended when her adopted son, William, molested a neighbor's child in 2006, and DSHS/DEL revoked her license with allegations that she violated the rules. CP 359.

B. DSHS/DEL SUSPENDED MS. HARDEE'S DAYCARE LICENSE WHEN HER SON MOLESTED A NEIGHBOR'S CHILD

1. DEL summarily suspended Ms. Hardee's license on 7/5/06, after William, then 19, molested a neighbor/friend's child. CP 352-354, CP 454-456. William had been babysitting at the request of the child's father, without knowledge or approval of Ms. Hardee. CP 662 (Tr. I, 85-86).[2] Because authorities were not sure at first whether this had happened

[2] The "Tr." cites to the transcript from the hearing.

at the daycare, DSHS/DEL opened up an investigation into the daycare. CP 835 (Tr. II, 54). It turned out that the child William molested was not at the daycare, it didn't happen during daycare hours, she was not one of Ms. Hardee's daycare children. CP 407, CP 471, CP 736, 987 (AR 253, 317, Tr. I, 159, Tr. III, 89)

2. William was promptly incarcerated. He pled guilty to "Child Molestation in the 1st Degree" and agreed to a 7 year sentence, which the parents requested to allow the child to reach her teen years. CP 1135-36. The parents of the child remain friends. Both the mother and father testified at the administrative hearing on Ms. Hardee's behalf and they do not feel that she was responsible in any way responsible. CP 863-871 (Tr. III, 82-90).

3. Ms. Hardee was providing daycare long before she adopted William. William presented some difficult challenges - he was early on diagnosed with ADD, ADHD, behavioral difficulties and bipolar personality disorder. This did not create problems for the daycare until 2001, when, at age 13, William was given incorrect medication, and began acting with extreme impulsivity. CP 448, 450, 550. William's behaviors in 2001 and 2002 led to a juvenile record for William and he was sent to a group home. CP 448, 450.

4. When William was to return home, Ms. Hardee consulted with DSHS/DEL. She provided DSHS/DEL a safety plan which states that William would never be allowed "any unsupervised contact" with the child care children, and DSHS/DEL granted her a waiver so she could continue proving home daycare. CP 442-443. Per the waiver, signed by DSHS/DEL, William lived in the home, was doing very well, was in counseling, attended church, did babysitting, and was getting Bs in school. William participated in activities with the daycare children, he "reads to the children, helps with organized games, and aids me in clean up of activities. Several of my parents are now using William as a care giver at their homes on weekends." CP 448, 556-557. DSHS/DEL produced a second waiver for the administrative hearing which added the word "unattended," but Ms. Hardee had not seen or signed that document and the DEL licensor Hariett Martin testified she had written the waiver herself. [3] CP 743 (Tr. I, 186).

5. The ALJ granted Ms. Hardee a stay of the summary suspension of her license on 8/2/06. CP 405-406. At that time, the only allegation was that William had molested a child and DSHS/DEL needed to

[3] DSHS produced annother waiver for the hearing, dated 4/26/05, but Ms. Hardee had not seen this document. CP 450, CP 594 (Tr. I, 37) CP 625 (Tr. I, 48-49) Her signature line says "Harriett Martin for Kathleen Hardee," and the document refers to Ms. Hardee in the third person. CP 450. On the bottom is a handwritten note "William is required to always be supervised and never left unattended with children in the child care home." CP 452. DEL Licensor Martin admitted that she had written the waiver herself. CP 763 (Tr. I, 186). The word "unattended" is not defined by the

investigate whether William might have harmed a daycare child. CP 406. In support of Ms. Hardee, her parents wrote declarations about the high quality of her daycare, of her caring concern for their children, that she is "loving and nurturing," that the children were well supervised, that she ran a "Five Star Daycare." CP 503-517.

6. The investigation did not find that William had harmed any daycare child, but reported that Ms. Hardee hasd allowed William to live at home without approval. CP 858, 865 (Tr. II, 77, 84)

C. DSHS/DEL SUBSEQUENTLY REVOKED HER DAYCARE LICENSE

1. On 11/9/06, DSHS/DEL revoked Ms. Hardee's license, alleging violation of the 2003 safety plan covering William (CP 386), for providing unauthorized child care (CP 1005-7, Tr. III, 107-9), and for allowing unauthorized persons to live at the residence. CP 386-7, CP 325. DSHS/DEL did not allege or claim that any daycare child had been harmed, or that William had done his criminal act at the daycare or during daycare hours. Ms. Hardee asked for an administrative hearing.

WAC and does not appear in her safety plan. CP 442, CP 568.

D. THE ALJ RULED IN FAVOR OF MS. HARDEE FINDING NO EVIDENCE SHOWED SHE HAD VIOLATED ANY RULES

1. The ALJ reversed the license revocation. The ALJ's Initial Order is attached, and in the record at CP 314-333. *Exhibit 1, AR 0161-0180.*[4] ALJ Rynold Fleck heard from 10 witnesses in 3 days and admitted 41 exhibits. He found there was **no evidence** to support the DSHS/DEL allegations of wrongful conduct: "William did not have any unsupervised contact with the children in the he daycare, nor was he left with their care unattended." CP 332 (AR 0179). There was no warning about William: "There had be no indication in William's behavior that he was a danger to young children. Nothing in his behavior had indicated any kind of sexually aggressive behavior." CP 327 (AR 0174)

The ALJ found that William had not been left unsupervised:

> "There is nothing in the evidence that indicates that the Appellant has ever allowed contact by William with the children in the day care that is unsupervised and/or unattended. Although there is some conflicting testimony of whether or not William changed one of the children's diapers, it is clear that Ms. Hardee was within view and/or could hear any activities between William and the child whose diaper hew was changing. This single episode does not constitute or support the allegation that the Appellant allowed William to violate any safety plan and/or any conditions associated with waivers allowing William to be on premises during daycare hours."

[4] The "AR" designation is the page number in the administrative record, which begins at CP 153.

CP 331 (AR 0178). The ALJ found there were no unauthorized residents:

> "There is nothing to support the allegation that, in fact, there were individuals, male or female, residing at the residence where the daycare was located who had not had a valid background check."

CP 331 (AR 0178). The ALJ found that Ms. Hardee's one day of unlicensed day of daycare was due to misunderstanding:

> "Although it was the Appellant's intention to continue to provide what is called family and friends care for some of those children who were being caused problems by virtue of the closure of her daycare, the one day's activities appear to have been the result of a misunderstanding between the Appellant and her licensor."

CP 332 (AR 0179).

2. The ALJ found there was only "circumstantial" or "inference" evidence against Ms. Hardee. The ALJ did not need to base any finding on a credibility determination. CP 331-2 (AR 178-179).

3. The DSHS/DEL investigator did not find that William had harmed any daycare child. CP 858, (Tr. II, 77). Investigator Junior was apparently unaware of the waiver and he believed that Ms. Hardee posed a risk by allowing William to be in the home. CP 865 (Tr. II, 84)

Evidence In The Record Re Supervision Of William:

4. Ms. Hardee testified she never allowed William unsupervised contact with the daycare children.[5] CP 177-9 (Tr. I, 24-26). There was no warning that William posed a threat to children. CP 212 (Tr. I, 59) William's counselor, Catherine Fisher, a psychiatric nurse practitioner, testified that William had been her patient for 3 years and that William displayed no indication that he would harm a child.[6] CP 991-2 (Tr. III, 93-94). William had excelled academically, had "never exhibited sexually inappropriate behavior before the incident," nor had there been any such indication. CP 518, CP 998 (Tr. III, 100).

5. Anthony and Susan White, parents of the child William molested, testified on Ms. Hardee's behalf. They have known her for years, and do not hold Ms. Hardee responsible. Mr. White had hired William to baby-sit on his own, and Ms. Hardee was not involved in "any way, shape or form." CP 984 (Tr. III, 86.)

6. DSHS/DEL alleged that Ms. Hardee had violated her safety plan that William would not be "unsupervised" when daycare children were present. CP 638 (Tr. I, 61). The DSHS/DEL licensor, Harriet

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5 Although Ms. Hardee's son Davis and his fiancee Brandi Nelli also lived in the home, and Ms. Nelli worked in the daycare two days per week, DEL/DSHS refused to allow their testimony because they weren't on the witness list. CP 974, (III, 76)

6 The ALJ's initial decision mistakenly omits Catherine Fisher, William's counselor, on its list of witnesses. Ms. Fisher's testimony appears in transcript III, beginning on

Martin, testified that the supervision plan forbid "unsupervised" contact with child care children. CP 797 (Tr. II, 16) DSHS/DEL produced no evidence that Ms. Hardee had requested or even seen the 2005 waiver and no evidence that their 2005 waiver was intended to be more restrictive than the 2004 waiver. DSHS/DEL Licensor Martin testified that she wrote the second waiver and that both waivers meant the same thing. CP 818 (Tr. II, 37).

7. There was one conflict in the testimony: parent JS testified that he had *once* come in and seen William changing his daughter's diaper in the changing room and that Ms. Hardee was in the living room with other children. CP 685 (Tr. I, 108-109). Ms. Hardee testified that she had been changing the diaper, but that when heard someone come in, she had William step over to do up the tabs and keep the child from falling, and she stepped in front of the room to see who had come in. CP 627-630 (Tr. I, 50-53), CP 1019 (Tr. III, 121-122). Although the DSHS investigator alleged that others reported William had unsupervised contact with children, no other other such witness appeared.

8. The ALJ found "Ms. Hardee was within view and/or could hear any activities," a finding which conforms with the WAC definition of

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supervision as being within sight or hearing. WAC 170-296-1360 (2). Appendix [2]The ALJ based this finding on the evidence, not on the relative credibility of these two witnesses.[7]

Evidence Re Unauthorized Residents:

9. Daycare parent DE testified she occasionally met people in the home, that one morning she met a person whom she "*assumed*" was "*staying*" there. She saw this person for about a week and never again. CP 789 (Tr. II, 8-9). Although the DSHS investigator alleged that others reported people were living in the home, no other witnesses appeared.

Evidence Re Unlicensed Daycare:

10. The day DSHS summarily suspended her daycare license, the DSHS/DEL licensor Harriet Martin told Ms.Hardee she could continue to provide "friends and family" daycare at the home of one of the parents. CP 601 (Tr. I, 24), CP 631-2 (Tr. I, 54-55). Ms. Hardee did this for one day. When she returned home, she had a message from licensor Martin who said she had been mistaken, that Ms. Hardee could not take care of more than one family's children, so Ms. Hardee stopped. CP 602 (Tr. I, 25), CP 631-2 (Tr. I, 54-56) Licensor Martin testified she told Ms. Hardee

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[7] The DSHS review judge acknowledged that the ALJ did not base this finding on credibility. CP 253 ("*regardless of which witness was correct.*")

she could continue doing daycare if she did it at another person's home. CP 714 (Tr. I, 137-138). There was no other evidence that Ms. Hardee did unlicensed daycare.

E. DSHS/DEL REVERSED THE ALJ AND RULED FOR DSHS/DEL BASED ON THE REVIEW JUDGE'S VIEW OF THE WEIGHT AND CREDIBILTY OF THE EVIDENCE.

1. DSHS/DEL reviewed the ALJ's decision and reversed. The review judge concluded that the ALJ had not made credibility determinations to which the board owed deference, and instead, did a de novo review of the evidence and ruled for the DSHS/DEL. The DSHS/DEL Final Order is at CP 249-282 (AR 0096-0129).

2. The review judge decided that the ALJ "failed to consider a significant portion of the evidence presented by the Department in support of its allegations, that the ALJ "did not properly weigh and consider all of the evidence." CP 250, CP 256 (AR 097, 103). The DSHS review judge held this was error, that the ALJ "should have discussed" the DSHS/DEL reports. CP 256 (AR 103).

3. The review judge acknowledged that the ALJ's finding about William was not based upon witness credibility, that it was "regardless of which witness was correct about the incident." CP 253 (AR

0100). Even so, the review judge decided that in the "the absence of a credibility determination," she was obligated to a de novo review, to evaluate the evidence for herself. CP 257 (AR 0104).

4. The review judge decided that the investigator's reports were more credible than direct evidence, even when it was in conflict. CP 256 (AR 103). For example, the review judge gave more weight to investigator Junior's hearsay about what DE said to him than he did to DE's own testimony, finding "she did not repeat her statements." CP 258 (AR 0105).

5. The DSHS review judge decided that Ms. Hardee was not credible, that Ms. Hardee's testimony was either false or that she "*was wearing blinders*." CP 278 (AR 0125).

6. The DSHS/DEL review judge entered the final order against Ms. Hardee. The review judge found that (1) Ms. Hardee had allowed William to have unsupervised contact with daycare children, (2) Ms. Hardee had unauthorized persons living in her home, (3) Ms. Hardee had provided unlicensed daycare. CP 258, CP 254 (AR 0105 and 0101). The DSHS review judge relied upon a dictionary definition of "unattended" and hearsay attributed to BD and DE, despite that BD did not testify, and

despite that DE's testimony did not corroborate the investigator 's reports. CP 257, CP 258 (AR 104-5).

7. The review judge made many findings based on speculation. For instance, she found that Ms. Hardee had left William unsupervised, that "*this likely happened many times*." (AR 0101).

8. The review judge's finding about JS and the diaper changing incident do not reflect JS' testimony or the record:

DSHS/DEL finding	Testimony/evidence
William was unsupervised - "*this likely happened many times.*" CP 274 (AR 0101).	--- JS was the only witness to one disputed event
The "*degree to which JS was upset was more consistent with his having observed or experienced something greater than just William diapering his daughter.*" CP 274(AR 0121)	**JS:** he was "*uncomfortable with any 17 year old boy changing diapers...*" "*it wasn't such a big deal.*" (Tr. I, 111, 113)
JS "*observed William acting guiltily or shamefully*" CP 274 (AR 0121)	**JS:** William "*seemed a little different.*" (JS, Tr. I, 111)
JS had "*seen overt symptoms of mental illness or decompensation in William.*" CP 274 (AR 0121)	**JS:** William "*seemed a little different.*" (JS, Tr. I, 111)
"*William responded as a guilty person would, or as a person with deep shame would respond.*" CP 274 (AR 0121)	- - -
"*William's behavior is indicative of William engaging in something he knew he should not be doing,*" "*It is possible that William was either touching Lila inappropriately or thinking of doing so.*" CP 274 (AR 0121)	- - -

9. The review judge made similar speculative findings about Ms. Hardee, for example, that she had a "constant stream of visitors,"

"various unidentified adults coming and going," and "it is reasonable to conclude that Appellant's ability to adequately supervise and provide care to her daycare children was compromised." CP 278 (AR 0125). Ms. Hardee had "an intent to provide further care in violation of licensing requirements," that her "motivation may have been to continue providing care illegally." CP 255 (AR 0102). Ms. Hardee did not "understand how children develop socially, emotionally, physically, and intellectually," that she "lacked a disposition that is respectful of a child's need for caring attention." CP 279 (AR 126)

10. The review judge found that Ms. Hardee could not see William at all times, that she "would have needed eyes in the back of her head to have been able to see both forward into the dining room and backward into the changing room at the same time." CP 276 (AR 0123)

11. The review judge denied reconsideration. CP 154-159 (AR 001-004). The DSHS/DEL acknowledged that the revocation of the license is based upon the **"more likely than not"** standard of proof.[8] CP 157 (AR 004)

[8] DSHS/DEL argued that they proved their case by the "preponderance of the evidence" standard. CP 360, 256 (AR 0206, AR 103)

F. SUPERIOR COURT AFFIRMED WITHOUT COMMENT

1. Ms. Hardee petitioned judicial review. She argued the decision violated her due process, the law, and was biased, and she moved for a temporary stay of the license revocation. Superior court granted the temporary stay, concluding that Ms. Hardee would likely prevail "if Ongom applies." (CP 1208, and see Ongom, supra.) Superior court accepted updated declarations from Ms. Hardee and her parents on matters relevant to the stay and to her claim of bias. CP 1112-1132, CP 1135-1136

2. Superior court, in its final order, denied Ms. Hardee's petition. The court affirmed the DSHS/DEL decision and vacated the stay. CP 1221. Superior court did not address the Ongom case or the other legal and factual issues Ms. Hardee raised, but directed Ms. Hardee to the court of appeals for further review. Ibid., Ongom, supra. Superior court subsequently denied Ms. Hardee's motion for a stay.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

The Court should reverse the DSHS/DEL decision as it is unconstitutional, the review judge misinterpreted the law and the record and acted arbitrarily and capriciously. The revocation of Ms. Hardee's

daycare license on less than clear and convincing evidence violates her fundamental right to due process. The decision violates Ms. Hardee's fundamental right to a fair hearing on the evidence by an unbiased decision-maker. The DSHS/DEL decision violates Washington law and the WAC – the DSHS Review Judge is not authorized to ignore set aside an ALJ's decision and enter contrary findings based on her view of the evidence and the credibility of witnesses she never heard. The DSHS/DEL findings are not supported by the evidence in any case but rely upon speculation and uncorroborated hearsay and show a remarkable bias for DSHS/DEL.

Fees should be granted to Ms. Hardee per the the Equal Access to Justice Act for this review and for review by superior court. The Court should reinstate the ALJ's initial decision. If an agency has the power to ignore the findings of the ALJ, to revoke licenses based on their own allegations, the agency has become accuser, judge and jury and the very notion of a fair hearing is meaningless.

B. STANDARD OF REVIEW

The standard for review of administrative orders in adjudicative proceedings is found in RCW 34.05.570(3). In relevant part, an agency decision may be overturned if the court finds that the decision is unconstitutional, the agency interpreted or applied the law erroneously, or

the agency acted arbitrarily or capriciously. The party challenging the administrative decision bears the burden of proving the invalidity of agency action, RCW 34.05.570(1)(A).

The ALJ's order is governed by RCW 34.05.461. The review by DSHS/DEL is governed by RCW 34.05.464. These statutes are attached in Appendix [3]

Although case law is in conflict, the Washington Supreme Court has recently held that judicial review under the APA defers to the factual findings of the administrative hearing officer. Ongom, supra.

Evidence relied upon:

The administrative record is at CP 1-420, and includes three transcripts of testimony. The key orders in the administrative record are the ALJ's Initial Order at CP 314-333, the DSHS/DEL Review Decision and Final Order at CP 249-280, and the DSHS/DEL Decision and Order on Reconsideration at CP 154-159. The Superior Court Order on Administrative Law Review is at CP 1221-1222. Declarations from Ms. Hardee and her parents filed in that court related to her stay and to her claim of bias appear at CP 1118-1126.

C. THE REVOCATION OF MS. HARDEE'S LICENSE WITHOUT CLEAR AND CONVINCING EVIDENCE VIOLATES HER FUNDAMENTAL RIGHT TO DUE PROCESS

The State must provide "due process of law" whenever it deprives any person of "life, liberty, or property." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. Ms. Hardee's daycare license is constitutionally protected property and revocation of her license requires "clear and convincing" evidence of wrongdoing. Ongom v. Department of Health. 159 Wn.2d 132; 148 P.3d 1029 (2006). In Ongom, Alice Ongom was a registered nurse's assistant, a voluntary registration that requires no training or education.[9] The Department of Health had revoked her registration based on a claim of unprofessional conduct. Ibid., 134. The evidence at the administrative hearing was disputed. Ibid., 136. The Washington Supreme court held that Ms. Ongom had a protected property and liberty interest in her license, that it was just as important to her, to her reputation, as the loss of a medical license is to a physician, perhaps more so because of her very limited skills. Ibid., 139, citing Nguyen v. Dep't of Health, 144 Wn.2d 516 (2001). The minimum constitutional standard of proof necessary to revoke Ms.

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[9] "Registered nursing assistants, by contrast, have no educational or training requirements at all, perform duties only as delegated and supervised by nurses, and are employed in a field plagued by chronic and frequent turnover." Ongom v. Dep't of Health, 124 Wn. App. 935, 943 (Wash. Ct. App. 2005), reversed on other grounds by Ongom v. Department of Health. 159 Wn.2d 132 (2006)

Ongom's license was clear and convincing evidence. Ibid., 142. In the Ongom case, because the incident of abuse was disputed, there was not the "clear and convincing" evidence required. This case is much weaker – the ALJ found no evidence, and the review judge found the incident was in dispute, which does not rise to the level of "clear and convincing" required under Ongom..

A professional license revocation proceeding is 'quasicriminal' in nature and, accordingly, entitled to the protections of due process, that the loss of a medical license is more than a loss of property. Nguyen v. Dep't of Health, 516. Government-initiated proceedings threaten the individual involved with 'a significant deprivation of liberty or 'stigma.' Nguyen v. Dep't of Health, 144 Wn.2d 516 , 550 (2001) citing Addington v. Texas, 441 U.S. 418, 424-425 (1979). As in Nguyen, the loss of Ms. Hardee's license is a permanent stigma, and leaves her unable to continue the daycare she has provided for 23 years, and takes away her profession, her business, and it makes her ineligible for the only kind of employment she knows.

It is well established in federal law that, once issued, state licenses create interests requiring due process protection. Even a horse trainer's licenses are protected. Barry v. Barchi, 443 U.S. 55, (1979) (licenses issued to horse trainers were protected by due process and equal protection

because "state law has engendered a clear expectation of continued enjoyment of a license absent proof of culpable conduct by the trainer"); Bell v. Burson, 402 U.S. 535, 539 (1971) (procedural due process protection). The United States Supreme Court has held that pursuit of an occupation or profession is a liberty interest protected by the due process clause. Conn v. Gabbert, 526 U.S. 286, 291-92, (1999) (the "Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment"); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572, (1972). See also Dittman v. California, 191 F.3d 1020, 1029 (9th Cir. 1999), (the pursuit of profession or occupation is a protected liberty interest that extends across a broad range of lawful occupations), *cert. denied,* 530 U.S. 1261 (2000); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1271 (S.D. Cal. 1997) ("'[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts'" of the federal constitution). Even a building permit is a protected federal constitutional right. R/L Assocs. v. City of Seattle, 73 Wn. App. 390, 392 (Wash. Ct. App. 1994)

Ms. Hardee's license for daycare can be no less protected than a horse trainer's license or Ms. Ongom's voluntary registration as a

nurse assistant. Daycare is her occupation, her profession, her career. It is the only career she has, the only employment. The loss of her license denies her this occupation and any employment as a care provider in any arena and is a permanent stigma upon her character. The revocation of Ms. Hardee's license based on the "more likely than not" standard violates Ms. Hardee's fundamental rights to property and due process.

D. THE DE NOVO REVIEW AND DECISION FOR DSHS/DEL AFTER THE ALJ RULED IN HER FAVOR VIOLATES MS. HARDEE'S FUNDAMENTAL RIGHT TO A FAIR HEARING.

The right to a fair hearing is fundamental:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'

Tumey v. Ohio, 273 U.S. 510, 532 (1927) . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must

satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 137 (1955)

The APA affords procedural safeguards against arbitrary and improper government action, including a public hearing before an unbiased tribunal, notice of the proposed action, the right to present evidence and argument and to know the government's evidence, the right to have a decision based only on the evidence presented, the opportunity to be represented by counsel, the making of a record, a statement of the reasons for the decision, and the right to judicial review. [10] An administrative body must be fair, free from prejudice, and have the appearance of impartiality. Sherman v. State, 128 Wn.2d 164, 188 (Wash. 1995). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the robability of unfairness." Offutt v. United States, 348 U.S. 11, 14 [349 U.S. 133, 137] Quasi-judicial hearings must be conducted so as to give the appearance of fairness and impartiality. OPAL v. Adams County, 128 Wn.2d 869, 889 (1996). In the disciplinary process, a person is entitled to a hearing before a hearing officer who was not only fair, but appeared to be

[10] Ongom v. Dep't of Health, 124 Wn. App. 935, 943 (Wash. Ct. App. 2005), reversed on other grounds.

fair. Brister v. Council of City of Tacoma, 27 Wn. App. 474, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981).

The ALJ was the fair hearing officer, the "impartial decision-maker." WAC 170-03-0020 (2). Unlike the review judge, the ALJs is an employee of the employed by the office of administrative hearings and is not a DEL employees or a DEL designee." WAC 170-03-0020 (2). The review judge **is** an employee of the agency and acts on behalf of the agency. WAC 170-03-0020(19), Costanich v. Dep't of Soc. & Health Servs., 138 Wn. App. 547, 563-564 (2007). A decision to ignore the ALJ's findings, based upon the review judge's view of the credibility and the weight of the evidence, violates the appearance of fairness and every citizen's right to a fair hearing.

The review judge's readiness to find facts not in evidence shows bias in fact. For instance, there is nothing to support the review judge's claim that the ALJ did not consider all of the evidence. .There is nothing to support the claim that William was acting "shamefully" or "guiltily" or that he was thinking of touching the child. There was nothing to show that Ms. Hardee left William unsupervised with "likely many times" - there was one disputed possibility. The claims that Ms. Hardee had a "constant stream of visitors," that she spent her time "sitting on the couch," that she did not understand child development, that she was "wearing blinders,"

when there is not support for these claims show unreasonable bias. The disregard of the auditory component of supervision, the finding that Ms. Hardee broke when she was given permission to do the friends and family daycare, shown unreasonable bias. The Court should consider Ms. Hardee's claim that DSHS/DEL has unfairly revoked her license because of her advocacy for daycare owners, her training about their rights, and her union organization activities.

E. THE REVIEW JUDGE HAD NO AUTHORITY TO REVERSE THE ALJ AND ENTER CONTRARY FINDINGS BASED UPON HER OWN VIEW OF THE EVIDENCE AND OF MS. HARDEE'S CREDIBILITY

1. The Review Judge Erred By Finding "The Absence Of A Credibility Determination" Vacated The ALJ's Decision

The Review Judge Erred By Finding "The Absence Of A Credibility Determination" Vacated The ALJ's Decision. The review judge failed to give due regard to the ALJ's opportunity to observe the witnesses. RCW 34.05.464. The ALJ's ruling for Ms. Hardee is an implicit credibility determination to which the review judge must defer. The ALJ's ruling in her favor is an implicit credibility determination that the review judge can not reverse by re-weighing the evidence. This exact point was recently clarified by the Ninth Circuit in Andrzejewski v. Federal Aviation Administration, No. 06-75730, (9th Circuit Dec. 2, 2008) In

Andrzejewski, the FAA revoked Ms. Andrezewski's pilot's license, claiming that she had violated FAA regulations. The ALJ heard disputed versions of the facts and ruled in favor of Ms. Andrzejewski. The review board, the NTSB, [11] reviewed the ALJ's decision and reversed. The NTSB concluded that the ALJ had not made credibility determinations to which the NTSB owed deference, and instead, did a de novo review of the evidence and ruled for the FAA. Ibid. The Ninth Circuit reversed the NTSB: where an ALJ chooses to credit one set of witnesses' version of events over another, he has made an implicit credibility determination to which a review board must defer. The review board's failure to give the ALJ's implicit credibility determination the requisite level of deference was arbitrary and capricious. Ibid. The review judge was not authorized to re-weigh the evidence:

> "The weight of evidence, measured by the witness' knowledge, experience, and other qualifications, is every bit as much a component of "credibility" as whether the witness has contradicted himself or given the trier-of-fact other reasons to find him not credible."

Ibid. Where a hearing officer does explicitly state which witnesses were more persuasive, the findings are implicit credibility assessments as entitled to deference as explicit findings. J. P. v. County Sch. Bd., 516 F.3d 254, 261 (4th Cir. VA, 2008). While these cases fall under the

[11] The National Transportation and Safety Board

federal APA, the Washington APA is to be consistent with federal administrative procedure. RCW 34.05.001.

Washington does not give the review judge authority to determine the credibility of witnesses she did not observe. Washington courts have also recognized that finding in one's favor are implicit credibility findings. In re Marriage of Lutz, 74 Wash. App. 356, 371, 873 P.2d 566 (1994), (the finding that a mother had "proceeded in good faith in securing care and treatment ...." was an implicit credibility determination that would not be disturbed on appeal.) The findings based upon the review judge's view of Ms. Hardee's credibilty are error.

2. The Review Judge Had No Basis To Find That The ALJ Had Not Properly Considered The Evidence

There is nothing in the record to show that the ALJ did not properly consider all of the evidence. There is no evidence that the ALJ wasn't listening, that he was not paying attention, that he didn't do his job. The ALJ heard the found the facts in favor of Ms. Hardee, based upon the direct evidence presented at the hearing. The ALJ is not required to explain say why he didn't rely upon hearsay. As the presiding officer, it is the ALJ decides whether hearsay could be the basis for a finding of fact. RCW 34.05.461. The ALJ is not required to discuss the credibility of the evidence or witnesses except where findings are based "substantially on credibility of evidence or

demeanor of witnesses." RCW 34.05.461(3). In this case, the ALJ's findings were based on undisputed evidence, which the review judge acknowledged. The decision is contrary to the facts.

3. The Review Judge Had No Authority To Evaluate The Evidence De Novo

The agency's authority to evaluate the evidence is limited: "Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence." RCW 34.05.461(5). The review judge acts for the agency. WAC 170-03-0020(19), Costanich v. DSHS, supra. The agency's reliance upon their their own hearsay reports to find Ms. Hardee not credible where the ALJ ruled in her favor is beyond the scope of the review power. Costanich v. Department of Social & Health Services, 138 Wn. App. 547, 559, 156 P.3d 232 (2007).

It is the sole province of the fact-finder to pass on the weight and credibility of evidence. Boeing Co. v. Heidy, 147 Wn.2d 78 (2002). "The hearing officer is in the best position to weigh the testimony and make findings as to its credibility." Peterson v. Dep't of Labor & Indus., 22 Wn.2d 647, 652, 157 P.2d 298 (1945). The ALJ was the fact-finder. He heard the testimony, watched the witnesses as they spoke, as they offered

evidence. The ALJ was the only one authorized to judge the weight of the evidence admitted and witness credibility. The review judge erred in deciding that she could make findings contrary to the ALJ's findings based upon her own view of the evidence and of the credibility of the witnesses.

4. The ALJ findings do not rely upon credibility in any case

Even the review judge acknowledged that ALJ's findings were not based on a credibility determination, but were made "regardless of which witness was correct." CP 253 (AR 0100). The ALJ was not wrong - supervision means within "sight or hearing" and DSHS/DEL did not prove that William was beyond hearing range at the one disputed event. WAC 170-296-1360, WAC 170-06-0020(10). Nor is there evidence that Ms. Hardee had ever seen the newer waiver with the word "unattended" added. In any case, "unattended" means "with no one there: with no one present to listen, watch, or participate." [12]

5. The Review Judge Misinterpreted The DEL Hearing Rules.

An agency review board is bound by its own hearing rules. Deffenbaugh v. Dep't of Soc. & Health Servs., 53 Wn. App. 868, 871 (1989). The DEL hearing rules provide that it is the ALJ who decides the

[12] *Encarta ® World English Dictionary © & (P) 1998-2005 Microsoft Corporation.*

weight and the credibility of the evidence: "Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ." WAC 170-03-0390 (4). "The ALJ determines whether to admit the evidence and what weight (importance) to give it." WAC 170-03-0410 (2). "The ALJ may admit and consider hearsay evidence. The ALJ may only base a finding on hearsay if the ALJ finds that the parties had the opportunity to question or contradict it." WAC 170-03-0400 (2). "The ALJ decides if a party has met the burden of proof.." WAC 170-03-0490(3). These hearing rules reflect the law which provides that a requires a review judge must to give due regard to the ALJ on credibility of witnesses (RCW 34.05.464) and that the agency may evaluate evidence only as related to the agency's expertise. RCW 34.05.461. The review decision ignored the implicit credibilty determination here and evaluated the evidence unrelated to its own expertise.

If RCW 34.05.464 does actually grant a review judge the full power of the ALJ, the statute is not constitutional.[13] Such a "review" surely would deny a citizen a fair hearing with an impartial judicial officer. DSHS/DEL would be accuser, prosecutor, judge, and jury, and there would be no point in holding the administrative hearing.

6. Equitable Estoppel Prohibits DSHS/DEL From Sanctioning Ms. Hardee For Her One Day Of Unlicensed Daycare

DSHS/DEL is estopped from sanctioning Ms. Hardee for providing one day of friends and family daycare as she had undisputed permission from her licensor. Under Washington law, equitable estoppel may be applied where an admission, statement, or act has been detrimentally relied on by another party. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 902 (2004). To establish equitable estoppel against the government, there must be proof by clear, cogent, and convincing evidence of an admission, act, or statement that is inconsistent with a later claim, another party's reasonable reliance on the admission, act, or statement, and injury to the other party that would result if the first party is permitted to repudiate or contradict the earlier admission, act, or statement. Ibid. Here, Ms. Hardee reasonably relied upon her licensor's statement that she could continue to do friends and family daycare at a parent's house when her license was suspended. The review judge erred in finding that she did unlicensed daycare when the licensor gave her permission to do this. DSHS/DEL is not authorized to ignore Washington law or to enact limiting regulations that are not expressly granted by statute. State v. Gilroy, 37 Wn.2d 41, 47 (1950) There is no statute that authorizes DSHS/DEL to

---

[13] WAC 170-03-0620 would be likewise invalid

ignore this long standing legal principle. The review judge erred in finding Ms. Hardee's day of friends and family daycare was a basis for revocation.

F. THE FINDINGS ARE NOT SUPPORTED BY EVIDENCE IN THE RECORD

The Court should grant relief because the DSHS/DEL decision is not supported by substantial evidence. RCW 34.05.570(3)(e). The very premise of the DSHS/DEL decision is false- there is no evidence to show that the the ALJ "failed to consider a significant portion of the evidence presented by the Department." (AR 097) There is no allegation that the ALJ was not fully aware of the evidence presented by witnesses at the hearing, or that he was dozing or sleeping, or that he was not listening, or that he was distracted. There is no allegation that he was not fit to be a hearing officer. This assumption is arbitrary and capricious, and the decision should be reversed for lack of evidence on this ground alone, and because it is arbitrary and capricious. RCW 34.05.570(3)(i)

The findings against Ms. Hardee are not based on substantial evidence. RCW 34.05.570, RCW 34.05.461(4). Evidence is substantial if it is of sufficient quantity "to persuade a fair-minded person of the truth or correctness of the [agency] order." City of Redmond, 136 Wn.2d at 46 (quoting Callecod v. Wash. State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). The ALJ heard all of the evidence DSHS/DEL presented and it did

not convince him. Nor could it. DSHS/DEL relied upon allegations and their own reports about what others allegedly said to their investigator. CP 269, 270. They produced no witnesses to support their allegations, except for JS, and the review judge speculatued without basis about that what JS said. DSHS/DEL has the full power of the State of Washington behind them, and if there were witnesses to Ms. Hardee's leaving William alone with the children, or to persons actually living in the home, DSHS/DEL could have easily supoenaed them to appear and testify. The fact that DSHS/DEL produced no witnesses to support their allegations beyond JS, is evidence itself that their allegations are ungrounded.

The findings about William are error: The finding that William was unsupervised with children "likely many times," that William had "extensive and intimate" with the children, are not grounded. Even DSHS/DEL invstigator testified only that William made the children's lunches. (Tr. II, 5/8/07, 57.) There was one disputed incident. The finding that Ms. Hardee at that incident had left William unsupervised, because she "would have needed eyes in the back of her head" shows the review judge's erroneous belief that Ms. Hardee was required to keep William in line-of-sight at all times. This is not the evidence and ignores the WAC, which defines supervision as within sight or hearing (WAC 170-296-1360(2)) and "unsupervised" as being alone with a child for "any

length of time" and "beyond visual or auditory range." WAC 170-06-0020(10). The review judge could only speculate that Ms. Hardee was out of hearing. There was no allegation that the disputed incident was for any length of time. DSHS/DEL may not now sanction Ms. Hardee for letting William out of constant line-of-sight as that was never the plan. An administrative agency is not authorized to punish citizens for conduct not explicitly defined under the law. State v. Gilroy, 37 Wn.2d 41, 47 (1950). Nor is there evidence that William was to be more than "supervised."

The findings about unauthorized residents are error: There were only uncorroborated allegations that someone was living in the home. The only witness "assumed" a man she saw occasionally was "staying there." This is not substantial evidence.

Equitable estoppel prohibits revocation for unlicensed daycare for which DSHS/DEL gave permission. There is no evidence that Ms. Hardee did unlicensed daycare beyond the one day for which her licensor gave her permission. The DSHS/DEL finding that Ms. Hardee had an "intent to provide further care in violation of licensing requirements" is speculation and bias, not substantial evidence. DSHS/DEL is estopped from sanctioning Ms. Hardee for the one day of friends and family daycare.

Equitable estoppel applies where an admission, statement, or act has been detrimentally relied on by another party. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 902, 83 P.3d 999 (2004). Ms. Hardee relied upon what the licensor told her. She quit when she learned otherwise. To now sanction Ms. Hardee with the loss of her license, her career, her employment, where DEL gave her permission would be manifestly unjust.

The findings of lack of understanding and poor character are not supported by any evidence: The only evidence of Ms. Hardee's understanding and disposition came from her daycare parents, who sent in declarations that she was nurturing, loving, caring, a safe and excellent resource, and that their children, and in particular, their special needs children, were in good hands. CP 503-517 (AR 349-363). The finding that she doesn't have the right character to be a daycare provider is not grounded.

V. CONCLUSION

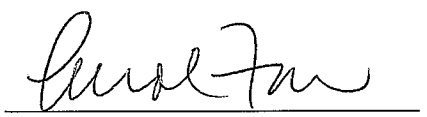
The Court should grant Ms. Hardee relief as authorized by RCW 34.05.570, reinstate the ALJ's decision and award her attorney fees. The DSHS/DEL order violates Ms. Hardee's right to due process, exceeds agency authority, ignores the WAC, and is manifestly unfair. The findings

are not based on substantial evidence, but upon inference, speculation and hearsay. The decision is so biased, so speculative against Ms. Hardee, that the possibility of DEL/DSHS retaliation against Ms. Hardee for her union activities can not be dismissed. It is arbitrary and capricious.

FEES. Fees should be awarded to Ms. Hardee. The Equal Access to Justice Act provides for attorney fees for a citizen who prevails on judicial review of an administrative decision. RCW 4.84.350. The act was adopted to allow a citizen to challenge arbitrary and capricious government action. The Court should grant her attorney fees for this appeal and for the review by superior court.

The Court should clarify to DEL/DSHS that they do not have unrestrained power over Washington daycare providers.

Respectfully submitted,



12-6-08

Carol Farr
WSBA #27470
Attorney for Kathleen Hardee

Appendix

1 Initial Order, ALJ Rynhold Fleck, 8/14/07, CP 314-333
2 WACs of particular relevance, on supervision and evidence
3 Text of RCW 34.05.571, RCW 34.05.461, RCW 34.05.464

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

MAILED
SHS - SEATTLE
AUG 14 2007
OFFICE OF
ADMINISTRATIVE HEARINGS

In Re: KATHLEEN HARDEE Appellant.	Docket No. 07-2006-L-0410 INITIAL ORDER (Child Care Agencies-Day Care)

RYNOLD C. FLECK, Administrative Law Judge (ALJ), conducted a hearing in the above-noted matter, covering May 7, 2007 through May 10, 2007. The Appellant, Kathleen Hardee, appeared and gave testimony. The Appellant was represented by Deborah Rosser and Cassandra Clemans of APRE. Patricia Allen, Assistant Attorney General (AAG), represented the Department of Social and Health Services (DSHS).

The following parties were called as witnesses for the Appellant: Kathleen Hardee, Anthony White, Susan White, and Brandy Nelli. The following parties were called as witnesses for DSHS: Harriet Martin, Joel Sexton, Don Eykel, Mack Junior, Kathleen Hardee, and Patricia Eslava-Vessey.

All of DSHS's Exhibits 1 through 23 were admitted into evidence. The Appellant's Exhibits A through R were admitted into evidence, with the exception of Exhibit O, which was withdrawn.

These matters were continued to June 15, 2007, to allow the parties' representatives to submit closing arguments in writing.

ISSUE

Whether or not the Appellant's in-home day care license should be revoked.

RESULT

The Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

FINDINGS OF FACT

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1. Kathleen Hardee has been providing in-home day care services under a license from the State of Washington since at least the year 2000. She was most recently

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relicensed in May of 2004, for the address 16434 Marine View Drive S.W., Burien, Washington, for a maximum of 12 children, with a maximum number of children under two years of age of 4. This license was effective through May of 2007.

2. On July 5, 2006, DSHS issued a letter to the Appellant suspending her license immediately, based upon an allegation that William, who is the Appellant's adult son, had committed an act constituting abuse or neglect on a minor child for whom he baby sat.

3. On October 9, 2006, DSHS issued a letter notice informing the Appellant that her in-home child care license had been revoked, referring to historical occurrences, and then citing several specific bases for the revocation, including providing unauthorized child care, violation of a 2003 safety plan, and allowing unauthorized persons to live at the residence of the day care.

4. In early 2002, DSHS issued a letter notice to the Appellant revoking her day care license. The basis of that revocation was episodes of violence between Appellant and her adopted child, William, which occurred in 2000 and 2001. None of the allegations in that revocation arise out of activities associated with the day care, but primarily out of the interaction between William and the Appellant. Out of concern of what might be observed or how that action might impact children in day care, DSHS decided to revoke the license. This revocation was rescinded because William was out of Ms. Hardee's residence.

5. William returned to the Appellant's home in 2003.

6. On March 23, 2003, the Appellant issued an e-mail to Harriet Martin from Hardee's Day Care which specifically provides the following:

> **<u>As per your request:</u>**
>
> **1. William has never, nor will be allowed any unsupervised contact with the child care children.**
>
> **2. I will notify the department immediately, of any incident that puts the child care children at risk.**
>
> **<u>Safety Plan for prevention of risk to child care children:</u>**
>
> **1. Children will be removed from situation immediately.**
> I have assistants that are with me throughout the day, the children will be removed to a safe area, i.e., separate room, outside (weather permitting), (with assistant present) and/or William will also be removed from the premises.

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> **2. I will be responsible for removing William and if necessary 911 will be called for assistance.** (I have been trained in passive restraint to deal with any risky behaviors from William)
>
> **My first responsibility is for the safety and well being of the children I care for, they will not be subjected to any form of risky behavior.**
>
> Williams leaves for school at 7:00 AM and does not return until 3:30 to 4:00 PM. William will probably be attending summer school. He is working after school for a family friend, participates in activities at The Purple Door (Burien teen center), attends counseling twice a week after school and participates in Youth group at our church. He is very active with outside interests. He is working hard to continue his success in the community and has great family and friend support.

Exhibit 7.

7. There is no duration on time on this e-mail commitment.

8. On December 17, 2004, a licensing waiver was issued by Division of Child Care and Early Learning (DCEL) to Kathleen Hardee which identifies the duration of the waiver as "now" to "ongoing." The specific provision of the waiver is to allow William to be present while the Appellant is providing care for children in the Appellant's home. As part of the waiver request is included the statement that William would never have unsupervised contact with the child care children.

9. Subsequently, in May of 2005, a licensing waiver request was approved for the time period May 1, 2004 through May 1, 2007, to allow William to be on the premises as a background check was returned which showed an assault for gross misdemeanor and malicious charge. This waiver was granted subject to William being supervised and never left unattended with children in the child care home.

10. An investigation into the July 5, 2006 allegation which resulted in the summary suspension of the Appellant's license determined that the incidents of alleged neglect or abuse occurred at someplace other than the day care facility and at hours other than day care hours. The investigation resulted in a determination that William had confessed to the behavior which was the subject of the referral from that date.

11. The investigation also brought into question whether or not the Appellant had allowed unsupervised contact by William with the day care children. Sometime in the recent past, Lila S. was a child in the care of Ms. Hardee. One evening when Lila's father came to pick

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up Lila, he saw William in an activity that he described as changing Lila's diapers. Lila's father did not think that it was appropriate for a teenage boy to be changing a child's diaper. Ms. Hardee immediately assured Lila's father that it would not happen again. There is a conflict in testimony regarding how this particular incident occurred. Lila's father testified that he entered the house, went to the dining room to sign out the child, observed Ms. Hardee with other children around her, sitting on a couch some distance from the washroom where the changing table was located. He was informed that Lila was being changed; at which time, Ms. Hardee went to the changing room, reached that room before Lila's father, and finished the process. Ms. Hardee, however, indicates that she is the one who changed the diapers and had left because she heard someone coming into the house. She left the child with William just to do up the tabs on the diapers, because she heard someone coming into the house. William was in her view at all times during this activity.

12. Prior to the July 5, 2006 referral there had been no indication in William's behavior that he was a danger to young children. Nothing in his behavior had indicated any kind of sexually aggressive behavior. All of the records, including the licensing waivers and the prior revocations deal with conflict between William and Kathleen Hardee. *See* Exhibits 4 and 5.

13. A witness, Dawn Eykel, whose two children, Mieke and Garrett, were with Ms. Hardee in her day care between April of 2005 and June or July of 2006, recalls observing people other than the Appellant and William at the residence on occasion. She would drop her children off at approximately 7:45 in the morning. Her son was there for the mornings; her daughter was there for all day. She did not know the name of the other adult present, nor was she aware of whether or not that party was anything more than visiting for short periods of time.

14. On July 5, 2006, as indicated above, DSHS issued a summary suspension, informing the Appellant that she needed to terminate her day care activities immediately.

15. After having discussed this with her licensor, the Appellant believed that she was able to provide family and friends in-home care at the family or friend's home itself. On July 7, 2006, the day following the closure of her day care, the Appellant took her granddaughter, Lila, and Elias and performed one day of care at the home of the parents of one of the children.

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16. The Appellant became aware that that was not what DSHS had determined to be friends and family care and terminated that activity. She never provided any day care for pay thereafter, until the summary suspension was lifted.

17. There is testimony that the Appellant was observed driving a van that had children in it. There is nothing that indicates that the Appellant was providing day care for those children she was transporting.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to the Revised Code of Washington (RCW) 43.215.300 and Washington Administrative Code (WAC) 170-296-0480.

2. WAC 170-296-0140 reads as follows:

WHAT PERSONAL CHARACTERISTICS DOES AN INDIVIDUAL NEED TO PROVIDE CARE TO CHILDREN?

(1) An individual must have specific personal characteristics to have a:
- (a) License;
- (b) Certification;
- (c) Primary staff position; or
- (d) Assistant and volunteer position.

(2) These characteristics are:
- (a) An understanding of how children develop socially, emotionally, physically, and intellectually;
- (b) The ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs;
- (c) The physical ability to respond immediately to the health, safety and emotional well-being of a child;
- (d) Reliability and dependability;
- (e) Truthfulness;
- (f) A disposition that is respectful of a child's need for caring attention from a care giver; and
- (g) Ethical business practices with clients, staff, the department and the community.

3. WAC 170-296-0190 reads as follows:

AFTER WE RECEIVE THE BACKGROUND INFORMATION WE:

(1) Compare the background information with convictions/actions posted on the DSHS secretary's list of disqualifying convictions/actions for economic services administration (ESA). The complete list can be found at http://www1.dshs.wa.gov/esa/dccel/pdf/Crime)and)Backg_Chex.pdf[http://www1.dshs.wa.gov/pdf/esa/dccel/Crime_and_Backg_Chex.pdf].

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(2) Review the background information using the following rules:
- (a) A pending charge for a crime is given the same weight as a conviction;

(b) If the conviction has been renamed it is given the same weight as the previous named conviction. For example, larceny is now called theft;

(c) Convictions whose titles are preceded with the word "attempted" are given the same weight as those titles without the word "attempted"; and

(d) The crime will not be considered a conviction for the purposes of the department when it has been pardoned or a court of law acts to expunge, dismiss, or vacate the conviction record.

(3) Conduct a character, competence and suitability assessment of you, your family members, staff, volunteer or any one else living at the same address as you if an individual is not automatically disqualified by a conviction record, pending charges and/or findings of abuse, neglect, exploitation or abandonment of a child or vulnerable adult.

(4) Notify you whether or not we are able to approve you, family members residing with you, staff, volunteer or anyone else living at the same address as you to have access to children in a licensed facility.

4. WAC 170-296-1410 reads as follows:

What are the required staffing qualifications for child care?

(1) You, a primary staff person, assistant, volunteer, and other person associated with the operation of the business who has access to the child in care must:

(a) Meet the qualifications in WAC 388-296-0140;

(b) Not have committed or been convicted of child abuse or any crime involving physical harm to another person; and

(c) Not have been disqualified from working in a licensed child care setting or have had a license revoked.

(2) The licensee must:

(a) Be eighteen years of age or older;

(b) Be the primary child care provider;

(c) Ensure compliance with minimum licensing requirements under this chapter; and

(d) Have completed one of the following prior to or within the first six months of obtaining an initial license:

(i) Twenty clock hours or two college quarter credits of basic training approved by the Washington state training and registry system (STARS);

(ii) Current child development associate (CDA) or equivalent credential or twelve or more college quarter credits in early childhood education or child development; or

(iii) Associate of arts or AAS or higher college degree in early childhood education, child development, school age care, elementary education or special education.

(3) Child care staff must be:

(a) Fourteen years of age or older if an assistant; or

(b) Eighteen years of age or older if a primary worker and assigned sole responsibility for the child in care.

(4) You and your staff must meet the following qualifications:

Position	Qualifications	Back-ground Check	TB Test	STARS Training	First Aid and CPR	HIV/AIDS and bloodborne pathogens training
Licensee	Eighteen years of age	X	X	X	X	X
Primary child care staff	Eighteen years of age	X	X	X Basic 20 hour training to be completed within the first six months of employment	X	X
Child care assistant/ volunteer	Fourteen years of age; (directly supervised by the licensee or a primary staff)	X	X	Recommended	If counted in staff to child ratio	X

5. WAC 170-296-0180 reads as follows:

Am I required to have a criminal history background check?

(1) At the time you apply for a license you must submit a completed background check form and finger print card if required to the background check central unit (BCCU) for each person who will have unsupervised access to children in your care. This includes:

(a) You;
(b) Members of your household sixteen years and older;
(c) Staff;
(d) Volunteers; and
(e) Other persons living at the same address as you.

(2) When you plan to have new staff or volunteers, you must require each person to complete and submit to you by the date of hire a criminal history and background check form:

(a) You must submit this form to the BCCU for the employee and volunteer, within seven calendar days of the employee's or volunteer's first day of work, permitting a criminal and background history check.

(b) The employee and volunteer must not have unsupervised access to the children in care until they have been cleared by a full background check.

(c) We must discuss the result of the criminal history and background check information with you, when applicable.

6. WAC 170-296-0110 reads as follows:

Who needs to become licensed?

(1) Individuals and agencies that provide care for children must be licensed, unless specifically exempt under RCW 74.15.020(2).

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(2) The person claiming an exemption must provide the department proof of the right to the exemption if we request it.

(3) We must not license a home that is legally exempt from licensing. However, at the applicant's request, we must investigate and may certify the home as meeting licensing and other requirements. We must apply the same requirements and procedures for certification that we apply for licensure.

(4) We may certify a family home child care for payment without further investigation if the home is:

(a) Licensed by an Indian tribe; or

(b) Certified by the federal Department of Defense. The home must be licensed or certified in accordance with national or state standards or standards approved by us and be operated on the premises over which the entity licensing or certifying the home has jurisdiction.

(5) The individuals and agencies wanting to care for children whose child care is paid for by the state child care subsidy program must:

(a) Be licensed or certified;

(b) Follow billing policies and procedures in Child Care Subsidies, A Booklet for Licensed and Certified Providers, DSHS 22-877(X); and

(c) Bill the department at the person's or organization's customary rate or the DSHS rate, whichever is less. (See WAC 388-290-0190 (2) and (3) for exceptions.)

7. RCW 43.215.300(2) reads as follows:

(2) In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

8. There is nothing in the evidence that has been presented that indicates that the Appellant has ever allowed contact by William with the children in the day care that is unsupervised and/or unattended. Although there is some conflicting testimony of whether or not William changed one of the children's diapers, it is clear that Ms. Hardee was within view and/or could hear any activities between William and the child whose diaper he was changing. This single episode does not constitute or support the allegation that the Appellant allowed William to violate any safety plan and/or any conditions associated with waivers allowing William to be on premises during day care hours.

9. Although there is testimony that individuals were observed at the home, there is nothing to support the allegation that, in fact, there were individuals, male or female, residing at the residence where the day care was located who had not had a valid background check. Although there may be testimony that others were observed there, that is all that the testimony rises to -- that there were other people who might have been there on an irregular or temporary basis. There is no evidence that these parties resided there or had contact with the children.

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10. RCW 43.215.010(2)(c) reads as follows:

(2) "Agency" does not include the following:

. . .

> (c) Persons who care for a neighbor's or friend's child or children, with or without compensation, where the person providing care for periods of less than twenty-four hours does not conduct such activity on an ongoing, regularly scheduled basis for the purpose of engaging in business, which includes, but is not limited to, advertising such care[.]

Although it was the Appellant's intention to continue to provide what is called family and friends care for some of those children who were being caused problems by virtue of the closure of her day care, the one day's activities appear to have the result of a misunderstanding between the Appellant and her licensor. When advised of the problem, the Appellant immediately terminated that activity. She did not dispute DSHS's interpretation; she merely resigned herself to stopping the care.

11. Based upon the foregoing, clearly there is a great deal of what might be characterized as circumstantial evidence or evidence which might create an inference regarding the Appellant's behavior. No one can fault DSHS in taking prompt action where children might be at risk. DSHS has a duty to protect those children who are being cared for through a franchise created by the state. DSHS must be vigilant in its duty to protect those children.

12. In light of the actual facts that have been proven, DSHS has failed to establish that the Appellant was in violation of any waiver or any security plan that might have been in existence with respect to William and his supervision. William did not have any unsupervised contact with the children in the day care, nor was he left with their care unattended.

13. There is no evidence that supports the proposition that the Appellant allowed individuals to reside at the day care residence without a background check.

14. Although the Appellant did provide one day of unlicensed care, it was based upon a misunderstanding that she had regarding the family and friends care and such violation does not rise to the level to warrant a revocation of her license. Based upon the foregoing, the Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

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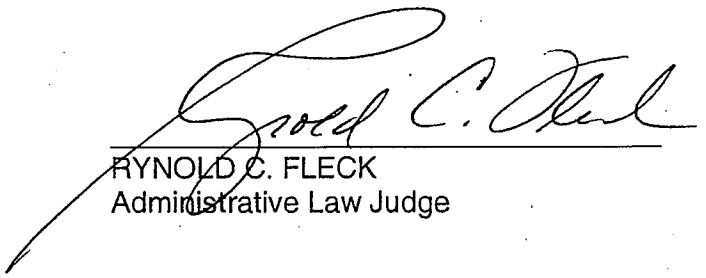
DECISION

Based upon the foregoing, the Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

SERVED on the date of mailing.



RYNOLD C. FLECK
Administrative Law Judge

RCF:jfk

Enclosure(s)

cc: Kathleen Hardee, Appellant
Patricia Allen, AAG, Department Representative
Cassandra Clemans, Appellant Representative
Rachael Langen, Program Admin.
Deborah Rosser, Appellant Representative
Community Services Division, Child Care - Day Care, Program Admin.

NOTICE TO PARTIES

This decision becomes the final administrative decision unless a party files a petition for review. A petition must be received within 21 calendar days of the mailing date of this decision at the Board of Appeals. A petition form and instructions are attached.

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[reversed]

WAC 170-296
Child care business regulations for family home child care

170-296-1360 What am I required to do to supervise children?

(2) You, or a primary staff person, must be within sight or hearing of the children in your care, both inside and outside, so that you or a primary staff person are capable of intervening to protect the health and safety of the children.
(3) Preschool age children and younger must be within sight and hearing of you or a primary staff person when outside.
(4) The supervision you provide must ensure that you are aware of what the children are doing at all times and can promptly assist or redirect activities when necessary.
(5) If you are unable to view children in your licensed space you must continually go to that area to check on them.

WAC 170-06
DEL background check rules

WAC 170-06-0020 Definitions. The following definitions apply to this chapter:

(10) "Unsupervised access" means:
(a) An individual will or may have the opportunity to be alone with a child in child care at any time for any length of time; and
(b) Access that is not within constant visual or auditory range of the licensee, an employee authorized by DEL, nor a relative or guardian of the child in child care.

Chapter 170-03 WAC
DEL HEARING RULES

WAC 170-03-0020 Definitions.

The following definitions apply to this chapter:

(1) "Administrative law judge (ALJ)" means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not DEL employees or DEL representatives.

(12) "Initial decision" is a decision made by an ALJ that may be reviewed by a review judge.

(18) "Review judge" or "DEL review judge" means an attorney employed by DEL to act as the reviewing officer and who is authorized to review initial orders and to prepare and enter the final agency order.

WAC 170-03-0040 The right to a hearing.

(3) A challenge to a DEL adverse action is heard in an administrative hearing by an administrative law judge (ALJ) employed by the office of administrative hearings (OAH).

WAC 170-03-0220 Rules an ALJ or review judge must apply when making a decision.

(1) ALJs and the review judge must first apply the DEL rules adopted in the Washington Administrative Code.

(2) If no DEL rule applies, the ALJ or review judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and published appellate court decisions.

WAC 170-03-0350 Authority of the administrative law judge.

(1) The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing, provided that the ALJ's authority shall be limited to determining whether the sanction imposed or action taken by the department was warranted and/or justified under the evidence presented during the hearing. The ALJ shall not have authority to substitute or impose an alternative sanction, remedy or action.

WAC 170-03-0390 Evidence.

(1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.

(2) Evidence may be all or parts of original documents or copies of the originals.

(3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.

(4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.

(5) The ALJ may only consider admitted evidence to decide a case.

WAC 170-03-0400 Introduction of evidence into the record.

(2) The ALJ may admit and consider hearsay evidence. Hearsay is a statement made outside of the hearing used to prove the truth of what is in the statement. The ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it.

(3) The ALJ may reject evidence, if it:

(a) Is not relevant;

(b) Repeats evidence already admitted;

(c) Is from a privileged communication protected by law; or

(d) Is otherwise legally improper.

(4) Except in cases where the department's notice of adverse action alleges the person lacks the character to provide for the needs of any child in care or to have unsupervised access to any child in care, evidence regarding character or reputation shall not be admissible. In cases where such evidence is admissible, the ALJ shall

exercise reasonable control over the number of character witnesses so as to avoid duplication of testimony and evidence and needless consumption of time.

WAC 170-03-0410 Objections to evidence.

(2) The ALJ determines whether to admit the evidence and what weight (importance) to give it.

(3) If the ALJ does not admit the evidence, the party may make an offer of proof to show why the ALJ should admit it. The offer of proof preserves the issue for appeal. To make an offer of proof, a party presents evidence and argument on the record to show why the ALJ should consider the evidence.

WAC 170-03-0490 Burden of proof.

(1) The party who has the burden of proof is the party who has the responsibility to provide evidence to persuade the ALJ that a position is correct under the standard of proof required.

(2) Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

(3) The ALJ decides if a party has met the burden of proof.

WAC 170-03-0620 Authority of the review judge.

(1) The review judge has the same decision-making authority as an ALJ, but must consider the ALJ's opportunity to observe the witnesses.

(2) The review judge's decision is the final decision of the agency in the case.

[]

APPENDIX
The Administrative Procedure Act
RCWS GOVERNING ENTRY OF AGENCY ORDERS AND REVIEW

§ 34.05.461. Entry of orders

...

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

....

§ 34.05.464. Review of initial orders

...

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a

provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

(5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.

.....

§ 34.05.570. Judicial review

...

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

§ 34.05.526. Appellate review by supreme court or court of appeals

An aggrieved party may secure appellate review of any final judgment of the superior court under this chapter by the supreme court or the court of appeals. The review shall be secured in the manner provided by law for review of superior court decisions in other civil cases.