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NO. 63362-7-I

THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KHURSHIDA ISLAM
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING
Respondent,

REPLY BRIEF OF APPELLANT

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Appellant Islam hereby submits her reply brief in response to the Brief of Respondent Department of Early Learning, (called DEL herein.)

I. REVIEW OF CERTAIN FACTS CITED IN RESPONSE BRIEF.

The appellant, Kurschida Islam, is an immigrant to the United States who obtained education in early childhood development, and successfully operated a licensed day care facility for 15 years, until she was summarily and permanently shut down by the DEL. The basis for this abrupt termination of her business and her career, as admitted by the DEL at its brief, p. 37, was “primarily (license violations) [that] occur(ed) on two particular days, February 3, 2004 and January 8, 2007.” Although the compliance agreement from 2004 noted that many of these concerns had been cited previously, AR 238, no facts were introduced of record that were sufficient upon which the review judge based the license revocation. Similarly, the second compliance agreement in 2007 recited that the violations had been previously cited, AR 225—227, but there were no facts admitted of record upon which the fact finder relied for any prior violations, other than those in 2004. The 2007 incident is the only single incident in which staffing levels were inadequate (for a period of approximately 15 minutes.) CP 578. None of the specific incidents of

2004 were replicated in 2007, and the facility was in compliance in 2003 and 2006. CP 557. At page 42 of its brief, DEL claims that Ms. Islam signed “multiple” Facility License Compliance Agreements over the years, but the brief cites to the only 2 in the record—at AR 225-227, 235-38. These are the agreements signed in 2007 and 2004, and nowhere in the record is there evidence that any of the deficiencies in those compliance agreements were not remedied.

Further, DEL admits that the January 12, 2007 incident in which the child received superficial injuries to his face, was not a basis for the license revocation. AR 87. DEL instead argues that the incident in which it learned of the injury was the “catalyst” for concluding that Ms. Islam’s license should be revoked. (DEL brief at 45)

II. CLEAR AND CONVINCING EVIDENCE

The Department of Early Learning (DEL) decision revoking Islam’s child care license violated her constitutional right to due process regarding the loss of her property and liberty interest, by erroneously applying a preponderance of the evidence standard, when the correct standard is clear and convincing evidence.

DEL urges this court to follow its similar ruling in *Hardee v. State of Washington, DSHS, DEL* 151 Wash. App 1028 (2009), in which it ruled that due process is satisfied by applying a preponderance of evidence standard to the revocation of a home

child care license. DEL further asserts that Ms. Islam relies upon the *Ongom v. Dept. of Health, Office of Professional Standards* 159 Wn. 2d 132 (2006) and *Bang Nguyen v. Dept. of Health* 144 Wn. 2d 516 (2001). decisions without analyzing the factors set forth in *Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) and related cases. However, the arguments of the State are both incorrect and untrue, for three reasons.

First, This court's conclusion that a daycare license is a mere "site" license, and more like that of an exotic dancer than a professional license, is based upon an erroneous understanding of the imposing licensing scheme in RCW 43.43. This court, in *Hardee*, dismisses the importance of the license to the individual, as compared to a "professional" license, but there is no indication in the court's decision that it was presented with a picture of the rigorous qualifications of the license and the quasi-criminal consequences of having a license revoked. This set of facts would change the strength of the analysis first prong of *Matthews v. Eldridge*.

Second, DEL quotes the important public responsibility of its legislative mandate to protect the public health and welfare. It does not, however, distinguish that role from the role of the medical profession in protecting vulnerable persons. Since a clear and convincing standard is

applied regarding health care licenses, although that profession is regulated also to protect vulnerable persons, there is no reason why this legislative mandate by itself should be a persuasive basis for requiring only a preponderance of the evidence for license revocation. Likewise, DEL ignores the source of most of its citations—footnotes from the body of the State of Washington Supreme Court decisions. These arguments by DEL have been considered and rejected by the Supreme Court of our state.

Third, in examining the third prong of analysis for *Matthew v. Eldridge*, the likelihood of a higher standard of proof being needed to avoid an erroneous result, DEL fails to consider an important factor. An erroneous result is more likely when the agency seeking to revoke the license acts as the investigator, prosecutor, and decision maker, as in a licensing action

The decision to bar the licensee from a daycare license also bars the licensee from working in any capacity—even a volunteer—in which he or she may be alone with a child, mentally ill person, or vulnerable adult. Yet, RCW 43.43 only prescribes a preponderance of evidence standard of proof. If denied a license based upon a past license revocation, however, a person must initiate a new, independent action and prove by clear and convincing evidence that he or she is no longer of suspect character, in

order to ever hold any license or be employed by an organization holding a license.

a. A daycare license revocation is akin to a professional license because of the imposing statutory scheme of RCW 43.43.

The *Bang Nguyen* court found that deprivation of a medical license fit within the category of personal rights for which a heightened standard of proof should be required, for 3 reasons: it involves much more than a mere money judgment, it is quasi criminal because it includes accusing and proving that an individual has committed some type of wrong-doing, and it tarnishes one's reputation. *Id.* At 525. Further, the strong public policy of government upholding the interests of individuals under its care was recognized as part of the reason for a heightened burden of proof. *Id.*

But DEL would have this court believe that, rather than a "Professional" license which is connected to a person's standing in the community, a daycare license is a mere "site" license, following a location more than a person. The requirements for a license quickly dispel this impression. WAC 170-295-0060, parts "a" through "n", in pertinent part, require that the licensee attend orientation programs that the DEL provides, arranges, or approves; fill out an application booklet; provide an employment and education resume; provide a diploma or education transcript copies; provide three professional references; provide a list of

qualified staff; create and provide a child care handbook for parents; prove liability and medical car insurance; create and demonstrate an in-service training program; provide a health care plan reviewed by a medical professional; create and provide written policies and procedures for the daycare. The WAC goes on to require actual and detailed “site” related submittals, such as occupancy permits and scale drawings. (at parts “l” and “o”) For 15 years, Ms. Islam satisfied all of these complex categories of standardized knowledges, skills, and abilities in order to obtain and maintain her license.

RCW 43.43.830 casts a broad net to regulate through background checks all prospective employees, custodians, parents (foster or adoptive), or volunteer who will have unsupervised contact with children, developmentally disabled persons, or vulnerable adults. Specifically, RCW 43.215.200 directs DEL to license agencies and investigate each of their staff having unsupervised access to children. This requirement extends to primary staff, assistants, volunteers, interns, and contract providers. WAC 170-96-0040. WAC 388-06-0620 provides that the background checks include conviction records and civil adjudications and are used to determine the suitability of the applicant to have unsupervised access to children, and other vulnerable persons. A person who is not authorized by DEL approval of the background check “shall not” have

unsupervised access to children in child care; WAC 170-06-0040(5). A “disqualified “ person shall not be present on the premises of a licensed facility. WAC 170-06-0040(7)

RCW 43.43.830(3) defines a “Civil Adjudication proceeding” in part, as a final order finding “violation of a professional licensing standard regarding a child or vulnerable adult.” Hence, if Ms. Islam’s license for her daycare is revoked, WAC 170-295-0100 (3) (c) requires that her application for a new license be denied. Further, without authorization by DEL, she cannot work in any agency as a child care worker or a caretaker for any vulnerable person. For any such job, she must pass a back ground check that reveals a “civil adjudication proceeding.” But WAC 170-06-0020(9) considers a license revocation or a civil adjudication proceeding to be a “negative action.” Even to work as a staff person, WAC 170-06-0070 (e) provides that past license revocation may disqualify an applicant.

Further, if DSHS or DEL refuses to allow her to obtain clearance because of her past license revocation, although she can protest and request a new hearing, she cannot contest the underlying revocation decision. WAC 170-06-0110. She must prove by “clear and convincing” evidence that she has taken enough “corrective action” and

“rehabilitation” for the department to “consider” her for a license in the future. WAC 170-295-0100.

Similar regulations bar staff from adult day care centers if they cannot achieve DSHS authorization to work through a background check. WAC 388-71-0752(7). Therefore, Ms. Islam does not only lose her daycare business if her license is revoked, but she also loses her opportunity to work with either children or adults, even as a volunteer, in any agency serving their needs.

For some programs, i.e., to work for any managed care entity that sends individuals into homes to care for children or vulnerable adults, DEL “will deny payment” for the services of any person who has had a license to care for children revoked. WAC 388-71-0540. Ms. Islam cannot obtain authorization to be the caretaker in a home, of her relative or of her own mother, under this section. There is no provision for regaining this care-giving function once a license revocation is final. The penalty is permanent.

Therefore, based upon all of the previously cited authorities, the revocation of Ms. Islam’s license is quasi-criminal in nature, for it brands her as a person who cannot be trusted in a care-giving situation, in the same way that a criminal record is viewed by the same regulations. Ms. Islam, a businesswoman in her community, who has never harmed any

child, is untouchable as a potential employee/care-giver. To imply that a day care license and the implications and consequences from revocation of the license is like that of an exotic dancer, as DEL does, is to disrespect this court's need to inquire into the true nature of the property interest of which Ms. Islam was deprived without due process. The licensing scheme is a web that is every bit as exacting and technical as the regulation of the medical profession.

b. DEL's string cites of out of State cases contribute no more to the analysis of this issue, and ignores the Supreme Court's weighting of the second factor of *Matthew v. Eldridge*.

Virtually all of the out of state authorities were cited and considered in the prior State Supreme Court cases, *Bang Nguyen* and *Ongom*. More importantly, the arguments regarding the State interest in protecting the public as a countervailing interest to the individual liberty interest in licensure, is faulty and was rejected in those cases. The out of state cases do not provide us with enough information about the regulatory processes in those states to compare the consequences of license revocation with that in Washington State.

The DEL argues that children are vulnerable and too young to “provide testimony due to their age, inability to retain and recall facts, and vulnerability in a hearing setting.” (DEL brief, page 20.) However, this

type of vulnerability is no more extreme than the vulnerability of the sick and injured to the medical profession. By itself, this issue cannot be distinguished from the similar situation, in which our Supreme Court has determined that the medical profession should be protected by a higher standard of proof.

The lack of ability to be reliable witnesses is also an important reason to support the need for a higher level of proof. DEL seems to argue that part of its mission cannot be to support highly qualified caretakers; it should instead realize that respect for those licensees who have complied with stringent requirements, is also a respect for the public. It should not want to wrongly accuse a caretaker of injuring a child when the caretaker is innocent, and thus deprive children of a nurturing care-giver. Yet, that is exactly what DEL wants in this case—although Ms. Islam never injured a child, DEL wants the mere fact that a child was injured superficially at her facility to allow the licensing agency to draw an inference that her character is inadequate to care for children. This type of attitude will not increase the public respect for and confidence in the good and protective aspects of the powerful government regulatory scheme in Washington State.

DEL's argument that the government has a right to regulate occupations is irrelevant to this case. The question is not the power to

regulate, but the umbrella of government regulations that infringe upon the liberty of individuals, to perform needed service-related jobs in society, to care for their own family members at home, and to be penalized as a criminal who has been convicted of a crime beyond a reasonable doubt.

Should that be taken away by the preponderance of evidence? No.

c. A higher standard of proof is needed to avoid an erroneous result.

DEL's argument that evidence is difficult to obtain because of the vulnerability of children actually supports the case for a higher standard of proof, because at the preponderance of evidence standard, individuals can be deprived of their liberty to obtain all of the jobs in their expertise, by mere inference. When decisions can be made upon speculative circumstances, it is important that the level of proof be high enough to prevent erroneous results.

In *Johnson v. Board of Governors of Registered Dentists* 913 P.2d 1339, 1345-47 (Okla. 1996), the court considered that when an agency seeks to revoke a professional license by acting as investigator, prosecutor, and decision maker, a higher level of proof is needed to prevent erroneous results. Here, because of the extensive licensing scheme, DEL has control over all of the licensing documentation. It is the investigator. It is the prosecutor. It determines to revoke the license. In this case, for instance, the testimony of the satisfied parents was discounted. The main witness

was the licensor, and the evidence consisted of the licensor reciting the violations that she had purportedly witnessed. While the licensee has a right to participate in hearings, this does not fully counterbalance the huge monopoly on information held by DEL. Just as vulnerable children do not make good witnesses for the state, they also do not make good witnesses for the licensee. Given the extreme impact upon an individual of a DEL license revocation, and the great potential for an erroneous decision, a clear and convincing standard of proof is needed in order to reduce the risk of erroneous deprivation.

III. REVERSAL OF SUMMARY SUSPENSION EXCEEDED REVIEW JUDGE AUTHORITY

The Review Judge exceeded her authority by reversing the initial order that found there was no cause for summary suspension of the license.

While the DEL brief cites some sections of the law that define the powers of the review judge, (particularly RCW 34.05.464(4), DEL has avoided mentioning the jurisdictional sections of the same law, at 34.05.464(1). Unless the jurisdiction of the judge is reached, the judge cannot exercise her powers. As cited in the opening brief, section (1) holds that, unless a party petitions for review, an initial order is final. WAC sections 170-03-0550 (2), 170-03-0580(1) and 170-03-0540 cannot be clearer—they require that to change the initial order, review must be

requested within 21 days, and if no one timely requests review, it becomes final. The review judge has no authority to review issues absent a petition for review. DEL cites no authority allowing the judge to initiate a review; the authorities cited only set forth the scope of the review judge's powers for issues properly before her. Accordingly, the review judge had no authority to reverse the initial order finding the summary suspension to be error.

Likewise, DEL provides no countervailing authority in its brief for its argument that the review judge's legal basis for reversing the summary suspension is valid. The department admitted it had no proof of an "imminent danger" or that there was the need for "emergency action" per the statute and per WAC 170-03-0300(1)

Finally, DEL does not address the arguments why the issue is not moot as a matter of public policy, since no person can appeal these legal issues until the final licensing action. DEL failed to address the federal authorities that rule that a wrongful deprivation can independently support damages. If DEL's position were accepted, and the issue is deemed moot, then summary suspensions—the harshest of actions because they deprive a person immediately from practicing under the license, regardless whether the license is ultimately revoked-- become exempt from any possibility of appellate court review. The destruction of a business will have already

happened before the process of a hearing can take place. DEL would have the court allow it to summarily suspend a license more easily than it can revoke it, and never answer to the process on appeal.

DEL in its brief provided this court with no authorities contrary to those cited by Ms. Islam in support of allowing for review of cases similar to review of the summary suspension proceeding. DEL obviously does not contest that failure to request and obtain a stay of proceedings was held not to make moot the case of a litigant contesting land zoning decisions, in *Pinecrest Homeowners v. Glen Cloninger and Assoc.* 151 Wn. 2d 279 (2004). While failure to obtain a stay may allow enforcement of the action below, i.e., a rezone, license revocation, or collection of a judgment, it does not render the matter moot. *Ryan v. Plath* 18 Wn.2d 839 (1943).

Likewise, DEL did not address the argument that even if moot, the court should address an issue when it raises an issue of substantial public interest that is likely to reoccur. *PR of Mines* 146 WN.2d 279 (2002) In making this determination, the Court of Appeals considers the following factors: whether the issue is of a public or private nature, and the need for a judicial determination for future guidance to public officials. Here, whether or not an agency has exceeded its legislative authority is a matter of public policy import; the protection of an individual's constitutional

rights to property and liberty from being summarily put out of business are also issues of public import.

IV. REGULATIONS MUST BE INTERPRETED LIKE SIMILAR DEL REGULATIONS

DEL provides no alternative ways to interpret its regulations, therefore, Ms. Islam's construct regarding the meaning of compliance agreements and the term "repetition" are correct and the findings do not contain adequate evidence to support the conclusions of law that Ms. Islam's license should be revoked.

The license of Ms. Islam was revoked based upon violations listed in compliance agreements in 2004 and 2007. The authority of the review judge is irrelevant to this discussion, because the Review Decision appropriately adopted the substantive findings of facts made in the initial decision. AR 22.

DEL admits that the Review Judge primarily relied upon the February 3, 2004 and the January 8, 2007 Facility Licensing Compliance agreements (DEL brief at 37), but argues that DEL was not obligated to allow Ms. Islam to demonstrate compliance with the agreements before moving to revoke her licenses. Also, DEL argues that the important terms are undefined in the applicable WAC, especially that the term "repeatedly" is not defined in its WAC provisions, DEL asserts that its action revoking the license was not arbitrary and contrary to its laws.

However, DEL cites to no authority to support its position that,

although these very terms are defined in the WAC relating to family home daycare licenses, the same definitions of these terms of art do not apply to Ms. Islam's Child Care center license.

Compliance Agreements are the identical tool used under both licensing schemes. DEL alleged "repeated" violations as the basis for license revocation in this case. "Violations" are those listed in the Compliance agreements. Yet, DEL tells the court it should not apply the definitions of the terms in the almost-identical licensing regulations.

DEL cites no authorities or standards to explain how these terms should be interpreted. There are no cases in Washington that either party has cited that interpret these terms under the DEL rules.

A standard tool of statutory interpretation, when the issue is of first impression, which has often been used by Washington courts is to be guided by interpretation of a similar statute. *Seattle Packaging Corp v. Barnard* 94 Wn. App 481 (1999) (interpretation of the language of a similar federal statute is utilized as guidance.); Statutory schemes should be interpreted as a whole, avoiding unreasonable and illogical consequences. *Seven Gables v. MGM/UA Entertainment* 106 Wn.2d 1, 721 P.2d 1 (1986).

The main difference between a license for a family home daycare and a daycare center is the number of children allowed at each facility. The

licensing schemes are governed by identical background screening regulations. There is no rational basis to define a Compliance agreement differently under the two licensing schemes, or to use a different standard for the term “repeatedly.”

Facility License Compliance Agreements are part of an over-all license enforcement scheme that is common to many licenses enforcement processes in the State of Washington, and the concept is defined and utilized universally similarly.

Per RCW 43.215, Facility License Compliance Agreements are defined in WAC 170-296 (pertaining to family home child care):

“Facility License Compliance Agreement” means a written notice of rule violations and the intention to initiate enforcement, including a corrective action plan.

WAC 170-296-0020

DEL provides no authority for interpreting the term differently as to Ms. Islam’s Child Care Center License.

Likewise, the language printed on the Compliance agreement states:

I understand that if I do not complete the plan of correction by the agreed on date, the department may fine me a maximum civil penalty of \$75 (family homes) or \$250 (child care centers) per day per item of noncompliance. I understand that I may call a licensor or health specialist of request an extension, for good cause, if I am unable to complete the plan of correction by the agreed-on date. I

understand that the department may also take other licensing action for failure to meet licensing requirements.

AR 225.

It is clear that the license scheme sets up a process for licensees to have an opportunity to correct deficiencies. DEL quoted in its brief only the last sentence of the above paragraph—but read as a whole, the last sentence means that further action will be taken against the license if the corrections are not made. Any other reading, given the preceding several sentences, would not make sense and would make the preceding statements useless. DEL’s interpretation violates basic contract and statutory interpretation principles. i.e., see *Seven Gables*.

Ms. Islam is correct to insist that her licensing scheme sets up a notice and opportunity to correct a deficiency, thus, contrary to the analysis of DEL, Ms. Islam correctly cited her legal authority holding that a licensee cannot be the subject of a lawful revocation process until adequate notice and opportunity to correct have been provided. *Valley View v. Social and Health Services* 24 WN.App 192, 599 P.2d 1313 (1979).

The definition of a clear standard for the term “repeatedly” further buttresses the intent of DEL’s licensing scheme. WAC 170-296-0200 defines the term “Repeatedly”:

“Repeatedly” means a violation of a licensing regulation

that is written on a facility licensing compliance agreement that occurs more than once during a twelve month time frame,

DEL argues that this WAC, by its terms of scope, pertains to Family Home daycare licenses, and not Ms. Islam's Child Care center License. However, DEL has not provided any authority or any rationale why this standard should not equally apply to both licensing categories. The weight of case law, to interpret the same regulations consistently with similar language in other regulations, instead supports Ms. Islam's analysis. The 2004 compliance agreement and the 2007 compliance agreement, were 3 years apart, and therefore there was no basis under its own regulations for DEL to move for revocation of Appellant's license based upon "repeated" violations. This WAC is key--it establishes the DEL's obligation to show that appellant violated licensing rules and that the rules were the subject of a Facility Licensing Compliance Agreement, more than once in a twelve month period. Otherwise, there is no basis for license revocation for "repeatedly" violating license rules.

If there is another standard for the term "repeatedly", DEL fails to provide any. Without any standard, the term is vague and allows for arbitrary and capricious license revocations.

In summary, DEL has failed to challenge Ms. Islam's opening brief

regarding the failure of the factual findings to support the conclusions that adequate evidence was proven to constitute revocation of the license, under DEL's own rules. Pointing out that a WAC applies to a specific license that is slightly different from Ms. Islam's license does not in any way discredit the use of the same definitions for Ms. Islam's licensing process, when there are no contrary definitions cited, and the statutory schemes are virtually identical.

V. ATTORNEYS FEES.

Appellant is entitled to attorneys fees and costs for this appeal because her license was revoked for a substantially erroneous reason.

RCW 4.84.350 provides that a court "shall" award a party that prevails in a judicial review of an agency action fees and other expenses, unless the court finds that the agency was substantially justified. In this case, the agency repeatedly violated appellant's constitutional rights by summarily putting her out of business and by determining her case on a relaxed and unconstitutional burden of proof. The agency also revoked her license without allowing her to demonstrate compliance under standard compliance agreements, or without crediting her with coming into compliance.

The purpose of this fee shifting statute, also called the Equal Access to

justice Act, is to allow for the recoupment of attorneys fees so that individuals may challenge actions of the State when otherwise it may not be feasible to do so.

This statute is mandatory, and shall be awarded; the agency has the burden of proof to show that its action is ‘substantially justified’ in order to escape payment of fees and costs. *Construction Industry Training Council v. Washington state Apprentice and Training Council* 96 WN. App 59 (1999).

Accordingly, if appellant prevails on any of her 3 assignments of error, she is entitled to her reasonable attorneys fees and costs on appeal.

DATED this 2nd day of December, 2009.



Jean Schiedler-Brown

WSBA #7753, for Appellant