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ORIGINAL

NO. 64007-1-1

COURT OF APPEALS
DIVISION ONE OF THE STATE OF WASHINGTON

WARE, Jacqueline,
Appellant

vs

COLLINS, Timothy and DSHS
Respondents

APPELLANT'S BRIEF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION ONE

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Ware v Collins & DSHS

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INTRODUCTION
Assignment of Error

(1) Ware *pro se* respectfully asks the Court to set aside and reverse the order entered by the Snohomish County Superior Court because the order was not supported by competent and substantial evidence as the hearing was conducted as a judicial review of the administrative record, over the objection of Ware, without benefit of the electronic transcription of proceedings in violation of RCW 34.05.566 (2) and without notice that Ware's Motion for Remand would be heard as a judicial review of the record.

(2) The superior court acting in its appellate capacity failed to comply with applicable statutes, the APA, and case law governing petitions for judicial review in violation of RCW 34.05.475 (1) (2) (h) and RCW 34.05.476 (2) (h). All case law and statutes require DSHS to transmit the electronic record for any Petition for Judicial Review unless parties stipulate to some other method. Ware did not stipulate. DSHS admitted no record. CP 54.

(3) The court failed to award court costs and legal fees even though Ware alleged the State filed frivolous briefs in support of Collins motion for change of Judge and change of venue from King County Superior Court to Snohomish County while acknowledging failure to comply with case law and statutes requiring the transmittal of the entire record of proceedings before the administrative law judge.

(4) The court failed to include the cost of the violin rental fees in its final order and its order on Ware's Motion for Reconsideration.

(5) The court acted in a *de novo* capacity in violation of RCW 34.05.588.

(6) The court limited what Ware could request for reimbursement to \$110.00 per month, not at 55% of the total cost of any lessons and violin rental fees per month. Ware may have written a check for two months of lessons totaling \$400.00. Collins would have owed 55% of 400.00, not a flat fee of \$110.00. CP 17

Ware asks this court to find error and reverse for the trial courts failure to remand the case back to the DSHS for a new hearing, failure to award costs and fees, and any other sanctions the court finds fair and reasonable.

STATEMENT OF THE CASE / BRIEF HISTORY

Did the trial court error by not remanding the case back to DSHS for their failure to provide the entire record on petition for judicial review? Did the trial court error for failing to award Ware costs and fees based on frivolous actions by the State? Did the trial court error for failure to include the violin rental fees in its final order? Did the trial court error by conducting a *trial de novo*?

The issue on appeal commenced on October 31, 2007, when King County Superior Court Judge Susan Craighead issued an Order of Child Support following a modification action involving appellant Ware and respondent Collins. Collins was sanctioned by Judge Craighead for failure to reimburse Ware for his share of court-ordered violin lessons and violin rental fees. The court found Collins in arrears for \$2,175.00. He was also ordered to pay \$1,000 in Ware's attorney fees for excessive litigation. CP 258

At the support modification hearing before Judge Craighead, carbon copy checks were provided and accepted by a superior court judge as “proof of payment.” The judge did not require Ware to produce copies of cancelled checks as “proof of payment” citing it was an unnecessary burden and would unreasonably delay reimbursement to Ware. Collins was advised that if he had any doubts about the cost of lessons and needed further proof of payment, he had the option to contact the violin instructor.

Ware was only required to provide the court with copies of the checks as proof of payment. Judge Weiss’ June 5, 2009 Order on Petition for Judicial Review concurs that King County Superior Court Judge Craighead accepted carbon copies as proof of payment.
CP 17

Judge Craighead only required Ware to send Collins “proof of payment” and if Collins failed to remit payment within two weeks, Ware was authorized to seek the services of the DSHS. Ware had the right to believe and trust that the same proof of payment accepted by a superior court judge would be sufficient and acceptable proof by a lower tribunal.

“Father agrees to pay \$2,136 to mother within two weeks. If he does not, then the mother may submit this to DSHS which shall enforce the obligation along with basic support.” --
KC Superior Court Order - Oct. 31, 2007 CP 17

Upon receiving proof of payment in December 2007, Collins refused to pay telling Ware that he would not accept carbon copies of checks as proof of payment and that he expected an itemized statement and copies of cancelled checks.

Ware felt Collins was trying to dodge payment and avoid complying with a superior court order by attempting to find a loophole to avoid compliance again. The parties were represented by competent counsel at the hearing before Judge Craighead. Collins was well aware of the proof of payment method submitted to the court in the form of carbon copy of checks. (Letter from Ware’s counsel to Collin’s counsel October 24, 2007 addressing a carbon copy check as proof of payment) CP 154

As Collins refused to comply with a court order, Ware contacted DCS about Collins refusal to pay per Judge Craighead’s order and was advised to send them the proof of payment along with

the letter submitted to Collins and his responsive letter refusing to pay and they would commence a transfer payment. Ware complied. Ware was not informed that Collins could request a hearing to contest DCS's decision to commence transfer payment for violin lessons and violin rental fees.

On February 22, 2008 DCS served Collins with a Notice of Support Owed re the violin lessons and violin rental fees. Collins *orally* requested a hearing in violation of RCW 34.05.570 (3) (c). The state confirms Collins orally objected to the Notice and requested an administrative hearing. CP 24

Thus, the ordeal begins.

On April 28, 2008, the hearing was conducted before Administrative Law Judge, Radcliffe. The hearing was only to determine if Collins failed to reimburse Ware for his share of the violin lessons and rental fees as required in Judge Craighead's October 2007 order. The hearing on a very narrow issue, lasted two hours.

Ware found the hearing confusing and frustrating as 1) the ALJ had re-numbered the exhibits in a way that was difficult to follow, 2) failed to control the proceedings, 3) allowed Collins to make disparaging remarks about Judge Craighead, 4) and permitted Collins to ramble about issues and facts not in evidence.

Ware objected several times concerning hearsay and irrelevant testimony without corrective action on the part of the ALJ. Collins interrupted numerous times, his testimony was rambling and on occasions so irrelevant that it was difficult at best for Ware to cross-exam Collins. The ALJ offered no structure and failed to sustain or even overrule many of Ware's objections. On occasions, the ALJ seemed resigned to Collins behavior or hesitant to take control of the proceedings.

The ALJ's final ruling was entered on May 19, 2008. The decision completely ignored facts in evidence as it pertained to oral testimony and Judge Craighead's order of October 2007. The court

seemed to disregard credible testimony by Ware, and set a different and more burdensome standard and requirement for “proof of payment”. (ALJ’s Final Order) CP 104

The ALJ substituted her judgment for that of a superior court judge in violation of WAC 388.14A.3310. On July 3, 2009, the ALJ denied Ware’s motion for reconsideration.

If there was any doubt, question or misunderstanding regarding a superior court order, out of fairness and in an abundance of caution, the ALJ had the duty and obligation to send the matter back to the superior court for clarification. Ware had a right to depend and rely on a Superior Court order that was based on a ruling permitting carbon copies as “proof of payment”. The ALJ imposed obligations which never before existed.

The ALJ ignored the plain language of the order and subjected it to her own private interpretation subjecting Ware to a more stringent standard and method to satisfy proof of payment.

The ALJ did exactly what the trial court wanted to avoid as the trial judge had access to the entire dissolution file and was well aware of Collins history of excessive litigation, failed payments, and prior sanctions.

The ruling was arbitrary and capricious in light of the facts in evidence and there were several findings and conclusions that disregarded circumstances and were not supported by the facts, evidence, or testimony in violation of *Eggert v Dir Employ Security*, 16 Wn.App 811.

At the conclusion of the hearing conducted on April 28, 2008, the ALJ asked counsel for DCS what he thought and he agreed that Ware had provided sufficient proof of payment. This was all electronically recorded. The ALJ's decision disagreed with counsel for DCS that Ware had submitted sufficient proof of payment to Collins and failed to send the matter back to Judge Craighead for clarification.

The ALJ's final decision of May 19, 2008 and July 3, 2008 ruling denying Ware's Motion for Reconsideration was timely appealed to King County Superior Court on July 29, 2008. At this point, given the confusion about the definition of "proof of payment" (if the lower tribunal or a superior court judge had final authority), Collins has failed to pay anything towards the violin lessons and violin rental fees for nine months.

The child, Taylor continued to take lessons from Dr. Quinton Morris at Seattle University. At this point, Collins is now over \$1,000 in arrears due to the litigation and the ALJ's failure to send the matter back to the Superior Court for clarification regarding the "proof of payment" language.

Once the petition for judicial review is filed in the King County Superior Court, Ware immediately moves to have the matter transferred to Judge Susan Craighead. Collins files an opposition to Ware's motion to transfer to Judge Craighead. The State does not intervene. The Chief Civil Judge grants Ware's motion as clarification of the "proof of payment" issue involved the October 31, 2007 order issued by Judge Craighead.

On September 18, 2008, a letter is received by the state which advises technical problems with the recording device. CP 54

“ I am the Assistant Attorney General representing the department of Social & Health Services (DSHS) in your petition for judicial review of the Administrative Law Judge’s order regarding child support. I learned that, due to technical problems with the recording device in your administrative hearing, the Department is unable to produce a complete transcript of the hearing below. Only the Administrative Law Judge’s voice can be heard on the tapes of the hearing.” ...if you believe your argument to the court necessarily relies on evidence that would have been contained in the transcript of proceedings, the matter may need to be remanded back to the Office of Administrative hearings in order to re-create an adequate record for review by the superior court.”

On September 22, 2008, Ware sent a letter to AAG, Daphne Huang advising that RCW 34.05 required the full record. CP 96

Ware also encouraged the parties to try and settle the matter per RCW 34.05 and advised that the deadline had passed for filing the entire administrative record. CP 186

On October 7, 2008, the State again advises the parties that there was a recording device failure.

“It is regrettable that a complete a complete recording of your administrative hearing was not made due to a recording device failure.”

Ware made it clear to the State that the ALJ's notes would not be acceptable or any other abbreviation of the two hour hearing. Ware requested remand and a return of the filing fee for the Petition for Judicial Review, attorney fees, and any interest. The state responded as follows:

“Such fees and costs are not provided for under Washington’s Administrative Procedure Act, which governs this administrative law review, nor under other statutory authority.”

Collins files an improper Motion to Affidavit Judge Craighead, (CP 37 & 49) and instead of the State requesting the court remand the matter back to the DSHS due to the lack of the electronic record as required by law and the case schedule, the State immediately files a brief in support of Collins Motion to Affidavit and for Change of Venue. The State provides all case authority, statutes and case law in support of and on behalf of Collins. CP 42, CP 44

Parties were *pro se* until the State intervened on behalf of Collins. Ware felt compelled to retain counsel to defend against the affidavit and change of venue as it appeared the State now had an interest in the case and was representing Collins by joining in his motion. Mr. Michael Loudon was retained as he was counsel of record for Ware at the child support modification action before Judge Craighead.

Judge Craighead eventually signed the order on affidavit of prejudice, but denied the request for change of venue on November 25, 2008 as the cause number on the petition for judicial review was a different cause of action from her Order of Child Support. Therefore, she had not made a discretionary ruling on the new filing for judicial review. CP 22

The Petition and Ware's Motion for Remand was subsequently transferred to Judge Regina Cahan. Judge Cahan recused as she was familiar with Ware in a professional capacity and wanted to avoid any appearance of unfairness.

To avoid additional recusal's and as Ware was expected to provide support for other judge's, the matter was transferred to Snohomish County. Cahan denied Ware's motion for costs and fees as Collins and DSHS's motion for change of venue was granted. Cahan did not issue a ruling on the merits of the Petition for Judicial Review or the Motion for Remand in which Ware was also requesting fees for the State's frivolous support of Collins motions in light of their failure to provide the electronic record. CP 73

The Petition and Ware's Motion for Remand was transferred to Snohomish County Superior Court; creating an additional burden. The petition should have remained in King County Superior Court with Judge Susan Craighead as there was no conflict of interest and she had already made a discretionary ruling on the modification action.

It is not clear to Ware why the State joined in Collins motion to affidavit Judge Craighead. Ware can only speculate for argument sake that perhaps the State did not want Judge Craighead to hear the petition for judicial review as it appeared the ALJ had substituted her judgment for that of the trial judge.

The ALJ's ruling was arbitrary and capricious, failed to give deference to the expertise of a higher tribunal, and there was no transmittal of the electronic record in violation of APA, Chapter 34.05 RCW.

Although Ware only requested Snohomish County Judge Weiss address the Motion for Remand without argument to avoid time and travel expenses, the court ordered the parties to appear on June 5, 1009.

Unfortunately, violin lessons stopped January 2009 as Ware could not afford to pay for lessons without reimbursement from Collins. Ware had expected a swift and fair resolution on the Petition for Judicial Review. The actions of DSHS and Collins prohibited a fair, swift, and just resolution.

Collins was in violation of a King County Superior Court order issued by Judge Susan Craighead October 2007, yet there was no clarification as to what constituted proof of payment based on the written decision issued by ALJ Radcliffe. Collins is now over 18 months in arrears at \$110.00 per month; excluding cost of violin rental fees.

The hearing occurred as scheduled on June 5. Appellant Ware and respondent Collins appeared pro se. DSHS appeared through AAG, Michael Scott Majors.

The State continued to argue orally and in its briefing that “remand may not be necessary,” contrary to all APA rules, all controlling case law, and statutes governing appeals of administrative hearings in violation of RCW 34.05.476 (2)(h).

DSHS admits in its brief in their Response to Second Motion for Remand, CP 9, page 60 that “where a petition for judicial review is filed, DSHS is required to transmit the record maintained by the ALJ...It shall also include a transcript of the recording..” The State never cited one statute or referenced any case law in support of their position that the transcription of the electronic recording “may” not be necessary.

However, over Ware’s strenuous objections, Judge Weiss conducted a trial *de novo* on the merits of the petition for judicial review.

Ware's motion before the court was only for remand for DSHS's failure to produce the entire record for review. (Second Motion for Remand) CP 12

Ware cites the following cases in her support of remand if there is no transcript of proceedings:

Ault v Highway Comm'n, 77 Wn.2d 376, 378, 462 P.2d 546 (1969); Porter v Dept't retirement System, 100 Wn.App. 898, 903, 999 P.2d 1280 (2000). Vazquez v Dep't of Labor & Industries, 44 Wn.App. 379, 383, 722 P.2d 854 (1986); RCW 34.05.510 (2).

If APA is silent, court looks to the Rules of Appellate Procedure (RAP). The RAP also requires a transmittal of the electronic record. If no record, remand is required.

The state emphasized that the record was "adequate" without transmittal of the electronic record. Ware contends that the court acting in its appellate capacity requires the entire record as required by law.

Although the State admitted in its Response to Second Motion for Remand (CP 61) that “it is not clear that failure to provide a transcript necessarily requires that the matter be remanded”, rather than finding case law clearly required remand, they proceed full steam ahead with objections to Ware’s motion for remand.

DSHS states “nevertheless, if a transcript is necessary for proper review of the issues presented by the hearing, a remand for additional proceeding is appropriate and Ware’s motion should be granted.” CP 62. The State does not cite one authority to support their position that a transcript is needed for “proper review”. Ware contends that the law requires a transcript for any review on appeal.

June 5, 2009, Judge Weiss denies Ware’s motion for remand, issues a decision on judicial review, and denies costs and fees.

What is confusing is that the court found 1) that a copy of a carbon copy does not constitute proof of payment, 2) that King County Superior Court Judge Craighead “accepted the front of checks as proof of payment when establishing the father’s liability for unpaid violin lessons, and 3) found that the ALJ committed no error of law or fact or that the ALJ’s final order was improper. CP17

Ware’s motion for reconsideration (CP 24) was denied on July 9, 2009. CP 6

Before a court can test the validity of an administrative act, it must have the record of the evidence submitted to the agency. The court must review the same record which was before the agency and apply its own independent judgment to it.

Ware files this appeal.

ARGUMENT

The issue before the Judge Weiss was not just the fact that the ALJ substituted her judgment for that of a superior court judge, or that it was arbitrary and capricious in light of the entire record, or that she failed to allow for structured cross-examination, but that there was no electronic record for the trial court.

If in Judge Weiss' order he agrees that King County Judge Craighead accepted the front of checks as proof of payment, why was a lower tribunal (ALJ) permitted to substitute her judgment for that of a superior court judge?

If Judge Weiss found that King County Superior Court Judge Craighead accepted carbon copy checks as proof of payment, wouldn't his ruling suggest that the ALJ erred by substituting her judgment for that of a superior court judge? CP 17

Given the seemingly conflicting findings, Ware is placed in a no win situation.

Ware contends that the matter should have been remanded once it was determined that the electronic recording was defective and could not be made available to the court. In the alternative, the State should not have supplied briefing supporting Collins motion to affidavit Judge Craighead, but should have supported Ware's remand or allowed Judge Craighead an opportunity to clarify her order. Thompson, 97 Wn.App 878, a clarification is merely a definition of rights already given, spelling them out more completely.

Ware believes she had a right to rely on Craighead's order and that the ALJ had a duty to seek clarification if the order by Craighead was ambiguous.

Instead, the ALJ created additional burdens on Ware that were not contained in the order issued by Judge Craighead and Judge Weiss supported the decision of the ALJ even though he found that Judge Craighead had allowed carbon copies.

Further, Snohomish County proceeded with a trial de novo over Ware's objections and without the entire record as required by law. Farm Supply Distrib v Washington Utilities & Transp. Comm'n, 83 Wn.2d 446, 518 P.2d 1237 – "*A decision of an administrative agency determined upon review by an appellate court, to have been based upon an incorrect statute must be remanded to the agency for further proceedings consistent with the reviewing officer's guidance.*" Snohomish County Judge Weiss did not cite any statute or legal authority permitting a trial de novo in absence of the entire record.

In City of Redmond v Central Puget Sound Growth Management Hearings Board 136 Wn.2d 38, 959 P.2d 1091 (1998), "*the court accords deference to an agency interpretation of law where the agency has specialized expertise in dealing with such issues, but the court is not bound by an agency's interpretation of statute.*"

In this instance, the ALJ should have accorded deference to Judge Craighead as she had specialized expertise in dealing with issues involving Collins and had a clear purpose and reason for not requiring copies of cancelled checks. In addition, as Snohomish County Superior Court Judge Weiss found that King County Superior Court Judge Craighead did permit carbon checks as proof of payment, it would be reasonable to expect that he would have found for Ware.

CONCLUSION / REQUEST FOR FEES

(1) Error: There was no legal authority or case law cited by the State, Collins, or in the Order on Judicial Review supporting the position that the entire record (including transcription of the electronic recording) was not required by law.

In every responsive brief filed by the State on the remand issue, the State failed to cite one case in support of their position that remand was not required by law.

If the State had provided some case law or statute in support of their position that remand was not required, Ware would have abandoned her pursuit of a fair and equitable resolution in compliance with the law.

(2) Error: The Snohomish County Court failed to remand for lack of the entire record as required by all applicable law and statute. RCW 34.05.476(1), “an agency shall maintain an official record of each adjudicative proceeding under this chapter, (h) the recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding. Shall is unambiguous.

(3) Error: Based on the error of law and substantial evidence standard, the trial court did not have the authority to hear the matter *de novo* as the entire record on appeal was not made available to the trial court and Ware objected to the hearing.

(4) Error: Snohomish County failed to award costs and fees. The State forced Ware into a litigious position with frivolous briefing objecting to Ware's request for remand and substantially delaying justice. Ware requests costs and fees from the State and a reversal of Judge Weiss' order.

(5) Error: The order issued by Snohomish County limited the amount Ware could obtain for reimbursement to \$110.00 per month, not 55% of the cost of the any violin lessons and rental fees. CP 3

(6) Error: The Order failed to include the violin rental fees.

POSTURE OF PAYMENTS BY COLLINS

To date, Collins has not complied with Judge Craighead's or Judge Weiss' order even though Ware complied with Weiss' order by obtaining a copy of the cancelled check. It took over a month for the bank to submit the copy. CP 32

Ware was in compliance with the 2007 order issued by Judge Craighead, in compliance with the administrative hearing procedures, in compliance with rules governing the King County Superior Court case schedule on judicial review, in compliance with Judge Weis' June 5, 2009 requiring submission of cancelled checks as proof of payment to the ALJ . However, DSHS and Collins have failed to comply with the law, statutes, case schedules, and orders of the court.

Ware respectfully moves for reversal and an award of costs and fees from the state.

Respectfully submitted this 2nd day of January, 2009

A handwritten signature in cursive script, reading "Jacqueline A. Ware", is written over a horizontal line.

Jacqueline A. Ware, pro se Appellant

64007-1

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COURT OF APPEALS, DIVISION ONE

WARE V COLLINS & DSHS

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 2010, I caused to be served by hand-delivery true and correct copies of the foregoing Brief of Appellant on the court.

Clerk of the Court
Court of Appeals, Division I
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Seattle, WA 98101

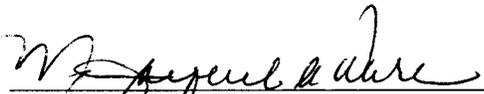
Copies of Appellant's Brief was placed in U.S Mail for delivery to the parties below on January 4, 2010:

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

Dated this 4th day of January, 2010



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