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No. 70749-3-I

COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON

JANET SAARELA,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

APPELLANT'S AMENDED REPLY BRIEF

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I. INTRODUCTION

The Department asks this Court to ignore clear statutory language relating to the options the Department has when faced with an untimely request for hearing. .

Apparently, realizing they agreed to commence an adjudicative proceeding (see page 16 of Respondent's brief), the Department contends the adjudicative hearing was the proper forum for litigating Appellant's right to a hearing.

The Department primarily relies on WAC 388-02-0085 to support their actions in this case. The support is misplaced. This rule merely states if a right to a hearing is requested one is scheduled. If the Department questions the right then the ALJ decides if the right to hearing is appropriate. This WAC essentially implements the statutory scheme described in RCW 34.05.419. The Department's options, upon receipt of a Notice of a Request for Hearing, are either to commence a proceeding or dispose of the matter in accordance with RCW 34.05.416.

As pointed out in Appellant's opening brief, this statute requires the Department to notify the applicant in writing of its decision. If the Department had complied with this statutory procedure and denied the request for hearing then the Applicant would have the right to have

the ALJ determine if the Department's action was correct. If the ALJ ruled in the Applicant's favor only then could the hearing be commenced. Instead of following this procedure, the Department commenced the hearing and asked Appellant's request for hearing be dismissed. There is no statutory authority for using this procedure.

The Department further argues Appellant's interpretation of RCW 34.05.419(2) renders RCW 34.05.440(1) meaningless. The latter statute gives the Department the right to declare a default for failure to request an adjudicative proceeding within the time limits providing that default is served upon the applicant or her attorney. It is clearly one of the notices that can be sent out per RCW 34.05.419. Even if RCW 34.05.440 is deemed to be the sole method to be used to deny a hearing to an untimely applicant, the Department chose not to use this procedure in the instant case.

Contrary to the Department's contention, Hutmacher v. The State of Washington, Board of Nursing, 81 Wash. App. 768, 915 P.2d 1178 (1996) controls the result in this case. As pointed out in Appellant's opening brief, this case defines what commencement of a hearing means. In short, the right to proceed to a hearing on the merits.

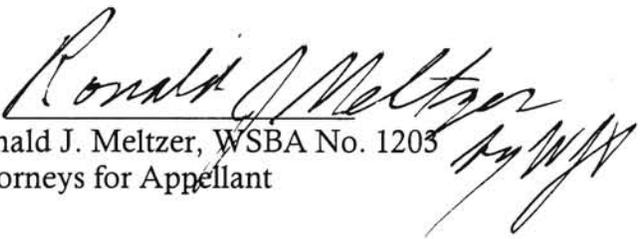
An untimely request is not jurisdictional. The Department simply has the right to reject the Request for Hearing provided it complies with the relevant statute. Their reference to J.A. v State of Washington, Department of Social and Health Services, et al., 120 Wash.App. 654, 86 P.3d 202 (2004) is misplaced. This is a case relating to subject matter jurisdiction. No one has argued the subject matter of appellants request for hearing was beyond the jurisdiction of the ALJ.

II. CONCLUSION

There is a statutory procedure permitting the Department to deny an untimely request for hearing. By ignoring this procedure and commencing a hearing the Department waived its right to deny Appellant her right to a hearing on the merits. The decision of the Superior Court should be reversed.

RESPECTFULLY submitted this 26th day of February 2014.

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