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NO. 676423 – I

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

SUE HONG dba HERITAGE HOUSE I

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

FOR THE STATE OF WASHINGTON

Respondent.

APPELLANT SUE HONG'S REPLY BRIEF

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I. INTRODUCTION.

Department of Social and Health Services failed to prove its original allegations of verbal and sexual abuse of a resident by Sue Hong's caregiver, Theo LaFargue, and its subsequent attempt to bootstrap its license revocation on lack of criminal background check is not supported by DSHS's own established standards and testimony. As much as DSHS now tries to attribute the revocation on the "unqualified" caregiver, the fact remains DSHS lacked evidence to revoke Hong's license that was primarily based on the alleged abuses which the hearing ALJ found to be unsupported.

As stated below, DSHS's selective quotation of witness testimony to support Hong's knowledge of the alleged abuse is rebutted by the full evidence, including testimony of its own investigator Lisa Foster. On cross examination, Foster admitted that she did not have any evidence that Hong knew of alleged abuse. Also, contrary to DSHS's assertion that Hong is misquoting the testimony of DSHS's Janice Schurman, who decided on the revocation, Schurman's full testimony illustrates that it was her mistaken belief that Hong had failed to act despite being informed of alleged abuse that instigated and was the primary basis for the license revocation notice on November 13, 2008. DSHS's revocation is not supported by substantial evidence and should be reversed.

II. ARGUMENT

A. DSHS Lacked Evidence to Establish that Hong Knew

About the Alleged Abuse. DSHS cited the following violations against

Hong:

	WAC	Basis
	Original Notice	
1	388-76-10020	Failure to remove caregiver after notice of abuse
2	388-76-10135(4)(6)	Lacked documentation re 2 step TB testing and training
3	388-76-10160(3)	Failure to complete criminal background check
4	388-76-10670(3)(4)	Failure to protect residents after being aware of abuse
	Amended Notice	
5	388-76-10160(1)(a-b)(2)(a-b)(3)(4)	Failure to complete criminal background check
6	388-112-0245(3)	Failure to complete food handler training
	Second Amended Notice	
7	388-76-10175(3)	Failure to have direct supervision

Regarding the most serious violations of alleged abuse, the hearing ALJ found that there had not been any verbal or sexual abuse. CP 127. According to his findings and conclusions of law No. 9, “(H)e did not commit any sexually inappropriate behavior and although he may have

been invading Ms. ___ space when speaking to her, those actions do not rise to the level of verbal abuse.” CP 127.¹

The ALJ also found that Hong was not aware of any such alleged abuse. CP 127. However, DSHS in its response brief still asserts that, “[t]he collective testimony of the witnesses establish that Ms. Hong knew of Mr. LaFargue’s verbal abuse of Ms. K at least by October 25, 2008.” See page 20-21 of DSHS’s response brief.

DSHS’s citations to transcript testimonies are at best selective and DSHS ignore weight of contrary evidence. First, DSHS relies on the testimony of its principal investigator Lisa Foster who testified that Hong admitted to her that she became aware of the allegations of verbal abuse. However, on cross examination, Foster stated that this was based on the CRU form, the information provided by the original complainant on the DSHS hotline, and her interview with Hong. Vol. II, p. 67. Foster admitted that the CRU form does not state anywhere that Hong was notified on October 25 of verbal abuse. Then asked about her handwritten notes Foster took contemporaneously at the time of her interview with

¹ Although the Reviewing Judge did find verbal abuse, Hong submits that the Reviewing Judge’s findings are contrary to numerous evidence, including the alleged victim, Ms. K’s own statement, that although she and LaFargue had “buted heads, but she was fine with him.” AR 259. The reviewing standard requires significant deference to the ALJ, which is appropriate because an independent ALJ hears the case to “insure that the contestant has a fair and impartial fact finder.” *Costanich v. DSHS*, 138, Wn. App., 547, 156 P.3d 232 (2007).

Hong, Foster stated that her notes did not state that Hong notified of any verbal abuse. In fact Foster's notes stated "No one told me (Hong) he was yelling at the residents." Vol. II, p. 78, AR 267. Similarly, DSHS's citations to Nathan Dabney's Testimony, that her supervisor told her that the situation had been described to Hong, is hearsay and lacks reliability. Vol. III, p.130.

B. **DSHS Admitted that Lack of Criminal Background Check Does Not Warrant License Revocation.** As testified by DSHS's own Adult Family Home Specialist, Janice Schurman who decided to revoke Hong's license, the decision to revoke was premised on the belief that Hong was notified of the alleged verbal abuse but failed to take action. She stated:

Looking at conditions, this was a situation where Ms. Hong had been informed by professional people that they had observed and heard one of her caregivers being verbally abusive and intimidating to a resident who was on a hospice. Once Ms. Hong was notified of that, she did not do anything to ensure that that caregiver was gone. That would have been our expectation was when a provider is informed of an abusive caregiver, their remedy is to get rid – their first primary duty and responsibility is to protect their vulnerable adults...

Vol. IV, pp. 96-97.

Taking the whole picture as a whole, yes. I mean not only was this person verbally abusive and inappropriate with a most vulnerable adult, if not others, but we have the one but – and she had left him alone with her residents whom she has a duty to protect. And then she hasn't even bothered to have a Background Check to make sure he doesn't have a prior history or hasn't had other problems with it. And then even when she has been informed of the problems, she still doesn't know who this person is. **So yes, it's part of the picture, but if it was just that standing alone, it might by a civil fine.** But it's a part of the whole picture of lack of judgment.

Vol. IV, p. 102. (underline added).

Schurman's testimony contradicts DSHS's current argument that lack of criminal background check provided sufficient basis for Hong's termination. As Schurman repeatedly stated, the primary concern for DSHS was not removing the alleged abuser immediately and letting him stay in the house for one more week. Vol. IV, pp. 95-102.

DSHS has an internet website in which it provides information on how its enforcement decisions are considered. The site features a chart called the "Adult Family Home Enforcement Decision Tree," AR 287-288, which categorizes violations into four levels of severity: "minimal or no harm, moderate, serious, and imminent danger of threat of harm." Revocation of license is listed as appropriate remedy in the last two

categories. When asked about this chart, Susan Hajek, DSHS employee who also participated in the Hong license revocation, testified that “serious” means there is significant actual harm or reasonable predictability of recurring actions with potential for significant harm.” Vol. V, p. 31. She then testified that in this case, the actual harm was the **verbal abuse** by LaFargue. Vol. V, p. 34. Without allegation of abuse and Hong alleged knowledge, DSHS’s revocation is not supported by substantial evidence.

C. **The Caregiver LaFargue Had Received Training and *Bond v. DSHS* is Distinguishable.** DSHS asserts that the caregiver LaFargue was “unqualified.” As stated before, LaFargue had previously worked for Hong. When he was hired on October 8, 2008, he received proper training and orientation from Hong, including about the residents, and when and whom to contact in case of emergency. This was documented in the orientation form signed by LaFargue. See AR 285-286. Admittedly, although he had not completed the criminal background check, which meant that he could not provide direct unsupervised care, the situation is distinguishable from the replacement caregiver in *Bond v. DSHS*, 111 Wn. App. 566, 45 P.3d 1087 (2002), who did not know how to contact the licensee in case of emergency and was only told to call 911.

III. CONCLUSION

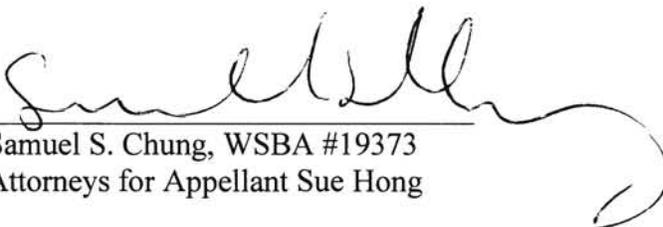
DSHS revoked Hong's license based on allegations of verbal and sexual abuse. Although DSHS attempts to shift the focus on the incomplete criminal background check, it revoked her license because DSHS erroneously believed that despite Hong having been told about the abuses, she allowed the caregiver to stay in the house for 8 more days. At the administrative hearing, DSHS failed to prove that the caregiver had abused the resident Ms.K, and that Hong knew about the allegations of abuse.

The ALJ and the Review Judge's orders upholding the license revocation are unsupported by substantial evidence. For the foregoing reasons, this Court should vacate the review and final decision and reinstate Hong's license.

RESPECTFULLY SUBMITTED this 4th day of May, 2012.

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By


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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Diane Dorsey
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via Legal Messenger
 via Facsimile

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct on May 4, 2012.



Deborah Oh