

69938-5

69938-5

No: 69938-5

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

Fyodor Klimovich and Pelageya Klimovich

Petitioners,

v.

Washington State Department of Social and Health Services,

Respondent.

PETITIONER'S BRIEF

Appellants

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. Introduction

In this appeal from a decision made by the Department of Social and Health Services (DSHS, or Department), and affirmed by the Office of Administrative Hearings, the Board of Appeals, and the Superior Court, the Court of Appeals is invited to analyze whether conduct that does not clearly jeopardize the health, safety, and well-being of a DSHS client can nevertheless justify terminating an Individual Provider's contract.

Ivan Kozorezov and Larisa Kozorezova are the son-in-law and daughter of Fyodor and Pelageya Klimovich, who were clients of DSHS. Mr. and Mrs. Klimovich rented a home owned by Ivan and Larisa, until Ivan and Larisa decided to sell the home. Mr. and Mrs. Klimovich then accepted their caretaker/family members' offer to live with them while another home was being renovated. They believe that they made all necessary disclosures to both the Department and the Home Care Agency that also oversaw Mr. and Mrs. Klimovich's care.

Mr. and Mrs. Klimovich moved in July without incident. The Department later claimed that they were never told of the move, and were in fact misled by Ms. Kozorezova as to the dates of the move. *Four months later*, they decided to terminate Ivan and Larisa's contracts to serve as Mr. and Mrs. Klimovich's providers.

The Department's rules establish the grounds for termination of a contract. They require clear evidence of jeopardy to the health, safety, and well-being of the clients, including physical abuse, substance abuse, failure to medicate, improper response to an emergency, etc. Nevertheless, the Department asserted as grounds for its termination of the Individual Provider contracts the brief period of time that they had been out of touch with Mr. and Mrs. Klimovich four months before.

Mr. and Mrs. Klimovich are being harmed by the loss of their chosen independent providers. They feel mistreated by the Department, and in particular by their case manager, Elena Bruk. Mr. and Mrs. Klimovich urge this Court to seriously consider the purport of the law governing termination of a contract, and to determine that the Department committed legal error, or was arbitrary and capricious in its decision to terminate the contracts of their chosen care providers.

II. Assignment of Error

1. The Board of Appeals (BOA) Review Judge erred in concluding that the actions complained of jeopardize the health, safety, and well-being of the Petitioners (Conclusion of Law 8);
2. The Finding of Fact (38) that the Department's ignorance of the Petitioners' address for four weeks jeopardized their health, safety, and well-being is not supported by substantial evidence.

3. The Department's decision to terminate the contracts is contrary to law, or is arbitrary and capricious.
4. The BOA Review Judge's inconsistent standards when weighing testimony were arbitrary and capricious.

III. Issues Pertaining to Assignment of Error

1. Whether the failure to inform DSHS of a move for four weeks jeopardizes the health, safety, and well-being of a client so as to justify the termination of two Individual Providers' contracts?
2. Whether the BOA Review Judge found that the health, safety, and welfare of clients were jeopardized without substantial evidence?
3. Whether the decision to terminate the contracts violated substantive due process?
4. Whether the decision to terminate contracts, without logical reason, and in the presence of animosity by the Department toward the client and providers, was arbitrary and capricious?
5. Whether the BOA Review Judge's application of different standards of deference to testimony, where that application materially impacts his decision, was arbitrary and capricious?

IV. Statement of the Case

A. Mr. and Mrs. Klimovich's family cared for them with the Department's aid.

Fyodor and Pelageya Klimovich were husband and wife. CABR 2 (¶ 3), 167.¹ Mr. Klimovich became a client of the Department of Social and Health Services in January of 2005, and was eligible for Medicaid Personal Care ("MPC") in amounts between 80 and 155 hours per month. CABR 1 (Finding of Fact ¶1). Mrs. Klimovich became a DSHS client in March 2005 and received 35 to 77 hours of MPC per month. CABR 2 (¶3). Mr. and Mrs. Klimovich have been at all times relevant to this case elderly and disabled Russian immigrants. CABR 1-2.

Larisa Kozorezova and Ivan Kozorezov² are the daughter and son-in-law of Mr. and Mrs. Klimovich, and provided in-home care for them through Home Care Agencies from March 2005 until November 1, 2009 CABR 3 (¶¶ 9-11). Prior to November, 2009, Larisa and Ivan were employed by Home Care Agencies to provide care for Mr. and

¹ The Certified Appeal Board Record (CABR) was sent to the Court of Appeals as the original. Citations thereto will be identified as "CABR" followed by the page number and parenthetical citing to paragraph numbers, where appropriate. Administrative Testimony will be cited to as the Verbatim Report of Proceedings (VRP) and volume number. The Verbatim Report of Proceedings at the Superior Court is designated as "Superior Court VRP."

² For the sake of simplicity, Mr. Kozorezov and Ms. Kozorezova will be referred to by their first names.

Mrs. Klimovich. CABR 3 (¶13). There were never any complaints about the quality of care or attention provided by Larisa and Ivan.

B. Ivan and Larisa became Individual Providers.

In May 2009, the law began requiring in-home care providers who were family members to contract as Individual Providers with the Department, as DSHS could no longer pay home care agencies for in-home services provided by family members. CABR 3 (¶14); CABR 1464-67 (Ex. MMM). Ivan and Larisa signed on as Individual Providers with an effective date of November 1, 2009. CABR 4 (¶17); CABR 782-807 (Ex. 24). The Department case manager assigned to oversee the care of Mr. and Mrs. Klimovich, named Elena Bruk, explained the changes to them and coordinated the hiring of Ivan and Larisa as their Individual Providers. CABR 4 (¶16) CABR 659, 684-85.

Ivan and Larisa were vigilant, responsible caretakers of their clients. When Larisa's aunt, Aleksandra Myachina,³ was hospitalized on June 18, 2009, Mr. Kozorezov immediately contacted DSHS to inform it of the occurrence. CABR 910 (Ex. 52). Changes in Mr. and Mrs. Klimovich's plan of care were routinely reported to the Department. CABR 716, 733, 736, 739, 744, 748, 757-58, 766 (Ex. 23). After Mr. and

³ Ms. Myachina is deceased, but was another client of Ivan and Larisa through their caretaker positions. CABR 2-3 (¶¶ 6-8, 13)

Mrs. Klimovich's food benefits had been reduced, Ivan made numerous attempts to determine why this had happened. (CABR 12 (¶44)). Mr. and Mrs. Klimovich received quality care from Ivan and Larisa.

Ivan and Larisa reviewed their Individual Provider contracts, which provided a definition of cause for DSHS to terminate a contract, including failure to meet or maintain any requirement for contracting with DSHS; failure to protect the health or safety of any DSHS client; failure to perform or breach of the contract; and violation of the law. CABR 782-807 (Exs. 24-25). The contract also imposed conditions with which each Individual Provider must comply, including the duty to comply with the Service Plan's requirements; to act to protect and promote the client's healthy, safety, and well-being; to report any significant change in a client's condition; to allow DSHS access to the clients; and to maintain proper time sheets. *Id.* The BOA Review Judge determined that there was no evidence to establish that any conditions of the contract were breached during its effective dates. CABR 5 (¶20).

C. Mr. and Mrs. Klimovich changed addresses in 2009.

In May 2009, Larisa and Ivan owned three homes in Shoreline, Washington: one at 17503 5th Avenue NE, where Mr. and Mrs. Klimovich lived, and for which they paid rent (CABR 1776); a home at 206 175th Street, where Ivan and Larisa lived; and a home on the same lot at 208 NE

175th Street, which was unoccupied and undergoing renovation so Mr. and Mrs. Klimovich could move into it. CABR 1779-81.

Larisa and Ivan decided to sell the home on 5th Avenue, and invited Mr. and Mrs. Klimovich to move in with them until the house at 208 was ready. CABR 1782-83. The invitation was accepted, and the Klimovichs moved in with Larisa and Ivan in July of 2009. CABR 1840. Ms. Klimovich testified that neither she nor her husband⁴ experienced any hardship or stress to their health, safety, or well-being during or after the move. VRP Vol. X., p. 28.

D. The parties disagree as to whether the Department was informed of the move.

Previously, in May 2009, Ms. Bruk had conducted an annual Comprehensive Assessment Reporting Evaluation (CARE assessment). VRP Vol. IV, pp. 42-43. Larisa testified that she told Ms. Bruk about the pending sale and move, and provided her with written confirmation during this assessment. CABR 7 (¶27). Mrs. Klimovich testified that she witnessed Larisa hand the document to Ms. Bruk. *Id.* Larisa and Ivan also testified that the change of address was faxed to DSHS. CABR 7 (¶29). A copy of the faxed form was submitted as an exhibit. CABR

⁴ Mr. Klimovich passed away prior to the hearing on this matter. It is undisputed that his death is unrelated to the quality of care provided by Ivan and Larisa.

1522-24 (Ex. QQQ). Ms. Bruk denies being informed that the petitioners were moving. CABR 7 (¶26); VRP Vol. IV, p. 43.

Ms. Bruk states that she never received notice of the move. She states that her first notice was when a piece of mail was returned to her on July 14, 2009. CABR 7 (¶26); CABR 1629. She states that the envelope bore a legend stating that Mr. and Mrs. Klimovich had moved to 206 175th Avenue. CABR 661, 686; VRP Vol. IV, pp. 44-45; CABR 6. This establishes that Ms. Bruk knew of the location of Mr. and Mrs. Klimovich as early as May 2009,⁵ or had an idea as to where the claimants were located.

Ms. Bruk testified that she called Larisa, who told her that she had changed the mailing address to her own address because the Klimovichs' mail was getting stolen, but that Mr. and Mrs. Klimovich had not moved. CABR 7 (¶26). VRP Vol. IV, p. 43.

Ms. Bruk also testified that she spoke with Mrs. Kozorezova on July 29, and Larisa told her that Mr. and Mrs. Klimovich had moved to the

⁵ The envelope was not offered in evidence, despite being in the exclusive custody and control of the Department. This is particularly significant given the testimony of Phaly Won, another DSHS employee, who states that Ms. Bruk gave her the incorrect address for Mr. and Mrs. Klimovich. VRP Vol. II, p. 105. Ms. Bruk told Ms. Won to send letters to 208 125th Street, instead of to 208 175th Street, which explains why they were returned. VRP Vol. II, p. 90. A review of the envelope may have revealed that Ms. Bruk had misaddressed it.

house next door, at 208 175th Street. VRP Vol. IV, p. 49. Ms. Bruk states that Larisa suffered from a “fear of spies, who are watching them all the time, like in Russia.” CABR 10 (¶35). Larisa denies making this statement.

In addition, in Ms. Bruk’s SER notes for August 11, 2009, she noted that Hanna Hatalskaya, who worked with Chesterfield, reported to her that Mr. and Mrs. Klimovich told her they were residing at the 208 address instead of the 206 address. CABR 665 (Ex. 21). Ms. Hatalskaya denies ever reporting this information to Ms. Bruk. VRP Vol. VI, p. 114-16. Ms. Hatalskaya further reported that, during the initial conversation when she reported the move, Ms. Bruk was “not very ... polite” and unhappy with the disclosure of the new address. VRP Vol. VI, p. 116; 118

Regardless of any concern Ms. Bruk may have had that she could not locate Mr. and Mrs. Klimovich in July 2009, the concerns about the health, safety, or well-being of the DSHS clients did not prompt a home visit until an unscheduled visit in October 2009,⁶ nearly *four months* after acknowledging knowledge of the new address. CABR 1676. No genuine

⁶ This visit appeared to be calculated to catch Ivan and Larisa in some fraudulent behavior, rather than to determine the health, safety, and well-being of Mr. and Mrs. Klimovich. CABR 834, 837. Ms. Bruk’s SER notes indicate that she suspected subsidized housing fraud, despite the fact that Mr. and Mrs. Klimovich did not receive subsidized housing. Ex. 21, pp. 16-17.

concern for their whereabouts was reflected in Ms. Bruk's SER notes. In fact, Ms. Bruk testified that the primary reason she visited in October was not to ensure the safety and welfare of Mr. and Mrs. Klimovich, but to gather proof that Ivan and Larisa were engaged in some subsidized housing or Medicaid fraud. CABR 1649-52.

Mrs. Klimovich's testimony that she witnessed the delivery of the change of address notification to Ms. Bruk was corroborated by the testimony of Ivan and Larisa. CABR 7-8. Ms. Hatalaskaya also testified that she informed Ms. Bruk of the move in July. CABR 8 (¶31). As to Ms. Bruk's claims that Mrs. Kozorezova misled her about the address, Ms. Bruk (and all other DSHS workers) had access to Mr. and Mrs. Klimovich by way of Chesterfield, whose undisputed testimony demonstrates that they knew of the new address.

In the summer of 2009, both DSHS and Chesterfield were in a chaotic state. Chesterfield was undergoing massive personnel change and a change in location. CABR 8-9 (¶32). Ms. Bruk also testified that, between May and September, DSHS was overloaded with work, and that it was difficult to keep up with the correspondence between the clients. CABR 1604.

E. Elena Bruk disdains the Petitioners.

Mrs. Klimovich believes that Mrs. Bruk sabotaged her family and the course of home care by Ivan and Larisa. The record supports the conclusion that Ms. Bruk bore ill-will toward Mr. and Mrs. Klimovich, and may have engineered the miscommunication that ultimately led to the termination of Ivan and Larisa's Individual Provider contracts with DSHS.

First, Mrs. Klimovich testified that Ms. Bruk told her that she despises Russian immigrants because of the benefits they receive from state agencies such as DSHS. CABR 464-65; Superior Court VRP, 1/25/13, p. 9. Ms. Bruk is an immigrant herself, and Mrs. Klimovich recalls her begrudging the immigrants who receive benefits, when she was not entitled to the same. CABR 464-65. She told Mrs. Klimovich that she would destroy her and her family. CABR 464-65.

Second, following the release of Ms. Myachina from a lengthy hospital stay, Ms. Bruk (who was also Ms. Myachina's case manager) refused to reinstate her caregiver benefits. CABR 706-710. Ms. Myachina's agent contacted the office of the Governor of Washington State, resulting in Ms. Bruk's dismissal as Ms. Myachina's case manager and the reinstatement of caregiver benefits.

Third, Ms. Bruk caused Ivan and Larisa to perform unnecessary work. On June 22, 2009, she asked for and received the care schedules for

Mr. and Mrs. Klimovich. Her SER notes indicated that “[t]he schedule is Ivan for Fyodor from 8am to 10am daily and Larisa for Fyodor from 1pm to 5 pm; Ivan for Pelageya from 11am to 3pm as stated in their timesheets faxed to me by HC Agency.” CABR 1393-94; 1433-34 (Ex. HHH & III). Later, on October 1, 2009, Larisa and Ivan submitted additional care plans and schedules to Ms. Bruk. CABR 1345; 1355 (Ex. XX & BBB). Nevertheless, on October 14, Ms. Bruk requested an additional schedule of services on October 14, 2009. CABR 1392; 1399; 1436; 1443. She offered no reason for the new request, and did not instruct them on how to prepare the schedules or provide any tools to assist them in their preparation. *Id.* The schedules were submitted to Ms. Bruk on October 15. CABR 1345; 1355; 1401; 1441. Ms. Bruk later cited the schedules as grounds for termination of Ivan and Larisa’s Individual Provider contracts. CABR 6.

Fourth, a week later, Ms. Bruk visited Mr. and Mrs. Klimovich. VRP Vol. IV., p. 57. The visit was not scheduled, and Mr. and Mrs. Klimovich were not expecting her. *Id.* In fact, Mr. Klimovich was sleeping to rest for a doctor’s visit later that day. VRP, Vol. IV, p. 124-25. There, she spoke with Ivan regarding “problems” with the care schedules submitted the previous week. VRP Vol. IV., p. 60-61. Ivan assisted her in preparing new ones. VRP, Vol. IV, p. 61.

F. The Department terminated Ivan and Larisa's contracts.

On November 19, 2010, DSHS sent Planned Action Notices (PANs) to Mr. and Mrs. Klimovich informing them that Larisa and Ivan were being terminated as their Individual Providers. CABR 5 (¶21). The stated reasons were (a) "The Department/AAA finds that your provider's inadequate performance or unwillingness to deliver quality care is jeopardizing your health, safety, or well-being;" and (b) "the Department has determined that your provider is not qualified based on character, competence, and suitability." *Id.*; CABR 476-77; 480-81; 822-23 (Exs 3, 5, & 30). The PANs contained no factual allegations supporting these conclusions. CABR 5 (¶21).

On April 5, 2010, after Mr. and Mrs. Klimovich had requested an Administrative Hearing, DSHS sent amended PANs stating the same grounds for termination. CABR 6 (¶23). It supported the claims this time with a letter authored by Ms. Bruk. *Id.* In that letter, Ms. Bruk accuses Ivan and Larisa of repeatedly falsifying information to DSHS about Mr. and Mrs. Klimovich's address; of delaying the delivery of schedules of services for 21 days; of being "disruptive" during meetings with Ms. Bruk; of limiting access to Mr. and Mrs. Klimovich; and of owning real property in foreclosure. *Id.*

The administrative hearing began on October 25, 2010, and concluded on February 18, 2011.

G. Mr. and Mrs. Klimovich attended a hearing.

During the hearing before the Administrative Law Judge, DSHS argued eleven reasons for the termination of Ivan and Larisa as Individual Providers. CABR 6-7 (¶24). Of these eleven, the ALJ rejected eight. CABR 10-14 (¶¶39, 40, 42, 45, 48, 51, 57, & 58). The remaining three all related to issues of communicating the move to DSHS:

1. Failure to notify the case managers when the Petitioners' [*sic*] moved ...
2. Misrepresentations regarding the Petitioners' address;⁷
3. Failure to contact the case manager when there were changes (related to the move) which could affect the personal care and other tasks listed on the plan of care.

CABR 6-7 (¶24). The ALJ credited the Department witnesses on these issues, and concluded that the Department's ignorance of Mr. and Mrs. Klimovich's home address threatened their health, safety, and well-being. CABR 16 (¶8).

Mr. and Mrs. Klimovich filed a petition for review of the ALJ's decision. CABR 1 (¶I.2). In its Review Decision and Final Order, the BOA Review Judge fully adopted the ALJ's findings. It reviewed the

⁷ The Department alleged that both Ivan and Larisa had misled it; however, the ALJ rejected the argument as to Ivan, finding that it was more likely a simple miscommunication. FOF 34.

evidence and determined that Ivan and Larisa's failure to notify DSHS of the change in address demonstrated a lack of fitness and an inability to communicate, restricting their ability to meet their family members' needs. CABR 16 (¶8).

In the face of conflicting testimony regarding whether and when DSHS was notified of the change in address, the BOA Review Judge credited the Department's testimony due to the Petitioners' failure "to produce any additional evidence proving that any notice of a change of address was provided to the Department prior to July 29, 2009." CABR 8-9 (¶35). Because Ms. Kozorezova's testimony was not corroborated by Ms. Bruk's contemporaneous SER notes, whereas Ms. Bruk's testimony was consistent with her own notes, Ms. Bruk's testimony was found to be more reliable. CABR 10 (¶37).

The BOA Review Judge concluded that "there is no logical reason why Ms. Bruk would have not entered new address information into the system if she had received it." CABR 8 (¶32). She also concluded that "there is no logical reason why [Ms. Bruk] would place her employment at risk [by intentionally fabricating, in great detail, the facts set forth in her SER notes.]" CABR 10 (¶37). However, the judge did not subject the testimony or claims of Mr. and Mrs. Klimovich or their witnesses to the same crucible of "no logical reason." For example, the judge did not

consider that there was no logical reason for Ivan and Larisa to not report the change of address to DSHS. They had notified the Post Office, Social Security, and Chesterfield. VRP Vol. X, p. 29. They testified that they had notified DSHS as well. *Id.* There was no logical reason for Ms. Kozorezova to lie about the petitioners' address, yet the BOA Review Judge determined that she did. It was a matter of public record that the Fifth Avenue home was sold in June 2009, and that Mr. and Mrs. Klimovich would have to move. Ms. Kozorezova's testimony was corroborated by Mrs. Klimovich and by Ms. Hatalaskaya. It was discredited by the BOA Review Judge, despite the absence of a logical reason.

Mrs. Klimovich appealed to the Superior Court. At the hearing, the judge asked Mrs. Klimovich questions that were relayed to her by a translator. At one point, an "unidentified speaker" stepped in to correct the translator's efforts. Superior Court VRP, 11:6-13. It is possible that other errors and nuances were made in translation that affected the fairness of her hearing.⁸

⁸ Ms. Bruk also complained of the quality of the translators during the first day of her testimony. VRP Vol. III, p. 41-42. Non-English speaking persons are entitled to qualified, accurate interpreters in legal proceedings. RCW 2.43.030.

V. Argument

A. Standard of Review

In reviewing an administrative action, the Court of Appeals sits in the same position as the superior court, applying the standards of the Administrative Procedures Act (APA), RCW 34.05, directly to the record before the agency. *Brighton v. Wash. State Dep't of Transp.*, 109 Wn.App. 855, 861–62 (2001) (citing RCW 34.05 RCW; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402 (1993)). Under the APA, the court may reverse an agency adjudicative decision if the agency's decision is unsupported by substantial evidence, based on erroneously interpreted or applied law, or is arbitrary and capricious. *Brighton*, 109 Wn. App. at 862 (citing *Tapper*, 122 Wn.2d at 402)⁹. The party challenging an agency's action bears the burden of demonstrating the invalidity of the decision. *Brighton*, 109 Wn. App. at 862 (citing RCW 34.05.570(1)(a)).

“The findings of fact relevant on appeal are the reviewing officer's findings of fact—even those that replace the ALJ's.” *Hardee v. Dep't of*

⁹ As relevant to this case, RCW 34.05.570(3) states that a reviewing court shall grant relief from an agency order in an adjudicative proceeding only if it determines that “(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; ... or (j) The order is arbitrary or capricious.”

Soc. & Health Servs., 172 Wn.2d 1, 19 (2011) (citing *Tapper*, 122 Wn.2d at 406). In reviewing challenged findings for substantial evidence under RCW 34.05.570(3)(e), substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Brighton*, 109 Wn. App. at 862 (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46 (1998)). If substantial evidence supports the findings challenged, the court reviews *de novo* conclusions of law to determine if the reviewing judge correctly applied the law. *Morgan v. Dep't of Soc. & Health Servs.*, 99 Wn. App. 148, 151, *review denied*, 141 Wash.2d 1014 (2000).

In analyzing the law, the court should first apply the DSHS rules adopted in the Washington Administrative Code. If no DSHS rule applies, the court should decide the issues according to the best legal authority and reasoning available. WAC 388-02-0220.

B. The Department misapplied the law regarding terminable offenses.

1. Rules governing termination are different from those governing other discipline.

Contracts with DSHS may only be terminated for cause. The Department has rules that govern the conduct of its Individual Providers, and rules that justify termination of the Providers' contracts.

RCW 74.39A.095(7) provides that the Department may terminate a contract if it finds that “an individual provider’s inadequate performance or inability to deliver quality care is jeopardizing the health, safety, or well-being of a consumer receiving service under this section ...” Section (8) of the same statute permits the Department to reject a request by a consumer “to have a family member ... serve as his or her individual provider if the case manager has a reasonable, good faith belief that the family member or other person will be unable to appropriately meet the care needs of the consumer.”

The Department has developed guidelines for implementing this statute. Former WAC 388-71-0551¹⁰ permits the Department to terminate a contract if “the provider’s inadequate performance or inability to deliver quality care is jeopardizing the health, safety, or well-being” of the client. The regulation provides seven specific examples of such “inadequate

¹⁰ This regulation has been amended at least twice since the events that underlie this litigation occurred. Because the issue was determined under this regulation, and because its application is challenged as erroneous, it should remain the legal basis for the court’s decision. *See Harbor Steps Ltd. P’Ship v. Seattle Technical Finishing, Inc.*, 93 Wn. App. 792, 799-800 (1999) (presumption favoring prospective application of statutory amendments is overcome only where amendment is clearly curative, i.e., it technically corrects a statute or clarifies an ambiguity, and does not contravene judicial construction of a statute.

performance or inability to deliver quality care” that are so extreme as to justify termination:

- (1) Domestic violence or abuse, neglect, abandonment, or exploitation of a minor or vulnerable adult;
- (2) Using or being under the influence of alcohol or legal drugs during working hours;
- (3) Other behavior directed toward the client or other persons involved in the client’s life that places the client at risk of harm;
- (4) A report from the client’s health care provider that the client’s health is negatively affected by inadequate care;
- (5) A complaint from the client or client’s representative that the client is not receiving adequate care;
- (6) The absence of essential interventions identified in the service plan, such as medications or medical supplies; and/or
- (7) Failure to respond appropriately to emergencies.

Former WAC 388-71-0551.¹¹

In contrast, RCW 74.39A.080 indicates when the Department may take other disciplinary action against its Individual Providers where the underlying conduct does not merit termination. If a provider refuses to comply with the chapter’s requirements, operates without a license, knowingly makes a false statement of material fact in any matter under investigation by the Department, or prevents or interferes with any inspection or investigation by the Department, the Department may

¹¹ The Department may also terminate a contract “for default or convenience” according to the terms of the contract. WAC 388-71-0556; however, there is no argument here that this contract was terminated for default or convenience, so the regulation does not apply.

decline to issue the contract; impose conditions on a contract; impose civil penalties up to \$100 per violation; suspend, revoke, or refuse to renew a contract; or suspend admissions to the DSHS facility. RCW 74.39A.080(1) and (2).

The Department has also adopted regulations defining the responsibilities of Individual Providers. Former WAC 74-39A-0515(6)¹², the only provision of relevance here, states that an Individual Provider is responsible to “notify the case manager immediately when the client enters a hospital, or moves to another setting.” The regulation does not prescribe discipline or remedies for violation of any of these responsibilities. However, given that grounds for termination are set forth with greater particularity in other regulations, even a temporary neglect of this regulation does not justify termination.

2. Even if all findings of fact are adopted, the Individual Providers’ actions do not constitute grounds for termination as a matter of law.

Ms. Klimovich is challenging some of the BOA Review Judge’s findings of fact as lacking substantial evidence. *See infra, Section D.* However, even if all facts found by the Board of Appeals stand, the

¹² This regulation has also been amended since the events underlying this litigation. Former subsection (6) is now subsection (7).

conduct complained of does not rise to the level of a terminable offense. It was legal error to conclude otherwise.

A close examination of the exemplar grounds for terminating a contract reveals that each describes conduct that clearly places the client in immediate risk: abuse, intoxication, failure to provide medication, etc. Even though the examples are “without limitation,” they are provided to give an idea of the character of what constitutes grounds to terminate a provider’s contract.

Here, the conduct complained of simply does not rise to the level of the examples offered by regulation. There is no evidence that Mr. or Mrs. Klimovich ever endured even a modicum of stress; in fact, their own testimony contradicts the suggestion that their health, safety, or well-being were ever threatened. Even if DSHS was ignorant of where Mr. and Mrs. Klimovich were living, it had alternative means of finding out, including by contacting Ivan and Larisa, or by asking Chesterfield. The Findings of Fact demonstrate that the Department did not even try to take any of these steps until July 14, 2009, and then on July 27.

Furthermore, if the Department thought that Ivan and Larisa lacked the ability to protect Mr. and Mrs. Klimovich’s health, safety, and well-being, it would have acted immediately after it determined that Larisa had misled them. Instead, Ms. Bruk did not even visit until October 22, and

then she only did so in order to develop evidence of subsidized housing fraud. If the clients' health, safety, or well-being were at risk due to the unfitness of their Individual Providers, the Department would not have waited over four months, until November 19, 2009, to notify Mr. and Mrs. Klimovich that Ivan and Larisa were being terminated as their IPs.

The statute and rules regarding termination of an Individual Provider's contract contemplate an objectively serious risk of probable harm to clients – of jeopardy to their health, safety, or well-being. The facts relied on by the Department are at best characterized as a miscommunication between the Department, the clients, and the providers. The statute contemplates remedies for miscommunications or mistakes in the course of caring for a DSHS client. It was an error of law to conclude that Ivan and Larisa's conduct constitutes such inadequate performance or inability to deliver quality care as to put their family members in danger.

C. The contract's termination violates due process.

“The touchstone of due process is protection of the individual against arbitrary government actions, whether in denying fundamental procedural fairness (procedural due process) or in exercising power arbitrarily, without any reasonable justification in the service of a legitimate governmental objective (substantive due process).” *Becker v. Washington State University*, 165 Wn. App. 235, 255 (2011) (citing

County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998). The substantive due process rights of Mr. and Mrs. Klimovich were violated when the Department, through Ms. Bruk, terminated the contract of its Individual Providers arbitrarily.

A contract with the state cannot be terminated without due process. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Mr. and Mrs. Klimovich were third party beneficiaries of Ivan and Larisa's Individual Provider contracts.

The evidence here demonstrates that the termination of the contracts was an arbitrary and abusive use of power. Ms. Bruk manifested contempt for Mr. and Mrs. Klimovich and her care providers and went out of her way to try to find grounds to terminate the contracts of Ivan and Larisa. The pretextual contention that the Department was concerned for the health, safety, and well-being of Mr. and Mrs. Klimovich is exposed by the significant length of time before the Department took any action to ensure that their welfare was being tended to. The decision to terminate the contract, when based on an alleged action that falls far short of the seriousness of the enumerated examples of terminable offenses, was an arbitrary use of power. No legitimate state purpose was accomplished by the termination.

D. Findings of Fact are not supported by substantial evidence.

In deciding a DSHS case, the Department bears the burden of proof to persuade the Judge that its position is correct. WAC 388-02-0480. Ms. Klimovich contends that the Department failed to support the following Finding of Fact with substantial evidence.

1. Finding of Fact 38 is not supported by substantial evidence.

Finding of Fact 38 states that “The Kozorezovs’ [*sic*] failure to notify the Department of the Petitioners’ move to the 206 address deprived the Department of the ability to monitor the health, safety, and well-being of the Petitioners ...” The implication is that the inability of DSHS to monitor the health, safety, and well-being of its clients for four weeks puts that health, safety, and well-being in jeopardy. This finding is not supported by substantial evidence.

When something is in jeopardy, it is at risk of harm, loss, or failure. No evidence supports the finding that Mr. and Mrs. Klimovich’s health, safety, or well-being was ever at risk. They were in the hands of their caring, vigilant, and experienced Individual Providers who were also their family members. If the Department’s oversight is really so central to maintaining the health, safety, and well-being of its clients, then Ms. Bruk would not have waited three months before making an unscheduled visit. The Department would not have delayed until November to take action to

terminate Ivan and Larisa's contract. Other means were available to the Department to reach or locate Mr. and Mrs. Klimovich, but were not taken. There was no jeopardy, and the finding of fact should be reversed.

E. The Department's decisions were arbitrary and capricious.

The "arbitrary and capricious" test is defined as action which is willful and unreasoning in disregard of facts and circumstances. *Heinmiller v. Dep't. of Health*, 127 Wn.2d 595, 609 (1995). Under this test, a court will set aside a discretionary decision if there is a clear showing of abuse. *ARCO Prods. Co. v. Utilities & Trans. Comm'n*, 125 Wn.2d 805, 812 (1995). In this case, the Board's decision to terminate the contract, and the BOA Review Judge's inconsistent standards of weighing testimony were both arbitrary and capricious.

1. The termination of the contracts by the Department was arbitrary and capricious.

Four months after the actions complained of, Mr. and Mrs. Klimovich were notified that Ivan and Larisa's contracts were going to be terminated. The stated reason was that lack of care and inattention were putting their health, safety, and well-being in jeopardy. However, the supposed "lack of care" had not been an issue since July.

There is substantial evidence supporting the conclusion that the Department's decision was an abuse of authority. Ms. Bruk had a

demonstrated animus toward Mr. and Mrs. Klimovich, as well as toward Ivan and Larisa. She had threatened them in the past, and had motivation to cause them anguish. In the absence of any logical explanation for the lapse of time between the supposedly jeopardizing conduct was discovered and the Department's action terminating the contract, the logical conclusion is that the determination to terminate the contract was arbitrary and capricious.

Ivan and Larisa are experienced, effective, caring providers. They take their responsibilities seriously, as demonstrated by the many questions they interjected in the Individual Provider training seminar provided by the Department. CABR 12 (¶46-48). They were caring for their family members and fellow expatriates. There is no logical reason that they would jeopardize the health, safety, or well-being of Mr. and Mrs. Klimovich, or even disrupt the Department's provision of care to them by failing or refusing to inform them of the move. The termination of the contract was arbitrary and capricious.

2. The decision to terminate the contracts should have been made independently for each.

The BOA Review Judge concluded that Ivan and Larisa "*intentionally*" failed to notify the department of the change of address for Mr. and Mrs. Klimovich, and that they failed to "truthfully communicate"

with the department. CABR 16 (¶18) (emphasis in original). However, while the Judge made specific findings of fact regarding Larisa's purported untruthful communications to Ms. Bruk, he specifically found that Ivan did not misrepresent the address to the department, and that any mistake was based on a miscommunication between the two. CABR 9 (¶34). Nevertheless, the Review Judge concluded that the Individual Provider contracts for both Ivan and Larisa were properly terminated.

Only two conclusions can follow from this: either (1) Larisa's alleged deception was not a but-for cause of the termination (i.e., that the contract would be terminated without evidence of intentional deception); or (2) that Ivan was "painted with the same brush" as his wife in the decision to cancel both contracts, rather than weighing the evidence against each provider separately. If it is the former, then for purposes of this action the court should disregard the evidence of the alleged lies to determine whether the miscommunication or misunderstanding constitutes cause to terminate Ivan's contract. If the latter, then the Court should determine that the decision was arbitrary and capricious, or a violation of due process, because the decision deprived Mr. and Mrs. Klimovich of two separate independent provider agreements, and each should be subject to the same scrutiny.

3. Findings of Fact 32 and 37 are arbitrary and capricious.

In Finding of Fact 32, the BOA Review Judge made an arbitrary credibility determination, finding that Ms. Bruk was not notified of Mr. and Mrs. Klimovich's move in a timely fashion. He made this finding based on a lack of evidence that a change of address had been received by the Department before July 29, 2009, and the failure to produce a copy of the letters submitted to Chesterfield (which had been undergoing "extensive reorganization"). In contrast, Ms. Bruk's testimony was credible because it was corroborated by her own SER notes and the same lack of evidence. He did not hold the Department's failure to produce the allegedly returned envelope against it.

Similarly, the BOA Review Judge was arbitrary and capricious in the test he used for discerning the truth. In finding of fact 32, he found "no logical reason why Ms. Bruk would not have entered new address information into the system if she had received it." Similarly, in Finding of Fact 37, he credited Ms. Bruk's testimony because "there is no logical reason why she would place her employment at risk" by fabricating her SER notes. In other words, the state employee is entitled to the benefit of the doubt where there would be no logical reason to mistrust her testimony.

In contrast, the Petitioners' witnesses were not granted any benefit of the doubt. There was no logical reason for Ms. Kozorezova to lie or mislead Ms. Bruk about the relocation of the family. It was public record and had been disclosed to other entities. Nevertheless, despite this lack of logical reason, and despite the demonstrated ill-will held by Ms. Bruk against Mr. and Mrs. Klimovich, which would provide a reason, the BOA Review Judge declined to credit her testimony that she did not lie to Ms. Bruk.

VI. Conclusion

In order to justify the termination of an Individual Provider's contract, the conduct of the Individual Provider must jeopardize the health, safety, and well-being of the client. The standard for this terminable conduct is set forth in law and requires that the jeopardy be clear and present, such as substance abuse, physical abuse, or failure to medicate. In this case, the Department claims that it was not informed that Mr. and Mrs. Klimovich moved for roughly four weeks. Ivan and Larisa continued to care for them during this time. Their health, safety and well-being were not threatened. This lack of jeopardy is reflected in the Department's long delay in visiting the Klimovichs and in notifying them that their providers were being terminated. Moreover, when the Department finally did make

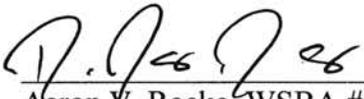
a visit, it was unscheduled and conducted in the hope of witnessing an act of deceit.

Mr. and Mrs. Klimovich informed the Department that they were moving. It seems there may have been a miscommunication. But even if Ivan and Larisa did not tell the Department where their family was moving, this is not grounds for termination. The decision to cancel the contract was arbitrary and capricious, and the review procedure flawed.

The Department erred in applying the law governing termination. Its decision is arbitrary and capricious, and Ivan and Larisa should be reinstated as Individual Providers.

Respectfully submitted this 24th day of June, 2013.

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Declaration of Service

I caused a copy of the foregoing Opening Brief to be served on the following in the manner indicated below:

Via Personal Service to:
Diane L. Dorsey
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 24th day of June, 2013, at Seattle, Washington.



Sarah Borsic, Legal Assistant