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I. INTRODUCTION

Persons who represent themselves as licensed social workers must be licensed by the Department of Health (Department). RCW 18.225.020. Under the Uniform Disciplinary Act (UDA), RCW 18.130, the Department may suspend the license of a licensed social worker who commits “unprofessional conduct.” RCW 18.130.160.

In 2008, the Department’s presiding officer held a hearing under the Washington Administrative Procedures Act (APA), RCW 34.05, and entered a final order suspending Appellant David Stanzak’s license to practice as a licensed social worker. The presiding officer found that Mr. Stanzak had breached the standard of care of a licensed social worker and committed acts of moral turpitude, constituting unprofessional conduct under the UDA. Mr. Stanzak did not file a petition for judicial review of the final order under the APA. Instead, nearly four months after the Department’s order was issued, Mr. Stanzak filed a complaint in Thurston County Superior Court, seeking statutory writs to compel a new hearing of his case by the Office of Administrative Hearings (OAH).

The superior court dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted, ruling that the APA provides the exclusive means of judicial

review of a final agency order and Mr. Stanzak failed to timely file a petition for judicial review under RCW 34.05.542(2).

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the superior court properly dismiss Mr. Stanzak's complaint seeking statutory writs or declaratory judgment when the APA is the exclusive means of obtaining judicial review in his case and he failed to timely seek judicial review under RCW 34.05.542(2)?

2. If the Court finds that the superior court should not have dismissed the complaint, did the Secretary of the Department of Health follow proper procedures in exercising her statutorily authorized responsibilities consistent with the provisions of the statutes?

III. STATEMENT OF THE CASE

A. Statutory Background

A person who represents himself or herself as an independent clinical social worker (licensed social worker) must be licensed by the Department.¹ RCW 18.225.020. Under the UDA, RCW 18.130, the Department may suspend the license of any "license holder" who commits "unprofessional conduct." RCW 18.130.160. The term "license holder" is statutorily defined to include social workers licensed under RCW 18.225.

¹ "Licensed social workers" include "licensed advanced social workers" and "licensed independent clinical social workers." RCW 18.225. Mr. Stanzak was licensed by the Department as an independent clinical social worker in July 2001. CP 005.

RCW 18.130.040(2)(a)(xi); RCW 18.130.020; RCW 18.120.020. Under the UDA, the APA, RCW 34.05, governs all disciplinary hearings. RCW 18.130.100.

The Secretary is the agency head of the Department. RCW 43.70.030. Pursuant to RCW 34.05.425, the agency head may exercise discretion to act as the presiding officer to conduct administrative hearings, designate another person to do so, or utilize the OAH. RCW 34.05.425(1). Use of OAH is discretionary, not mandatory, when agency officials render the final decision. RCW 34.12.040.

B. Factual Background

The Department conducted an adjudicative hearing on August 13-15 and August 22, 2008, regarding allegations of professional misconduct against licensed clinical social worker David Stanzak, Appellant. CP 071. The hearing was conducted by presiding officer Christopher Swanson, Health Law Judge, as delegated by the Secretary of Health. CP 071, CP 100.

Following the hearing, the presiding officer issued “Corrected Findings of Fact, Conclusions of Law and Final Order” (Corrected Final Order) on January 15, 2009. CP 070.² The presiding officer found that

² The presiding officer issued the Corrected Findings of Fact, Conclusions of Law and Final Order to correct scrivener’s errors that occurred in the original order. CP 071.

Mr. Stanzak “repeatedly and graphically initiated the issue of sex into the counseling sessions” with two vulnerable patients, “disclosed information regarding his own sexual urges,” “used provocative language to illicit shock and embarrassment from his patients,” and appeared to enjoy doing this. CP 091-092. The presiding officer found that this conduct not only constituted moral turpitude, it also breached the standard of care of a social worker. CP 089. The presiding officer further found that Mr. Stanzak’s treatment of the two patients breached the standard of care when he failed to adequately assess the patients, failed to develop a treatment plan, and failed to develop coping strategies or emergency plans to deal with bouts of depression. CP 088. The presiding officer concluded that Mr. Stanzak’s conduct caused mental distress to the patients and created an unreasonable risk of further harm. CP 092.

Based on these findings, the presiding officer ruled that, by clear, cogent, and convincing evidence, the Department had proved that Mr. Stanzak committed acts of moral turpitude and failed to meet the standard of care of a clinical social worker, in violation of RCW18.130.180(1) and RCW 18.130.180(4). CP 090-093. As a result, the presiding officer suspended Mr. Stanzak’s clinical social worker license for two years as allowed under RCW 18.130.160(2). CP 093. Mr. Stanzak did not file a petition for judicial review of the Corrected

Final Order under RCW 34.05.542. Instead, on May 6, 2009, *seventy-nine days* after service of the Corrected Final Order, Mr. Stanzak filed a complaint in Thurston County Superior Court, seeking declaratory judgment, a preliminary injunction, a writ of prohibition, and a writ of mandamus. CP 004, CP 009. On May 26, 2009, the Department filed a motion to dismiss for lack of subject matter jurisdiction under CR 12(b)(1) and for failure to state a claim upon which relief may be granted under CR 12(b)(6). After oral argument on July 24, 2009, the court issued an order dismissing the complaint with prejudice. CP 215. On August 24, 2009, Mr. Stanzak filed his notice of appeal to this court.

IV. STANDARD OF REVIEW

The appellate court conducts de novo review of rulings on motions to dismiss for failure to state a claim under CR 12(b)(6) and motions to dismiss for lack of jurisdiction under CR 12(b)(1). *Reid v. Pierce Cy.*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). The issue of whether a court has jurisdiction is a question of law subject to de novo review. *Crosby v. Cy. of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

The appellate court also reviews de novo questions of law such as the meaning of a statute. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). However, substantial weight is given to an

agency's interpretation of the law. *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007).

V. ARGUMENT

A. **The Superior Court Correctly Dismissed The Complaint Because The APA Provides The Exclusive Means Of Judicial Review Of Agency Action And Mr. Stanzak Did Not Timely File A Petition For Judicial Review Under RCW 34.05**

When reviewing an administrative decision, a superior court acts in its "limited appellate capacity, and all statutory procedural requirements must be met before the court's appellate jurisdiction is properly invoked." *Seattle v. Public Empl. Relations Comm'n.*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991).

The APA applies to Department disciplinary proceedings against healthcare providers. RCW 18.130.100. A petition for judicial review of an agency's "final order" must be filed within 30 days of service of the final order. RCW 34.05.542(2). A final order is an order that finally determines the legal rights of persons. RCW 34.05.010(11)(a). The presiding officer's January 15, 2009 decision suspended Mr. Stanzak's license for two years. The decision was a final order in that it undeniably left Mr. Stanzak without further *administrative* recourse against the Department.

Mr. Stanzak sought to judicially challenge the presiding officer's final order through an action under RCW 7.16, 7.24, and 7.40.³ However, the provisions of the APA are the “*exclusive* means of judicial review of agency action.” (Emphasis added). RCW 34.05.510. “Agency action” includes “licensing” and “imposition of sanctions.” RCW 34.05.010(3). Hence, the final order against Mr. Stanzak was an agency action appealable *only* through a petition for judicial review under RCW 34.05.⁴

Consistent with the provision that the APA is the exclusive means of judicial review, declaratory judgment relief and writs of mandamus and prohibition do “not apply to state agency action reviewable under chapter 34.05 RCW.” RCW 7.16.360; 7.24.146. “Appellant’s loss of the remedy provided by the APA through failure to file a timely petition for review does not render that remedy inadequate, or give rise to a right to extraordinary writs. . . . Therefore, if APA review is available, the extraordinary writs are not.” (Citation omitted). *Bock v. State Bd. of*

³ The complaint contesting the January 15, 2009 final order was not filed until May 6, 2009. Thus, the complaint, even if properly filed as a petition for judicial review under RCW 34.05, would not have been *timely filed within 30 days as required by RCW 34.05.542(2)*.

⁴ Mr. Stanzak argues that a petition for judicial review was not required because he challenges the constitutionality and legal authority for the order. RCW 34.05.510 contains no such exception. Moreover, in a petition for review of a final order under RCW 34.05.570(3), the court reviews whether the agency acted constitutionally; whether the agency acted within its statutory authority and jurisdiction; whether the agency used lawful procedures; whether the agency correctly applied the law; whether the order is supported by substantial evidence; whether the agency decided all the issues; whether a motion for disqualification was properly denied; whether the order is consistent with agency rules; and whether the order is arbitrary or capricious. Thus, all of Mr. Stanzak’s arguments could have been raised in a petition for review under RCW 34.05.

Pilotage Comm'rs., 91 Wn.2d 94, 98, 586 P.2d 1173 (1978). Accordingly, the superior court properly held that it had no jurisdiction to review the presiding officer's final order under the provisions of RCW 7.16, 7.24, and 7.40.

Mr. Stanzak failed to timely file a petition for judicial review, thereby depriving the superior court of subject matter jurisdiction. Without subject matter jurisdiction, the superior court is unable to decide the controversy brought before it. *Skagit Surveyors and Eng'rs., LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry Co., Inc. v. Spokane Cy. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999). Appellant's complaint against the Department was properly dismissed for lack of subject matter jurisdiction.

B. The Secretary Of The Department Of Health Properly Exercised Her Statutory Authority To Conduct Disciplinary Hearings Regarding Licensed Social Workers

If the Court finds that the superior court properly dismissed Mr. Stanzak's complaint, then the Court need not consider the issues raised by Appellant. Mr. Stanzak argues the presiding officer did not have the statutory authority to hear the case against him and, therefore, the final order is void. However, he failed to properly raise the argument through a

petition for judicial review under RCW 34.05. Thus, the superior court lacked jurisdiction over his complaint.

In any event, Mr. Stanzak's argument lacks merit. Mr. Stanzak's reliance on *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), as supporting judicial review of his case is misplaced. First, *Marley* did not involve the issue of whether a person could contest an agency's adjudicative proceeding under a statutory writ or declaratory judgment. Furthermore, in *Marley*, the court held that a final agency order may be collaterally attacked for lack of subject matter jurisdiction only when the agency had decided a type of controversy over which it had no authority to adjudicate. *Id.* at 541. On that basis, subject matter jurisdiction is not at issue when the only claim is that the Department of Health used the wrong presiding officer to decide a health profession disciplinary case. *Wash. State Dep't of Health Unlicensed Practice Program v. Yow*, 147 Wn. App. 807, 817, 199 P.3d 417 (2008), review denied by *Yow v. Dep't of Health Unlicensed Practice Program*, 166 Wn.2d 1012, 210 P.3d 1019 (2009). If the Court elects to review the procedural allegations, Department submits the following arguments to refute those allegations.

**1. The Secretary Of Health Or The Secretary's Designee
May Conduct Disciplinary Hearings**

Appellate courts review any statutory interpretation to discern legislative intent by examining the plain language of the provision in the context of closely related statutes and the underlying legislative purposes. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 647, 62 P.3d 462 (2003). The interpretation should give effect to all statutory language, consider statutory provisions in relation to each other, and harmonize them to ensure proper construction. *King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000).

The superior court properly found that the UDA authorizes the Secretary of Health to conduct adjudicative proceedings involving licensed social workers. The Secretary of Health is the “disciplinary authority” for social worker licensing actions. RCW 18.225.080; 18.130.040(2)(a)(xi). As the disciplinary authority, the Secretary may bring disciplinary actions. RCW 18.130.090(1). Upon request, the Secretary must schedule a hearing to contest an action. RCW 18.130.090(2). The Secretary must hold the hearing and issue a final order under the APA. RCW 18.130.100; .110.

Under RCW 18.130.020(10), “Secretary” means “secretary of health *or the secretary’s designee.*”⁵ The Department defines “presiding officer” to mean designated Department employees who are authorized to make final decisions for the Secretary in adjudicative proceedings. WAC 246-10-102. Thus, the Secretary had authority to designate its employee, Christopher Swanson, as the presiding officer to hear and decide Mr. Stanzak’s case.

In support of his argument, Mr. Stanzak cites RCW 18.130.095(3), which states in part:

Only upon the authorization of a disciplinary authority *identified in RCW 18.130.040(2)(b)*, the secretary, or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplinary authority authorized under this chapter.

(Emphasis added). RCW 18.130.040(2)(b) lists particular boards and commissions that are authorized to act as their own disciplinary authority. By contrast, RCW 18.130.040(2)(a) lists other professions for whom the Secretary is the disciplining authority.⁶ Social workers licensed under RCW 18.225 are among those other professions. RCW 18.130.040(2)(a)(xi). Hence, RCW 18.130.095(3) is inapplicable to Mr. Stanzak’s case.

⁵ “Secretary” is similarly defined in the practice act for social workers as “the secretary of health or the secretary’s designee.” RCW 18.225.010(10).

⁶ Commonly referred to as “secretary professions.”

Mr. Stanzak also cites RCW 18.130.050(10),⁷ which states that a disciplining authority has “authority”:

To use a presiding officer as authorized in RCW 18.130.095(3), or the office of administrative hearings [OAH] as authorized in chapter 34.12 to conduct hearings.

The first clause of this provision does not apply to Mr. Stanzak’s case because, as stated above, RCW 18.130.095(3) does not apply to social worker disciplinary cases, because the Secretary, not a board or commission, is the disciplinary authority for licensed social workers. RCW 18.130.040(2)(a). The second clause of this sentence merely “authorizes” the Secretary, as the disciplinary authority in social worker actions, to use an OAH administrative judge to conduct the hearing. It does not *compel* the Secretary to use OAH. In fact, as stated above, under WAC 246-10-102, the Secretary has elected to use designated Department employees—not OAH administrative law judges—to make final decisions for the Secretary in adjudicative proceedings.⁸

⁷ Effective July 1, 2008, the legislature amended the UDA, which resulted in renumbering of portions of RCW 18.130.050. Laws of 2008, ch. 134, § 3. RCW 18.130.050(8) was recodified as RCW 18.130.050(10) and amended to include language not relevant here. The portion of the subsection Appellant relies upon was unchanged.

⁸ It should be noted that agencies are required to use OAH administrative law judges *only* when a hearing is *not* presided over by an official who renders a “final” agency decision. RCW 34.12.040. Because the Department of Health presiding officers render final decisions, the Department is not required to use OAH to conduct its adjudicative proceedings.

The superior court correctly concluded that the Secretary of Health, as the disciplining authority for social workers, or her designee, has the statutory authority to conduct administrative hearings related to licensed social workers.

2. To Apply RCW 18.130.095(3) To Disciplinary Proceedings In Which The Secretary Is The Disciplinary Authority Is Contrary To Legislative Intent As Manifested In The Plain Meaning Of The Statutes And Would Result In Absurd Consequences

In construing a statute, the court's first duty is "to ascertain and give effect to the intent and purpose of the legislature as expressed in the act. Second, the act must be construed as a whole, and all language must be given effect. Third, all provisions must be harmonized, if possible. Fourth, strained or absurd results must be avoided." *State v. Rhodes*, 58 Wn. App. 913, 919, 795 P.2d 724 (1990) (Citations omitted). RCW 18.130.040(2)(a) clearly designates the Secretary as the disciplinary authority for the professions listed in that subsection, including social workers. RCW 18.130.040(2)(b) specifies which boards and commissions have authority for the professions listed in that subsection, which clearly does not include social workers.

RCW 18.130.020(10) defines "Secretary" as "the secretary of health or the secretary's designee." Therefore, the Secretary's designee operates with the same authority as the Secretary for the professions for

which the Secretary is the disciplinary authority in RCW 18.130.040(2)(a). That authority includes the ability to make findings of fact and issue final orders under RCW 18.130.110. However, because the disciplinary authority for professions listed in RCW 18.130.040(2)(b) are the boards and commissions listed therein, the legislature, in RCW 18.130.095(3) authorized the Secretary or her designee to serve as the presiding officer for those professions if the boards or commissions listed in RCW 18.130.040(2)(b) gave that authority to the Secretary or her designee. To conclude otherwise, as Appellant asks this Court to construe RCW 18.130.095(3), would result in the absurd situation where a nonexistent board must authorize the use of a presiding officer in a case involving a profession that is not under the jurisdiction of any board or commission.

A statute should not be construed in a manner that results in unlikely, absurd, or strained consequences. *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003). *See, Newby v. Gerry*, 38 Wn. App. 812, 814, 690 P.2d 603 (1984) (“A statute must be read to avoid injustice or an absurd result.”); *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983) (“[W]e may construe a statute so as to avoid strained or absurd consequences which could result from a literal reading.”).

The statutory language is plain and unambiguous. The court must consider the statutory context as a whole so as to produce a harmonious whole. *State v. Marshall*, 39 Wn. App. 180, 183, 692 P.2d 855 (1984); *Durfee v. Dep't of Licensing*, 34 Wn. App. 521, 524-25, 622 P.2d 70 (1983).

When examining RCW 18.130.095 as a whole, it is clear that the references to Secretary and “disciplining authority” in the subsections of that statute references the Secretary’s relationship with the boards and commissions listed in RCW 18.130.040(2)(b), rather than the Secretary in her role as the disciplining authority for the professions over which she has jurisdiction under RCW 18.130.040(2)(a). RCW 18.130.095(1)(a) requires the Secretary, “in consultation with the disciplining authorities,” to develop uniform procedural rules and RCW 18.130.095(1)(b) authorizes the Secretary “on behalf of the disciplining authorities” to enter into interagency agreements. Then, RCW 18.130.095(4) limits the authority of the presiding officers, who have been authorized by the boards and commissions to serve in that capacity under RCW 18.130.095(3), to “determine and issue decisions on all legal issues and motions arising during adjudicative proceedings.” These presiding officers are not authorized to issue the findings of fact and final orders in

RCW 18.130.110, as that authority remains with the boards and commissions for those professions listed in RCW 18.130.040(2)(b).

There is no need to examine legislative history because the statute is not ambiguous when examined in its context rather than in isolation as presented by the Appellant. The difference between the proposed bill (excerpted in Appellant's Opening Brief at 12) which would allow the Secretary or her designee to be the presiding officer in hearings regarding all professions, and the bill that became law⁹ illustrates not what Appellant suggests, but rather, that RCW 18.130.095(3) limits the Secretary's authority to preside over *board or commission profession disciplinary hearings*. It does not limit the Secretary's authority to preside, or have her designee preside, over proceedings involving "secretary professions"—those licensees listed in RCW 18.130.040(2)(a), over whom she has jurisdiction and authority.

The only logical construction of the UDA consistent with legislative intent and the statutory scheme is that the Secretary has the statutory authority to conduct disciplinary hearings, either herself or through a designee, regarding unprofessional conduct for those licensees listed in RCW 18.130.040(2)(a) for whom she is the disciplining authority,

⁹ On page 13 of his brief, Appellant discusses the 1993 bill, but then cites to a section of the UDA added in 2008—RCW 18.130.062 (Laws of 2008, ch. 134, § 5), which gives full authority to the Secretary to adjudicate allegations involving sexual misconduct.

but the Secretary could only authorize a presiding officer to “determine and issue decisions on all legal issues and motions arising during adjudicative proceedings” for the boards and commissions if the boards and commission authorized her to do so. The agency’s interpretation of the statute should be upheld. *Nationscapital Mortgage Corp. v. State Dep’t of Financial Inst.*, 133 Wn. App. 723, 736-737, 137 P.3d 78 (2006).

C. Appellant’s Due Process Rights Were Not Violated

Mr. Stanzak has not demonstrated that the use of a presiding officer in his disciplinary hearing was unlawful. Nor has he demonstrated any due process violation. Other than a vague assertion that a procedure allegedly requiring his case to be heard by the Office of Administrative Hearings was ignored, Mr. Stanzak has not sufficiently argued or explained how this deprived him of due process. Appellant’s Opening Brief at 17-18. Assertions unsupported by sufficient argument and citation to authority will not be considered. RAP 10.3(a)(6). *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). This issue should be considered waived.

Due process essentially requires the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976). The process followed meets minimum constitutional requirements when it provides a citizen with

sufficient safeguards in a state action. *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n.*, 144 Wn.2d 516, 524, 29 P.3d 689 (2001). Mr. Stanzak received a full hearing over several days that complied with all requisite elements of due process, including a heightened standard of proof. *See Nguyen*, 144 Wn.2d 516. Mr. Stanzak's constitutional rights were protected and there was no due process violation.

VI. CONCLUSION

The superior court acted properly in dismissing Mr. Stanzak's complaint because he failed to timely petition for review under the APA and the APA afforded him the exclusive remedy. In addition, should this Court examine Mr. Stanzak's allegations of procedural errors, RCW 18.130.095(3) does not limit the Secretary's authority to conduct hearings regarding those licensees for whom she is the disciplinary authority or to designate a presiding officer to conduct those hearings. The dismissal should be affirmed.

The Department respectfully requests that this Court affirm the order dismissing Mr. Stanzak's complaint. The superior court correctly found that it lacked subject matter jurisdiction and that

RCW 18.130.095(3) does not limit the secretary of the Department's authority to conduct disciplinary hearings regarding social workers.

RESPECTFULLY SUBMITTED this 20th day of January 2010.

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Attorney for State of Washington
Department of Health

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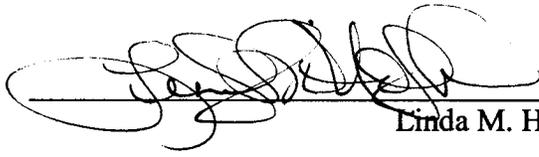
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Linda M. Hoffman