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NO. 41492-9

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

CLERK

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

MICHAEL HELLICKSON, TARA HELLICKSON, and
HELLICKSON.COM, INC.,

Respondents.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

The Brief of Respondent does not include a counter statement of the case or the issues. This is not required, of course, “if respondent is satisfied with the statement in the brief of . . . petitioner.” RAP 10.3(b).

II. SUMMARY OF REPLY TO HELLICKSONS’ ARGUMENT

Hellicksons (1) attempt to mislead the court about service on the Office of Administrative Hearings (OAH), (2) provide no reasoned argument to support their claim that the superior court properly exercised its inherent review power, a claim that was not raised to or by the superior court, (3) cite to cases from other jurisdictions to support their argument while ignoring controlling Washington case law that does not support their argument or implying that cases supports their argument when clearly they do not, and (4) improperly allege facts that are not in the record.

A. **Hellicksons did not serve OAH with a copy of their petition for judicial review.**

Hellicksons have never claimed they served OAH with a copy of their petition for judicial review. But in an apparent attempt to mislead this court, Hellicksons state:

Although not required to do so, Hellicksons had “Respondents’ Petition for Review of Order Denying Stay” served on the Office of Administrative Hearings on September 27, 2010, *after DOL raised its objection*. Declaration of Service (Appendix A).

Br. of Resp'ts at 7–8 (emphasis added). The Department objected only to Hellicksons' failure to serve OAH with a copy of their petition for judicial review. CP at 129–131.

Moreover, the document Hellicksons attach as Appendix A is the last page of a 25-page declaration of service, showing that Hellicksons served on OAH a copy of their petition to the Director of Licensing for administrative review of the ALJ order denying stay. CP at 160–184. Compare Hellicksons' petition for judicial review, CP at 1–25.¹ Since the Department never asserted that Hellicksons were required to serve OAH with their petition for administrative review, Hellicksons' statement is inaccurate, and is not responsive to any argument before the court. It can only be reasonably interpreted as an attempt to mislead the court.²

B. Hellicksons' claim that they "incorrectly identified the agency action being reviewed" is incomprehensible.

To invoke the superior court's appellate jurisdiction, Hellicksons were required to serve OAH with their petition for judicial review.

¹ The superior court petition is titled, "Petition for Review of Order Denying Stay" whereas the administrative petition is titled, "Respondents' Petition for Review of Order Denying Stay."

² The Department stated in its Motion for Discretionary Review, at 8, that Hellicksons (1) did not serve OAH with their petition for judicial review; (2) had served OAH with a copy of their petition for administrative review and had filed in Pierce County Superior Court a declaration of service of the administrative review petition; and (3) had not demonstrated they ever served OAH with a copy of their petition for judicial review. Unlike here, in their response (Respondents' Answer to Motion for Discretionary Review And Motion To Stay Orders) Hellicksons did not claim to have served OAH.

Hellicksons seek to avoid this basic principle by claiming they “incorrectly identified ALJ Schuh’s Order Denying Stay as the agency action being reviewed” and that “it was actually the Ex Parte Order issued by the Director that was reviewed by Judge Grant.” Br. of Resp’ts at 9. Their actions and their statements to the superior court belie their assertion.

Under RCW 34.05.546, a petition for judicial review must set forth, inter alia:

- (3) The name and mailing address of the agency whose action is at issue;
- (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action; . . . and
- (8) A request for relief, specifying the type and extent of relief requested.

Hellicksons did not provide the name and mailing address of the agency whose action is at issue. But they identified the agency action at issue as “Administrative Law Judge Terry A. Schuh entered the attached Order Denying Stay.” CP at 2. Hellicksons attached to their petition for review ALJ Schuh’s order. CP at 26–30. Hellicksons’ requested relief was “for an order staying the suspension of Petitioners’ real estate licenses pending a hearing on the merits.” CP at 25. This, of course, was the remedy that Hellicksons sought from ALJ Schuh and which he refused, and thus their petition for judicial review of ALJ Schuh’s order.

During at least three colloquies with the superior court, Hellicksons made clear they sought judicial review of ALJ Schuh's order:

MR. TINGVALL: So this morning or about noon I filed this case seeking judicial review of the administrative law judge's denial of the stay pending the hearing on the merits.

Verbatim Report of Proceedings (VRP) at 2, Sept. 22, 2010.

THE COURT: I assume you are appealing from the motion to stay?

MR. TINGVALL: And it took about one and a half hours to argue before the administrative law judge. The issues are slightly narrow here, and it was before the ALJ. So my guess is one hour would be sufficient.

VRP at 10, Sept. 22, 2010.

THE COURT: Let me ask you this. Normally there is an order, and from that order you can take exception and qualify those exceptions by way of the transcript.

MR. TINGVALL: We have an order. It's an order denying stay, and that was attached to our petition for review. It's a four-page order, short order. But one of the problems with going back in asking the Director or someone else to reconsider is the ALJ has applied the wrong standard of proof.

VRP at 14, Sept. 22, 2010.

C. Inherent review was not raised below and is not adequately raised here.

Hellicksons did not raise below the issue of inherent power of the superior courts. Their claim that the superior court had inherent power to interrupt the administrative process and undertake review of the

interlocutory orders does not warrant this Court's consideration. Beyond their bold assertion, Hellicksons provide little, if any, analysis to assist the court in evaluating their claim. Notably absent is any citation to relevant authority. Instead, they cite to *Marbury v. Madison*, 1 Cranch 137 (1803) and to the dissenting opinion in *Andersen v. King County*, 158 Wn. 2d 1, 138 P.3d 963 (2006) for the proposition that the court's duty is to invalidate unconstitutional laws.

Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Moreover, the law does not support their claim.

A superior court's inherent power to review administrative action derives from Article IV, Section 6 of the Washington Constitution.³ The constitutional writ invokes the original, not appellate, jurisdiction of the court.

"The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Saldin Sec., Inc. v. Snohomish County*, 134 Wash.2d 288, 292, 949 P.2d 370 (1998). A court will grant review under article IV, section 6 only if the petitioning party "can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious." *Id.* (citing *Pierce*

³ This is usually referred to as the constitutional writ of certiorari.

County Sheriff v. Civil Serv. Comm'n of Pierce County, 98 Wash.2d 690, 693-94, 658 P.2d 648 (1983)). Constitutional writs of certiorari will not issue if another avenue of review, such as a statutory writ or direct appeal, is available. *Id.* at 293, 949 P.2d 370; see also *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wash. App. 248, 253, 724 P.2d 1110 (1986).

Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 532-33, 79 P.3d 1154 (2003).

In the case below, Hellicksons clearly sought judicial review of an ALJ's order, under RCW 34.05, the Administrative Procedure Act (APA), not a writ of certiorari. Nothing in the parties' briefs or the oral arguments address the court's inherent power. The court's orders reflect no indication that the court was asked to, or did, exercise its powers under the state constitution.

As noted in *Torrance v. King County*, 136 Wn.2d 783, 966 P.2d 891 (1998), whether to grant review under this constitutional provision falls within the discretion of the court. Granting review should be exercised only when the decision below is arbitrary and capricious or contrary to law, and no other adequate remedy at law is available. *Id.* at 787-88. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress afforded without issuance of the writ. *City of Olympia v. Thurston Cnty. Bd. of Comm'rs*, 131 Wn. App. 85, 96, 125 P.3d 997 (2005).

A constitutional writ of certiorari is unavailable if the reviewing court's power to grant relief from an agency order under the APA will provide complete and full relief. *Torrance* at 791. See also the recent opinions of Divisions One and Two of the Court of Appeals relying upon *Torrance: Brinnon Group v. Jefferson Cnty.* 159 Wn. App. 446, 245 P. 3d 789 (2011), and *Davidson Serles & Associates v. City Of Kirkland*, 159 Wn. App. 616, 246 P.3d 822 (2011).

A superior court's inherent power to review administrative decisions is limited to a review of the record below to determine whether decisions or acts complained of involved arbitrary and capricious or illegal actions. *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986).

Because the Hellicksons did not serve OAH, that office did not file a certified copy of the record of the proceeding. Therefore, the court did not have a complete copy of the agency record that was considered by the ALJ when deciding not to stay the Director's order suspending Hellicksons' licenses.

The scope of judicial review under inherent review is limited to assuring that the administrative decision is not arbitrary and capricious or illegal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d at 532-33, *State v. Ford*, 110 Wn.2d 827, 828-30, 755 P.2d 806 (1988); *Pierce Cnty. Sheriff*

v. Civil Serv. Comm'n, 98 Wn.2d 690, 694, 658 P.2d 648 (1983); *State v. MacKenzie*, 114 Wn. App. 687, 695–96, 60 P.3d 607 (2002).

Arbitrary and capricious action [is] willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

Pierce Cnty. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d at 695, (quoting *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980)).

Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.

Wash. Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 483, 663 P.2d 457 (1983) (citing *Wash. State Emp. Ass'n v. Cleary*, 86 Wn.2d 124, 542 P.2d 1249 (1975)).

Here, the ALJ promptly conducted a hearing on the question of whether the Director's order suspending the Hellicksons' licenses should be stayed during the pendency of the proceeding. Ample opportunity to be heard was afforded to the Hellicksons. The ALJ, exercising honest and due consideration, determined that to protect the public the Director's order should not be stayed. The ALJ's decision shows careful deliberation and cannot be said to be arbitrary and capricious.

The interlocutory orders that the superior court reversed were not illegal. The term “illegal” is not synonymous with "error of law." *State ex rel. Cosmopolis Consol. School Dist. 99 v. Bruno*, 59 Wn.2d 366, 367 P.2d 995 (1962). Instead, the act of an official or agency is “legal” if official or agency had the legal authority to perform the act at issue. *Id.* at 369.

Contrary to Hellicksons’ exhortations, the Director of Licensing had legal authority to summarily suspend Hellicksons’ real estate licenses, and to then proceed as quickly as feasible to complete required proceedings. RCW 34.05.479. In fact, the superior court articulated twice in response to Hellicksons’ oral argument that the court found no error in the Director having issued the summary suspension order (which the court called “the TRO”):

I can certainly understand how the TRO was issued at eminent risk of harm to the public. I don't have any problems with that. I probably would have signed the order myself.

VRP at 11, Oct. 5, 2010; “I do appreciate the arguments. I find that the Department had every right to issue the TRO.” VRP at 32, Oct. 5, 2010.

In addition, under the APA, particularly under RCW 34.05.479, and under WAC 10-08-200, the ALJ had legal authority to rule on whether

the Director's order suspending the licenses should be stayed during the pendency of the administrative proceeding.

The superior court gave no indication it was exercising inherent authority, but if it did, this court's review is de novo. *Torrance*, 136 Wn.2d at 787. If the court were exercising its inherent authority, the court made no findings or conclusions that the ALJ's order under review, or the Director's order, was arbitrary and capricious or illegal. Since the Director's order suspending Hellicksons' licenses and the ALJ's order were neither arbitrary and capricious nor illegal, the court's orders granting review, reversing the ALJ order and staying the Director's order were a clear abuse of discretion.

D. RAP 8.1(b) does not dictate the standard of review of a superior court order staying an administrative order under the APA.

Hellicksons makes an illogical claim that the last sentence in the first paragraph of RAP 8.1(b) ("Stay of a decision in other civil cases is a matter of discretion.") means this Court reviews the superior court order under an abuse of discretion standard. Br. of Resp'ts at 10. Clearly that sentence refers to the discretion of the court of appeals, not the discretion of the superior court. Hellicksons provide no other authority for the standard of review.

This Court should apply the error of law standard in evaluating the superior court's order staying the Director's summary suspension of Hellicksons' licenses, as the court did not first consider and apply the criteria in RCW 34.05.550(3). *See Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005) (the decision under review turns on the interpretation of statutory procedural requirements, which dictates de novo review). But even if the abuse of discretion standard applies, a superior court abuses its discretion if its decision is based on untenable grounds, which necessarily includes committing an error of law. *Humphrey Indus., Ltd. v. Clay Street Assoc., LLC*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010) (the court's conclusion that defendant substantially complied with the Limited Liability Company Act is erroneous, and constitutes an error of law, thus reversing an award of attorney fees, reviewed under the abuse of discretion standard, as based on untenable grounds); *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (if the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion).

E. Summarily suspending Hellicksons' licenses does not violate their constitutional rights to due process.

Hellicksons fail to tie their claim of due process violations to any controlling case law. They ignore precedential decisions of the United States Supreme Court and Washington courts regarding the validity of summary suspensions of licenses.

Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Dixon v. Love*, supra, 431 U.S., at 113, 97 S.Ct., at 1728. And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. See, e.g., *Barry v. Barchi*, 443 U.S. 55, 64-65, 99 S.Ct. 2642, 2649, 61 L.Ed. 2d 365 (1979); *Mathews v. Eldridge*, 424 U.S., at 334, 96 S.Ct., at 902.

Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 2619, 61 L. Ed. 2d 321 (1979).

Washington cases are in line with the Supreme Court decisions. See, e.g., *Hannum v. Friedt*, 88 Wn. App. 881, 947 P.2d 760 (1997) which involves a summary suspension of a vehicle dealer license, brought pursuant to RCW 34.05.422(4), the same statute the Director of Licensing relied upon in summarily suspending Hellicksons' licenses. Hannum sued

in superior court to enjoin enforcement of the summary suspension, and to obtain damages under 42 U.S.C. § 1983. The superior court dismissed the action and this Court affirmed, noting the relevant question, whether the statutory procedure in RCW 34.05.422(4) is capable of affording due process, was not contested. *Hannum* at 886 n.7.

Two other more recent examples are *Jones v. State Dep't of Health*, 170 Wn.2d 338, 351, 242 P.3d 825, 832 (2010), cited in the Brief of Petitioner at 24, and *Islam v. State*, 157 Wn. App. 600, 238 P. 3d 74 (2010). *Islam* holds that in a situation requiring immediate action, the agency may act upon information that has not yet been tested in a hearing, provided the action is based on reliable information.

In Brief of Respondents at 11–14, Hellicksons set out a string of quotations from various cases. Hellicksons do not analyze the holdings or demonstrate their applicability to the issues under review. For example, they quote language from *Jones v. State*, 140 Wn. App. 476, 492–93, 166 P.3d 1219 (2007) as supporting their position. Clearly *Jones* supports the Department's position instead. Hellicksons ignore the language immediately following the text they quote:

As discussed above, the governmental interest here was important because Jones' violations threatened the health and well-being of his patients. And he received all the process that was due. Jones received notice of the summary suspension and of all later charges and hearings associated

with his professional licenses. He was represented by counsel. Twenty-one days after the summary suspension, a three member panel of the Pharmacy Board heard his motion to stay and modify the summary suspension order. Each time Jones and his pharmacy received a failing score, the Board reinspected the pharmacy in accordance with WAC 246-869-190. Finally, when the Board issued the summary suspension, Jones had an opportunity to be heard before the Board at a September 10, 1999 prompt hearing.

Id. at 493.⁴

Similarly, Hellicksons' reliance on *Washington Medical Disciplinary Board* is misplaced. Br. of Resp'ts at 12.⁵ Again, *Johnston* favors the Department's case. Johnston's medical license was summarily suspended, but the case does not revolve around that fact. Instead, the case dealt with other matters, such as whether unconstitutional bias results when members of the hearing panel were also involved in the decision to summarily suspend the license. The court denied Johnston relief, holding that he was not denied due process, and that there was no violation of the appearance of fairness doctrine or the administrative procedure act.

Similarly, *State ex rel. Swartout v. Civil Service Commission of Spokane*, 25 Wn. App. 174, 605 P.2d 796 (1980), cited in Brief of

⁴ As noted in the Brief of Petitioner at 24 n.11, the Supreme Court reversed the trial court's grant of partial summary judgment to the Department of Health, because there was a genuine issue of material fact as to whether state inspectors had fabricated evidence of the "emergency" which led to the summary suspension of Jones' pharmacy license. *Jones v. State Dep't of Health*, 170 Wn.2d at 351.

⁵ Hellicksons refer to this decision as "*Matter of Johnston*."

Respondents at 12, is inapposite. The court found no infringement of Swartout's liberty interest and no right to a name-clearing hearing.

In short, Hellicksons provide no authority that actually contradicts the supported arguments set forth in the Brief of Petitioner.

F. Hellicksons made no showing, and the superior court made no findings, pursuant to RCW 34.05.534(3) that they should be relieved from exhausting their administrative remedies.

Hellicksons present to this Court the same flawed arguments they presented to the superior court regarding exhaustion. Br. of Resp'ts at 19–27. They fail to adequately address the APA standards and instead mistakenly rely upon public policies that inform the common law doctrine requiring exhaustion.

Hellicksons also misrepresent the facts when they claim “judicial review of the Order Denying Stay did not delay or interrupt the administrative process at all. The hearing on the merits of the charges proceeded as scheduled and has been concluded.” Br. of Resp'ts at 23. The merits hearing was set to commence on October 19, 2010. CP at 29. But as Hellicksons' counsel stated to the superior court, “The hearing has been continued until February 14th as a result of the emergency stay being lifted.” VRP at 5, Nov. 5, 2010.

G. No express standard governs the ALJ's analysis of whether to stay the Director's order summarily suspending Hellicksons' licenses and the ALJ did not abuse his discretion by applying the standard set forth in RCW 34.05.550(3).

The ALJ used the criteria for granting a stay of a final order on judicial review set forth in RCW 34.05.550(3), one of which is the likelihood that the Hellicksons would prevail at hearing. Looking to the breadth of the allegations and the number of complaints regarding the Hellicksons, and considering the preponderance standard of proof the Department must meet, the ALJ reasonably determined it was not probable the Department would be unable to establish at least some of its allegations, and therefore, the Hellicksons were not likely to prevail at hearing. Thus the ALJ refused to stay the Director's summary suspension order. Order Denying Motion to Stay. CP at 30 (Conclusion of Law 5.10).

As the presiding officer, the ALJ is authorized to rule on procedural matters, objections and motions. WAC 10-08-200. Pursuant to this authority, the ALJ did not abuse his discretion by applying the standards of RCW 34.05.550(3).

Hellicksons argue that the burden of proof applicable in real estate licensing disciplinary cases is the clear, cogent and convincing burden as set forth in *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 544, 29 P.3d 689

(2001) and therefore, the ALJ should have applied that standard when deciding their motion to stay the Director's summary suspension order.

To the contrary, RCW 18.85.390 establishes the burden as preponderance of the evidence at the hearing on the merits. Moreover, nowhere in the case law is there a suggestion that an order summarily suspending a license must be based on clear, cogent and convincing evidence.

H. Hellicksons' brief fails to comply with RAP 10.3.

Hellicksons' brief does not comply with RAP 10.3(a)(5) because they do not cite to the record for each factual statement, several of which aver facts that occurred after the superior court issued the orders this Court is reviewing.

Hellicksons' brief also fails to comply with RAP 10.3(b) which requires the brief to conform to section (a) of RAP 10.3 and answer the brief of appellant or petitioner. Hellicksons' brief goes far afield of answering the Brief of Petitioner.

III. CONCLUSION

Hellicksons fail to present cogent argument and relevant authority to counter the Department's challenges to the superior court orders under

review. The Department asks this Court to reverse the orders under review and direct the superior court to vacate them and dismiss Hellicksons' petition for judicial review.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

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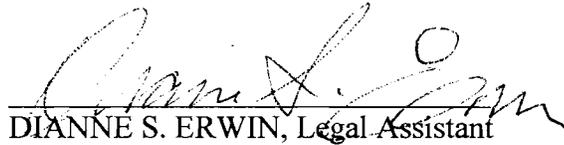
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 19th day of May, 2011, at Olympia, Washington.


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