

No. 294706

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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JOAN STEWART  
Appellant/Plaintiffs,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES, DEPARTMENT OF EARLY  
LEARNING,  
Defendants/Respondents

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Brief of Appellant

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## **Assignments of Error**

### Assignment of Error No. 1:

The Court Below erred in failing to grant Appellant's petition to overturn the decision of the Department of Early Learning.

## **Issues Pertaining to Assignments of Error**

### Issue No. 1: May the Department of Early Learning

permanently ban a person from ever caring for children based upon her husband's medicinal use of marijuana?

## **STATEMENT OF THE CASE:**

The facts in this case are basically undisputed. [CP 17, 23] They are as follows:

JOAN STEWART operated a day care center and had for many years. The patrons of the day care had nothing but praise for the way the center is run.

ROGER STEWART suffers from ongoing, progressive diabetes leading to kidney disease which required him to begin dialysis in January of 2006. This condition is not fatal as such: it is chronic and could be fatal if untreated, but with treatment is manageable. Mrs. STEWART notified the Department of Mr. STEWART's condition in January of 2006

On April 23 2007 the Department decided to revoke the STEWARTS' day care license on the ground that ROGER STEWART was using marijuana, an "illegal" drug. On May 17 2007 STEWARTS filed a timely appeal of that order identifying that ROGER STEWART used marijuana

medicinally and supplying physician verification which satisfied RCW 69.51A and made the use of marijuana by Mr. STEWART not illegal. Additionally evidence was adduced showing Mr. STEWART did not use marijuana around children, nor care for them while under the influence.

On September 4, 2007 the ALJ issued a ruling granting DEL's motion for summary judgment. On 9/5/2007 STEWARTS appealed that decision and the decision was upheld on January 15, 2008. The Superior Court further upheld the decision.

JOAN STEWART then applied for a day care license for herself alone with Mr. STEWART not to have contact with children. That was denied and the denial upheld in this order. The agency action on February 26, 2010, granting a summary judgment upholding refusal to permit Plaintiff's daycare license.

STEWART appealed that decision to Superior Court,

[CP 1] and the Hon. Annette Plese affirmed the decision. [CP  
61] This appeal followed. [CP 66]

## ARGUMENT

This case presents one legal issue, whether the Department had legal authority to blackball Mrs. STEWART from further daycare activities for life.

### **1. Exhaustion of Administrative Remedies**

The ALJ determined that Petitioner's argument required him to invalidate a DEL rule, which an ALJ may not do under WAC 170-03-0230(1), which states:

(1) Neither an ALJ nor a review judge may decide that a DEL rule is invalid or unenforceable. Only a court may decide this issue.

Further exhaustion of Administrative remedies would be futile.

RCW 34.05.534 states,

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile;

In this case since the ALJ or review tribunal cannot issue the

relief requested, this Court should deem exhaustion of Administrative remedies inapplicable and permit this appeal to proceed.

## **2. Denial Based Upon Prior revocation**

WAC 170-296-0450(2)(c)<sup>1</sup> does provide:

(2) We must deny, suspend or revoke your license if you:  
... (c) Or anyone residing at the same address as you had a license denied or revoked by an agency that provided care to children or vulnerable adults;

However, nothing in the enabling legislation gave the DEL the delegated authority to refuse to exercise discretion and arbitrarily deny licensing to anyone previously revoked for any reason.

RCW 43.215.200 permits the Director of DEL to “adopt and publish minimum requirements for licensing applicable to each of the various categories of agencies to be licensed under

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<sup>1</sup> There are 2 sections (c). The first provides “ (c) Fail to report instances of alleged child abuse, child neglect and exploitation to the DSHS children's administration intake or law enforcement when an allegation of abuse, neglect or exploitation is reported to you.” The second is reproduced above.

this chapter.”

RCW 43.43.832 (6) provides,

(6) The director of the department of early learning **shall adopt rules** and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances: ...(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care.

However RCW 43.215.260 is specific to the denial of

licensing:

Each agency shall make application for a license or renewal of license to the department on forms prescribed by the department. Upon receipt of such application, the department shall either grant or deny a license within ninety days. **A license shall be granted if the agency meets the minimum requirements set forth in this chapter and the departmental requirements consistent with the [this] chapter,**

And RCW 43.215.300 provides,

(1) An agency may be denied a license, or any license issued pursuant to this chapter may be suspended, revoked, modified, or not renewed by the director upon proof (a) that **the agency has failed or refused to comply with the provisions of this chapter or the requirements adopted pursuant to this chapter.**

The minimum standards set out in RCW 43.215 do not include the absence of prior revocation. Therefore **nothing in Chapter 43.215 requires or permits automatic refusal of a license due to any former revocation.** More important, a license may only be denied under agency requirements “adopted pursuant to this chapter.” *The RCW chapter does not allow the agency to refuse to exercise discretion in determining whether a prior revocation mandates denial of further licensing.*

A rule that exceeds the authority of the Agency as delegated by the Legislature is invalid. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wash.2d 430, 446-47, 120 P.3d 46 (2005); *Qwest v. Wash. Util. And Transp. Com'n*, 140 Wn. App. 255, 166 P.3d 732 (2007). Legislative rules made by an Agency must be within the agency's delegated authority, reasonable, and adopted using the proper procedure. *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wash.2d 310, 314-15, 545 P.2d 5 (1976).

Here the agency is denying a license without reference to the facts or policies of the case, based upon a regulation that precludes application of discretion without legislative support and without exercise of reasonable discretion. As such it is arbitrary and capricious, and the decision must be disallowed. Agency action is deemed arbitrary and capricious if it is willful and unreasoning, and taken without consideration and in disregard of the facts and circumstances. *Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995).

### **3. Personal Disqualification**

Mrs. Stewart has been denied a license on the ground that the Department has decided she may never be licensed again. Now this clearly is an exercise of discretion: WAC 170-06-0070 provides,

- (7) The department may also disqualify an applicant if the applicant has other nonconviction background information that renders the applicant unsuitable to care for or have unsupervised access to children in child care. Among the factors the department may consider are: ...
- (e) The applicant had a license or certification for the

care of children or vulnerable adults terminated, revoked, suspended or denied.

This language is permissive and requires the Department to “consider” factors. In this case the Department’s decision, based solely upon Mrs. Stewart’s husband’s medicinal use of Marijuana in the prior revocation proceeding, to disqualify Mrs. Stewart, is arbitrary and capricious. There is nothing in the facts and circumstances of this case suggesting that Mrs. Stewart herself is in any way incapable of or unsafe in caring for children. The disqualification occurred solely because she and her husband asserted a reasonable legal proposition, that her husband’s medicinal use of marijuana, specifically approved of in State Legislation, was not a disqualification.

RCW 69.51A.005 provides,

[T]he people of the state of Washington intend that:  
... Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

RCW 69.51A.040 then states,

(1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. **Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.**

(2) The qualifying patient, if eighteen years of age or older, shall:

- (a) Meet all criteria for status as a qualifying patient;
- (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
- (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.

It is undisputed that ROGER STEWART met all these criteria.

The Department took the position that marijuana was

nonetheless an “illegal drug” as that term was used in WAC

170-296-0450:

(2) We must deny, suspend or revoke your license if you: ... (g) Use illegal drugs, or excessively use alcohol or abuse prescription drugs;

There was no statutory support for including use of “illegal drugs” in the WAC in the first place<sup>2</sup> and no context to permit determination of the meaning of the term “illegal drugs.”

STEWART contended that because the drug was not illegal as he used it, and RCW 69.51A.040 provides that users under its aegis “shall not be penalized in any manner,” it was not covered by the WAC. The Superior Court disagreed and STEWARTS declined to appeal that decision; but the legal argument is reasonable.

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<sup>2</sup>. RCW 74.15.020 does not include "illegal drugs" in its definitions. RCW 74.15.030 permits the Department to set standards for the character of workers but does not include “illegal drug use.” In fact it states,

The minimum requirements shall be limited to: ...

(b) The character, suitability and competence of an agency and other persons associated with an agency directly responsible for the care and treatment of children, expectant mothers or developmentally disabled persons...

The statute then addresses criminal records and prior findings of abuse and neglect but not drug use.

Now the Agency is punishing Mrs. Stewart, not because she was a marijuana user, but because she asserted a legal position the Agency didn't like. As such this comprises arbitrary and capricious decision making and should be reversed.

### **CONCLUSION**

This court is asked to rule that Mrs. STEWART's disqualification is based on an invalid statute and require reconsideration of her application without reference to the invalid statutory requirement.

January 3, 2011

Van Camp & Deissner

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dustin Deissner WSB# 10784

Attorney for Appellants

CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
NICOLE KOYAMA ATTORNEY GENERAL'S OFFICE 1116 W Riverside Avenue Spokane, WA 99201-1194	<input type="checkbox"/> US Mail 1 <sup>st</sup> Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to: <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

January 3, 2011



Dustin Deissner WSB# 10784