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NO. 294706

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

JOAN STEWART,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES DEPARTMENT OF EARLY LEARNING,

Respondents.

BRIEF OF RESPONDENT

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I. SUMMARY

In 2007, Ms. Stewart, the Appellant, owned and operated a daycare in her home. Her daycare license was issued jointly with her husband, Mr. Roger Stewart. Mr. Stewart admittedly smoked marijuana in the family home. After his admission and positive drug test, Mr. Stewart received a doctor's recommendation for medical use of marijuana. The Department of Early Learning (DEL) revoked the Stewart's family home license on April 23, 2007, as a result of their failure to comply with DEL regulations; specifically WAC 170-296-0450 (2)(g) which states, "[DEL] must deny, suspend or revoke your license if you: Use illegal drugs, or excessively use alcohol or abuse prescription drugs." Mr. Stewart did not have a recommendation for medical use of marijuana at the time of revocation, April 23, 2007.

Mr. and Ms. Stewart appealed the 2007 revocation. DEL moved for summary judgment. The Administrative Law Judge (ALJ) granted the motion; thereby upholding the revocation of Mr. and Ms. Stewart's childcare license. The Stewarts appealed to the Board of Appeals, which affirmed the decision of the ALJ. Mr. and Ms. Stewart then appealed to the Superior Court, which again upheld the 2007 revocation.

On June 16, 2008, Ms. Stewart individually applied for a childcare license, listing Mr. Stewart as a household member. Ms. Stewart later withdrew the June 16, 2008 application.

On July 8, 2009, Ms. Stewart submitted a new application for a home child care license. DEL denied this application. The WAC mandates that DEL deny the application based on the prior 2007 revocation of her license and her history of non-compliance with the department.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. DEL has the authority to make rules under its enabling statute, and WAC 170-296-0450 does not exceed that authority.
2. DEL's decision to disqualify Ms. Stewart was not arbitrary and capricious because the decision was based on the facts and circumstances discovered in Ms. Stewart's background check and license history.

III. COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does DEL have statutory authority to create a regulation that prohibits DEL from issuing a license to an individual who has previously had a license revoked?
2. Was DEL warranted in disqualifying Ms. Stewart from working in or volunteering in licensed childcare?

IV. STATEMENT OF THE CASE

On April 23, 2007, DEL revoked Ms. Stewart and Mr. Stewart's license to operate a daycare in their home as a result of their refusal to comply with DEL regulations. (CP 61) The Stewarts appealed DEL's decision. (CP 62) DEL moved for summary judgment. (CP 62) An Administrative Law Judge (ALJ) granted DEL's motion for summary judgment, upholding DEL's action revoking Ms. Stewart's 2007 license. (CP 62) The Stewarts next appealed to the Board of Appeals (BOA) which upheld the summary judgment granted by the ALJ. (CP 62) The Stewarts next appealed the BOA decision to the Superior Court of Spokane County. (CP 62) The Honorable Tari Eitzen of the Superior Court also upheld the ALJ's summary judgment. The Stewarts did not seek further review of the April 23, 2007 DEL license revocation. (CP 62)

On September 8, 2008, Ms. Stewart submitted a new application for a license to DEL. Ms. Stewart later withdrew this application. (CP 62)

On July 8, 2009, Ms. Stewart submitted a second application for a child care home license. DEL denied this application after a background check on September 15, 2009 for two reasons: (1) Ms. Stewart had a 2007 child care license revoked; and (2) Ms. Stewart was disqualified on October 10, 2009 from working or volunteering in licensed child care.

(CP 39 – 43) Ms. Stewart appealed the license application denial and personal disqualification to the Office of Administrative Hearings (OAH). DEL moved for summary judgment, which OAH granted in favor of both DEL’s denial and disqualification actions. Ms. Stewart then appealed OAH’s decision to the Superior Court of Spokane County. The Honorable Annette Plese upheld the OAH decision to deny Ms. Stewart a license and to disqualify her from working or volunteering in licensed child care. (CP 64 - 65) Ms. Stewart timely appeals that decision to this court.

V. ARGUMENT

The issues presented in this appeal are: (1) Does DEL have statutory authority to create a regulation that prohibits DEL from issuing a license to an individual who has previously had a license revoked (WAC 170-296-0450), and (2) Was DEL warranted in disqualifying Ms. Stewart from working or volunteering in licensed child care?

In reviewing an agency order in an adjudicative proceeding, a court may grant relief from the order only if it determines that: (1) the order, or the statute or rule on which the order is based, is unconstitutional on its face or as applied; (2) the order is outside the agency's statutory authority or jurisdiction; (3) the agency has engaged in an unlawful procedure or decision-making process or failed to file a prescribed procedure; (4) the agency erroneously interpreted or applied the law; (5)

the order is not supported by substantial evidence when viewed in light of the whole record before the court; (6) the agency has not decided all issues requiring resolution by the agency; (7) a motion for disqualification was made and improperly denied; (8) the order is inconsistent with an agency rule; or (9) the order is arbitrary or capricious. RCW 34.05.570(3). The party asserting the invalidity of the order has the burden of demonstrating the invalidity. RCW 34.05.570 (1)(a). The Court of Appeals sits in the same position as the Superior Court in conducting review of an administrative decision where judicial review has been requested. *Hardee v. State, Dept. of Social and Health Services, Dept. Early Learning*, 152 Wn. App. 48, 53-54, 215 P.3d 214 (2009).

A. WAC 170-296-0450 was within the rule-making authority granted to DEL by the Washington State legislature.

Ms. Stewart first claims that DEL exceeded its rule making authority in enacting WAC 170-296-0450. It did not.

A department's powers are limited to those powers, "expressly granted or necessarily implied," from the department's enabling statute. *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978), citing *Ortblad v. State*, 85 Wn.2d 109, 530 P.2d 635 (1975); *State v. Pierce*, 11 Wn. App. 577, 523 P.2d 1201 (1974). A department rule is invalid if it exceeds the

department's authority. *Kabbae v. Department of Social and Health Services*, 144 Wn. App. 432, 439, 192 P.3d 903 (2008), citing RCW 34.05.570(2)(c); *Superior Asphalt & Concrete v. Department of Labor & Industries*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996). A rule exceeds the department's statutory authority when the department's enabling statute does not authorize the rule either, "expressly or by necessary implication." *Kabbae*. at 440, citing *In the Matter of the Consolidated Cases Concerning the Registration of Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-40, 869 P.2d 1045 (1994).

If a legislature grants a department administrator rule making authority, courts will presume the administrator's rules to be valid so long as they are, "reasonably consistent with the statute being implemented." *Id.* at 439-40, citing *St. Francis Extended Health Care v. Department of Social & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). Courts will enforce the plain language of a statute when the legislature's intent is made clear in that language. *Id.* at 440, citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

In *Kabbae*, the court held that an agency's rule conflicted with the agency's enabling statute because the rule limited the powers of a review judge that had been expressly granted by the plain language of the agency's enabling statute. *Id.* at 442-43. The plain language of the statute

stated that, “the review judge ‘shall exercise all the decision-making power’ the ALJ has to decide and enter the initial order.” *Id.* The agency rule limited the powers of a review judge by stating that the review judge could only add findings if, “they are ‘essential’ and ‘consistent with the ALJ’s findings.’” *Id.* The agency rule limited the powers granted to review judges by the legislature because ALJs have the power to enter their own findings of fact but the agency rule prevented review judges from doing the same unless the review judge’s findings of fact were essential and consistent with the ALJ’s findings of fact. *Id.* The court held that the agency rule was invalid because it restricted the powers of a review judge when the plain language of the agency’s enabling statute made it clear that the legislature intended a review judge to have the same powers as an ALJ. *Id.*

The plain language of the DEL’s enabling statute clearly grants rule making authority to DEL. RCW 43.215.020 states, “The department is vested with all the powers and duties transferred to it under this chapter and such other powers and duties as may be authorized by law.” The same statute also lists DEL’s duties which include administering child care and early learning programs, standardizing licensing criteria, and making rules for the program of early learning. RCW 43.215.020. The enabling statute also states that DEL’s director, “shall adopt rules for the following

program components... minimum program standards [and]... approval of program providers.... The department has administrative responsibility for... approving and contracting with providers...” RCW 43.215.0002. The plain language of DEL’s enabling statute makes it clear that the legislature intended for DEL to have rule making authority.

The plain language of the enabling statute also granted DEL specific authority to enact WAC 170-296-0450. RCW 43.215.200 requires¹ DEL’s director to, “adopt and publish minimum requirements for licensing applicable to each of the various categories of agencies to be licensed under this chapter.” The director’s duties are restated in RCW 43.43.832 which requires the director to:

“Adopt rules and investigate... 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.”

The plain language in DEL’s enabling statute clearly requires DEL, specifically DEL’s director, to make rules for the issuance of licenses.

¹ The RCW uses the word “shall”. The word “shall” in a statute is a “mandatory directive” unless it is clear that the legislature intended a different meaning. *Kabbae* at 448, citing *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

Ms. Stewart contends that WAC 170-296-0450 is outside DEL's statutory authority because the regulation lists a condition necessary for the issuance of a license that is contrary to the language of DEL's enabling statute. Appellant refers to the "minimum standards" set out in RCW 43.215 and claims the condition is not included in those standards. The plain language of RCW 43.215 does not set out "minimum standards". It does, however, set out "minimum requirements" for the issuance of a license. RCW 43.215.205. The minimum requirements for licensing include, "The character, suitability, and competence of an agency and other persons associated with an agency directly responsible for the care of children." *See* RCW 43.215.205.

The plain language of the statute indicates that WAC 170-296-0450, a regulation which prohibits issuance of a license to an applicant if the applicant has a prior revocation in his or her history, follows the legislative intent. The enabling statute states that the legislature recognizes that early childhood development is critical to a child's success later in life and that the purpose of the statute is to, "safeguard and promote the health, safety, and well being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care." RCW 43.215.005. WAC 170-296-0450 is directly related to the legislature's intent to protect children, follows the

legislature's requirement that the DEL determine an individual's character, suitability, and competence prior to issuing them a license and enforces the legislature's policy that the safety of children is paramount to an individual's right to protect child care. WAC 170-296-0450 does not exceed statutory authority because DEL is clearly required to pass rules regarding the issuance of licenses and the regulation is in no way contrary to the legislature's intent.

B. DEL'S decision to deny Ms. Stewart's license application and disqualify her was not arbitrary and capricious because DEL conducted a background check prior to the decision and based the disqualification on the facts and circumstances revealed by the background check.

DEL's decision to disqualify Ms. Stewart was not arbitrary and capricious because it was based on specific facts and circumstances contained in Ms. Stewart's background check and licensing history. A department decision is arbitrary and capricious if it is, "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Brown v. State Dept of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1999), citing *Heinmiller v. Department of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995). Courts should treat department decisions with considerable deference because such decisions "are peculiarly a matter of administrative competence." *Id.* at 17, citing *State ex rel. Washington Fed'n of State Employees v. Board of Trustees*,

93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980). A department decision is not arbitrary and capricious simply because a party objects to the decision so long as there is an explanation for the decision. *Id.* at 16, *citing Heinmiller*, 127 Wn.2d at 609; *Matter of Stockwell*, 28 Wn. App. 295, 302, 622 P.2d 910 (1981). The harshness of the decision is not the test for whether or not a department decision is arbitrary and capricious. *Brown*, 94 Wn. App. at 17, *citing Heinmiller*, 127 Wn.2d at 609.

In *Brown*, the court held that an agency decision was not arbitrary and capricious because the agency considered the facts and circumstances before issuing its decision. 94 Wn. App. at 10. The court explained that the party alleging that a decision is arbitrary and capricious carries a “heavy burden” because the scope of review is narrow. *Id.*, *citing Keene v. Board of Accountancy*, 77 Wn. App. 849, 859, 894 P.2d 582, *review denied*, 127 Wn.2d 1020, 904 P.2d 300 (1995); RCW 34.05.570(1)(a). The court stated that the harshness of the decision did not make it arbitrary and capricious because the agency decision was made after consideration of the facts and circumstances of the case. *Brown*, 94 Wn. App. at 10.

DEL’s disqualification of Ms. Stewart is not arbitrary and capricious. DEL followed its background check rules and based its decision to disqualify Ms. Stewart on facts and circumstances revealed by the background check and her licensing history. Appellant’s history

includes a 2007 license revocation action. The concerns which led to the revocation, and Ms. Stewart's subsequent actions, reflect a disregard of or refusal to comply with DEL regulations. *See* CP 35 - 42.

Additionally, WAC 170-06-0070(7)(e) states, "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: the applicant has a license or certification for the care of children or vulnerable adults terminated, revoked, suspended or denied." DEL, per WAC 170-06-0070(7)(e), disqualified Ms. Stewart because she had a prior license for the care of children revoked.

WAC 170-296-0450 prohibits DEL from issuing a license to an individual who has had a license revoked previously or to an individual who has been disqualified based on information in his or her background check. Appellant had a prior license revoked on April 23, 2007. Appellant was disqualified from working or volunteering in licensed child care on October 10, 2009. DEL acted in compliance with its rules and refused to issue Ms. Stewart a license because she had previously had a DEL license revoked and had been disqualified. Although Ms. Stewart may believe the DEL decision was harsh, this belief has no bearing as to

whether or not DEL decision was arbitrary and capricious. DEL has well reasoned policy supporting its decision.² DEL considered the facts and circumstances of Ms. Stewart's application including the background check and made its decision after considering the facts and circumstances in light of DEL regulations.

Ms. Stewart argues that DEL's decision to deny her license application was based solely on her husband's use of medicinal marijuana. Further, Ms. Stewart argues that this was a legal use, and therefore does not qualify as an illegal drug under WAC 170-296-0450(f). In its letter to Ms. Stewart dated February 3, 2009 denying Ms. Stewart's license application (Administrative Record (AR) 42 - 44), the department indicates several reasons for which Ms. Stewart's application was denied. These include: (1) failure to submit an employment and education resume and three references from persons not related to Ms. Stewart; (2) failure to submit proof of a negative Mantoux tuberculin (TB) test for Mr. and Ms. Stewart; (3) failure to submit completed background check forms for Mr. and Ms. Stewart; (4) prior revocation of childcare license on April 23,

²See RCW 43.215.005 which states that the legislature recognizes that early childhood development is critical to a child's success, that the purpose of this program and DEL is to ensure the safety and well being of children in early childhood education programs and that the safety and well being of these children is paramount to any individuals right to provide care to children.

2007; and, (5) prior revocation of Mr. Stewart's childcare license, as he was listed as living at the same address. (AR 43)

Additionally, in its letter to Ms. Stewart regarding her disqualification to work or volunteer in licensed childcare, dated October 10, 2009 DEL detailed a history of noncompliance with the Department's regulations regarding licensing. (AR 61 - 65) The facts detailed in this letter included a prior license revocation, providing unlicensed childcare, and failure to provide required documentation with applications.

ALJ James Conant, in his review of OAH's grant of summary judgment to DEL (AR 31-37), also found that while Mr. Stewart did eventually receive a medical marijuana license, he did not do so until after his and Ms. Stewart's childcare license was revoked. While he may have had subsequent protection from criminal prosecution, such protection did not exist at the time the license was revoked. (AR 37) Furthermore, any protections afforded under the Medicinal Marijuana Act only relate to criminal prosecution and thus do not apply here, in a civil litigation proceeding. RCW 69.51A.005 ("Qualifying patients with terminal or debilitating illness who, in the judgment of their physicians, would benefit from the medicinal use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.")

Because DEL considered several facts and circumstances in this case, its decision was not arbitrary and capricious.

VI. CONCLUSION

Ms. Stewart has failed to demonstrate that WAC 170-296-0450 exceeds DEL's authority. The rule is within the DEL's statutory authority because the DEL's enabling statute grants the DEL the authority to make rules for licensing and the rule is consistent with the plain language of the statute. Ms. Stewart has also failed to demonstrate that DEL's disqualification action was arbitrary and capricious. The disqualification was based on Ms. Stewart's refusal to comply with DEL regulations which resulted in Ms. Stewart's license being revoked in 2007. The Superior Court Order should be affirmed.

RESPECTFULLY SUBMITTED this 3 day of February,
2011.



NICOLE KOYAMA
WSBA #29384

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on February 4, 2011, I served the Brief of Respondent upon the Appellant herein, by delivery of a copy by legal messenger to:

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DATED this 4th day of February, 2011.


NIKKI GAMON