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COURT OF APPEALS #62436-9-I

Superior Court # 09-2-07787-0 KNT

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OF THE STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE SHARON ARMSTRONG

KATHLEEN HARDEE,

Appellant

vs.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS)/
DEPARTMENT OF EARLY LEARNING (DEL),

Respondent

REPLY BRIEF OF APPELLANT

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ORIGINAL

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Note – this reply brief has brief is organized in the same manner as the Brief of Respondent for convenience of the reader.

I. INTRODUCTION TO REPLY

Ms. Hardee's licensing case implicates one of the most serious challenges faced by modern governments: protecting the individual citizen from the overweening power of a bureaucratic state. The facts of this case validate Justice Frankfurter's view that "*[t]he history of liberty has largely been the history of observance of procedural safeguards.*" *McNabb v. United States*, 318 U.S. 332, 347 (1943). The DSHS/DEL review judge has ignored the procedural safeguards which guarantee a Washington citizen a fair hearing. She improperly ignored the ALJ, the evidence, the law and the rules, and was biased against Ms. Hardee. She entered improper findings for DSHS/DEL in reliance upon uncorroborated DSHS hearsay and upon personal speculation about Ms. Hardee and the ALJ. Respondents have identified no evidence to support the findings and these findings must be reversed.

II. REPLY TO ISSUES PRESENTED BY DSHS/DEL

1. The issue is not children's rights, but whether a daycare provider has the right to a fair hearing and a decision on the evidence.
2. The issue is not about whether the review judge has the authority

to enter findings, but whether this review judge violated her authority.

3. The issue is whether substantial evidence supports the review judge's decision when it is based upon an unreasoning rejection of the ALJ, ignores the WAC definition of supervision, ignores the evidence, and relies upon uncorroborated hearsay and speculation.

4. The issue is whether the decision is arbitrary and capricious when the review judge had no basis to reject the ALJ's findings, no basis to enter de novo findings on her own view of the evidence and the WAC.

5. Fees are required as Ms. Hardee must prevail under the facts.

III. REPLY TO COUNTERSTATEMENT OF THE CASE

A. Suspension And Revocation - Corrections

Ms. Hardee's license was suspended on ^{7/05/06}~~2/5/05~~, not 2/5/06. CP 572.

Respondent has admitted that the finding against Ms. Hardee's character is based on their findings that she broke the rules. (Brief of Respondent, p 5)

B. Administrative Adjudication – Reply

DSHS/DEL relied upon three licensing violations to support revocation: (1) that William was unsupervised (“extensive and intimate contact with children”), (2) that unauthorized persons lived in the residence, and (3) that Ms. Hardee did unlicensed daycare. CP 258.

Correction
*

**1. DSHS/DEL Knew William's History When They
Granted The Waiver; Provided No Evidence Of A
Requirement For Supervision Beyond The Definition In
The WAC**

DSHS/DEL knew all about William's troubles in 2001 when they told Ms. Hardee in 2003 that William could move back home with supervision. CP 385, CP 441. The 2004 waiver signed by Ms. Hardee and DSHS/DEL grants permission for William to be present during daycare, as long as he is never unsupervised. CP 447-448, CP 557. "Supervision" means within sight or hearing." WAC 170-296-1360.¹ The waiver has no requirement for constant line-of-sight supervision at every moment. There was no history of sex offenses, no indication that this would be a problem DSHS/DEL routinely makes rules for child care providers and certainly would have made a higher supervision level clear if it were required.² The review judge's finding that Ms. Hardee failed to supervise William was based upon her opinion of what *should have been* the supervision requirement: "leaving the child in another room where her could not be observed should be considered as leaving him unattended, in violation of the safety plan in place." CP 250. Ms. Hardee can not be

1 WAC 170-296-1360 is specifically the supervision WAC for which Ms. Hardee was cited in their letter of revocation dated 10/9/06. CP 496. This WAC replaced 388-296-1360, which had the same language on supervision.

2 For instance, WAC 170-296-0960 requires infants who holding bottles be "within eyesight."

punished for failing to follow rules that were never in place and never expressed. State v. Gilroy, 37 Wn.2d 41, 47 (1950)

DSHS/DEL pointed to no evidence to support their claim that William was left unsupervised. The only disputed fact was provided by parent JS, who testified that he had once come in to find Ms. Hardee out of the room when William was with his daughter. The ALJ specifically noted this dispute and found it was not a critical factor in his decision, as it was clear that Ms. Hardee was “within view and/or could hear ...” CP 327, CP 331. This is the definition of supervision in WAC 388-296-1360, the supervision WAC that DSHS/DEL claimed Ms. Hardee violated. CP 494, 496. If credibility were a factor, the ALJ’s finding for Ms. Hardee is an implicit determination that she was credible. The review judge’s finding that William was unsupervised, that he had “extensive and intimate” contact is not based on this record.³

2. The DSHS/DEL Finding That Ms. Hardee Lacked “Personal Characteristics” Relies Wholly Upon Their Findings That She Violated The Rules

The review judge specifically stated that Ms. Hardee’s lack of character was due to three findings of rule violations: (1) unsupervised

³ The only evidence of William’s schedule is the investigator’s report of his interview with Ms. Hardee, who told him William was never alone with any daycare children, he never took care of them, that he was gone from 7 am to 3 pm, that when he was home on occasion, he helped make lunch. Investigator’s report, CP 478 (mid page).

contact, (2) unlicensed daycare, and (3) that Ms. Hardee allowed “unqualified individuals to *live in her home.*”⁴ CP 258, 4th par.

Respondents’ claim to revocation for hat revocation is justified because there were “unknown persons” and “unknown males” is without reason. (Brief of Respondent, page 10). Respondents point to no evidence that visitors were unknown to the Hardee family, or that the family’s visitors would have failed a background check, or that they had unsupervised access to the children, or that they posed any problems at all. Child care providers are not prohibited from having friends come over, and there is no requirement to call DSHS/DEL for pre-approval or background checks on visitors before they come to the home.⁵

Respondent is mistaken in their assertion that William was present for “large portions of the day and that he had “extensive hands on care for the children” – this claim cites to NO evidence, but the review judge’s words. The only evidence of William’s schedule comes from the investigator, who reported that Ms. Hardee told him William was never alone with any daycare children, he never took care of them, that he was gone from 7 am to 3 pm, that if he was at home, he helped with lunches.

4 The review judge found Ms. Hardee “demonstrated poor character in allowing her son William to be unattended around child care children, allowing unqualified individuals to live in her home, and providing unlicensed daycare.” CP 258, 4th par.

5 It is residents over 16, all staff and volunteers who care for the children, who must have background checks. WAC 170-296-1450. WAC 170-296-0020, WAC 170-

CP 478 (mid page).

C. Superior Court Did Not Address The Issues Raised

Superior court recognized that Ms. Hardee would likely prevail under the Ongom decision. CP 1208, Ongom vs. Dep't of Health, 159 Wn.2d 132 (2006). The court did not address Ongom, or any of Ms. Hardee's arguments in her decision. CP 1221.

IV. ARGUMENT

A. Standard Of Review – Reply

RCW 34.05.464 gives the department authority for *review* of the ALJ's decision. The statute does not give the review judge *de novo* review, the authority to decide the credibility of witnesses she did not see or hear, to re-weigh the evidence, to enter findings based upon uncorroborated hearsay and speculation. Findings must be based upon evidence admissible in a civil trial unless the ALJ finds otherwise. RCW 34.05.461. Respondent's claim to unlimited review power belies the promise of a fair hearing.

B. Revocation Of Ms. Hardee's License With Less Than Clear And Convincing Evidence Violates Her Right To Due Process

296-0180.

Ms. Hardee does not rely upon the Ongom decision to prevail. Ongom vs. Dep't of Health, 159 Wn.2d 132, 142 (2006) Ms. Hardee merely pointed out that the decision, *on its face*, violates due process in Washington. The Court could reverse it on this ground alone and skip the other details of this case. But, as the decision is wrong on so many other levels, the Court need not even address Ongom to rule for Ms. Hardee.

**1. License Revocation Though Disciplinary Action
Requires Clear And Convincing Evidence Of Wrongdoing**

In Washington, the revocation of a professional license through *disciplinary action* requires clear and convincing evidence of wrongful conduct. Ongom vs. Dep't of Health, 159 Wn.2d 132, 142 (2006). Disciplinary hearings are *quasi-criminal* in nature and this standard of proof does not vary from case to case based on the nature of the charges. Ibid., 140. This standard applies no less to the state registration of an unskilled nursing assistant as to a license to practice medicine. Ibid., citing Nguyen v. Dep't of Health, 144 Wn.2d 516, 518 (Wash. 2001) (license to practice medicine); see also Chandler v. Office of the Ins. Comm'r, 141 Wn. App. 639, 644 (2007) (insurance agent's license.) RCW 43.215.300 applies to more than disciplinary actions and Ms. Hardee makes no claim that it is unconstitutional.

Respondent has ignored the Supreme Court's analysis in the

Ongom case, which fully considered Mathews v. Eldridge. As in Ongom, there is no basis to justify disparate treatment for a child care provider under the generalized considerations set forth in Mathews v. Eldridge, 424 U.S. 319, (1976). Ongom, 138.

a) A Child Care License Is No Less Protected Than Any Other Professional License.

The Department of Early Learning (DEL) recognizes child care licenses as professional licenses, and states this on their web site “Information for Providers.” Appendix A. The protected interests of the licensee are no different than that of Ms. Ongom, Dr. Nguyen, or Mr. Chandler. The revocation of her child care license will end her career, terminate her livelihood, and severely limit her employment opportunities. The revocation will be posted on the department’s web site, accessible by the public. RCW 43.215.370. The revocation will appear on the “Director’s List of Crimes and Negative Actions” which includes crimes such a rape and homicide along with license revocations.⁶ Appendix B. The revocation name on this list will appear on background checks, will disqualify her for many caregiving professions, would disqualify her for state assistance if she had to care for her own relative, and may even

⁶ This list is published on the department’s web site at www.del.wa.gov/publications/licensing/docs/DEL_DirectorsListOfCrimesAndNegativeActions.pdf

disqualify her from adopting her own grandchild. Appendix C.

Every license is conditioned upon compliance with agency rules. Once a license is issued, it becomes a property interest that may be essential to one's livelihood, and can not be revoked without the procedural due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539 (1971). Respondent cites no case in which a citizen faces the loss of property or another fundamental interest, no case which involved the government taking a professional license and one's livelihood.⁷ A child care license is not limited because it is tied to a residence – the disciplinary action is against Ms. Hardee personally, not her house. Ms. Hardee's child care license is no different than the licenses of Dr. Nguyen and Ms. Ongom. There is nothing to justify disparate treatment for Ms. Hardee.

b) The Procedural Safeguards Include A Fair Hearing And Clear And Convincing Evidence.

Procedural safeguards: The constitution requires clear and convincing standard "to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual with 'a significant deprivation of liberty' or 'stigma.'" Santosky v Kramer, 455

⁷ Respondent relies upon a case of a man who had not established parental rights, and civil expatriation cases. These are not licensing cases, or quasi-criminal proceedings.

U.S. 745, 756 (1982). Even so, the review judge ignored fundamental fairness and the procedural safeguards in the APA, under any standard of proof.

- c) No Evidence Or Law Supports The Claim That A “Higher Standard Of Proof Makes It More Likely That Children Will Be Subjected To Inadequate Home Child Care Providers”

Respondents provide no evidence that this standard of proof would put children at risk, and a similar claim was rejected in Ongom. Ongom, 159. The State’s interest in protecting the public from incompetent or abusive child care providers can not be any greater than the State's interest in protecting the public from incompetent or abusive medical doctors, or nurse assistants, who routinely work with children, or for than matter, the criminal law which requires proof beyond a reasonable doubt. The state’s interest is best furthered by disciplinary proceedings which reach an accurate and reliable result. Ongom, 159. This case only proves that the higher standard of proof is required in these actions.

Children’s rights are impacted by this decision, except to the extent that children’s rights are best protected by accurate decisions. Because of this improper decision, Ms. Hardee’s daycare children and their families lost their child care, which for some children, was the only place they were successful, and which some families had relied upon for years. This

case provides evidence that children and their families are also hurt by careless and ungrounded revocations.

2. Nguyen And Ongom Are Law In Washington.

The state's effort to overturn Ongom was denied by the U.S. Supreme court. Wash. State Dep't of Health v. Ongom, 550 U.S. 905 (2007). Under Ongom, the Court could reverse the decision and skip the other errors. CP 155. However, Ms. Hardee does not rely upon Ongom for her appeal – this decision is error under any standard of proof.

Washington is not alone in holding that the correct standard of proof is clear and convincing evidence in disciplinary proceedings. Many other states have this standard for professional license revocation through disciplinary actions.⁸

⁸ See e.g. Silva v. Superior Ct., 14 Cal.App.4th 562, 17 Cal.Rptr.2d 577 (1993) (clear and convincing standard - same as in attorney disciplinary cases); Rife v. Dept. of Prof'l Reg., 638 So.2d 542 (Dist. Fla. Ct. 1994) (clear and convincing standard); Ferris v. Turlington, 510 So.2d 292 (Fla. 1987) (clear and convincing in actions to revoke a professional license); Mississippi St. Bd. of Nursing v. Wilson, 624 So.2d 485 (Miss. 1993) (clear and convincing standard if fraud or quasi-criminal conduct is involved); Davis v. Wright, 243 Neb. 931, 503 N.W.2d 814 (1993) (adopted clear and convincing standard for medical disciplinaries; held no need to differentiate between attorney and medical disciplinaries); In re Zar, 434 N.W.2d 598 (S.D. 1989)(clear and convincing standard for all professional license revocation proceedings); Robinson v. Oklahoma State Bd. of Med. Licensure & Supervision, 916 P.2d 1390 (Okla. 1996) (clear and convincing standard in disciplinary cases involving a professionally licensed person); Bernard v. Board of Dental Exam'rs, 2 Or.App. 22, 465 P.2d 917 (1970) (clear and convincing standard for all license revocations); In re Sobel, 130 Or.App. 374, 882 P.2d 606 (Ct. App. 1994)(clear and convincing standard applied in cases involving revocation of license); Devous v. Board of Med. Exam'rs, 845 P.2d 408 (Wyo. 1993) (clear and convincing standard in medical disciplinaries).

C. The Decision Is Unfair And Biased On Its Face

A decisionmaker may be challenged under the appearance of fairness doctrine for “evidencing a persona bias or personal prejudice signifying an attitude for or against a party.” Buell v. City of Bremerton, 80 Wn. 2d 518, 524 (1972). Under this doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995). The appearance of fairness doctrine has been applied to administrative tribunals acting in a quasi-judicial capacity when an agency has employed procedures that created the appearance of unfairness. Faghih v. Dep't of Health, Dental Quality Assur. Comm'n., ___ Wn. App. ___ (Wash. Ct. App. Feb. 17, 2009). The decision on review in this case shows substantial personal prejudice not only against Ms. Hardee, and for the department, but also against the ALJ and the very notion of fairness.

9

1. Ms. Hardee Pled Bias As Soon As It Was Shown

Ms. Hardee properly raised bias in superior court. RCW

⁹ For instance, the review judge relied on Junior’s report, but ignored his report that the other residents in the house, Dylan and Brandi, both said that William was never unsupervised. CP 471.

34.05.554. She raised this in counsel's statement [CP 1093 (sub# 13)], her trial brief [CP 1169 (sub# 28)] and in her declaration about the SEIU, her role in the union, and her classes for child care providers [CP 1158 (sub # 24)]. Ms. Hardee raised claimed bias in her opening brief, at page 46.

2. The Decision Shows Bias Against Ms. Hardee, Bias In For The Department, And Bias Against The ALJ

The review judge's decision shows bias against Ms. Hardee with her improper assumption that the ALJ did not do his job. She found, for instance, that: "*ALJ Fleck also left out information from ... of Hariett Martin regarding un-cleared persons...*" (CP 253), "*ALJ Fleck did not consider the testimony of Inspector Junior...*" (CP 254), "*...the relevant testimony from Inspector Junior was disregarded in its entirety...*" (CP 255), "*the [Department's documentary] evidence should have been discussed, if only to discredit it in some way*" (CP 256) "*the ALJ erroneously discounted important Department evidence of licensing violations...*" (CP 256), "*the ALJ should have considered all of the evidence, .. nor did he properly determine credibility*" (CP 256). There is no evidence to support these claims. She had no basis to overcome the presumption that the ALJ properly did his job. Nationscapital v. Dep't of Fin. Insts., 133 Wn. App. 723, 758-759(2006). No child care provider

would possibly find this decision fair.

D. The Decision On Review Exceeds The Authority On Review

RCW 34.04.464 provides for *review* of initial findings:

“In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.” RCW 34.05.464(4).

RCW 34.05.461 limits the department’s power to weigh evidence:

“Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.” RCW 34.05.461(5)

RCW 34.05.461 prohibits findings based upon hearsay unless *the ALJ*, the “presiding officer,” finds that so doing would not abridge a citizen’s rights. RCW 34.05.461(4). The review judge had no authority to make findings based upon hearsay. She had no authority to make contradictory findings solely on hearsay evidence the ALJ rejected Kabbae v. Dep't of Soc. & Health Servs., 144 Wn. App. 432, 445 (2008). She had no authority to reject the ALJ’s implicit credibility determinations without substantial evidence to the contrary in the record. Chandler v. Office of the Ins. Comm'r, 141 Wn. App. 639, 657 (2007).

The department’s reliance upon the Regan case is misplaced. Regan v. Dep't of Licensing, 130 Wn. App. 39, 60 (2005). Regan holds that an agency may change findings of fact, including on credibility,

where the changed findings are based upon substantial evidence in the record.¹⁰ Ibid., 44, 58-60. Unlike in Regan, the ALJ's findings were not based upon credibility. The disputed diaper-changing incident was not crucial to the ALJ's decision. Unlike in Regan, the review judge's critical finding that the ALJ didn't do his job was based upon NO evidence; the finding about strangers living in the home was based upon hearsay; the finding that William was unsupervised was based upon a definition of supervision contrary to the WAC, and upon a standard of line-of-sight supervision never claimed. Unlike in Regan, there was NO evidence to support the finding that JS was more credible than Ms. Hardee, and the department's failure to produce the witnesses they claimed required the review judge to assume facts in Ms. Hardee's favor. Henderson v. Tyrrell, 80 Wn. App. 592, 606-607 (1996)

1. The Costanich Decision Is Consistent With RCW 34.05.464

This Court has already determined that "The decision in Costanich that the review judge did not give due regard to the ALJ's findings is

¹⁰ In Regan, the changed DOL findings against bail bondsman Regan were based upon very substantial evidence, including that (1) Mr. Regan's testimony was contradictory, (2) Mr. Regan had attempted to coach his assistant Patterson before her testimony, (3) Patterson's testimony contradicted Mr. Regan's, and was consistent and also self-incriminating, (4) DOL told Mr. Regan he could not have Patterson working in his offices, that she had no license, (5) Mr. Regan testified that he knew that Patterson was still selling bonds after DOL contacted him and told him she could not do this. Regan v. Dep't of Licensing, 60 (2005)

consistent with RCW 34.05.464(4).” Kabbae v. Dep't of Soc. & Health Servs., 144 Wn. App. 432, 445 (2008)

2. Cases Cited Show That An Agency Review Judge Must Defer To The Hearing Officer's Determination Of Credibility As Evidenced In His Findings

The federal cases cited by Ms. Hardee are cited to show that a finding in favor of a citizen is an implicit finding of the citizen's credibility which can not be reversed by a review judge. Andrezjewski v. Federal Aviation Administration, No. 06-75730 (9th Circuit Dec. 2, 2008); J.P. v. County Sch. Bd. 516 F. 3d 254, 261 (4th Cir. VA, 2008). These rulings were not based on the agency involved, but the process.

E. Respondents Cite No Evidence Which Supports Their Findings Against Ms. Hardee

1. No Evidence Shows The ALJ Acted Improperly

Respondents have provided no basis in law or fact support their finding that ALJ acted improperly. RCW 43.215.310. The ALJ properly identifies the department witnesses on the first page of his decision. CP 314. He properly took their testimony which appears in the administrative record. He had no obligation to comment on the department's evidence, no obligation to comment upon hearsay he

rejected, no obligation to comment upon credibility unless it is the basis for a finding. RCW 34.05.461. The ALJ properly noted that the one disputed fact, properly noted it was not material, properly relied upon the definition of supervision presented in the department's revocation letter, WAC 170-06-1360. CP 496. Respondents point to no evidence that would indicate Ms. Hardee was required to have constant line-of-sight supervision of William. Respondents do not claim that Ms. Hardee was out of hearing. There is no basis to overrule the ALJ on this point.

2. Uncorroborated Hearsay Is Not Substantial Evidence

Findings shall not be based upon hearsay "unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order." RCW 34.05.461. Findings shall not be based upon hearsay and conjecture unless there is corroborating testimonial evidence. McDaniel v. Department of Social & Health Servs., 51 Wn. App. 893, 756 P.2d 143 (1988). There is NO testimonial evidence that anyone was living in the Hardee home. There is NO testimonial evidence that William was out of sight and hearing, or that he was out of sight for more than a few moments.

3. Ms. Hardee Was Cited For Violating WAC 170-296-

1360

Respondent raises the claim to violation of WAC 388-06-0020 for the first time. There is no evidence that the department relied upon WAC 388-06-0020 pre-hearing, not at the hearing, not on review. The revocation letter has a section titled "Legal Basis for Revocation" which claims violation of supervision under WAC 170-296-1360. CP 494. The revocation letter lists WACs violated on the last page, all from WAC 170-296: 170-296-0110, -0140, -0180,-0370, -1360, -1410. (CP 496) Appendix D. Although these WACs were adopted in 2006, they are the licensing requirement for home child care which replaced WAC 388-296. Theinition of supervision in the newer WAC 170-296-1360 is the same as it was in the WAC it replaced, WAC, 388-296-1360. Respondent is relying on background check rules, which were not at issue. Even so, is NO evidence that Ms. Hardee violated WAC 388-06-0020 either, as there is NO evidence in the record other than hearsay and speculation, that William was alone with a daycare child for any length of time.

4. No Evidence Shows That Ms. Hardee Failed To Supervise William

Respondents point to NO evidence that William was unsupervised under any definition. Respondents cite NO evidence that he was out of

Ms. Hardee's sight and/or hearing, and NO evidence that he was out of her sight for any length of time. Respondents cite NO evidence that Ms. Hardee was ever notified she was to maintain line-of-sight supervision of William at every moment. Respondents made no claim that William was beyond Ms. Hardee's hearing the time of the disputed incident, and cite no evidence that this incident, under any version, was for any length of time, or that it was significant.

It is significant that the department produced none of the witnesses who allegedly saw Ms. Hardee leave William unsupervised, despite having the full subpoena power of the State of Washington. It is significant that the department prevented the testimony of residents in the home Dylan Hardee and Brandi Nelli when they appeared at the administrative hearing, and the department knew would testify that William was never unsupervised. CP 974, (III, 76), and CP 471. This failure to produce witnesses and this deliberate suppression of material evidence requires a finding that William was never left unsupervised.

Henderson v. Tyrrell, 80 Wn. App. 592, 606-607 (1996) ¹¹

Investigator Junior's testimony was hearsay, licensor Martin's

¹¹ "Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. In so holding, we have noted, '[t]his rule is uniformly applied by the courts and is an integral part of our jurisprudence'"

testimony was hearsay, supervisor Vessey's testimony was at least double hearsay. The ALJ rejected this hearsay and the review judge exceeded her authority by making contradictory findings solely on hearsay evidence the ALJ rejected as lacking credibility. Kabbae v. Dep't of Soc. & Health Servs., 144 Wn. App. 432, 445 (2008)

5. No Rule Bans Visitors To A Home Daycare

DSHS/DEL found unapproved persons were *living in this home*, not "in and around" the home. CP 258. Respondents point to NO evidence that anyone lived in the home beyond those who were approved. Ms. Hardee testified that the only residents in this home were herself, William, Dylan, his wife, her granddaughter. CP 603. No law or rule prohibits visitors, nothing requires a daycare provider to notify the department before having friends over.¹² DSHS/DEL may not sanction Ms. Hardee for having visitors to the home where this is not forbidden conduct. State v. Gilroy, 37 Wn.2d 41, 47 (1950).

6. DSHS/DEL Has No Authority To Revoke Ms. Hardee's License On The Vague Claim She Lacks "Character"

Henderson v. Tyrrell, 80 Wn. App. 592, 606-607 (1996) 11

¹² Background checks are required for all residents over 16, and all who have unsupervised access to the daycare children. WAC 170-296-1450. WAC 170-296-0020, WAC 170-296-0180.

The department has no authority to punish Ms. Hardee for any conduct which is not explicitly defined in statute. State v. Gilroy, 37 Wn.2d 41, 47 (1950) “Character” is defined in the statute as a background check. RCW 74.15.030 “Character” as defined in the WAC means crimes, pending charges, or founded CPS referrals:

“Character, competence, and suitability assessment” means a determination of whether an applicant should be allowed access to vulnerable people if that applicant has a conviction record, pending charges and/or findings of abuse, neglect, exploitation or abandonment of a child or vulnerable adult and child protective services (CPS) adverse referral history.”

WAC 170-296-0020. The department has no other basis to find a person lacks “character.” There must be ascertainable standards of guilt to protect against arbitrary enforcement of misconduct, and the department has no authority to enforce such a vague claim about Ms. Hardee. State v. Williams, 144 Wn.2d 197, 203 (Wash. 2001) Citizens must have fair warning of what conduct to avoid and must be protected from arbitrary, ad hoc, or discriminatory law enforcement. Ibid. Ms. Hardee has no convictions, pending charges, or founded CPS findings. The review judge may not revoke her license for faulty character.

The “personal characteristics” required of a child care provider are understanding children, the ability to plan and care for them appropriately,

reliability, truthfulness, a good disposition, and ethical business practices. WAC 170-296-140(2). The only evidence about Ms. Hardee's personal characteristics came from her parents, who said she is nurturing, caring, trustworthy, successful with often very challenged children. The review judge may not revoke this license for a lack of personal characteristics.

a) There Is No Evidence That William Was Allowed "Daily And Intimate" Contact With The Daycare children.

Respondents cite to no evidence of William having "daily and intimate" contact with the daycare children. JS ("Mr. S") testified to *one* disputed possibility of out-of-sight contact. CP 685 (Tr. I, 108-109) Per the investigator's report of his interview with Ms. Hardee, William was never alone with any daycare children, he never took care of them, he was gone from 7 am to 3 pm, that if he was at home, he helped make lunch. CP 478 (mid page). Per his report with Dylan and Brandi, who also lived there, William was never unsupervised. CP 471.

b) There Is No Evidence Of "Unknown Adults" In This Daycare

There is no rule forbidding a daycare provider and her family from having visitors, or limiting the number of visitors. For 24 years Ms. Hardee has run a successful daycare, along with raising children in her

home. There is NO evidence that any of their visitors were unknown to the Hardees, or that there were “a steady stream.” The review judge’s characterization of Hardee family friends as “a steady stream” and “adult traffic” and “unidentified adults” is unexplainable. The claim that Ms. Hardee had too many visitors to properly supervise her daycare children just shows bias.

c) There Is No Basis In Law Or In Fact To Revoke Ms. Hardee’s License On The Vague Claim Of “Character”

The department has no authority to sanction Ms. Hardee, or any daycare provider, for poor “character” beyond the WAC. The department may not sanction Ms. Hardee for “poor judgment” about William. They knew about William and his history when they gave Ms. Hardee a waiver for William to return. There was no evidence that he posed a threat to children. William grew up in this daycare. He had not acted out against any child. Ms. Hardee worked with William, sought services for William, consulted DSHS/DEL, kept William in counseling, kept him under supervision. No one could have predicted that he would later molest a child. Ms. Hardee’s flaw in character is that she did not abandon her son.

F. The Findings And Conclusions Are Arbitrary And Capricious

See Above.

**G. A Remand Would Unfairly Protract These Proceedings
And Give The Department An Alternate Way To Deny Ms.
Hardee Her License**

A remand would improperly delay resolution of this case. RCW 34.05.574. It would be unfair to send this back to the review judge who already decided that Ms. Hardee is either lying or blind. CP 278 (*“Appellant’s testimony is either false or she is wearing blinders.”*) There is no new evidence. There is no evidence that Ms. Hardee is anything but a caring and nurturing daycare provider with a disturbed child. Ms. Hardee relies upon her license for her livelihood and continued loss of license puts her, and her families, under significant hardship. The department has the power to continue this litigation nearly indefinitely,¹³ and it would be manifestly unfair to allow the department to use their power to litigate to take her license where the evidence is absent.

**H. Ms. Hardee Should Be Awarded Fees Here And In
Superior Court Under The Equal Access To Justice Act**

The Equal Access to Justice Act mandates attorney fees for a petitioner who prevails. RCW 4.85.350. The act mandates fees unless the agency can prove their action was substantially justified. RCW

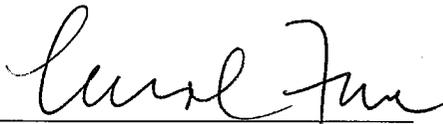
¹³ In Costanich case, supra, the department litigated revocation of Ms. Costanich’s foster care license for seven years – they revoked her license in 2001, delayed the administrative hearings through 2004, reversed the ALJ’s findings in her favor, then appealed the superior court order reinstating the ALJ’s findings for Ms. Costanich, and then argued about fees all the way to the Supreme Court. This was without a remand.

4.85.350. Agency action is substantially justified if it has a reasonable basis both in law and fact.” Costanich v. Dep't of Soc. & Health Servs., 138 Wn. App. 547, 563 (2007). The review judge's decision constitutes agency action. Ibid., 564. The review judge had no justification for her disregard of the ALJ, her disregard for the law and the rules, for her speculation and bias against Ms. Hardee.

V. CONCLUSION

The Court should reverse the decision and reinstate the ALJ's decision as the final decision. The Court should grant Ms. Hardee attorney fees on appeal and for the superior court review. The Court should clarify for all Washington child care providers that they are indeed entitled to a fair hearing.

Respectfully submitted,



Carol Farr
Attorney for Ms. Hardee
WSBA # 27470

3/3/09

VI. APPENDIX

A “Information for Providers,” printed March 3, 2009, from
www.del.wa.gov/requirements/infor/default.aspx

B Department of Early Learning “Director’s List of Crimes and Negative
Actions” printed 3/1/09 from
www.del.wa.gov/publications/licensing/docs/DEL_DirectorsListOfCrimesAndNegativeActions.pdf

C Some RCWs Which Require Background Checks

D WACs DSHS/DEL Alleged Ms. Hardee Violated

Appendix A.

“Information for Providers,”

printed March 3, 2009, from
www.del.wa.gov/requirements/infor/default.aspx

Washington State Department of Early Learning

- [Just For Kids](#)
- [Parents & Family](#)
- [Providers & Educators](#)

[Home](#) » [Providers & ECEAP Contractors](#) » [Information for Providers](#)

Information for Providers



The Department of Early Learning (DEL) licenses more than 7,400 child care centers and family home child care providers within Washington. Licensed child care providers follow minimum licensing requirements set by the state to ensure children in licensed care are in safe, healthy, and nurturing places.

DEL licensors work to help licensed child care providers offer the best programs possible. DEL licensors provide orientation workshops, ensure provider application packets are complete, process background checks, inspect and monitor facilities, and take corrective action as necessary. Working with licensed providers, licensors identify strengths in the child care setting, and offer information and resources when something needs to be changed.

Child care licenses must be renewed every three years. Licensors must license and relicense facilities within 90 days of submission of a completed application. Child care homes must be monitored every 18 months and child care centers, every year.

[Getting licensed](#)

The licensing process begins with orientation, which is usually a group meeting with a licenser, depending on where you live.

[Read More >](#)

Business Resources for Providers

At the Department of Early Learning (DEL), we understand that as a licensed child care provider you not only care for children, but for your business too!

[Read More >](#)

Professional development

Like other professionals, early childhood care providers strive to increase their knowledge, skills and abilities.

[Read More >](#)

State Training And Registry System (STARS)

The State Training and Registry System (STARS) offers initial and ongoing child care training linked to state minimum licensing requirements.

[Read More >](#)

Child Care Facility Fund

The Washington State Child Care Facility Fund was created to help increase the availability of quality, affordable, convenient child care for working families by providing loans and grants to licensed child care centers, or centers in the process of becoming licensed.

[Read More >](#)

Quarterly Child Care Conversations

DEL is hosting Quarterly Child Care Conversations to hear feedback from licensed child care providers about working with DEL and about improving the child care system in Washington.

[Read More >](#)

Related Information

[Child Care Regulations](#)

[Child Development, Health and Safety](#)

[Finding Licensed Child Care](#)

[Licensing Complaints](#)

Top Downloads

[2009 Child Care Licensing Orientation Schedule: DEL Eastern Service Area \[123K\]](#)

Appendix B.

Department of Early Learning

“Director’s List of Crimes and Negative Actions”

printed 3/1/09 from

www.del.wa.gov/publications/licensing/docs/DEL_DirectorsListOfCrimesAndNegativeActions.pdf

Department of Early Learning
Director's List of Crimes and Negative Actions

If "5 or more years" follows a crime on the list, the applicant must not be allowed unsupervised access to children until five years has passed since the date of the conviction.

When the conviction record does not show a level of seriousness, such as first, second, third or fourth degree, the most serious (first degree) will be assumed until the record is officially updated by law enforcement.

Attempted Crimes – (RCW 9A.28.020)

Conspiracy Crimes – (RCW 9A.28.030)

Solicitation Crimes – (RCW 9A.28.040)

Crimes with special court finding of sexual motivation – (RCW 9.9A.835)

Abandonment of a child

Abandonment of a dependent person not against child (5 or more years)

Abuse or neglect of a child

Arson

Assault 1

Assault 2

Assault 3 Domestic Violence

Assault 3 not Domestic Violence (5 or more years)

Assault 4/simple assault (5 or more years)

Assault of a child

Bail jumping

Burglary (5 or more years)

Carnal knowledge

Child buying or selling

Child molestation

Coercion (5 or more years)

Communication with a minor for immoral purposes

Controlled substance homicide

Criminal mistreatment

Custodial assault (5 or more years)

Custodial interference

web site



*Printed
3/1/09*

July 2006

at www.del.wa.gov/publications/licensing/docs/DEL_DirectorsListOfCrimesAndNegativeActions.pdf

Department of Early Learning
Director's List of Crimes and Negative Actions

Custodial sexual misconduct (5 or more years)
Dealing in depictions of minor engaged in sexual explicit conduct
Domestic Violence (felonies only)
Drive-by shooting
Extortion 1
Extortion 2 (5 or more years)
Forgery (5 or more years)
Harassment (5 or more years)
Harassment Domestic Violence
Homicide by abuse
Homicide by watercraft
Identity theft (5 or more years)
Incendiary devices (possess, manufacture, dispose)
Incest
Indecent exposure/Public indecency (Felonies only)
Indecent liberties
Kidnapping
Leading organized crime (5 or more years)
Luring
Malicious explosion 1
Malicious explosion 2
Malicious explosion 3 (5 or more years)
Malicious harassment
Malicious mischief (5 or more years)
Malicious mischief Domestic Violence
Malicious placement of an explosive 1
Malicious placement of an explosive 2 (5 or more years)
Malicious placement of an explosive 3 (5 or more years)
Malicious placement of imitation device 1 (5 or more years)
Manslaughter

Department of Early Learning
Director's List of Crimes and Negative Actions

Murder/Aggravated murder
Patronizing a juvenile prostitute
Patronizing a prostitute (5 or more years)
Possess depictions minor engaged in sexual conduct
Possess explosive device (5 or more years)
Promoting pornography (5 or more years)
Promoting prostitution 1 (5 or more years)
Promoting prostitution 2 (5 or more years)
Promoting suicide attempt (5 or more years)
Prostitution (5 or more years)
Rape
Rape of child
Reckless endangerment (5 or more years)
Registered sex offender
Residential burglary (5 or more years)
Robbery
Selling or distributing erotic material to a minor
Sending or bringing into the state depictions of a minor
Sexual exploitation of minors
Sexual misconduct with a minor
Sexually violating human remains
Stalking (5 or more years)
Theft (5 or more years)
Unlawful imprisonment (5 or more years)
Unlawful use of bldg for drug purposes (5 or more years)
Use of machine gun in felony
Vehicular assault
Vehicular homicide (negligent homicide)
Violation of child abuse restraining order
Violation of civil anti-harassment protection order

Department of Early Learning
Director's List of Crimes and Negative Actions

Violation of protection/contact/restraining order

Violation of the Imitation Controlled Substance Act

(manufacture/deliver/intent - 5 or more years)

Violation of Uniform Controlled Substance Act

(manufacture/deliver/intent - 5 or more years)

Violation of the Uniform Legend Drug Act

(manufacture/deliver/intent - 5 or more years)

Violation of the Uniform Precursor Drug Act

(manufacture/deliver/intent - 5 or more years)

Voyeurism

The negative actions which must be considered part of the Director's List(s) are those taken by a state agency which results in a finding against a person or service provider, including:

(a) A decision made by a state agency after an investigation;

(b) A decision issued after an administrative hearing by an agency;

(c) A decision issued by an Administrative Law Judge showing a finding of abuse, neglect, exploitation, or abandonment of a juvenile, a child or vulnerable adult;

(d) Termination, revocation, suspension, or denial of a license, certification;

(e) Revocation, suspension, denial or restriction placed on a professional license;

(f) A disciplinary board final decision.

(g) A person or service provider choosing to give up a license, certification, or contract because of a state agency action or pending action is also considered a negative action.

Appendix C.

Some RCWs Which Require Background Checks

List of Some Statutes That Require Background Checks.

§ 9.41.073. Concealed pistol license

§ 18.20.125. Background checks for boarding homes

§ 18.52 – Nursing pools

§ 18.225. Mental health counselors, marriage and family therapists, social workers

§ 19.220.010. Matchmaking organizations

RCW 26.10.135 Custody orders — Background information to be consulted.

(1) Before granting any order regarding the custody of a child under this chapter, the court shall consult the judicial information system, if available, to determine the existence of any information and proceedings that are relevant to the placement of the child.

(2) Before entering a final order, the court shall:

(a) Direct the department of social and health services to release information as provided under RCW 13.50.100; and

(b) Require the petitioner to provide the results of an examination of state and national criminal identification data provided by the Washington state patrol criminal identification system as described in chapter 43.43 RCW for the petitioner and adult members of the petitioner's household.

§ 28A.400.301. School employees

§ 43.20A.710. State Government - employees or individual providers .

§ 43.43.830. Washington State Patrol Background checks -- Access to children or vulnerable persons

§ 43.43.832. Washington State Patrol background checks for businesses and organizations providing services to children, developmentally disabled persons, and vulnerable adults. (...in addition to the state background check by the department of social and health services...)

§ 43.150.080. Volunteers for at-risk children

§ 46.72A.090. Chauffeurs – Driving a limosine

§ 64.44.060. Contaminated property - Certification of contractors, supervisors, or workers

§ 64.44.070. Contaminated property – background checks on independent third party samplers

§ 70.97.080. Background checks for persons at enhanced service facilities

§ 70.128.122. Adult family homes licensed by Indian tribes

§ 70.129. Long Term Care residential facilities

§ 71.09.300. staff at transition facilities for sexually violent predators

§ 72.23.035. Background checks of prospective employees at public and private facilities for mentally ill

§ 74.15.030. Care of children, expectant mothers, developmentally disabled

§ 74.18.123. Background checks for individuals having unsupervised access to persons with significant disabilities, for the blind

§ 74.39A.050. background checks for personal aides who provide in-home services funded by medicaid personal care

Appendix D.

WACs DSHS/DEL Alleged Ms. Hardee Violated

The WACS that DEL alleged Ms. Hardee Violated

- 170-296-0110 Who needs to become licensed?
170-296-0140 What personal characteristics does an individual need to provide care to children?
170-296-0180 Am I required to have a criminal history background check?
170-296-0370 How does the department notify me if I am in violation of the licensing rules and what am I required to do?
170-296-1360 What am I required to do to supervise children?
170-296-1410 What are the required staffing qualifications for child care?
-

170-296-0110 Who needs to become licensed?

- (1) Individuals and agencies that provide care for children must be licensed, unless specifically exempt under RCW 74.15.020(2).
- (2) The person claiming an exemption must provide the department proof of the right to the exemption if we request it.
- (3) We must not license a home that is legally exempt from licensing. However, at the applicant's request, we must investigate and may certify the home as meeting licensing and other requirements. We must apply the same requirements and procedures for certification that we apply for licensure.
- (4) We may certify a family home child care for payment without further investigation if the home is:
 - (a) Licensed by an Indian tribe; or
 - (b) Certified by the federal Department of Defense. The home must be licensed or certified in accordance with national or state standards or standards approved by us and be operated on the premises over which the entity licensing or certifying the home has jurisdiction.
- (5) The individuals and agencies wanting to care for children whose child care is paid for by the state child care subsidy program must:
 - (a) Be licensed or certified;
 - (b) Follow billing policies and procedures in Child Care Subsidies, A Booklet for Licensed and Certified Providers, DSHS 22-877(X); and
 - (c) Bill the department at the person's or organization's customary rate or the DSHS rate, whichever is less. (See WAC 388-290-0190 (2) and (3) for exceptions.)

170-296-0140 What personal characteristics does an individual need to provide care to children?

- (1) An individual must have specific personal characteristics to have a:
 - (a) License;
 - (b) Certification;
 - (c) Primary staff position; or
 - (d) Assistant and volunteer position.
- (2) These characteristics are:
 - (a) An understanding of how children develop socially, emotionally, physically, and intellectually;

See Department's Revocation Letter, CP 496

- (b) The ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs;
- (c) The physical ability to respond immediately to the health, safety and emotional well-being of a child;
- (d) Reliability and dependability;
- (e) Truthfulness;
- (f) A disposition that is respectful of a child's need for caring attention from a care giver; and
- (g) Ethical business practices with clients, staff, the department and the community.

170-296-0180 Am I required to have a criminal history background check?

- (1) At the time you apply for a license you must submit a completed background check form and finger print card if required to the background check central unit (BCCU) for each person who will have unsupervised access to children in your care. This includes:
 - (a) You;
 - (b) Members of your household sixteen years and older;
 - (c) Staff;
 - (d) Volunteers; and
 - (e) Other persons living at the same address as you.
- (2) When you plan to have new staff or volunteers, you must require each person to complete and submit to you by the date of hire a criminal history and background check form:
 - (a) You must submit this form to the BCCU for the employee and volunteer, within seven calendar days of the employee's or volunteer's first day of work, permitting a criminal and background history check.
 - (b) The employee and volunteer must not have unsupervised access to the children in care until they have been cleared by a full background check.
 - (c) We must discuss the result of the criminal history and background check information with you, when applicable.

170-296-0370 How does the department notify me if I am in violation of the licensing rules and what am I required to do?

If you are in violation of the licensing rules we issue a notice to you called a facility licensing compliance agreement.

- (1) You are required, with technical assistance from your licensor if you request it, to write a corrective action plan stating:
 - (a) How you plan to correct the violations; and
 - (b) When the violations will be corrected.
- (2) You must:
 - (a) Sign the agreement;
 - (b) Return a copy of the completed agreement to us; and
 - (c) Comply with the agreement.

170-296-1360 What am I required to do to supervise children?

- (1) You must ensure that the required number of staff supervise children.
- (2) You, or a primary staff person, must be within sight or hearing of the children in your care, both inside and outside, so that you or a primary staff person are capable of intervening to protect the health and safety of the children.
- (3) Preschool age children and younger must be within sight and hearing of you or a primary staff person when outside.
- (4) The supervision you provide must ensure that you are aware of what the children are doing at all times and can promptly assist or redirect activities when necessary.

- (5) If you are unable to view children in your licensed space you must continually go to that area to check on them.
- (6) Children must not be on a floor level of the home unless you or a primary staff person is on the same floor level. When deciding how close to supervise, you must consider the following:
 - (a) Ages of the children (sleeping or napping infants must be in the main child care space and subject to continual checks);
 - (b) Individual differences and abilities;
 - (c) Layout of the house and play area;
 - (d) The risk associated with the activities children are engaged in; and
 - (e) Your outdoor play area and nearby hazards.
- (7) A baby monitor or video monitor must not take the place of the required supervision for children in your care.

170-296-1410 What are the required staffing qualifications for child care?

- (1) You, a primary staff person, assistant, volunteer, and other person associated with the operation of the business who has access to the child in care must:
 - (a) Meet the qualifications in WAC 388-296-0140;
 - (b) Not have committed or been convicted of child abuse or any crime involving physical harm to another person; and
 - (c) Not have been disqualified from working in a licensed child care setting or have had a license revoked.
- (2) The licensee must:
 - (a) Be eighteen years of age or older;
 - (b) Be the primary child care provider;
 - (c) Ensure compliance with minimum licensing requirements under this chapter; and
 - (d) Have completed one of the following prior to or within the first six months of obtaining an initial license:
 - (i) Twenty clock hours or two college quarter credits of basic training approved by the Washington state training and registry system (STARS);
 - (ii) Current child development associate (CDA) or equivalent credential or twelve or more college quarter credits in early childhood education or child development; or
 - (iii) Associate of arts or AAS or higher college degree in early childhood education, child development, school age care, elementary education or special education.
- (3) Child care staff must be:
 - (a) Fourteen years of age or older if an assistant; or
 - (b) Eighteen years of age or older if a primary worker and assigned sole responsibility for the child in care.
- (4) You and your staff must meet the following qualifications:

Position	Qualifications	Background Check	TB Test	STARS Training	First Aid and CPR	HIV/AIDS and bloodborne pathogens training
Licensee	Eighteen years of age	X	X	X	X	X
Primary child care staff	Eighteen years of age	X	X	X Basic 20 hour training to be completed within the first six months of employment	X	X

Court of Appeals # 62436-9-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

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STATE OF WASHINGTON
2009 MAR -5 PM 3:29

Kathleen Hardee,

Appellant

v.

Department of Social & Health
Services,

Respondent

Court of Appeals # 62436-9-1
Superior Court # 09-2-07787-0 KNT

CERTIFICATE OF SERVICE

I, Carol Farr, hereby certify that I sent, via placing in the ABC messenger box, the following documents to Patricia Allen, attorney for Respondent, at Office of Attorney General, 900 Fourth Avenue, Suite 2000, Seattle, WA 98164: Reply Brief of Appellant, Notice of Correction And Corrected Table of Authorities For Brief of Appellant, this Certificate of Service.

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

Dated this March 3, 2009, at Renton Washington.



Carol Farr

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