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No. 70749-3-I

COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON

JANET SAARELA,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

This is an appeal from a decision of the Superior Court upholding the dismissal of Appellant's appeal of a finding by the State of Washington, Department of Social and Health Services Board of Appeals of abuse of a vulnerable adult. Appellant failed to give notice to the Department of Social and Health Services ("Department") within 30 days of receiving a letter notifying her of her right to appeal the finding.

It is Appellant's position the subsequent actions of the Department waived this late notice and Appellant was entitled to a hearing on the merits.

II. ASSIGNMENT OF ERROR

1. Assignment of Error Number One: The Court erred denying the Petition for Judicial Review. (CP 55-56)

Issues relating to Assignment of Error Number One.

1. Did the Department of Social and Health Services (the "Department") acknowledge the timeliness of the appeal by setting the matter for prehearing conference?

2. Did the Court err in not addressing the Department's failure to comply with the provisions of RCW 34.05.419(2).

3. Did the Department have an obligation to inform Saarela of the obvious and inadvertent omission of case number 150771 in the request for hearing?

III STATEMENT OF THE CASE

On October 21, 2011 the Department sent Ms. Saarela a notice informing her of two separate findings of vulnerable adult abuse: one based on an alleged incident on June 6, 2011, which was assigned case ID number 121289; and the other based on an alleged incident on August 24, 2011, which was assigned the case ID number 150771. (Certified Appeal Board Record, 79-81, 91-94)¹

Each of these involved Ms. Saarela allegedly yelling at her mother.

On November 2, 2011, Ms. Saarela's representative sent a Request for Hearing to the Office of Administrative Hearings, as per the instructions given to the appellant. The fax included a completed Request for Hearing form with the case ID number 121289 indicated at the top. (CAB 90)

On November 29, 2011, Ms. Saarela's counsel's office sent an amended Request for Hearing to DSHS, advising of the inadvertent

¹ The Certified Appeal Board Record does not have Clerk's Papers numbers assigned, however, it is Bates stamped. Therefore, when making reference to these documents, Appellant will refer to it as "CAB."

omission of a request for hearing on case ID number 150771, stating “On November 2, 2011, a Request for Adult Services Hearing was faxed to the Office of Administrative Hearings for Case ID No. 121829. The Request for Hearing for Case ID No. 150771 was inadvertently left out of that fax, as Ms. Saarela received letters for two different case numbers on the same day.” (CAB 74)

On December 15, 2011, Ms. Saarela’s counsel received a Notice of Prehearing Conference scheduled for February 4, 2012. (CAB 83) Paralegal Marci Umatum called the Office of Administrative Hearings to inquire why there was only one case number on the notice. She was advised the Office of Administrative Hearings had received both requests and they would be addressed at the Pre-Hearing Conference. (CAB 69-70)

On January 17, 2012, the Department filed a Motion to Dismiss the appeal of case number 150771 as untimely. (CAB 100S-124S) The Administrative Law Judge granted this motion on April 6, 2012 on the sole grounds it lacked jurisdiction to rule on the matter because the hearing request was untimely. (CP 41-46)

Appellant appealed the ALJ Order to the Board of Appeals. The Board of Appeals upheld the decision of the ALJ. (CAB 14-18) An Order on Reconsideration was denied. (CAB 1-2)

The Superior Court adopted the ALJ's ruling without further discussion. (CAB 55-56)

IV. LEGAL ARGUMENT

A. The ALJ's Decision Did Not Address The Failure Of The Department To Comply With RCW 34.05.419(2) With Regard To The November 29, 2011 Request For Hearing In Case Number 150771.

RCW 34.05.419(2) reads as follows:

Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application.

If the Department's position is the Request for Hearing was untimely, it must act within 30 days to notify the Appellant.

No action was taken by the Department on this matter until January 17, 2012, when it filed a Motion to Dismiss. The Department does not contend it acted within 30 days of November 29, 2011 (the date of the Amended Notice of Hearing) or December 16, 2011 (the date it concedes it received notice). The failure to timely send such

notice precludes the Department from asserting any errors in the application.

B. The Department, By Setting This Matter For Adjudication, Waived Any Defects In The Application.

There are statutory procedures the Department must follow when it receives an application for an adjudicative proceeding.

In particular, RCW 34.05.419 sets out the actions the agency must take upon receipt of an application for adjudicative proceeding:

After receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows:

- (1)(b) Commence an adjudicative proceeding in accordance with this chapter or
- (c) Dispose of the application in accordance with RCW 34.05.416

RCW 34.05.416 provides:

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

Thus, the Department appears to have two options on receipt of a request for adjudication: 1. It can commence an adjudicative

proceeding; or 2. It can elect non-adjudication and provide notice and opportunity for review on the non-adjudication decision.

What the Department clearly cannot do is what it attempted to do in this proceeding: to both set the matter for adjudication, thereby implicitly acknowledging the application was timely, and that there was no default, and then to request that it be dismissed for its untimeliness.

The failure of the Department to comply with the statutes referred to above prevents it from asserting the November 29, 2011 request for hearing was untimely.

In Huntmacher v. State of Washington, Board of Nursing, 81 Wash.App. 768, 915 P.2d 1178 (1996) the court said at page 771-772:

An adjudicative proceeding is defined as “a proceeding before an agency in which *an opportunity for hearing* before that agency is required by statute....” RCW 34.05.010(1) (emphasis added). “An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.” RCW 34.05.413(5). Thus, an adjudicative proceeding is not limited to the formal hearing itself, but also contemplates other stages of proceedings affecting the rights of an individual under the administrative scheme. *See generally* William R. Anderson, *The 1988 Washington Administrative Procedure Act-An Introduction*, 64 Wash. L.Rev. 781, 789 (1988).

In Forfeiture of One 1988 Black Chevrolet Corvette, et al v.

Scharf, 91 Wash.App. 320, 323, 963 P.2d 187 (1998), the court stated:

RCW 34.05.413(5) provides that “[a]n adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

It is clear the adjudicative proceeding was commenced by the Notice of Prehearing conference. The Department participated in the conference understanding it applied to case number 150771. Its Motion to Dismiss case number 150771 was filed under the prehearing notice setting the original prehearing conference. (CAB 100S)

RCW 34.05.413 sets out the duties of an agency when it receives an application for adjudication.

(2) When required by law or constitutional right, and upon the *timely* application of any person, an agency shall commence an adjudicative proceeding (**Emphasis added**)
(5) An adjudicative proceeding commences when the agency or presiding officer notifies the party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

The Department sent Notice of the Prehearing Conference, set for February 3, on December 13, 2011.

By doing so, under this section, it acknowledges the application was "timely." The adjudicative procedure was "commenced." If the Department took the position the November 29, 2011 request for hearing was untimely, it should not have set the matter for adjudication by participating in the Prehearing Conference, but declared a default, or proceeded according to the provisions of RCW 34.05.419.

Thus, the APA would seem to offer the Department three possibilities when it receives what it deems to be an improperly or untimely filed request for adjudication. It can and should inform the applicant of the deficiencies in the application and allow an opportunity for these deficiencies to be corrected. This would have been the proper choice.

Or it can deem the application a nullity and declare a default.

It can elect non-adjudication and provide notice and opportunity for review on the non-adjudication decision.

What the Department cannot do is what it attempts to do here: both set the matter for adjudication, thereby implicitly acknowledging the application was timely, and that there was no default, and then to request that it be dismissed for its untimeliness.

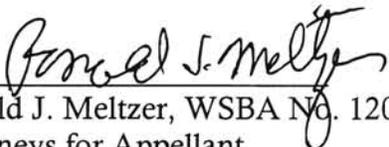
The failure of the Department to comply with the statutes referred to above prevents it from asserting the November 29, 2011 request for hearing was untimely.

V. CONCLUSION

The Court is asked to reverse the decision of the trial court upholding the dismissal of the appeal of DSHS citation number 150771 and direct that it be resolved at an evidentiary hearing.

RESPECTFULLY submitted this 18th day of November 2013

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