

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re: ) Docket No. 08-2018-LIC-02199  
)  
[APPELLANT] ) REVIEW DECISION AND FINAL ORDER  
)  
Appellant ) Adult Protective Services

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I. NATURE OF ACTION

1. The Department of Social and Health Services (DSHS or Department) received an allegation that the Appellant had financially exploited a vulnerable adult. After an investigation and review, the Department determined the allegation was substantiated. The Appellant requested a hearing to contest the Department’s substantiated initial finding. Administrative Law Judge (ALJ) Jill H. Brown held a hearing on December 13, 2018, to address the Department’s *Motion to Dismiss for Lack of Jurisdiction*. On January 2, 2019, the ALJ issued an *Order Denying Department’s Motion to Dismiss*, wherein she determined that the Appellant had shown good cause for failing to timely request a hearing, and denied the Department’s *Motion*.

2. On January 17, 2019, the Department filed a *Department’s Request for an Interlocutory Appeal of Office of Administrative Hearing’s Order Denying Department’s Motion to Dismiss*.

3. On February 12, 2019, the Appellant filed a *Response to the Interlocutory Request for Review*.

II. RESULT OF REVIEW

The *Order Denying Department’s Motion to Dismiss* is **reversed**. This Appellant failed to timely request an adjudicative hearing to contest the Department’s founded finding of financial exploitation of a vulnerable adult. Therefore, the Appellant has no right to an agency

review, an adjudicative hearing, or judicial review of the founded finding. The Department's *Motion to Dismiss for Lack of Jurisdiction* is **granted**.

### III. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, the *Department's Request for an Interlocutory Appeal of Office of Administrative Hearing's Order Denying Department's Motion to Dismiss*, and the *Response to the Interlocutory Request for Review*. The following Findings of Fact were relevant and supported by substantial evidence in the record.

1. The Appellant holds a Certified Nursing Assistance credential and has worked previously in a skilled nursing facility and as an in-home care giver.

2. By letter dated February 14, 2018, the Washington State Department of Health (DOH) informed the Appellant that DOH was investigating a complaint against him related to the alleged financial exploitation of a vulnerable adult. The letter included instructions for the Appellant to provide DOH with a full and complete explanation of the matter in writing by March 8, 2018. The letter did not reference a right to request a hearing or a deadline to do so.

3. By letter dated March 16, 2018, the Department of Social and Health Services (Department) notified the Appellant that the Adult Protective Services (APS) Program had determined that he financially exploited a vulnerable adult.

4. APS mailed the March 16, 2018, notice to the Appellant at his address of record. The notice included a signed certificate of mailing, certifying that Legrand Jones mailed a copy of the letter by certified and regular mail.

5. The March 16, 2018, notice informed the Appellant that he had a right to an administrative hearing to challenge the APS finding. The notice instructed the Appellant that he must submit a written request for a hearing to the Office of Administrative Hearings

(OAH) and that OAH must receive the request within thirty (30) days of March 16, 2018, (the date of the notice). The notice include the following relevant language:

***“You only have 30 calendar days to request a hearing from the date the department's letter of notice is mailed or personally served upon you.”*** (Emphasis in original.)

6. The March 16, 2018, notice informed the Appellant that the APS finding would become a final finding if he did not timely request a hearing and that his name would be *“placed on a registry,”* which could prevent him from being employed in a position or hold a license that involved the care of vulnerable adults or children.

7. The record does not include proof of service showing that the Appellant received the March 16, 2018, APS notice. However, in a declaration signed on November 28, 2018, the Appellant stated:

*“7. On approximately March 16, 2018, I received the notification of findings letter from DSHS that is contained as Exhibit 2 to the Department’s Motion to Dismiss.”*

8. With a letter dated March 29, 2018, DOH informed the Appellant that DOH closed the report of alleged unprofessional conduct without investigation or disciplinary action. The Appellant’s employer allowed him to return to work after he received the March 29, 2018, DOH notice.

9. On August 6, 2018, OAH received a written request from the Appellant (via his attorney) for an administrative hearing to appeal the APS determination that he had financially exploited a vulnerable adult. This was one hundred and forty three (143) days after the notice was mailed by APS.

10. On October 25, 2018, the Department filed a *Motion to Dismiss for Lack of Jurisdiction*. On November 29, 2018, the Appellant filed a written response to the Department’s *Motion*.

11. The Appellant suffered a stroke in 2000 and asserts that he can be confused easily as a result.

12. The Appellant asserts that he did not understand there were two (2) concurrent but separate investigations of his professional behavior, one conducted by APS and one by DOH. He acknowledges speaking to multiple investigators, but asserts that he believed there was only one investigation.

13. The Appellant asserts that he would have requested a hearing within thirty (30) days of the March 16, 2018, notice, if he had not received the March 29, 2018, DOH notice, informing him that the DOH investigation was closed. Because he believed "*everything was dropped*," he did not pursue an appeal with APS.

14. All correspondence to the Appellant from DOH and APS appeared on letterhead capped by the seal of the State of Washington.

#### IV. CONCLUSIONS OF LAW

1. The *Petition for Review* was timely filed and is otherwise proper.<sup>1</sup> Jurisdiction existed to review the *Order Denying Department's Motion to Dismiss* and to enter the final agency order regarding this issue.<sup>2</sup>

2. Pursuant to WAC 388-02-0220, ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions. The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.<sup>3</sup>

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<sup>1</sup> WAC 388-02-0560 through -0585.

<sup>2</sup> WAC 388-02-0215, -0530(2), and -0570.

<sup>3</sup> WAC 388-02-0225(1).

3. In an adjudicative proceeding involving a finding of financial exploitation of a vulnerable adult and placement of the Appellant's name on the APS Abuse Registry, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.<sup>4</sup> This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo*. In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.<sup>5</sup> The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.<sup>6</sup> Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Fact and Conclusions of Law, regardless of whether any party has asked that they be reviewed.

5. The standard of proof refers to the amount of evidence needed to prove a party's position.<sup>7</sup> Unless a WAC provision, RCW provision, or published case law states otherwise, the standard of proof in a Department hearing is a preponderance of the evidence.<sup>8</sup> A preponderance of the evidence means that it is more likely than not that something happened

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<sup>4</sup> WAC 388-02-0217(3).

<sup>5</sup> WAC 388-02-0600, effective March 3, 2011.

<sup>6</sup> RCW 34.05.464(5).

<sup>7</sup> WAC 388-02-0485.

<sup>8</sup> *Id.*

or exists.<sup>9</sup> The burden of proof<sup>10</sup> is borne by the party attempting to persuade the ALJ that his or her position is correct.<sup>11</sup>

6. A person named as an alleged perpetrator in a founded finding of financial exploitation of a vulnerable adult has the right to seek review and amendment of the finding. The alleged perpetrator must request a review of the finding in writing. OAH must **receive** the written request within thirty (30) calendar days of the date the Department's letter of notice is mailed or personally served upon the alleged perpetrator, whichever occurs first. ***If a timely request for hearing is not made, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding.***<sup>12</sup>

7. By utilizing the word "**receive**," WAC 388-71-01240 burdens the alleged perpetrator with the responsibility to see that OAH timely receives the request. In order to meet this burden, the individual can fax the request, mail the request certified mail, hand-deliver the request, or mail the request and follow up with a phone inquiry within the designated time-frame. As stated above, OAH must receive the written request within thirty (30) calendar days of the date the Department's letter of notice is mailed **or** personally served upon the alleged perpetrator, ***whichever occurs first.***

8. On March 16, 2018, the Department mailed a notice of founded finding of financial exploitation of a vulnerable adult to this Appellant. Pursuant to the procedures outlined

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<sup>9</sup> WAC 388-02-0485.

<sup>10</sup> *Schaffer v. Weast*, 546 U.S. 49, 56 (U.S. 2005) (stating: The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." 2 *J. Strong, McCormick on Evidence* § 342, p 433 (5th ed. 1999) (hereinafter McCormick). Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," i.e., which party loses if the evidence is closely balanced, and the "burden of production," i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)).

<sup>11</sup> WAC 388-02-0480(2).

<sup>12</sup> RCW 34.05.440 and WAC 388-71-01240(1).

in WAC 388-02-0035, the Appellant was required to provide OAH with any hearing request prior to 5:00 p.m. on April 15, 2018. OAH received the Appellant's hearing request on August 6, 2018. This was one hundred and forty three (143) days after the notice was mailed by APS. Consequently, the Appellant's request was untimely and legal authority does not allow either the ALJ or the Review Judge to make an exception and "grant" jurisdiction in this matter. Specifically, the Department's rules do not allow for a determination that the Appellant "substantially complied" with the requirement's outlined in WAC 388-71-01240, and neither the ALJ, nor the undersigned reviewer, have the legal authority to find and grant "good cause" to excuse the late-filed request. Because this Appellant's request for hearing was not received by OAH until after the regulatory time period for filing such a request, the Department's founded finding of financial exploitation of a vulnerable adult became final, and the Appellant has no right to a hearing regarding this final finding. The ALJ incorrectly denied the Department's *Motion to Dismiss for Lack of Jurisdiction*.

9. The undersigned has considered the *Initial Order*, the *Department's Request for an Interlocutory Appeal of Office of Administrative Hearing's Order Denying Department's Motion to Dismiss*, the *Response to the Interlocutory Request for Review*, and the entire hearing record. The Initial Findings of Fact are only adopted as findings in this decision, pursuant to the clarifying modifications outlined above. Initial Conclusions of Law 5.1 through 5.5, 5.7 through 5.9, and 5.11, cited and applied the governing law correctly and they are adopted and incorporated as conclusions for this decision. Initial Conclusions of Law 5.6, 5.10, and 5.12 through 5.14, contained errors of law or were based on previous erroneous legal conclusions and are not adopted and incorporated as conclusions for this decision.<sup>13</sup> The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

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<sup>13</sup> RCW 34.05.464(8).

**V. DECISION AND ORDER**

1. The *Order Denying Department's Motion to Dismiss* is **reversed**.
2. The Appellant failed to timely request an adjudicative hearing to contest the Department's founded finding of financial exploitation of a vulnerable adult. Therefore, the Appellant has no further right to an agency review, an adjudicative hearing or judicial review of the finding.
3. The Department's *Motion to Dismiss for Lack of Jurisdiction* is **granted**.

*Mailed on the 15<sup>th</sup> day of February, 2019.*

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THOMAS L. STURGES  
Review Judge/ DSHS Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT], Appellant  
Gregory Rhodes, Appellant's Representative  
Legrand Jones, Department's Representative, MS: 45610  
Vicky Gawlik, Program Administrator, MS: 45600  
Jill H. Brown, ALJ, [CITY 1] OAH