STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 10-2018-LIC-02358
	)	
[APPELLANT'S NAME]	)	**REVIEW DECISION ON INTERLOCUTORY APPEAL OF DENIAL OF MOTION FOR DISMISSAL**
	)	
Appellant	)	Adult Protective Services

I. NATURE OF PROCEEDING

The Department of Social and Health Services Adult Protective Services Program (Department) gave notice to the Appellant that he had neglected a vulnerable adult. The Appellant requested a hearing to contest the Department's substantiated initial finding of neglect of a vulnerable adult. On December 10, 2018, the Department filed a motion for summary judgment with seven attached supporting documents, identified as Exhibits 1 through 7, with the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Michael Hovey held a hearing on January 10, 2019, to address the Department's motion. The ALJ issued an *Interlocutory Order Denying Summary Judgment* (initial order) on February 8, 2019. The Department filed a petition for review of the initial order with the Board of Appeals (BOA) on February 22, 2019.

Based on the following Findings of Fact and Conclusions of Law, the *Interlocutory Order Denying Summary judgment* is **vacated**, the Department's motion for summary judgment is **granted**, and the Appellant's request for hearing is **dismissed**.

[SECTION INTENTIONALLY LEFT BLANK]

II. FINDINGS OF FACT RELEVANT TO INTERLOCUTORY REVIEW

1. On March 13, 2018, the Department received a referral alleging the Appellant had neglected a vulnerable adult identified as [NAME 1].[1] [NAME 1] was [AGE] years of age and unable to care for herself.

2. On August 9, 2018, the Department filed a *Petition for Vulnerable Adult Order for Protection* (PTORVA) in the Superior Court of Washington For [COUNTY NAME] County on behalf of [NAME 1].[2] The PTORVA asserts that, "A Vulnerable Adult protection order is available to protect a vulnerable adult from abandonment, abuse, financial exploitation or neglect," and sets forth the statutory definition for "neglect" found at RCW 74.34.020(16).[3]

3. The PTORVA incorporates a statement signed under penalty of perjury by Assistant Attorney General (AAG) for the Department.[4] In pertinent part, the AAG's declaration provides:

> [NAME 1] has lived with her [RELATIVE 1] [the Appellant] since she had a stroke two and a half years ago. Her [RELATIVE 1] has been unable to provide consistent, ongoing safe care for [NAME 1] as evidenced by several hospital admissions due to mental confusion, perhaps related to urinary tract infections, fevers, and sepsis. [NAME 1] needs care for all of her activities of daily living. She is bedbound and is at risk of aspiration when left flat on her back; she has a PEG tube for feeding and medications. Witnesses have observed that her [RELATIVE 1] does not use the pillow recommended by [NAME 1's] doctor recommended (*sic*) for her feedings to keep her at a 45 degree angle to support her while she is being fed through her feeding tube to avoid aspiration. She in unable to take anything by mouth. [NAME 1] is unable to toilet independently and has a catheter. She also has diabetes and high blood pressure.
>
> Her [RELATIVE 1] has accepted full responsibility to provide the care for his [RELATIVE 2], including hiring her caregivers. APS's investigation shows that problems arise when the caregivers are not qualified to provide the level of care [NAME 1] needs. Caregivers are sometimes hired to also provide property management services for the homes belonging to [NAME 1's] [RELATIVE 1], which are short-term rentals. This leaves the caregivers/property managers confused about which of their duties they should be prioritized or performed on a given time and day. Several people have contacted APS since 2016 to report neglect-like issues in her [RELATIVE 1]'s management of [NAME 1's] care. (*See* Declaration of Rebekah Hoefs, APS Investigator)

---

[1] The alleged vulnerable adult is referred to by her initials in this decision to protect her identity pursuant to WAC 388-71-01225 and -01250(2).
[2] Exhibit 1, p. 1. The Department asserts in the petition that [NAME 1] "lacks the capacity or ability to consent to this petition."
[3] Exhibit 1, pp. 4-5.
[4] Exhibit 1, pp. 6-7.

An incident in mid-March was reported that [NAME 1] did not receive her feedings or medications for a whole day, because her caregiver was unable to get her food liquefied, and was unable to find a pill cutter for her medications. The caregiver made several attempts to contact [NAME 1's] [RELATIVE 1], but was unsuccessful. When police arrived in response to a 911 call, they found [NAME 1] on a mattress on the floor, with fecal matter and a heavy smell of stale urine. A colostomy bag was lying on the floor. [NAME 1] had heavy contractures and was minimally responsive. Her skin was ashen, her lips dry and cracked and her urine was dark and cloudy. The officer noticed on the counter with multiple prescription bottles only 2 pages of a 3-page medication and instruction list. (*See* Police Report)

Another incident occurred on March 31 where [NAME 1] was sent to the hospital with altered mental status, fever, possible urinary infection and sepsis. Her mental status improved with hydration and insulin.

Adult Protective Services offered the services of placement at a facility qualified to care for [NAME 1] but her [RELATIVE 1] refused the services. He was also given resource lists for privately paid qualified caregivers but refuses to hire this type of caregiver, and instead places Craigslist ads for his [RELATIVE 2]'s caregivers. While he agrees to pay the caregivers he hires for his [RELATIVE 2], and claims to have two on duty at all times, that is not always the case, and the concern for her caregivers' qualifications is not met. [The Appellant] has been mostly resistant to receiving assistance or taking advice regarding his [RELATIVE 2]'s care.

[NAME 1] is currently in the hospital. The hospital notified APS on August 8, 2018 that they were intending to discharge [NAME 1] back home to her [RELATIVE 1]. [The Appellant] claimed to his [RELATIVE 2]'s hospital social worker that he has now hired qualified caregivers, but the hospital social worker indicated they will need additional training. APS believes that this is an unsafe discharge. That belief is based on the APS investigations which show a long pattern of [the Appellant's] failure to provide the care to keep his [RELATIVE 2] consistently safe.

[The Appellant] has pending criminal charges for Abandonment of a Dependent Person, based on the lack of care for his [RELATIVE 2] and the consequences she suffered.
On July 25, 2018 the [CITY 1] Municipal Court Judge issued conditions of [the Appellant's] release pending trial that include: Not move [RELATIVE 2] from [location redacted] without prior approval of APS and that he must provide adequate care for his [RELATIVE 2] or allow APS to take custody. (*See* Conditions of Release on Personal Recognizance or Bail). While APS does not have the authority to take custody of a vulnerable adult, they do have grave concerns about the safety of [NAME 1] if [the Appellant] is allowed to take her home. APS is in the process of filing for guardianship for [NAME 1].

3. On August 23, an *Amended Order for Protection – Vulnerable Adult* (ORPRTVA) was entered in the Superior Court of Washington for [COUNTY NAME] County naming [NAME 1] as a *Vulnerable Adult (Protected Person)* and the Appellant as the *Respondent (Restrained Person).*[5] Within the ORPRTVA, the Superior Court found, *inter* alia, the Appellant "committed acts of abandonment, abuse, personal exploitation, improper use of restraints, neglect and/or financial exploitation of the vulnerable adult, as described in the Petition and attachments."[6]

[5] Exhibit 4, p. 1.
[6] *Id.*

The Superior Court also found the Appellant "has been provided with reasonable notice and an opportunity to be heard."[7] There is no evidence in the hearing record that the ORPRTVA has been appealed, vacated, or rescinded.

4. On September 13, 2018, the Department issued a notice to the Appellant informing him of a substantiated initial finding of neglect of a vulnerable adult entered against him.[8] The letter sets forth the basis for the Department's substantiated initial finding of neglect as:

> From approximately 2016 to August 2018, while serving as a caregiver to a vulnerable adult, you hired unlicensed caregivers off of "Craig's List" and told them that they were being hired as housekeepers or property managers rather than caring for a vulnerable adult. These employees were not qualified to provide the level of care that the vulnerable adult needed. This led to incidents in which the vulnerable adult was put in clear and present danger and/or harmed, including but not limited to: the vulnerable adult not receiving medication for an entire day, altered mental status, fever, and sepsis leading to hospitalizations(s).[9]

5. On October 15, 2018, the Appellant requested an administrative hearing to challenge the substantiated initial finding of neglect.[10] On December 10, 2018, the Department filed a motion for summary judgment with seven attached supporting documents, identified as Exhibits 1 through 7, with the OAH. A motion hearing was held on January 10, 2019, and the ALJ issued an *Interlocutory Order Denying Summary Judgment* (initial order) on February 8, 2019. The Department filed a petition for review of the initial order with the BOA on February 22, 2019.

III. CONCLUSIONS OF LAW

Jurisdiction to Review an Interlocutory Order

1. An Administrative Law Judge is authorized to enter an order to address limited issues before closing the record and mailing a hearing decision resolving all issues.[11] The

[7] *Id.*
[8] Exhibit 6.
[9] Exhibit 6, p. 1.
[10] The Appellant's request for hearing to challenge the substantiated initial finding of neglect is a necessary jurisdictional document and is entered into the hearing record as Exhibit J-1.
[11] WAC 10-08-210(5) and 388-02-0500(2).

procedural rules for Department administrative hearings provide that review at the Board of Appeals is available when a party disagrees with an initial order.[12] A Board of Appeals Review Judge reviews decisions made by an Administrative Law Judge.[13] Neither the term "hearing decision" nor "decision" is defined in chapter 388-02 WAC, although WAC 388-02-0010 provides that "Initial order" is a hearing decision made by an ALJ that may be reviewed by a Review Judge at either party's request. Absent clear regulatory guidance, the undersigned turns to the enabling statute for guidance.[14] The initial issue to be resolved is: Does the ALJ's *Interlocutory Order Denying Summary Judgment* entered on February 8, 2019, fall within the Administrative Procedure Act definition of initial order and, thus, subject to administrative review under RCW 34.05.464 and the applicable regulations.

2. The Administrative Procedure Act defines "order" as follows:

> ""Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties privileges, immunities, or other legal interests of a specific person or persons."[15]

While the order in this case is not ***the*** initial order resolving all of the disputed issues raised in the Department's substantiated finding notice, it is ***an*** initial order that makes a final determination as to the Department's legal right to resolution by dismissal based on the doctrine of collateral estoppel.[16] The order is in fact a ***final*** determination as to the single limited legal right to the remedy of dismissal, since that issue, once decided, cuts off the moving party's (Department's) right to dismissal based on collateral estoppel and denies that party the appurtenant benefits of avoiding time and resource loss involved in a full hearing on the merits of the substantiated initial finding notice. If the decision on the motion to dismiss had gone against the Appellant and the Department's motion for summary judgment had been granted, there would

[12] WAC 388-02 sections 0530(2), 0560(1), and 0570.
[13] WAC 388-02-0010, at **"Review Judge."**
[14] WAC 388-02-0220(2).
[15] RCW 34.05.010(11)(a).
[16] *Id.*

be no jurisdiction to proceed further with the hearing and the Appellant would clearly have a right to appeal such an outcome to the BOA. If the decision provides an appealable right to the Appellant, it must also provide an appealable right to the Department. If the interlocutory order can be entered without challenge, the Department loses the right to have the matter resolved by summary judgment and all the benefits appurtenant to that right.

3. The foregoing analysis of the right to appeal orders entered prior to a decision on the merits is consistent with the approach used in the courts. As noted above, RCW 34.05, WAC 10-08, or WAC 388-02 provide neither explicit authority permitting, nor prohibiting, appeal to the Board of Appeals of orders such as the one entered in this case. Absent such authority, the best legal authority available, including legal authority found in case law, must be applied to the case.[17] The rule applied under such "borrowed" case law authority is clear – such appeals will be entertained when there is an order finally determining the rights of the parties; but when there is no such order, appeals will not be entertained unless there is a clear showing of irreparable harm. *State v. Brown,* 64 Wn.App. 606, 825 P.2d 350, *rev. denied*, 119 W.2d 617 (1992); *Owens v. Kuro,* 56 W.2d 564, 354 P.2d 564 (1960); *Maybury v. Seattle*, 53 W.2d 716, 336 P.2d 878 (1959); *see* Washington Appellate Practice Deskbook, § 3.2 Washington State Bar Association (1998). In this case, the ALJ's order is an order that makes a final disposition as to the Department's right to have the matter resolved on a basis of collateral estoppel. Waiting until an "initial decision" is entered after a merits hearing will render the collateral estoppel issue moot, as the moving party will have lost the benefit of dismissal based on collateral estoppel. Under the case law analysis, an ALJ's order on a motion for dismissal is subject to review by the BOA.

4. It is noted that not every "order" entered by an ALJ prior to the decision on the merits in a case is subject to review at the BOA under the foregoing analysis. BOA review of ALJs' orders entered prior to the decision on the merits is limited to orders that make a final

[17] WAC 388-02-0220(2).

disposition as to a legal right.[18] Chapter 388-02 WAC itself makes a clear distinction between unappealable procedural orders and appealable hearing decisions. Orders concerning strictly procedural matters, such as those procedural matters that are specifically permitted to be addressed in prehearing conference orders, are not subject to review at the BOA, but must be challenged by filing an objection with the ALJ.[19] However, chapter 388-02 WAC contains no similar restriction on BOA review of orders that go beyond the limited scope of procedural orders that may be entered after a prehearing conference or motion hearing.

5. The Department timely filed a petition for review of the *Interlocutory Order Denying Summary Judgment* and it is otherwise proper.[20] Jurisdiction exists to review the order and to enter the final agency order on the limited issue addressed in the order.[21]

6. It is recognized that the Department's role in pursuing actions in obtaining a Vulnerable Adult Protection Order (VAPO) to provide for the necessary immediate protection of a vulnerable adult can be different from the role of making a substantiated initial finding of abuse against an alleged perpetrator through this administrative process. Any such difference in the goals or results of the two processes does not diminish nor render null and void the Superior Court's specific finding of abuse (neglect) based on the same facts and incidents. The undersigned recognizes that the Legislature has adopted specific provisions in statute to provide expedited protection for vulnerable adults through protection orders entered by the Superior Court. A reading of RCW 74.34.110 through 74.34.160 reveals an intention to provide such necessary protection as immediately as possible and not necessarily to make final determinations or judgments as to the underlying cause for the protection. Although RCW 74.34.110(2) requires the petitioner to allege the subject vulnerable adult has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial

[18] RCW 34.05.010(11)(a) and 34.05.464.
[19] WAC 388-02 sections -0200 and -0205(3).
[20] WAC 388-02-0580.
[21] WAC 388-02-0560 to -0600.

exploitation, or neglect by the respondent, the relevant statute does not appear to specifically require the Superior Court to find abuse has occurred in order to grant the relief sought in the non-exclusive list set forth in RCW 74.34.130. Additionally, RCW 74.34.160 provides: "Any proceeding under RCW 74.34.110 through 74.34.150 is in addition to any other civil or criminal remedies." Under the relevant statutory provisions, it appears that the Superior Court can enter a protection order without making a specific finding of abuse and, in doing so, not undermine any administrative processes that may eventually determine abuse/neglect has occurred. Just as the Superior Court deleted the "financial exploitation" language in paragraph 2 on page 2 of the ORPRTVA, the Superior Court could have deleted the specific finding of abuse (neglect) if it did not intend to make such a finding upon entry of the final protection order, but it did not. If the Superior Court believed it necessary to make a finding of neglect in order to enter the ORPRTVA, the Appellant would have been informed of this once he made a request that the finding be deleted. The Appellant could then have rescinded any agreement to entry of the ORPRTVA and presented his case to the Superior Court as to why he believed he had not neglected [NAME 1].[22]

7. The "supremacy of the forum" relationship between the Superior Court and this administrative forum also plays a part in this analysis. Under the Administrative Procedure Act (RCW 34.05), it is the Superior Court of Washington (or the Court of Appeals upon granting direct appeal) that reviews administrative decisions entered in this forum and not the other way around.[23] And it is either the Court of Appeals or the State Supreme Court that reviews any

[22] The undersigned has reviewed Superior Court orders, at least in child dependency proceedings, that specifically state that issuance of the order should not be construed as a finding of abuse/neglect, leaving in place any concurrent administrative proceeding regarding a Child Protective Services (CPS) finding of abuse/neglect. This may occur because CPS regulations address this issue in the founded CPS finding of abuse process by specifically requiring ALJ's to uphold a Superior Court's finding of abuse, if one has been made. *See* WAC 110-30-0300(3). Perhaps the Department could adopt a similar APS regulation to ensure Superior Court findings of abuse in a VAPO proceeding are given full force and effect in the administrative process, but the current existence of this rule in the CPS regulations and not in the APS rules cannot be deemed authorization for an ALJ to disregard a finding of neglect made by the Superior Court under the same facts supporting the substantiated initial finding of neglect.

[23] *See* RCW 34.05.514(1) and .518.

final judgement of the Superior Court.[24] Under the Administrative Procedure Act (APA), the Superior Court has jurisdictional authority to review an administrative order, but the APA does not grant the administrative forum authority to review a material finding made by the Superior Court.[25] The undersigned is unaware of any statute (APA or otherwise), regulation, or precedential case law that allows an ALJ in this administrative forum to review, ignore, dismiss, reverse, amend, or otherwise countermand a specific finding of neglect entered by the Superior Court when the ultimate issue to be decided by the administrative forum is the existence or nonexistence of neglect based on the same alleged incident(s). To allow an ALJ such authority under the guise that the Superior Court did not really intend for the finding of neglect to be a finding of neglect, is an inappropriate dismissive response to the existence of the Superior Court's specific finding of neglect of a vulnerable adult by the Appellant.

Collateral Estoppel or Issue Preclusion

8. The Department asserts that the Appellant's request for an administrative hearing should be dismissed based on collateral estoppel or issue preclusion. If an issue has been previously decided by a court of competent jurisdiction, previous litigation may preclude the necessity to decide that same question in a later proceeding. Such issue preclusion or collateral estoppel requires that four requirements be met: 1) the issue in the prior adjudication must be identical to the issue currently presented for review; 2) the prior adjudication must be a final judgment upon the merits; 3) the party against whom the doctrine is asserted must have been a party to, or in privity with a party to, the prior adjudication; and 4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied.[26]

9. The ALJ's conclusion that the Department has not proven the first element of collateral estoppel fails to acknowledge and address certain basic conditions existing under the

[24] RCW 34.05.526.
[25] RCW 34.05.510 through .598.
[26] *State v. Harrison,* 148 Wn.2d 550, 561, 61 P.3d 1104 (2003), *citing Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).

unchallenged facts and law relevant to disposition of this case. First, the Superior Court of Washington for [COUNTY NAME] County found, based upon the court record: "[the Appellant] committed acts of . . . neglect . . . of the vulnerable adult, as described in the Petition and its attachments."[27] This language is clear, unambiguous, and cannot be ignored or dismissed by either the ALJ or the undersigned. The relevant definition for "neglect" is the same for both the Superior Court proceeding and this administrative process to adjudicate the substantiated initial finding of neglect.[28] The PTORVA filed with the Superior Court, leading to entry of the ORPRTVA, specifically establishes the basis for the petition – alleged neglect of [NAME 1] by the Appellant involving the same actions and incidents that form the basis for the Department's substantiated initial finding of neglect. Based upon the record, including the specific allegations set forth in the Department's petition for the ORPRTVA, the Superior Court found that the Appellant "committed acts of . . . neglect . . . of the vulnerable adult, as described in the Petition and its attachments." Although the operative goals and results may be different in each forum, the issue decided in the prior adjudication by the Superior Court is the same issue present in the current administrative hearing. The first element of the doctrine of collateral estoppel is present in this case and the ALJ's conclusion to the contrary is rejected.[29]

---

[27] *See* Exhibit 4, p. 1.

[28] *See* WAC 388-71-0105 which adopts by reference the definitions found in RCW 74.34.

[29] Under the facts of this case, it could be argued that the Appellant simply chose not to challenge entry of the protection order because: (1) the Appellant may have chosen to agree to not commit any acts of abandonment or neglect, not to attempt to remove [NAME 1] from "any facility," and believed this was the sole consequence of entry of the order; (2) the Appellant did not conceive any acquiescence on his part to entry of the protection order would preclude his administrative challenge to any future Department's findings of abuse (neglect), even if based on the same facts; (3) the language in the protection order finding neglect, among other abusive behavior, was merely "boilerplate" existing in all such court-order form orders; and (4) a belief that none of the persons party to entry of the protection order, including the petitioning Department investigator, the assigned AAG, and the court commissioner signing the order, had any conception that entry of the order would constitute a final judgment on the merits of the Department's substantiated initial finding of neglect. Based on these assumptions, it could be argued that not all four elements of *collateral estoppel* set forth by the *Harrison* court have been met. However, none of the four stated premises is relevant to, nor render less effective, the Superior Court's finding that the respondent (Appellant) neglected a vulnerable adult. If "boilerplate form" language in a court order renders such language less effective than other provisions, this begs the question can the restraint provisions of the order also be disregarded due to the "boilerplate" nature of such language? Or what parts of the ALJ's and the undersigned's decisions can be ignored due to the fact that they are repetitive among decisions of common issues and, thus, to a certain extent "boilerplate?"

10. There is no evidence in the hearing record that the Superior Court's finding that the Appellant neglected [NAME 1] was somehow peripheral or otherwise unattached to the hearing held and resulting court action taken on August 23, 2018. Based on a review of the PTORVA, the declaration in support of the petition, and the ORPRTVA, it must be concluded that the issue of abuse (neglect), based on the same actions set forth in the Department's substantiated initial finding notice, was considered by the Superior Court and a judgment reached on the merits of that issue. The allegation of neglect was the sole basis for seeking the ORPRTVA and, for this reason, must have been "actually recognized by the parties as important and by the judge as necessary to [entry of the order]."[30] There is no evidence in the hearing record that the Superior Court's finding that the Appellant committed acts of neglect of a vulnerable adult was somehow conditional; meant something other than the specific language of the finding; or was not a final judgment on the merits of the allegation of neglect of a vulnerable adult. There is no evidence in the hearing record that supports the conclusion that the Superior Court's finding of neglect has been reversed, rescinded, or modified by the Superior Court or a higher court on appeal. The second element of collateral estoppel exists in this case.

11. There is no dispute that the Appellant was a responding party to both the Superior Court proceeding and this administrative hearing process. The third element of collateral estoppel exists in this case.

12. There is no evidence in the hearing record that the Appellant was denied an opportunity to challenge the basis for entry of the protection order in the Superior Court. The evidence does support the finding that the Appellant was properly notified and provided the opportunity to be heard at the hearing scheduled for August 23, 2018.[31] The evidence in the hearing record supports the finding that the Appellant was "provided with reasonable notice and an opportunity to be heard" prior to entry of the ORPRTVA which found he had committed acts

[30] *See Shuman v. Department Of Licensing,* 108 Wn. App. 673, 681, 32 P.3d 1011 (2001).
[31] Exhibit 4, p. 1.

of neglect of the vulnerable adult named in the Superior Court proceeding.[32] If the Appellant did not receive an actual "full and fair" hearing on the merits of the neglect allegation, it is only because he chose either not to challenge the allegation in the Superior Court proceeding or, in doing so, failed to convince the Superior Court that he had not neglected [NAME 1].

13. The Appellant's possible failure to recognize the significance of not specifically challenging the neglect allegations in the Superior Court proceeding, or his lack of ample perceived incentive to litigate the issue at that time, is not relevant in determining the effect of the Superior Court's finding that he did neglect [NAME 1]. The assertion as to such lack of knowledge, and resulting lack of incentive, fail to recognize and address the fact that the Superior Court's finding of neglect, alone, has a significant possible effect on the Appellant's future employability, at least in the long-term care services arena, regardless of what happens in this administrative forum.[33] RCW 74.39A.056(2) specifically provides:

> "No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority or a court of law or entered into a state registry with a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter 74.34 RCW shall be employed in the care of and have unsupervised access to vulnerable adults."

14. By its specific language ("Respondent committed acts of . . . neglect . . . of the vulnerable adult"), the ORPRTVA is a final order of a substantiated finding of neglect entered by a court of law. The stand-alone legal effect of RCW 74.39A.056(2) based on entry of the ORPRTVA can limit substantially the Appellant's employability in long-term care services. "Long term care workers" include all persons who provide paid, hands-on personal care

[32] *Id.*

[33] The actual effect of the ORPRTVAs, alone, on the Appellant's future employability in the long-term care arena may be determined by whether a separate state registry has been established for long-term care workers apart from a registry comprised of persons with disqualifying criminal convictions or negative actions as allowed under WAC 388-113-0005, WAC 388-113-0030, and WAC 388-71-01280, and dependent upon whether the Department will place a defendant in such VAPO proceedings on such a limited registry based solely on the VAPO.

services for the elderly or persons with disabilities, including but not limited to individual providers of home care services, direct care workers employed by home care agencies or a consumer directed employer, providers of home care services to persons with developmental disabilities under Title 71A RCW, all direct care workers in state-licensed assisted living facilities, enhanced services facilities, and adult family homes, respite care providers, direct care workers employed by community residential service businesses, and any other direct care worker providing home or community-based services to the elderly or persons with functional disabilities or developmental disabilities.[34] It can be argued the Appellant can not be employed in the long-term care services arena in the care of and have unsupervised access to vulnerable adults based on findings made by the [COUNTY NAME] County Superior Court in the ORPRTVA and application of RCW 74.39A.056(2). The cited statutory law provided the Appellant with an ample incentive to litigate the finding in the Superior Court proceeding comparable with incentives he may now have within this administrative forum. The Appellant may not have been aware of the possible effect of the Superior Court's finding of neglect on the Appellant's future employability at the time of entry of the Superior Court order. However, this does not change the ultimate affect of the Superior Court's finding of neglect.[35]

15. The fact that the Appellant may already be precluded from being employed in the care of, and having unsupervised access, to vulnerable adults in the long-term care services field under the existing Superior Court finding, regardless of the outcome of this administrative proceeding, mitigates against injustice occurring by application of the collateral estoppel doctrine in this case. For this reason, and the fact that the Appellant had a full opportunity to be

[34] RCW 74.39A.009(20)(a).
[35] It is noted that RCW 74.39A deals with home and long-term care services provided by formal and informal caregivers for persons who require assistance (RCW 74.39A.005). RCW 74.39A covers a broad spectrum of employment situations involving care of vulnerable adults and it would appear that entry of the ORPRTVAs and application of RCW 74.39A.056(2) would have a significant effect on the Appellants' employability, but not to the fullest extent created by affirmation of the substantiated initial finding of financial exploitation through this administrative process. There may be potential care scenarios not covered by RCW 74.39A.056(2) that the Department feels need to be addressed through affirmation of the substantiated initial finding of financial exploitation.

heard in the Superior Court proceeding, the ALJ's conclusion that granting of the Department's motion for summary judgment would work an injustice on the Appellant is rejected. The fourth element of the doctrine of collateral estoppel exists in this case.

16. It is the Superior Court of Washington for [COUNTY NAME] County, by its explicit language, that found the Appellant had neglected a vulnerable adult. For this reason, it will have to be the Superior Court that rescinds or modifies it's order *nunc pro tunc* if the court agrees that entry of the protection order was never intended to be a final judgment on the issue of neglect. If the Superior Court VAPO proceeding was deficient and failed to provide a full and fair hearing on the issue of neglect as argued by the Appellant's representative at the motion hearing and in the response to the Department's motion, it is the Superior Court that will have to correct this. Because neither the ALJ nor the undersigned have jurisdictional authority to change or rescind the Superior Court's finding of neglect of a vulnerable adult made against the Appellant, holding a full merits hearing on the Department's substantiated initial finding of neglect can serve no meaningful purpose. The Appellant's remedy or relief, if one exists, must be sought in the Superior Court.[36]

(Remainder of this page intentionally left blank.)

[36] This analysis is supported by an existing and effective final decision entered into the BOA *Index of Significant Decisions* as attached to the Department's petition for review and identified as Docket No. [FORMER DOCKET NUMBER] [FORMER DECISION]. Decisions entered into the *Index of Significant Decisions* are precedential and the ALJ is required to follow the legal premises set forth in such decisions pursuant to RCW 42.56.070(6). The undersigned recognizes that decisions in this forum are often fact driven and can often be differentiated on the facts from an indexed decision. However, the legal premise that a finding of abuse/neglect made by the Superior Court in a VAPO is controlling in this administrative forum when the elements of collateral estoppel are met is applicable in this case to the same extent as in the cited index decision. The initial order did not effectively differentiate the *Index* decision from the case at bar to allow disregarding the precedential affect of the *Index* decision.

IV. DECISION AND ORDER

Based on the conclusions entered above, the *Interlocutory Order Denying Summary Judgment*, entered on February 8, 2019, is **vacated**. The Department's motion for summary judgment is **granted**. The Appellant's request for hearing to challenge the Department's substantiated initial finding of neglect is **dismissed**.

Mailed on this 3rd day of April, 2019.

JAMES CONANT
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant
Gregory McBroom, Appellant's Representative
Christine Glenn, Department's Representative, MS: N95-02
Vicky Gawlik, Program Administrator, MS: 45600
Michael Hovey, ALJ, [CITY 2] OAH