BEFORE WASHINGTON STATE GOVERNOR JAY INSLEE

In re: Fred T. Korematsu Center for Law and Equality at Seattle University School of Law; Washington State Long Term Care Ombuds Program, Patricia Hunter; Office of Developmental Disabilities Ombuds, Betty Schwieterman; AARP Washington State; Alzheimer's Association, Washington State Chapter; Columbia Legal Services; Elder Law Clinic of the Community Justice Project at Gonzaga Law School; Northwest Health Law Advocates; Solid Ground; WSBA Elder Law Section; Washington Academy of Elder Law Attorneys; Washington State Senior Citizens' Lobby Petitioners.	APPEAL OF DSHS DENIAL OF PETITION FOR RULEMAKING TO AMEND RULES TO ENSURE DISCHARGE PROTECTION FOR RESIDENTS IN ALL LICENSED LONG-TERM CARE SETTINGS

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I. INTRODUCTION

A fair and equitable government agency looks for legally supportable ways to further its mission to protect vulnerable populations rather than erring on the side of doing nothing, especially when there is little to no legal risk. Here, the Department of Social and Health Services ("Department") is avoiding doing what it agrees is an equitable way to protect the most vulnerable citizens in Washington State—long-term care facility residents facing involuntary discharge from their homes.

In 1994, the Washington State legislature extended federal rights for nursing home residents to home and community-based settings, such as assisted living facilities. These rights include discharge notice protections and administrative hearing rights. Yet, despite this unequivocal grant of important rights to *all* long-term care residents, the Department never promulgated rules setting out these rights as it did for nursing home residents. Without rules, vulnerable residents who are told they must leave their homes are not aware of these important protections granted in statute. Therefore, a coalition of 12 Petitioners representing a broad spectrum of long-term care residents—who need rules to clarify the discharge protections guaranteed in statute—filed a rulemaking petition and memorandum in support ("Petition"). Despite the clear intent of the State legislature and multiple final decisions from the Board of Appeals for the Health Care Authority (HCA) confirming the legal right to these discharge protections, the Department denied the Petition claiming that "it goes beyond the scope of resident rights granted in statute."

Governor Inslee now has the power to overturn this erroneous decision and to model mission driven public policy by granting this petition for rulemaking. Pursuant to RCW 34.05.330,

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the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law and the Washington State Long Term Care Ombudsman Program, et al. ("Petitioners") submit this appeal of the denial issued by the Department on November 30, 2022 ("Denial Letter") of the Petition.

II. ARGUMENTS FOR GRANTING THIS RULEMAKING PETITION

Petitioners' chief concern is that the Department is simply unwilling—not legally unable—to grant the Petition for Rulemaking. Accordingly, Petitioners ask the Governor to closely review and consider the legal authority and numerous concerns cited in the Petition (attached) and in this Appeal, and then direct the Department to initiate rulemaking proceedings in accordance with Chapter 34.05 RCW. If the Governor should choose to deny this Appeal, Petitioners request that he "specifically address the concerns raised by the petitioner[s]" in this Appeal, which is required by RCW 34.05.330(3)(1) when the governor denies an appeal of an agency's denial of a petition for rulemaking.

A. The Department's position regarding lack of rulemaking authority is based on both a misreading of the governing statutes and a misstatement of the statutory authority needed to promulgate rules.

According to the Denial Letter, the requested rulemaking "would exceed its rulemaking authority, as it goes *beyond the scope* of resident rights granted in statute."[1] The Department provides no legal authority for this standard. Under the correct standard, the rules must be "reasonably consistent" with the statute being implemented.[2] If the rules are reasonably consistent with the relevant statute, courts will uphold them unless "compelling reasons" exist to demonstrate

[1] Denial Letter at 1, ¶ 1 (emphasis added).
[2] Petition at 16.

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the rules are in "conflict" with the "intent and purpose" of the legislation. The Denial Letter never addresses this standard.

The Department cannot reasonably argue that the relatively informal nature of an administrative hearing somehow conflicts with the relevant statutes (the licensing statute for each facility type and the resident rights statute), all of which have the intent and purpose of: (1) providing residents the *same basic rights* in all settings; (2) ensuring that *residents and others* who seek to assist them have the *least formal means* available to resolve disputes; and (3) *minimizing complexity* in long-term care facility rules. Hearing rights are in harmony, not in conflict, with these statutory intents and purposes, thus satisfying the legal standard against which courts would analyze the agency's rulemaking authority.

B. The Department misunderstands the relevance of HCA rulings, which represent the State of Washington's final administrative position on the issue of hearing rights.

In a footnote to the unfounded statement about the "scope" of statutory rights needed to promulgate rules, the Department says it does not consider final decisions from the HCA to be "established case law." [3] The meaning of this footnote is unclear. Petitioners never suggest that an administrative decision from the HCA is tantamount to a judicial opinion. Indeed, the Petition for Rulemaking includes *actual* judicial opinions with analysis of the statutory authority needed for rulemaking.

The footnote also states that the Department does "not see [HCA's decision] as an alternative to the interpretation of the statutory authority." Petitioners do not offer it as such. HCA

[3] Denial Letter at 1, n.1.

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was not tasked with determining whether statutory authority for rulemaking exists. Instead, HCA was tasked with determining whether a statutory right to a hearing exists. HCA found that it does.[4]

Petitioners provided the final HCA decisions to show that the existence of hearing rights in statute is not merely a theoretical construct. A neutral administrative tribunal—the very arbiter of the substantive rights at issue—has found these rights to exist in statute. The HCA's final decisions are agency statements of authority that the State of Washington agrees these rights already exist.

While the HCA has the legal expertise and administrative agency authority needed to find these rights through statutory analysis, the vulnerable adults living in long-term care facilities do not. Thus, Petitioners have asked the Department to set forth in rule what the HCA has already found to exist in statute. The lack of rulemaking by a separate agency—the Department—leaves vulnerable adults in an untenable position, as described in the Petition. Why the Department refuses to act is unclear.

C. **The Department cites irrelevant case law for its inaccurate position that the rulemaking would exceed its statutory authority; established case law supports the Department's ability to grant the requested rulemaking.**

In the Denial Letter, the Department concludes that the legislature intentionally omitted discharge hearing rights from RCW 70.129, while conceding that RCW 70.129 also includes specific citation to federal laws that expressly include hearing rights.[5] Yet, the Department does not cite legislative history to support this legal conclusion or provide any legal authority to

[4] To the extent that the Department believes it can only promulgate a rule if it within the "scope" of the rights set forth in statute *and* the Department "supports the concept of appeal rights," the Department could grant the requested rulemaking by relying, in part, on the legal analysis set forth in the HCA's final decisions. But, even if the Department disagrees with the HCA's analysis and does not find the right to exist in statute, the Department could still grant the requested rulemaking by relying on the legal authority for rulemaking set forth in the Petition.

[5] Denial Letter at 1, ¶ 2.

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contradict the specific citations to both law and history provided by Petitioners in the Petition memo demonstrating the clear intent to include the same discharge and hearing rights afforded to nursing home residents.[6]

Further, the Department offers no legal authority for why its conclusion is relevant to its claimed lack of rulemaking authority. The Department's unstated premise seems to be that an administrative agency may provide rights in rule *only if* the legislature explicitly included those exact rights in statute. Petitioners are not aware of any such standard. Indeed, courts recognize that administrative agencies actually have authority to "fill in the gaps"—without regard to whether such gaps were intentional or not.[7] To be lawful, the rulemaking need only be reasonably consistent with the relevant statutes. The Department has previously promulgated rules that included rights not specifically included in the relevant statutes.[8]

It is important to note that the three cases cited by the Department have nothing to do with agency rules, let alone the statutory authority needed to promulgate them. Instead, these cases involve *courts* interpreting statutes, as courts regularly do. The cases involve disputes over the meanings of three statutes: a criminal law on child endangerment; a criminal law on theft; and a civil law on employment discrimination. In each case, the courts refused to "read into the statute" what the legislature had left out. This is appropriate *for courts* because courts, unlike the Department, lack rulemaking authority. But these cases are irrelevant to the Petition because Petitioners are not asking a court to read discharge rights into a statute. Instead, Petitioners are asking an administrative agency to engage in rulemaking. As Petitioners explain at length in their

[6] Petition at 10-11.
[7] Petition at 15-16.
[8] Petition at 15, n.51.

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petition, administrative agencies *unlike courts* are permitted to "fill in the gaps" through rulemaking. All that is required is that the agency have express or implied rulemaking authority to effectuate the purposes of the statutes at issue.

The Department's unwillingness to engage in rulemaking appears to stem from a concern about legal exposure. The Department appears to believe that if it were to grant hearing rights by rule, it would be sued successfully for acting outside its statutory authority. Given the solid legal foundation set forth in the Petition and the Department's stated support for administrative appeal rights, the Department would face little, if any, legal exposure if it promulgates the requested rulemaking. In the unlikely event of a lawsuit challenging this rulemaking, the Department would prevail for all the foregoing reasons and the legal authority cited in the Petition.

D. The Department's Denial Letter fails to meet the standard required by the legislature in RCW 34.05.330.

Per RCW 34.05.330(1), "Within sixty days after submission of a petition, the agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320."

The legislature has made it clear that when an agency denies a petition for rulemaking, the agency "shall" state "its reasons for the denial, *specifically addressing the concerns raised by the petitioner.*" In their brief, Petitioners raised numerous concerns, such as:

1. Fairness, consistency, and judicial economy (e.g., inconsistent and unfair holdings within the OAH; waste of time and resources in HCA when the jurisdictional issue is argued in *every* case before the ALJ);

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2. Disparate impacts for residents who do not get an OAH hearing, including costly unlawful detainer hearings for some; discharge with no understanding of rights and no forum for justice for others;

3. Hospital dumping;

4. Transfer trauma;

5. Disparate impact on people of color;

6. Inability of residents to have "least formal means" for resolving disputes as legislature intended; and

7. Debilitating mental, psychological, and physical conditions when residents are forced to move against their will with no forum available to assert their rights.

In its Denial Letter, the Department failed to address even one of these concerns. This mandate in RCW 34.05.330(1)(i) should not be confused with the discretionary directive in subsection (1)(ii). Per subsection (1)(ii), the Department does have discretion "where appropriate" to state "the *alternative means* by which it will address the concerns raised by the petitioner." However, this discretionary language does not apply to the statutory requirement in (1)(i) that the denial letter itself "*specifically address* the concerns raised by petitioner." Thus, the Department's brief reference to working with stakeholders to "explore options" to protect residents does not meet the statutory requirement of subsection (1)(i).

III. CONCLUSION

We ask Governor Inslee to reverse the Department's decision to deny this rulemaking petition. There is clear legal authority to provide vital notice and hearing rights to vulnerable residents of long-term care facilities and for the Department to implement those rights in rule, just as it has done for nursing home residents. Granting this Petition affirms that our government is

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guided by its mission to do what is legally possible to promote resident independence and safety, and to transform lives by advancing equity, diversity, and inclusion.

RESPECTFULLY SUBMITTED in the State of Washington.

DATED this __29th___ day of _December_____, 2022.

By:

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