

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 05-2004-L-1720
)
[APPELLANT'S NAME]) **REVIEW DECISION AND**
) **FINAL AGENCY ORDER**
)
)
)
) Adult Protective Services
Appellant) Case ID #[NUMBER 1]

I. NATURE OF ACTION

1. On April 31, 2004, the Department of Social and Health Services (Department) notified [APPELLANT'S NAME] (Appellant) that it had determined she mentally abused a vulnerable adult. The Appellant objected and requested an administrative hearing. Administrative Law Judge (ALJ) William J. Stewart conducted a hearing and issued an Initial Order on August 12, 2005. The Initial Order affirmed the Department's determination.

2. On August 29, 2005, the Appellant filed a Petition for Review of the Initial Order with the Board of Appeals. The Appellant argued in her petition as follows:

I. Introduction

Appellant [APPELLANT'S NAME], a former employee of [FACILITY 1], asks that the APS finding and the Initial Order issued by the Administrative Law Judge in this matter be reversed. Her request is based on irregularities in the investigation, the lack of consistency in the reports of the witnesses interviewed during the investigation, and the testimony of the witnesses called by [APPELLANT'S NAME] during her hearing. These irregularities prejudiced the Appellant through unreliable testimony and arguably led the APS investigator to reach erroneous factual findings that were unsupported by the witnesses' later testimony. Additionally, the deprivation of Appellant's ability to earn a living in her chosen field on the basis of a "preponderance of the evidence" standard violates Appellant's due process rights guaranteed under the United States Constitution.

Appellant's constitutional arguments were thoroughly briefed and submitted to the ALJ prior to the hearing. Appellant's closing arguments were submitted in writing and provide details of her allegations of irregularities, which are briefly summarized below.

II. Investigation irregularities

Despite the APS investigator, Lance Rickman's, best efforts, there were serious problems with the way the investigation was conducted.

IRREGULARITY 1: Posing leading questions to [VULNERABLE ADULT 1], the alleged victim.

IRREGULARITY 2: Interviewing the AV in the presence of a yet-to-be interviewed fact witness.

IRREGULARITY 3: Interviewing [NAME 1] together with another yet-to-be interviewed fact witness, [NAME 2].

IRREGULARITY 4: Investigator's lack of understanding of the date of the alleged incidents and their timing.

IRREGULARITY 5: Witnesses listed in the report to DSHS do not match witnesses now alleged to be present.

IRREGULARITY 6: Failure to ensure witnesses were capable of accuracy.

IRREGULARITY 7: Failure to examine and/or document allegedly corroborating evidence and details.

Did the witnesses' statements make sense when compared with one another?

Could the witnesses have seen what they claimed?

Did [APPELLANT'S NAME]'s personnel file contain evidence that she had been reprimanded previously?

IRREGULARITY 8: Failure of the Investigator to understand the meaning of the applicable statutes and regulations, which allow for flexibility in the interpretation of the definition of "emotional abuse."

IRREGULARITY 9: Failure of the Investigator to understand whether Appellant was complying with the training she received as a [FACILITY 1] employee.

III. Other inconsistencies in the testimony

The sheer number of inconsistencies in the witnesses' statements between one another and even between their depositions and the hearing is cause for grave concern. Below is a summary of the inconsistencies in the various statements given by the witnesses:

INCONSISTENCY 1: The identities of the alleged witnesses changed over time, as did the dates and time of the alleged incident(s).

INCONSISTENCY 2: [APPELLANT'S NAME] was initially reported to have stated to the AV that her [RELATIVES] did not love her anymore, but her testimony was recanted at the hearing.

INCONSISTENCY 3: [APPELLANT'S NAME]'s alleged behavior in the days before the incident was inconsistently described by various witnesses.

INCONSISTENCY 4: The witnesses have proven themselves to be unreliable in testimony regarding their failure to appear for depositions as subpoenaed.

IV. Conclusion

There are obvious irregularities in the investigation almost too numerous to count, but have nothing to do with the integrity or sincerity of the investigator and everything to do with his inexperience and arguably improper training. There are glaring substantive inconsistencies in the statements given by each of the witnesses at various times, even between their depositions and the hearing. [NAME 1]'s representation of her statement that Appellant told AV that the AV's [RELATIVES] did not love her any longer is the most glaring of them, but there are a host of other examples. In addition, the witnesses have frequently contradicted one another in their allegations. Given the issues [APPELLANT'S NAME] has presented, she respectfully submits that this body has sufficient reason to overturn the Initial Order upholding the APS findings.

3. On September 13, 2005, the Department filed a response to the Appellant's petition for review and argued as follows:

Comes now, the Department of Social and Health Services, Region [NUMBER 2], Home and Community Services (hereinafter "Department"), by and through its Department Representative, Lisa A. Malpass, to submit the Adult Protective Services Response to Appellant's "Petition for Review of Initial Decision." The hearing record and Initial Decision support an Adult Protective Services (APS) substantiated finding of mental abuse of a vulnerable adult pursuant to the Revised Code of Washington 74.34, *et seq.* and Washington Administrative Code 388-71, *et. sec.* First, the Department requests the DSHS Board of Appeals to affirm the Initial Decision in favor of Adult Protective Services, as there is substantial evidence to support the Initial Decision. Second, the Appellant's petition for appeal is insufficient because it fails to identify errors or issues in the Initial Decision that warrant reversal.

I. Procedural history

A hearing on the merit was held on June 28 and 29, 2005, at the [CITY 1] Office of Administrative Hearings. The Department's exhibits 1 through 23 were admitted into evidence and the record. The Department objected to Appellant's exhibits through its Motion in Limine and renewed objections before the closing of the hearing record. Written closing arguments were submitted by the parties to the Office of Administrative Hearings on or before the close of business (and the record) on July 15, 2005. The Department submitted timely its pre-hearing brief and closing brief. On September 7, 2005, the Department received from the DSHS Board of Appeals its "Notice of [Appellant's] Request for Review and Time to Respond." The Department did not receive notice or a copy from Appellant's counsel prior to the DSHS Board of Appeals notice. The Department submits its Response timely.

II. Legal authority

A. Relevant Authority pertaining to Adult Protective Service Investigations

The Washington legislature has determined vulnerable adults may be in particular need of protection from abuse, neglect, abandonment, or exploitation.¹ A vulnerable adult may have health problems that place him or her in a dependent position.² The Department is the state agency responsible for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult.³ The legal authority pertaining to abuse, neglect, financial exploitation, or

¹ RCW 74.34.005, *Schumacher, v Williams*, 107 Wn. App. 793, 467 P.2d 868 (2001)..

² RCW 74.34.005(4).

³ RCW 74.34.005; WAC 388-71.

abandonment of a vulnerable adult is included but not limited to WAC 388-71, *et. seq.*, RCW 74.34, 74.39, and 74.39A. The purpose of Chapter 74.34 is to provide the Department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies for vulnerable adults.⁴ Chapters 34.05 and 74.34 RCW, chapter 388-02 WAC, and the provisions of WAC 388-71 govern any administrative hearing regarding a substantiated APS finding.⁵

B. Standard and Burden of Proof at Hearing

Admission of evidence and findings shall be based upon the reasonable person standard where it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.⁶ The burden of proof in a DSHS Adult Protective Services hearing is preponderance of the evidence standard; more likely than not the events occurred as alleged.⁷ The Administrative Law Judge (ALJ) shall decide if a preponderance of the evidence in the hearing record supports a determination the alleged perpetrator committed an act of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult.⁸ If the ALJ determines there is evidence supporting the preponderance standard the ALJ shall uphold the finding.⁹

C. Standard and Burden of Proof upon Review

In Adult Protective Services cases, the authority of the Board of Appeals (herein Review Judge), like an ALJ, is limited by Department rule. A Review Judge may modify an initial hearing decision only if: (1) irregularities occurred in the proceedings, (2) the findings of fact are unsupported by substantial evidence in the record, (3) there is a need for additional consistent findings of fact based on substantial evidence in the record, (4) there is a need for clarification to implement the decision, or (5) there are errors of law in the conclusions of law.¹⁰

A finding of fact should be included for each material fact necessary to support a conclusion of law.¹¹ Any finding based on the credibility of evidence or demeanor of the witnesses shall be stated in the finding.¹² 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.¹³ Findings may be based on such evidence even if it would be inadmissible in a civil trial.¹⁴

III. Appellant's request for review is insufficient because Appellant's review request does not identify or provide evidence regarding what parts of the Initial Order are in dispute.

⁴ See 74.34.005 Findings; See also WAC 388-02-0110.

⁵ WAC 388-71-01245.

⁶ WAC 388-02-475; RCW 34.05.452; RCW 34.05.461(4).

⁷ WAC 388-02-0485; See also WAC 388-71-1255(1) ("The ALJ shall decide if a preponderance of the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult.")

⁸ WAC 388-71-01255.

⁹ *Id.*

¹⁰ WAC 388-02-0600.

¹¹ RCW 34.05.461(3).

¹² *Id.*

¹³ RCW 34.05.464(4).

¹⁴ RCW 34.05.461(4); See also 34.05.452; *Clausing v. State*, 90 Wn. App. 863, 955 P.2d 394 (1998) *rev. den.* 136 Wn.2d 1020, 969 P.2d 1063.

A party requesting review must clearly identify parts of the initial order with which the party disagrees and evidence to support the party's position.¹⁵ The review request submitted by Appellant fails to cite any irregularities that occurred in the proceeding that would warrant reversal. Appellant fails to identify any findings of fact that are not supported by substantial evidence in the record that would warrant reversal of the Initial Decision. Appellant did not identify the need for additional consistent findings of fact. There is no argument presented on the need for clarification to implement the decision, and there are no articulated or identified errors of law in the conclusions of law by Appellant to support reversal of the Initial Decision.

Appellant fails to identify parts of the initial order with which the party disagrees and fails to identify evidence in support of Appellant's contention there is an error of law. The Department, or the Review Judge, should [not] have to anticipate or speculate the parts to which the Appellant does not agree or argue what evidence strengthens the Appellant's position. The Appellant argues about "investigation irregularities" and failures of witnesses, who are not employees of the Department, "to be unreliable in testimony regarding their failure to appear for depositions as subpoenaed." None of the "irregularities or inconsistencies" cited by Appellant come with any legal references or identification of findings of fact or testimony at hearing.

Nonetheless, the Department argues the ALJ appropriately applied and interpreted the law and the evidence in support of the Department's substantiated finding of mental abuse against the Appellant. The Department argues it is familiar law that the interpretation of a statute by an agency entrusted with its administration is entitled to considerable deference from the court.¹⁶ The Department argues the findings of fact support the conclusions of law, and Appellant's petition for review is without merit.¹⁷

IV. Introductory remarks

[APPELLANT'S NAME] was hired by [FACILITY 1] to support [VULNERABLE ADULT 1] in a supported living program at [FACILITY 1]. At [FACILITY 1] the vulnerable adult lives independently and autonomously with assistance from others to help her to achieve a positive quality of life. The Department argues [APPELLANT'S NAME]'s role in [VULNERABLE ADULT 1]'s home was subordinate to [VULNERABLE ADULT 1] in the respect [APPELLANT'S NAME] was there to help [VULNERABLE ADULT 1] live her life. [VULNERABLE ADULT 1] is entitled to autonomous living, free from unreasonable restraint or restrictions. Just as one would hire a housekeeper or a nanny, [APPELLANT'S NAME]'s professional role was to serve the interests of the client. A reasonable person would not expect a housekeeper or nanny to control and direct their life and their emotions the way [APPELLANT'S NAME] attempted to control or modify [VULNERABLE ADULT 1]'s life in the supported living program. The Department argues [APPELLANT'S NAME] strived to control [VULNERABLE ADULT 1] by using methods and "punishments" that were not authorized. The Department argues a reasonable person would consider [APPELLANT'S NAME]'s acts mentally abusive to [VULNERABLE ADULT 1].

¹⁵ WAC 388-02-0575 "What must a party include in the review request?" See also WAC 388-71-01265 that states: "If the alleged perpetrator or the department disagrees with the ALJ's decision, either party may challenge this decision by filing a petition for review with the department's board of appeals **consistent with the procedure contained in chapter 34.05 RCW and chapter 388-02 WAC.** [emphasis added]"

¹⁶ *Moses v. Dep't of Soc. & Health Servs.*, 90 Wn. 2d 271, 274, 581 P.2d 152 (1978) (the court is the final authority on statutory construction and need not approve regulations or decisions inconsistent with a statute or policy underlying the statute. See also *St. Francis Extended Health Care v. Dep't of Soc. and Health Servs., State of Wash.*, 115 Wn. 2d 690, 706-07, 801 P.2d 212 (1990) (court held substantial weight and deference to an agency's interpretation of the statutes and regulations it administers.)

¹⁷ Also, it may be that procedural or investigative issues raised by Appellant may fall outside the subject matter jurisdiction of this tribunal.

[APPELLANT'S NAME]'s controlling or dictatorial behavior toward [VULNERABLE ADULT 1] during and before March 2004 surely exasperated the anxiousness

[VULNERABLE ADULT 1] felt toward [APPELLANT'S NAME] and set the stage repeatedly for occurrences such as those occurring in March 2004.

The statute does not expect a person with a duty of care towards a vulnerable adult to have the patience and/or compassion of a saint, but the statute proscribes the behavior exhibited by the Appellant toward [VULNERABLE ADULT 1]. Thus, [APPELLANT'S NAME] should be held accountable for her acts toward the vulnerable adult, which constitute mental abuse.

V. Summary of argument

The Department incorporates its Pre-Hearing Brief and Closing Brief as support of its Response to Appellant's petition for review.

A. [VULNERABLE ADULT 1] is a vulnerable adult within the meaning of RCW 74.34.020(13)(c) because:

- a. [VULNERABLE ADULT 1] has a developmental disability as defined under RCW 71A.10.020.
 - i. See Initial Decision Findings of Fact 1 and 2.

B. The Administrative Law Judge should hold there is a preponderance of evidence Appellant mentally abused a vulnerable adult because the evidence shows more likely than not:

- a. Appellant was disparaging toward [VULNERABLE ADULT 1] to [VULNERABLE ADULT 1] and others, including but not limited to inappropriate restrictions, calling her names, and negative assumptions about her [RELATIVES].
 - i. See Testimony of [NAME 4] and [NAME 9], Initial Decision Finding of Fact 27 and Conclusion of Law 8 excerpted "*The importance of this evidence is that it is corroborative of Appellant's other acts of mental abuse toward [VULNERABLE ADULT 1] and of her general attitude and philosophy with respect to dealing with [VULNERABLE ADULT 1]'s difficult and sometimes dangerous behaviors.*"
 - ii. See Appellant's own statement of calling [VULNERABLE ADULT 1] a "turd."
 - iii. See Initial Decision Finding of Fact 22.
- b. Witnesses observed Appellant point her finger at [VULNERABLE ADULT 1] while standing over her and speaking to [VULNERABLE ADULT 1] harshly in front of others.
 - i. See Initial Decision Finding of Fact 10: "*Appellant pointed her finger at [VULNERABLE ADULT 1] while speaking loudly to her.*"

[VULNERABLE ADULT 1] was visibly hurt after Appellant made these statements.” See also Testimony of [NAME 5] and [NAME 1].

ii. See Initial Finding of Fact 14 below at (d)(iii).

iii. See Initial Decision Finding of Fact 28: *“One Monday prior to the March 17, 2004, incident, [NAME 2] was in her office with the door closed talking to [VULNERABLE ADULT 1] during a session. Appellant interrupted the session, came into [NAME 2]’s office, and began speaking sternly to [VULNERABLE ADULT 1]. Appellant was upset, [Appellant] adopted an aggressive stance toward [VULNERABLE ADULT 1], leaned over [VULNERABLE ADULT 1] while she was seated, and shook her finger at [VULNERABLE ADULT 1] while speaking. [VULNERABLE ADULT 1] was not acting out or having a behavior at that time. [NAME 2] did not document this incident and did not report it to APS because she believed she curtailed the incident before it became abusive.*

iv. See Department’s Exhibit 10 identified in Initial Decision Finding of Fact 17.

c. Appellant devised “client agreement(s)” that were unreasonable restrictive measures without authority designed as punishment for [VULNERABLE ADULT 1]’s behaviors related to her developmental disability and violate DDD policy.

i. See Initial Decision Finding of Fact 25: *“For this reason, Appellant executed a Client Agreement with [VULNERABLE ADULT 1] on October 2, 2003. (Exhibit 22). It states: [VULNERABLE ADULT 1] agrees to the following: (1) Sleeping through the night with only 1 visit to the bathroom at night. (2) Participating in activities with the programs without pouting or having a behavior. (3) Eliminating behaviors that require physical intervention or include verbal abuse of staff or roommates. If [VULNERABLE ADULT 1] follows through with this agreement, she can go with staff and other clients next Tuesday – 10/7 – into [CITY 1] and cash her checks. (This is contingent upon having two clients and two staff available.) If she does not, the trip to [CITY 1] will wait until she does comply. Further after cashing the checks, [VULNERABLE ADULT 1] agrees to maintain this agreement for shopping on Saturday, 1/11 (sic). If she fails to do this, she will have to wait until the next Saturday. The program will honor this agreement for the entirety of October.*

ii. See Initial Decision Finding of Fact 26: *“This agreement violates DDD policies 5.06, 5.13, 5.15 (Exhibits 13, 14, 21). The “consequences” mentioned therein constitute punishment within the meaning of RCW 74.34.020(2)(c).”*

iii. See also testimony of Appellant’s witness, [NAME 3]¹⁸ [who] corroborated the inappropriateness and violation(s) of the “client

¹⁸ Initial Decision lists “[NAME 3A]” in error. The witness was identified as [NAME 3].

agreement executed by Appellant.”

iv. Testimony at hearing also showed such agreements were not authorized by Appellant’s employer [FACILITY 1].

v. See Conclusion of Law 8: *“The terms of the behavioral contract Appellant and [VULNERABLE ADULT 1] executed included consequences and punishment that, if invoked, excluded [VULNERABLE ADULT 1] from her regular recreational activities and friends. RCW 74.34.020(2)(c). The contract prohibited [VULNERABLE ADULT 1] from doing acts that she had a right to do in her own home, such as visiting the bathroom more frequently than once per night. Execution of this contract constitutes mental abuse and is a violation of several DDD policies.”*

d. The Department’s witnesses were credible.

i. See Initial Decision Finding of Facts 29 through 31.

e. Appellant’s willful acts constitute mental abuse.

i. See Finding of Fact 10: *“Appellant appeared to be very angry and responded to [VULNERABLE ADULT 1] that this is where she lives, she cannot go home, she has nowhere else to go, and she cannot live at home because her [RELATIVES] do not want her there.”*

ii. See Initial Decision Finding of Fact 13: *“The following Monday, [VULNERABLE ADULT 1] came to [NAME 2] and reported the incident. While relating the facts, [VULNERABLE ADULT 1] again began to cry.*

iii. See Initial Decision Finding of Fact 14: *“[VULNERABLE ADULT 1] reported that [APPELLANT’S NAME] had said some things that hurt [VULNERABLE ADULT 1]’s feelings: ‘She said mean things to me. She hurt my feelings. [APPELLANT’S NAME] said nobody wants me or love[s] me anymore. [APPELLANT’S NAME] said I can’t live anywhere else and I can’t do anything because I ruin all the outings for everybody. [APPELLANT’S NAME] said if I don’t behave I can’t do anything anymore.’ [VULNERABLE ADULT 1] also reported to [NAME 2]: I want to forget. I hope she won’t say any more mean things.” The report mentions that Appellant’s physical stance was intimidating and she repeatedly pointed her finger at [VULNERABLE ADULT 1].*

iv. See Conclusion of Law 7: *“In this case, Appellant’s actions of speaking harshly while leaning over [VULNERABLE ADULT 1] and pointing her finger at her on two occasions, constitutes willful action Appellant should have known could cause a negative outcome. [VULNERABLE ADULT 1] was upset, angry, and intimidated by these two incidents, both of which constitute mental abuse.”*

v. Conclusion of Law 10 and 11 support the Department meeting its burden of proof by a preponderance of the evidence that Appellant abused a vulnerable adult.

VI. Appellant mentally abused [VULNERABLE ADULT 1], a vulnerable adult

The Department has incorporated its closing argument with slight modification as support to affirm the Initial Decision.

Mental Abuse: RCW 74.34.020(2)(c) defines mental abuse:

Statutory Definition of Abuse

(2) Abuse means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse also includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(c) Mental abuse means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridicule, intimidating, yelling, or swearing.

RCW 74.34.020(2)(c) [emphasis added].

Appellant's actions were willful. Willful means the non-accidental action or inaction by an alleged perpetrator that she knew or reasonably should have known could cause harm, injury, or a negative outcome.¹⁹ To willfully commit an act is to do so voluntarily; knowingly; or deliberately, not unintentionally or accidentally.²⁰

VII. Discussion

[APPELLANT'S NAME] told [VULNERABLE ADULT 1] her [RELATIVES] did not want her around anymore. [APPELLANT'S NAME] told [VULNERABLE ADULT 1] she acts like a two-year old. [APPELLANT'S NAME] told [VULNERABLE ADULT 1] she was a brat. [APPELLANT'S NAME] called [VULNERABLE ADULT 1] a "turd." [APPELLANT'S NAME] told [VULNERABLE ADULT 1] nobody loves her. [APPELLANT'S NAME] told [VULNERABLE ADULT 1] reality is you are stuck here and nobody will take you. [APPELLANT'S NAME] would position herself over [VULNERABLE ADULT 1] with an intimidating stance and point her finger at her. [APPELLANT'S NAME] told [VULNERABLE ADULT 1] she has ruined outings.²¹ [APPELLANT'S NAME] would make [VULNERABLE ADULT 1] enter into "Client Agreements" that were not authorized under DDD policy guidelines without proscribed approval or known by her employer or [VULNERABLE ADULT

¹⁹ WAC 388-71-0105.

²⁰ BLACK'S LAW DICTIONARY 1593 (7th ed. 1999) defines "Willful" as "voluntary and intentional, but not necessarily malicious."

²¹ Department Exhibit 20, page 6, 4/8/05 "I have told her that she has ruined outings, she's reminded her she ruined an outing." Interview with APS investigator, Lance Rickman, [APPELLANT'S NAME] adds, "I told her that she is difficult to place from time to time" and "maybe I need to be more careful with the context - probably."

1]'s guardian.²² The client agreement purports to restrict [VULNERABLE ADULT 1] from visiting the bathroom more than 1 time per night, participate in activities, and potentially deny access to her own money.

The Department witnesses [NAME 1], [NAME 2], [NAME 4], and [NAME 5] provided testimony of their personal observations of acts made by Appellant toward [VULNERABLE ADULT 1]. [APPELLANT'S NAME] admits when "DSHS investigated the incident, and during their interview with [APPELLANT'S NAME], asked her to confirm several statements to Ms. Doe [[VULNERABLE ADULT 1]]. [APPELLANT'S NAME] confirmed making the statements, but could not adequately communicate the context in which the statements were made."²³ [APPELLANT'S NAME] denies telling [VULNERABLE ADULT 1] her [RELATIVES] did not love her.²⁴ However, [NAME 2] testified [APPELLANT'S NAME] admitted to her she made the statement but did not consider it abusive. [APPELLANT'S NAME] instead told [NAME 2] she was being manipulated by [VULNERABLE ADULT 1].²⁵ [APPELLANT'S NAME] contends there is an appropriate way to tell a vulnerable adult her [RELATIVES] does not love her or want her around. The Department disagrees.

In opening argument [APPELLANT'S NAME] stated she had no reason to deny what [NAME 2] said because [APPELLANT'S NAME] alleges [VULNERABLE ADULT 1] lies. Yet in testimony [APPELLANT'S NAME] denied [NAME 2] read or discussed the allegations made by [VULNERABLE ADULT 1] and others. The Department witnesses contend [VULNERABLE ADULT 1] does not have a reputation for lying. [APPELLANT'S NAME] states in order to have [VULNERABLE ADULT 1] understand her own "aberrant behavior" and its "consequences" [APPELLANT'S NAME] often explained to [VULNERABLE ADULT 1] her [RELATIVES] requested Ms. Doe not be allowed to live near them now, that no other facility could take her at this point because Ms. Doe required supervision that other facilities could not offer, and that "Ms. Doe could not go on outings without extra supervision because her behaviors were so disruptive."²⁶ Again, the Department does not see how it is beneficial or positive to disparage the vulnerable adult's behaviors that are attributable to her developmental disability and infer the consequences of those behaviors are being sequestered from [RELATIVES] or outings. [VULNERABLE ADULT 1], as an adopted child, was very close with her [RELATIVES] and her [RELATIVES] attentive to her as well. The Department's witness [NAME 4] testified to the relationship between [VULNERABLE ADULT 1] and her [RELATIVES]. A reasonable person would infer [APPELLANT'S NAME] was attempting to persuade [VULNERABLE ADULT 1] if her behaviors changed her living arrangements may change, which is not proper or a realistic expectation. [APPELLANT'S NAME] took [VULNERABLE ADULT 1] as her personal undertaking disregarding the emotions and feelings of [VULNERABLE ADULT 1].

On May 20, 2005, [APPELLANT'S NAME] denied she ever entered into a contract with the Alleged Victim [VULNERABLE ADULT 1] and maintains that she only signed one contract with a resident at [FACILITY 1].²⁷ Yet, [APPELLANT'S NAME] did not deny in testimony she was the author of the Client Agreement dated October 2, 2003, which lists several restrictions and the punishment that would follow. One must look at the difference between a punishment and a consequence. "Punishment" is a sanction, such as a fine, penalty, confinement, or loss of property, right or privilege assessed against a person who has violated the law,²⁸ whereas a "consequence" is a

²² Dept. Ex. 22.

²³ Dept. Ex. 5, pg. 3, para. 7.

²⁴ Id. at para. 2.

²⁵ Id. at para. 3.

²⁶ Dept. Ex. 5, pg. 2-3.

²⁷ See Department Exhibit 2, pg. 2, 4/6/04; See also Testimony of [NAME 2].

²⁸ BLACK'S LAW DICTIONARY 1247-48 (7th ed. 1999) also defines "Excessive punishment" as punishment that is

result or effect of one's actions. Appellant's expert witness [NAME 3] reviewed the "client agreement" and stated it appeared it violated DDD policy for its clients, especially as it relates to withholding the client's access to their own funds. The Department argues it also restricts recreational activity and use of one's own home. [APPELLANT'S NAME]'s own counsel asked in redirect of [APPELLANT'S NAME], "was the *threatened punishment* executed?"

The Department agrees the client agreement was a form of threatened punishment on the vulnerable adult and constituted mental abuse because it seeks to intimidate, is coercive, control oriented, and includes but is not limited to, a direct violation of DDD policy and procedure.²⁹ The Department argues [APPELLANT'S NAME] attempts to punish [VULNERABLE ADULT 1] by withholding funds and activities³⁰ would not be a natural consequence or result of [VULNERABLE ADULT 1] actions except as perceived by [APPELLANT'S NAME]. Unfortunately, we do not know how many more of these [APPELLANT'S NAME] entered into with [VULNERABLE ADULT 1] or other clients in Supported Living Programs. The punishment used by [APPELLANT'S NAME] constitutes mental abuse.

[APPELLANT'S NAME]'s testimony only offers the excuse that someone else made her do it, her acts were misinterpreted, or those who testify she did do it were biased or retaliating toward her. In her opening argument, [APPELLANT'S NAME] proffered she was not fond of [FACILITY 1] management and she allegedly "did not fit in." The Department's witnesses did corroborate [APPELLANT'S NAME] continually disparaged vulnerable adults, other staff, and management in front of the clients and other [FACILITY 1] employees, which made her somewhat unpopular. [APPELLANT'S NAME] was known to be aggressive and crass, opting to "do things her own way" and "prove she could do a better job" than other staff like [NAME 4], especially when it came to [VULNERABLE ADULT 1]. [NAME 4] testified to her personal observations of [APPELLANT'S NAME]'s malevolence toward [VULNERABLE ADULT 1].

[APPELLANT'S NAME]'s witness, [NAME 6], knew of [APPELLANT'S NAME]'s client agreements but testified [APPELLANT'S NAME] was the only person who told her they were authorized. [APPELLANT'S NAME] was [NAME 6]'s supervisor. [NAME 6] testified by phone and in declaration [APPELLANT'S NAME]'s observed behavior was restrictive toward [VULNERABLE ADULT 1] and the agreements "harsh." (See Dept. Ex. 16). [NAME 7] testified they were re-trained after [APPELLANT'S NAME] was suspended [and] staff supervised by [APPELLANT'S NAME] were too restrictive towards clients in general. [NAME 8]'s testimony was irrelevant in its entirety, focusing on her own [CHILD] who was not at issue in the hearing, but she voiced an obvious disdain for [FACILITY 1] in general. [NAME 8]'s testimony is obviously biased and prejudicial. [NAME 8] could only recall seeing [APPELLANT'S NAME] and [VULNERABLE ADULT 1] together approximately twice for a short period of time.

[APPELLANT'S NAME] claimed [VULNERABLE ADULT 1] was a difficult or challenging client who

not justified by the gravity of the offense or the defendant's criminal record." "Reformatory punishment" is punishment the purpose of which is to change the character of the offender.

²⁹ See DDD Policy 5.06 "Client Rights" (Dept. Ex. 13) pg.2, "B." Freedom from unnecessary medications, restraints, and restrictions;" See also DDD Policy 5.13 "Protection from Abuse" (Dept. Ex. 14) pg.9, "A." "Not allowing the client to eat, drink, or care for physical needs such as elimination;" See also Pg. 10, "C." threatening to or withholding a client's personal belongings or activities" under Mental Abuse.

³⁰ See Department exhibit 21, DDD Policy 5.15 – "Use of Restrictive Procedures" page 5, number 11 where restrictive procedures are permitted only by exception to policy (ETP). Testimony revealed no exception to policy existed for [VULNERABLE ADULT 1] and Appellant admitted no ETP existed for [VULNERABLE ADULT 1] and [VULNERABLE ADULT 1] not under Community Protective Program. Procedures used here are considered "severely intrusive." Policy 5.15, g. 5 (F)(11) states, "not allowing person to attend activities, at home or in the community, as a disciplinary consequence," requires approval of division director.

eloped frequently and needed to be controlled. [APPELLANT'S NAME] claimed she restricted [VULNERABLE ADULT 1] to using the restroom in her own home because if she awoke more than once during the night [VULNERABLE ADULT 1] would create a disturbance for staff that may be sleeping. However, her own expert [NAME 3] stated eloping can be a sign of a developmentally disabled person, like [VULNERABLE ADULT 1], feeling emotionally unsafe. [NAME 3] also stated staff needs are subordinate to the client and such a restriction is unreasonable. The Department contends [VULNERABLE ADULT 1] felt emotionally unsafe when [APPELLANT'S NAME] was around. [NAME 3] was only offered by Appellant police reports and the APS investigative report to make conclusions about [VULNERABLE ADULT 1] during Appellant's direct examination. However, the Department offered specific examples for cross examination as it pertained to the facts in the case.

[APPELLANT'S NAME] testified she is the victim and states she is a victim of a crime.³¹ [APPELLANT'S NAME] argues the investigation was "tainted" and "incomplete" and [FACILITY 1] is biased and retaliating toward her because she threatened to report them to regulatory agencies for their conduct.³² This claim is without merit. Yet, [APPELLANT'S NAME] testified that in the last 15 months since the substantiated finding she has not reported any incidents regarding [FACILITY 1] or its employees. [APPELLANT'S NAME] admitted she did not inform [FACILITY 1] upon her application for employment the references she identified as "supervisor" and those whom could give a business reference on her employment application were in reality ex-[SPOUSES] and/or [PARTNERS].³³ Acts or behaviors like this, plus her conflicting testimony, supports the Department's contention [APPELLANT'S NAME]'s version of the events are usually contradictory in nature and without merit.

The Department supported its finding of mental abuse by presenting witnesses with personal knowledge and documentary evidence supporting those acts against [VULNERABLE ADULT 1] which constituted a willful pattern of intimidation, control, and punishment constituting mental abuse pursuant to statutory definitions. The Department maintains [APPELLANT'S NAME]'s action was of a continuing nature and not limited to March 2004. [APPELLANT'S NAME] was trained in positive behavior techniques and respecting the dignity of clients from [FACILITY 1] trainer [NAME 9]. Nonetheless, [NAME 9] provided telephone testimony and a declaration detailing the "disgust and exasperation" [APPELLANT'S NAME] would display regarding [VULNERABLE ADULT 1] and how [APPELLANT'S NAME]'s relationships with co-workers was wrought with conflict. [APPELLANT'S NAME] ignored positive behavior techniques and respect for clients like [VULNERABLE ADULT 1].

VIII. Department's Response to Appellant's Objection to Burden of Proof Standard.

The Department presented argument within its closing argument in rebuttal to Appellant's alleged constitutional argument using the preponderance of evidence standard.

IX. Conclusion

Appellant does not deny she made the statements alleged to [VULNERABLE ADULT 1]. [APPELLANT'S NAME] fails to understand how these statements result in a negative outcome or

³¹ Department's Exhibit 5, page 5, last paragraph.

³² Department's Exhibit 5, page 5 states: "company was misappropriating client funds, denying client's right to access the community, lying to Case Managers regarding activities, restricting client's spending their own money, not following therapist's recommendation for client care, and restricting client's interactions with one another for no apparent reason than the staff's convenience.

³³ See incorporated in 132 pages of Appellant's exhibit C.

are considered abusive. Alarming, [APPELLANT'S NAME] admitted she speaks to other vulnerable adults the same way. Yet these statements or behaviors delivered to anyone else who attended the hearing would be considered hurtful and unreasonable. Any restriction outlined in the "client agreement" is simply unrealistic, unreasonable, is against DDD policy as [APPELLANT'S NAME] acknowledged, and designed as punishment. Statements made to [VULNERABLE ADULT 1] by [APPELLANT'S NAME] after [VULNERABLE ADULT 1] had de-escalated in an incident in March 2004 were nothing more than emotional punishment.

Based on the foregoing reasons, the Department respectfully requests the Review Judge uphold the Department's substantiated finding of mental abuse. The evidence and testimony shows there is a preponderance of evidence that more likely than not, Appellant mentally abused [VULNERABLE ADULT 1].

II. FINDINGS OF FACT

1. [VULNERABLE ADULT 1] is a 41-year old female who resided at [FACILITY 1], a Supported Living Facility in [CITY 2], Washington, during the relevant time period herein.

[VULNERABLE ADULT 1] is a client of the Department's Division of Developmental Disabilities (DDD). [FACILITY 1] supplies the staff to support DDD's clients, who live as independently as possible on their own.

2. [VULNERABLE ADULT 1]'s diagnoses include bipolar disorder and post-traumatic stress disorder on Axis I and mild retardation and borderline personality traits on Axis II. She is considered to be high-functioning, is able to communicate, and has relatively good cognitive abilities.

3. [VULNERABLE ADULT 1]'s most serious behavior is her tendency to frequently elope (leave the facility or an outing without approval or supervision). While doing so, she often endangers herself and staff members who engage in attempting to retrieve her. On one occasion, the Appellant pulled [VULNERABLE ADULT 1] out of the way of a moving vehicle.

[VULNERABLE ADULT 1] often eloped to a nearby store on a busy highway. [VULNERABLE ADULT 1] sometimes behaved in a bizarre manner during her elopements, including knocking on strangers' doors. She sometimes removed her clothing during these incidents. For these reasons, [VULNERABLE ADULT 1] resided in a community protection program home at [FACILITY 1] that has alarms on the doors and windows.

4. [VULNERABLE ADULT 1] was focused on returning home to live with her [RELATIVES]. She had a history of elopements and problems in other facilities as well and was considered difficult to place. For that reason, she was on respite status at [FACILITY 1], and another placement closer to her [RELATIVES] was being sought.

5. The Appellant was the program manager of [VULNERABLE ADULT 1]'s program and of one other client's program.

6. On March 17, 2004, [VULNERABLE ADULT 1] removed the alarms from her downstairs bedroom windows. Fearing an imminent elopement, the staff wanted her to go upstairs to the living room where she could be supervised. [VULNERABLE ADULT 1] refused to do so and stated she was leaving the facility. The Appellant was present and responded to the situation with [NAME 10] and [NAME 1], the other staff members. They began to forcibly carry [VULNERABLE ADULT 1] upstairs because she was struggling with them. [NAME 10] suffered a head injury while doing so.

7. [NAME 2], the Appellant's supervisor, was present but did not physically assist with the task of moving [VULNERABLE ADULT 1] upstairs. After the injury, she called [NAME 5] to help the Appellant and [NAME 1] with [VULNERABLE ADULT 1] and then took [NAME 10] to receive medical attention.

8. The staff members were successful in removing [VULNERABLE ADULT 1] upstairs, where she began to de-escalate. [VULNERABLE ADULT 1] was crying and stated she hated it there and wished to go home. This statement was not unusual for her.

9. The staff members were also frustrated and upset. The Appellant appeared to be very angry, and she responded to [VULNERABLE ADULT 1] by telling her that this is where she lives, she cannot go home, she has nowhere else to go, and she cannot live at home because her [RELATIVES] do not want her there. The Appellant pointed her finger at [VULNERABLE ADULT 1] while speaking loudly to her. [VULNERABLE ADULT 1] was visibly hurt after the Appellant made these statements. [NAME 2] did not witness this incident because she had already left the

premises to take [NAME 10] to receive medical attention.

10. After [VULNERABLE ADULT 1] calmed down, the Appellant determined that her room should be moved upstairs because of the risk of her elopement. The Appellant and [NAME 1] brought [VULNERABLE ADULT 1]'s belongings upstairs to the living room. [NAME 1] began to place [VULNERABLE ADULT 1]'s belongings in another upstairs bedroom, but the Appellant told her not to do so and that [VULNERABLE ADULT 1] must put her belongings away herself. These included her bed, mattress, and dressers, which were too heavy for [VULNERABLE ADULT 1] to move herself.

11. [NAME 1] later told [NAME 2] about the incident.

12. The following Monday, [VULNERABLE ADULT 1] came to [NAME 2] and reported the incident. While relating the facts, [VULNERABLE ADULT 1] began to cry.

13. [NAME 2] drafted an incident report on March 26, 2004. It states: [VULNERABLE ADULT 1] reported that [APPELLANT'S NAME] had said some things that hurt [VULNERABLE ADULT 1]'s feelings: "She said mean things to me. She hurt my feelings. [APPELLANT'S NAME] said nobody wants me or love[s] me anymore. [APPELLANT'S NAME] said I can't live anywhere else and I can't do anything because I ruin all the outings for everybody. [APPELLANT'S NAME] said if I don't behave I can't do anything anymore." [VULNERABLE ADULT 1] also reported to [NAME 2]: "I want to forget. I hope she won't say any more mean things." The report mentions that Appellant's physical stance was intimidating and that she repeatedly pointed her finger at [VULNERABLE ADULT 1].

14. On March 26, 2004, [NAME 2] reported the incident to the Department's Adult Protective Services (APS). The referral was assigned to Lance Rickman, APS investigator. On April 5, 2004, he began investigating the matter, discovered additional facts discussed below, and determined the incident should be classified as "substantiated" for mental abuse.

15. On April 7, 2004, [NAME 1] wrote a report for the owner of [FACILITY 1] at the direction of Human Resources and described the incident that occurred on March 17, 2004.

16. The Appellant was suspended and eventually terminated from her employment. Thereafter, [VULNERABLE ADULT 1]'s behavior changed: she was more relaxed and comfortable in her home. She still escaped from the facility and on outings, but such behavior was less frequent than before.

17. On April 20, 2004, the Department served the Appellant with a written notice by regular and certified mail. This notice states in part:

The Department of Social and Health Services' (DSHS) Adult Protective Services (APS) program recently investigated a report of possible mistreatment of a vulnerable adult (Case ID# [NUMBER 1]). Based on this investigation, APS has determined that you mentally abused a vulnerable adult. ...

During the month of April 2004, APS investigated allegations of incidents that happened in the month of March 2004. Based on the information received, it is more likely than not that these incidents occurred.

These actions meet the definition of mental abuse in RCW 74.34.020....

18. On May 13, 2004, the Appellant filed a request for an administrative hearing.

19. On June 27, 2004, prior to the commencement of the hearing, the Department amended its notice. This amended notice stated:

Pursuant to WAC 388-02-0260, the Department of Social and [Health] Services hereby amends the HCP APS Notification of Initial Substantiated finding letter dated April 13, 2004, [to] read:

During the month of April 2004, APS investigated allegation of incidents that happened in the month of March 2004. Based on the information received, it is more likely than not the incident in March occurred. However, there is reason to believe your acts of abusive behavior toward the vulnerable adult is [sic] not solely contained in the month of March 2004. There is evidence to suggest an escalation of acts by you that include both verbal and non-verbal acts of hostility and intimidation directed at the vulnerable adult.

This amendment is made to match the evidence and facts presented during the hearing. A copy of this amended notice was served on all parties by fax, with the original being mailed on the same day of June 27, 2005.

20. Several witnesses testified credibly that the Appellant was "focused" on [VULNERABLE ADULT 1]'s behaviors, and that the Appellant did not treat other residents in the same strict manner. The Appellant told several persons that she believed [VULNERABLE ADULT

1] endangered herself and others by her eloping behaviors and that [VULNERABLE ADULT 1] needed to be treated more firmly than was the practice of the other staff.

21. The Appellant on several occasions spoke to [NAME 9], a [FACILITY 1] employee who trains and orients new [FACILITY 1] staff, with disgust, disrespect, and exasperation regarding [VULNERABLE ADULT 1]. He also mentions the word “scorn” in his declaration. There is no evidence that [VULNERABLE ADULT 1] knew of these conversations.

22. Another of [VULNERABLE ADULT 1]’s behaviors with which the Appellant took issue is [VULNERABLE ADULT 1]’s propensity to stay up late at night or arise several times during the night to go to the bathroom or to do household chores. This caused the alarm to activate, awaking staff and other residents. It was then necessary for staff to supervise [VULNERABLE ADULT 1] if she chose to stay up.

23. For this reason, the Appellant executed a Client Agreement with [VULNERABLE ADULT 1] on October 2, 2003. This agreement states:

[VULNERABLE ADULT 1] agrees to the following:

- (1) Sleeping through the night with only 1 visit to the bathroom a night.
- (2) Participating in activities with the programs without pouting or having a behavior.
- (3) Eliminating behaviors that require physical intervention or include verbal abuse of staff or roommates.

If [VULNERABLE ADULT 1] follows through with this agreement, she can go with staff and other clients next Tuesday – 10/7 – into [CITY 1] and cash her checks. (This is contingent upon having two clients and two staff available.) If she does not, the trip to [CITY 1] will wait until she does comply.

Further, after cashing the checks, [VULNERABLE ADULT 1] agrees to maintain this agreement for shopping on Saturday, 1/11 [sic]. If she fails to do this, she will have to wait until the next Saturday. The program will honor this agreement for the entirety of October.

24. On one occasion in the summer of 2003, the Appellant’s program and [NAME 4]’s program had planned a barbecue together. The Appellant called [NAME 4] and suggested [VULNERABLE ADULT 1] that should be left behind with a caregiver because of her behavior at such outings and that the other clients should go to the barbecue as planned. [NAME

4] was uncomfortable with this suggestion, knowing [VULNERABLE ADULT 1] would be hurt if left behind, so she cancelled the barbecue and her program went to the park instead. There is no evidence [VULNERABLE ADULT 1] knew of the Appellant's plan to exclude her from the barbecue.

25. One Monday prior to the March 17, 2004, incident, [NAME 2] was in her office with the door closed talking to [VULNERABLE ADULT 1] during a session. The Appellant interrupted the session, came into [NAME 2]'s office, and began to speak sternly to [VULNERABLE ADULT 1]. The Appellant was upset, adopted an aggressive stance toward [VULNERABLE ADULT 1], leaned over [VULNERABLE ADULT 1] while she was seated, and shook her finger at [VULNERABLE ADULT 1] while speaking. [VULNERABLE ADULT 1] was not having a behavior or acting out at that time. [NAME 2] did not document this incident and did not report it to APS because she believed she had curtailed the incident before it became abusive.

26. On May 1, 2005, [NAME 1] was promoted to the Appellant's position. Notwithstanding, her testimony is credible. [NAME 1] did not fabricate her story of the March 17th incident to gain the promotion or because of conflicts in the workplace with the Appellant.

27. [NAME 9]'s and [NAME 4]'s testimony is credible. Neither was embroiled in the employment dispute between the Appellant and [FACILITY 1]. [NAME 9] intentionally avoided involvement in the dispute. [NAME 4] is no longer employed at [FACILITY 1] and had nothing to gain by perjuring herself.

28. [NAME 2]'s testimony is credible. [NAME 2] did not fabricate her story of the incident in her office because of conflicts in the workplace with the Appellant.

29. The Appellant did not intend to mentally abuse [VULNERABLE ADULT 1]. She believed the other staff members were too lenient with [VULNERABLE ADULT 1] and that she could do a better job of handling [VULNERABLE ADULT 1]'s behaviors.

[INTENTIONALLY LEFT BLANK]

III. CONCLUSIONS OF LAW

Procedure on Review

1. The Appellant's petition for review was timely filed and is otherwise proper. Jurisdiction exists for the undersigned Review Judge to review the Initial Order and to enter the final agency review decision and order in this matter. RCW 34.05.464(4).
2. The authority of the undersigned to modify an initial hearing decision in APS cases has been limited by Department rule. WAC 388-02-0600(2). The undersigned may modify an initial hearing decision only when irregularities have occurred in the proceedings, when the findings of fact are unsupported by substantial evidence in the record, when there is a need for additional consistent findings of fact based upon substantial evidence in the record, when there is a need for clarification in order to implement the decision, or when there are errors of law in the conclusions of law.
3. The undersigned is required to give due regard to the ALJ's ability to observe the witnesses. RCW 34.05.464(4).
4. ALJs and Review Judges must first apply the Department's rules adopted in the Washington Administrative Code (WAC). If no Department rule applies, then the ALJ and the Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington constitutions, statutes, regulations, and court decisions. WAC 388-02-0220(1) and (2). Neither an ALJ nor a Review Judge may decide that a Department rule is invalid or unenforceable. WAC 388-02-0225(1).

The Department's Notice

5. In its opening argument, the Department stated, "The evidence in this case will show that [APPELLANT'S NAME] mentally abused and mistreated a vulnerable adult ... in March of 2004 and consistently over a period of time prior to the investigation by Adult Protective Services." Before the hearing commenced, the Department amended its notice to state in part: "There is reason to believe your acts of abusive behavior toward the vulnerable

adult is [sic] not solely contained in the month of March 2004. There is evidence to suggest an escalation of acts by you that include both verbal and non-verbal acts of hostility and intimidation directed at the vulnerable adult. This amendment is made to match the evidence and facts presented during the hearing.” The ALJ allowed this amendment. However, the Department’s attempt to add additional, unspecified instances of when the Appellant allegedly mentally abused [VULNERABLE ADULT 1] do not meet the notice requirements set out in *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021 (1970).

6. It is a basic tenant of due process that a defendant/appellant be given prior and adequate notice before final actions are taken by the government against that party. “Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.” *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021 (1970). State and federal published appellate case law is replete in support of this commonly recognized principle, and such case law need not be cited further here. The notice need not be a fully detailed account of all incidents and actions relied upon by the Department to substantiate its finding of abuse. However, the notice needs to be specific enough to allow the Appellant prior adequate notice to prepare a defense. The Department’s language in its amended notice that, “There is evidence to suggest an escalation of acts by you that include both verbal and non-verbal acts of hostility and intimidation directed at the vulnerable adult” is inadequate to notify the Appellant that the Department has concluded that her conduct in entering into a Client Agreement with [VULNERABLE ADULT 1] constitutes abuse. Neither is it adequate to notify the Appellant that the Department has concluded an incident that occurred in [NAME 2]’s office prior to the March 17th incident constitutes abuse. WAC 388-02-0260 does allow the Department an absolute right to amend its notice before or during the hearing to comport with the evidence, but any amendment made must meet due process requirements.

7. The Department argues that it "... supported its finding of mental abuse by presenting witnesses with personal knowledge and documentary evidence supporting those acts against [VULNERABLE ADULT 1] which constituted a willful pattern of intimidation, control, and punishment constituting mental abuse pursuant to statutory definitions. The Department maintains [APPELLANT'S NAME]'s action was of a continuing nature and not limited to March 2004." However, RCW 74.34.020(2) does not define "abuse" to include patterns of conduct or actions of a continuing nature; rather, the definition speaks only of isolated incidents. Evidence and argument about patterns of conduct is not helpful when deciding whether a particular incident meets the definition of abuse. Moreover, evidence and argument about patterns of conduct has the potential to become a generalized vilification of a person named by CPS as an abuser of vulnerable adults. The Department has made some arguments that do not help the trier of fact decide whether specific instances of abuse have occurred. For example, arguments such as, "The evidence will also show that [APPELLANT'S NAME] did not get along with most of the people she encountered;" and "The Department's witnesses did corroborate [APPELLANT'S NAME] continually disparaged vulnerable adults, other staff, and management in front of the clients and other [FACILITY 1] employees, which made her somewhat unpopular;" and "[APPELLANT'S NAME] admitted she did not inform [FACILITY 1] upon her application for employment the references she identified as "supervisor" and those whom could give a business reference on her employment application were in reality ex-[SPOUSES] and/or [PARTNERS]" do not help the trier of fact. The ALJ erred in concluding that, "The importance of this evidence [that does not rise to the level of abuse] is that it is corroborative of the Appellant's other acts of mental abuse toward [VULNERABLE ADULT 1] and of her general attitude and philosophy with respect to dealing with [VULNERABLE ADULT 1]'s difficult and sometimes dangerous behaviors." The Appellant's general attitude and philosophy is not in issue.

Mental Abuse

8. [VULNERABLE ADULT 1] is a vulnerable adult under RCW 74.34.020(13)(c). This

definition states that a “vulnerable adult” includes a person who has a developmental disability as defined under RCW 71A.10.020. As a vulnerable adult, [VULNERABLE ADULT 1] is entitled to the protections and rights afforded vulnerable adults by the legislature in chapter 74.34 RCW.

One of these rights is the right to be free from mental abuse.

9. The term “mental abuse is defined at RCW 74.34.020(2)(c) as follows:

(2) “Abuse” means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(c) “Mental abuse” means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

10. The term “willful” is defined at WAC 388-71-0105 as follows:

“Willful” means the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury, or a negative outcome.

11. The Appellant’s actions of speaking harshly and angrily to [VULNERABLE ADULT 1] while leaning over [VULNERABLE ADULT 1] in an intimidating stance and pointing her finger at [VULNERABLE ADULT 1] on March 17, 2004, constitute willful action the Appellant should reasonably have known could cause a negative outcome. [VULNERABLE ADULT 1] responded negatively to the Appellant’s actions by becoming upset, angry, and intimidated. These actions by the Appellant constitute mental abuse under RCW 74.34.020(2)(c).

12. The incident that took place one Monday prior to the March 17, 2004, incident, where [NAME 2] was in her office with the door closed talking to [VULNERABLE ADULT 1] during a session and the Appellant interrupted the session, came into [NAME 2]’s office, and began to speak sternly to [VULNERABLE ADULT 1] does not constitute abuse. [NAME 2] herself believed she intervened before this incident rose to the level of abuse. [NAME 2] did not report the incident

to CPS nor mention it to the CPS investigator. And no findings of fact were entered in the Initial Order as to how [VULNERABLE ADULT 1] reacted to this incident.

13. The terms of the behavioral contract the Appellant and [VULNERABLE ADULT 1] executed included consequences or punishments that if invoked, excluded [VULNERABLE ADULT 1] from her regular recreational activities and friends. The contract would have prohibited [VULNERABLE ADULT 1] from doing acts that she had a right to do in her own home, such as visiting the bathroom more frequently than once per night. The “consequences” mentioned therein were designed to coerce [VULNERABLE ADULT 1] into changing her behavior. While the Appellant’s enforcement of this contract might constitute mental abuse of [VULNERABLE ADULT 1] under RCW 74.34.02092)(c), the Appellant’s execution of this contract in and of itself does not constitute mental abuse of [VULNERABLE ADULT 1].

14. The Appellant’s plan to exclude [VULNERABLE ADULT 1] from the barbecue does not constitute mental abuse because there is no evidence [VULNERABLE ADULT 1] ever knew of the plan. Similarly, the Appellant’s conversations with [NAME 9] were unknown to [VULNERABLE ADULT 1] and do not constitute mental abuse.

15. Both parties referenced and relied upon a DDD Policy Manual at the hearing. The Department argued that the Client Agreement the Appellant entered into with [VULNERABLE ADULT 1] violates DDD’s Policy Manual; the Appellant argued that the APS investigator’s testimony as to what constitutes abuse is contrary to DDD’s Policy Manual because the manual states that when evaluating whether any given action was abusive, the larger context must be considered. However, DDD’s Policy Manual is irrelevant to the outcome of this case. DDD’s Policy Manual does not have the force of law, and it does not control whether the Appellant’s entering into a Client Agreement with [VULNERABLE ADULT 1] violates RCW 74.34.020(2). DDD’s Policy Manual does not control how an APS investigator performs his job. Neither does language in DDD’s Policy Manual modify the definition of abuse found at RCW 74.34.020(2) nor direct how the ALJ and the undersigned are to interpret this statute. The Department may be

interested in how well [FACILITY 1] is meeting the conditions of its contract with the Department to provide services to its DDD clients, but [FACILITY 1]'s conduct is not at issue in this proceeding.

The Appellant's challenges to the Initial Order

16. The Appellant argues in her petition for review that nine irregularities occurred during the investigation APS Investigator Lance Rickman conducted into the allegation that the Appellant abused [VULNERABLE ADULT 1]. This argument is without merit for two reasons. First, only irregularities occurring during the hearing can be considered by the undersigned under WAC 388-02-0220(2). Irregularities that may have occurred prior to the hearing cannot be the basis for modifying the Initial Order.

17. And second, the Appellant has no right to have an APS investigation conducted in any particular way and no hearing right to challenge the procedures the Department used in its APS investigation. Correspondingly, neither the ALJ nor the Review Judge has the authority to evaluate the techniques the APS Investigator used to interview witnesses or to critique Department staff in the performance of their duties. Both the ALJ and the Review Judge are directed to hear and decide de novo whether the Appellant emotionally abused [VULNERABLE ADULT 1] based on the evidence that is presented during the hearing. WAC 388-02-0215(1). The Department has the burden of proof and the burden of going forward. The information it collects during its investigation will either be sufficient to convince the ALJ that the facts it alleged in its notice are true, or it will be insufficient. A poor APS investigation may yield poor factual information, and if the Department presents and relies upon poor factual information at the hearing, the consequence may be that the Department is unable to meet its burden of proof and/or prevail.

18. Substantial evidence has been described by the courts as "... evidence of sufficient quantum to persuade a fair-minded person of the truth of the premise." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 373, 617 P.2d 704 (1980). The undersigned has

personally reviewed the entire hearing record, is satisfied that the facts the Department alleged in its adverse notice are true and did occur, and concludes that the Initial Order's Findings of Fact are supported by substantial evidence. The undersigned is satisfied that the Initial Order's conclusions of law, as corrected by this decision, do not contain errors of law.

19. The Department's burden of proof in this matter is by a preponderance of the evidence. WAC 388-71-01255. The Department has met its burden of proof. The Initial Order shall be affirmed.

20. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

The Initial Decision is affirmed.

Mailed on November 3, 2005.

CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant
Donna Beatty, Appellant's Representative
Lisa Malpass, Department's Representative
Lori Melchiori, Program Administrator, MS 45600
William J. Stewart, ALJ, [CITY 1] OAH