

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

2016 JUL 15 A 8:25

In the Matter of:

LEO J. DRISCOLL,

Applicant.

Docket No. 16-0002

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER
**ORDER ON THE PETITION FOR
RECONSIDERATION FILED BY
APPLICANT**

TO: Leo J. Driscoll
4511 E. North Glenngrae Lane
Spokane, WA 99223

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
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Molly Nollette, Deputy Commissioner, Rates and Forms Division
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1. Background.

On June 15, 2016, I entered an Order on Cross Motions Summary Judgment (“Order”) in this matter. On June 28, 2016, Leo Driscoll (“Driscoll”) timely filed¹ with the OIC’s Hearings Unit “Applicant’s Petition for Reconsideration of the [Order]” (“Petition”). (Brackets added). For the reasons below and in the Order, I deny Driscoll’s Petition.

2. Driscoll’s Petition.

At Part 1, ¶5, of his Petition, Driscoll cites a ruling by a court in New York, *Thaler v. Stern*, 44 Misc.2d 278, 279-280, 253 N.Y.S.2d 622, 625 (1964), in support of his position that he has standing to pursue an adjudicative proceeding in this matter. However, that out-of-state authority, persuasive *at most* in the matter at hand, does not negate the reasoning at Section A, pages 4-10, of the Order, explaining why Driscoll does not have standing in this matter, or the reasoning at Section B, pages 10-12, of the Order, explaining that the common law “filed rate” doctrine trumps Driscoll’s Demand.

At page 10 of the Order, I conclude that Driscoll does not have standing to demand a hearing

¹ See RCW 34.05.470(1)

before the OIC, stating in part: "As with the appellants in *Newman*,² the OIC's approval or disapproval of rate increase(s) in the premiums of LTCL, does not provide Driscoll, or others similarly situated, with a right to a hearing or appeal rights under RCW Ch. 34.05 or RCW 48.04.010(1)(b)." (Footnote added). At Part I, ¶ 7, of his Petition, Driscoll states: "RCW 34.05.413(2) and RCW 48.04.010(1)(b) require the OIC to commence an adjudicative hearing when required by constitutional right. Due process rights of Driscoll to notice and an opportunity to be heard before the OIC under the Washington state (sic) and U.S. constitutions (sic) are invoked. . . ."

RCW 34.05.413(2) states: "When required by law or constitutional right, and upon the timely application of any person, an agency shall commence an adjudicative proceeding." (Emphasis added). A law review article examining the language in RCW Ch. 34.05.413(3) explains: "The statutory phrase which makes adjudications available when required 'by constitutional right' continues to enable judges, through rulings on procedural due process, to determine when the Act's adjudicatory procedures apply." William R. Andersen, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 808 (1989). That said, the fundamental requirement of due process is notice and an opportunity to be heard. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995)(citations omitted). So long as the party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, this court will not disturb the administrative decision. *Id.*

Driscoll's Petition erroneously equates an "adjudicative proceeding" with an "adjudicative hearing." However, RCW 34.05.413(2) only discusses the former, not the latter. RCW 34.05.010(1) defines "adjudicative proceeding" in part as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency." (Emphasis added). As the Court explains in *Hutmacher v. Board of Nursing*, 81 Wn. App. 768, 771-772, 915 P.2d 1178 (1996), the umbrella of "adjudicative proceeding," while it includes an opportunity for a hearing, is broader than just that, and anticipates that a hearing may not occur in the course of an adjudicative proceeding, since the adjudicative proceeding may be completed by a more expeditious route:

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

Here, the Board notified Hutmacher that it would be adjudicating her case by serving the Statement of Charges. This service apprised Hutmacher that an adjudicative proceeding

² *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 231 P.3d 840 (2010).

had commenced; the only remaining question was whether the proceeding would be completed via informal settlement, formal hearing, or default. We hold that the Board's filing of the Statement of Charges commenced the adjudicative proceeding. *See* RCW 34.05.413(1).

(Underlined emphasis added).

Driscoll was given an opportunity to present his views on the laws in question in this matter to the undersigned, and did so by filing a cross motion for summary judgment in this matter. Just because the undersigned granted the OIC's motion for summary judgment on certain grounds, and did not address *all* of the arguments Driscoll raised, does not mean that Driscoll's due process rights were violated. Principles of judicial restraint support this position.

At Part I, ¶¶ 12-13, of his Petition, Driscoll lists issues he claims the Order did not address. However, principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142, 1153 (2007) (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000)). In *Priorities First v. City of Spokane*, 93 Wn. App. 406, 413-414, 968 P.2d 431, 434-435 (1998) the Court emphasized that specifically with regards to motions for summary judgment, if one issue is dispositive, it is unnecessary to decide other issues in summary judgment, stating:

In light of our holding, we do not reach the issue raised by the superior court's alternative basis for its ruling, i.e., that the proposed law exceeds the scope of the initiative power by affecting matters that are administrative rather than legislative in character. *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990) (unnecessary to decide other issues in summary judgment if one is dispositive). Principles of judicial restraint underlie the rule that when one issue is dispositive we should refrain from reaching other issues that might be presented. *State v. Peterson*, 133 Wn.2d 885, 894, 948 P.2d 381(1997) (Talmadge, J., concurring).

(Emphasis added).

RCW 34.05.461(3) explains the contents of initial and final orders issued by presiding officers in adjudicative proceedings, and states:

Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall

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include a statement of any circumstances under which the initial order, without further notice, may become a final order.

In evaluating whether findings and conclusions satisfy RCW 34.05.461(3), “[a]dequacy, not eloquence, is the test.” *Nationscapital v. Dep’t of Fin. Inst.’s*, 133 Wn. App. 723, 751-752, 137 P.3d 78 (2006)(citing *US West Commc’ns, Inc. v. Washington Utilities & Transportation Comm’n*, 86 Wn. App. 719, 731, 937 P.2d 1326 (1997)(“the statute does not require that findings and conclusions contain an extensive analysis.”).

At Part I, ¶ 14, of his Petition, Driscoll implies that the Order does not comply with RCW 34.05.461(3), stating:

RCW 34.05.461(3) requires that final orders such as the [Order] shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact and law presented on the record. Driscoll respectfully requests that the Presiding Officer amend the [Order] as needed to comply with those requirements in respect to the issues referenced in paragraphs 4 to 14 above.

(Bracketed portions added).

Leaving aside whether the Order satisfies the standard in RCW 34.05.461(3), which I believe it does under the principles of judicial restraint expressed above, this statutory provision concerns findings and conclusions in both initial and final orders in adjudicative proceeding following an evidentiary hearing, not rulings on motions for summary judgment. As case law explains, while the Administrative Procedure Act (RCW Ch. 34.05) does not contain any provisions authorizing agencies to grant summary judgment, a legislatively created agency or board, when acting in a quasi-judicial capacity, may employ summary procedure if there is no genuine issue of material fact. *Eastlake Cmty. Council v. Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (“Thus the Board was within its power to grant an order of summary judgment.”)(citing *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 697, 601 P.2d 501 (1979)); *Pierce Cty. v. State*, 144 Wn. App. 783, 804, 185 P.3d 594 (2008); *Verizon Northwest, Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915-916, 194 P.3d 255 (2008).

The OIC, by through its hearings rule, specifically WAC 284-02-070(2)(a), states that the provisions of WAC Ch. 10-08 are applicable to adjudicative proceedings before the OIC. Page 3 of the Order specifically references the summary judgment standard in WAC 10-08-135 which provides:

A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Order was proper given the summary procedures adopted by the OIC in WAC 10-08-135, and the principles of judicial restraint outlined above.

3. **Ruling.**

Driscoll's Petition is denied for the reasons articulated above, and those included in the Order.

Dated: July 15, 2016



WILLIAM PARDEE
Presiding Officer

This order represents the final action of the OIC. Pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

CERTIFICATE OF SERVICE

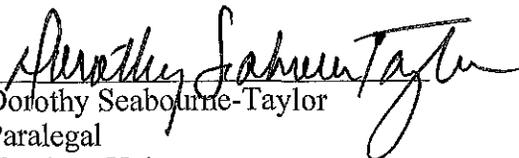
The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order on the Petition for Reconsideration filed by Applicant on the following people at their addresses listed below:

Leo J. Driscoll
4511 E. North Glenngrae Lane
Spokane, WA 99223

Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
Molly Nollette, Deputy Commissioner, Rates and Forms Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Mandy Weeks, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 15th day of July, 2016, in Tumwater, Washington.


Dorothy Seabourne-Taylor
Paralegal
Hearings Unit