149 Wash.App. 1025

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1
Court of Appeals of Washington,
Division 2.

Victory MOTEL, an unincorporated Washington business entity, Appellant,
v.
WASHINGTON STATE DEPARTMENT OF HEALTH, Respondent.

No. 36955–9–II. | March 17, 2009.

Appeal from Pierce County Superior Court; Honorable Brian Maynard Tollefson, J.

Attorneys and Law Firms

Jiangong Lei (Appearing Pro Se), Tacoma, WA, for Appellant.

Dorothy Harris Jaffe, Attorney General's Office, Olympia, WA, for Respondent.

Opinion

UNPUBLISHED OPINION

VAN DEREN, C.J.

***1** Jiangong Lei challenges the state's drinking water program's (Program) decision to classify his **motel** as having a Group A water system. He challenges a Health Law Judge's (HLJ) decision that the Program correctly penalized him for failing to comply with Group A water testing regulations. We hold that the HLJ incorrectly classified the system and that the Department of Health invalidly imposed penalties for Lei's failure to comply with water testing regulations; thus, we vacate the penalties.

FACTS

The **Victory** **Motel** was located at 10801 Pacific Highway, SW, Tacoma, Washington.[1] Jiangong "Jay" Lei was an owner. Admin. Record (AR) at 223. The water system serving the **motel** provided water for 1 residential unit and 18 non-residential (**motel**) units. Approximately 378 to 418 occupants per month used the **motel's** water connections.

In 1996, the Program classified the **motel** as a "Group A water system." AR at 221. On June 1, 1999, the Program notified Lei that as a Group A system, the **motel** needed to undergo a sanitary survey[2] every five years. Lei claims that he had a survey done in 2000 but the Program has no record of it.

Between 1999 and 2004, the Program requested a sanitary survey for the **motel** on numerous occasions. In 2004, Lei requested a water facility inventory form that he submitted on December 20, 2004. He testified that he submitted the updated form to challenge the **motel's** Group A classification.

On March 11, 2005, the Program issued a notice of violation for failing to conduct a 2000 survey. The notice stated that the **motel** had not had a sanitary survey performed in the past 5 years and required that it either submit documentation of a survey with 15 days of the notice or 5 water samples per month thereafter. In June, August, and October of 2005 and January 2006, the Program inquired of Lei about the survey. On October 18, 2005, the Program issued a "[r]ed" operating permit to the **motel**. AR at 222. This meant that the Program considered the **motel's** water system to be out of compliance with water safety standards. In December 2005 and February, March, April, and May 2006, the Program separately notified Lei of his failure to submit five water samples per month.

Further, in January 2006, the Program told Lei that, even had he conducted a survey in 2000, he had to conduct a second survey because five years had elapsed since 2000. On June 28, 2006, the Program issued an order directing the **motel** to comply with the March 11, 2005, notice of violation.

On August 23, the Program imposed $3,150 in penalties for the **motel's** failure to comply with the June 28 order.[3] RCW 70.119A.040. Lei requested an administrative hearing.

A HLJ conducted a hearing in January 2007. The HLJ concluded that the Program correctly classified the **motel** as a Group A water system because the **motel** had at least 15 service connections. Thus, the HLJ affirmed the penalties for the **motel's** failure to comply with rules governing these systems. The HLJ issued findings of fact and conclusions of law upholding the imposition of penalties. In particular, the HLJ found that the **motel** failed to obtain a sanitary survey between June 1999 and August 2006. It also found that the **motel** did not submit five water samples per month following the March 11, 2005, notice of violation.

***2** Lei requested judicial review of the administrative decision. The Pierce County Superior

Court affirmed. Lei appeals.

ANALYSIS

I. Standard of Review

Title 34.05 RCW, the Administrative Procedure Act (Act), governs our review of administrative agency actions. This Act specifies nine grounds for relief. Those pertinent here are:

> The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> ....
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or]
>
> ....
> i) The order is arbitrary or capricious.[4]

RCW 34.05.570(3)(a), (d), (e), (i).

In sum, we review an agency's factual findings to determine whether "substantial evidence sufficient to persuade a fair-minded person of the declared premise" supports the agency's findings. *Da Vita, Inc. v. Washington Dep't of Health,* 137 Wash.App. 174, 181, 151 P.3d 1095 (2007). We will overturn an agency's factual findings only if they are clearly erroneous. *DaVita*, 137 Wash.App. at 181, 151 P.3d 1095. Although we give weight to an agency's interpretation regarding law within the agency's area of expertise, we review the agency's legal conclusions de novo. *Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.,* 112 Wash.2d 353, 356, 770 P.2d 1040 (1989).

II. Classification of the Motel's Water System

The Program maintains that the **Victory Motel** was a Group A water system, as opposed to a Group B water system as Lei argues, because it had more than 15 "service" connections.

Group B water systems are regulated only by the state, unlike Group A water systems. The administrative code defines a Group B system in a simple and straightforward manner:

> 'Group B water system' means a public water system:
>
> Constructed to serve less than fifteen residential services regardless of the number of people; or
>
> Constructed to serve an average nonresidential population of less than twenty-five per day for sixty or more days within a calendar year; or
>
> Any number of people for less than sixty days within a calendar year.

WAC 246–291–010 (emphasis omitted).

WAC 246–290–020(4) (2005) generally defines a Group A water system:

> A Group A system shall be defined as a public water system providing service such that it meets the definition of a public water system provided in the 1996 amendments to the federal Safe Drinking Water Act (Public Law 104–182, Section 101, subsection b).

The relevant portion of the federal Safe Water Drinking Act provides:

> The term 'public water system' means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, *if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.*

***3** 42 U.S.C. § 300f(4)(A) (1996) (emphasis added). But at the time the Program classified Lei's system as a Group A water system, Table 1 in WAC 246–290–020 provided that Group A water systems must serve "15 or more residential connections" or "25 or more people/day for 60 or more days/yr."

In addition to the overarching definition of a Group A water system, WAC 246–290–020(5)(b)(ii) and federal laws and regulations establish subcategories of Group A water systems. In particular, the Program generally classifies **motels** as transient noncommunity (TNC) water systems. The WAC provides:

> (b) Noncommunity water system means a Group A water system that is not a community water system. Noncommunity water systems are further defined as:....
>
> (ii) Transient (TNC) water system that serves:
>
> (A) Twenty-five or more different people each day for sixty or more days within a calendar year;
>
> (B) Twenty-five or more of the same people each day for sixty or more days, but less than one hundred eighty days within a calendar year; or
>
> (C) One thousand or more people for two or more consecutive days within a calendar year.
>
> Examples of a TNC water system might include a restaurant, tavern, **motel**, campground, state or county park, an RV park, vacation cottages, highway rest area, fairground, public concert facility, special event facility, or church.

WAC 246–290–020(5)(b)(ii) (emphasis omitted).[5]

Lei relies on Table 1 in WAC 246–290–020, as well as other references to "residential" connections throughout the Washington Administrative Code to argue that his **motel** was not a Group A water system because his **motel** did not serve 15 or more residential connections. He provides other examples that indicate that the State relies on "residential" and not "service" connections when determining whether to classify a water system as Group A. For example, the Group B water system definition applies to water systems serving fewer than "15 residential services." WAC 246–291–010.

Moreover, at oral argument, Lei indicated that other sections of the WAC also provide that for water-related regulation, the state draws a line between systems serving 15 or more residential connections or over 25 people per day, on the one hand, and systems with fewer than 15 residential connections or fewer than 25 people served, on the other. For example, the definitions in the Drinking Water State Revolving Loan Program provide:

> 'Group A system' means a public water system that regularly serves fifteen or more residential connections, or twenty-five or more people per day for sixty or more days per year.
>
> 'Group B system' means a public water system that serves less than fifteen residential connections and less than twenty-five people per day, or serves twenty-five or more people per day for sixty or fewer days per year.

See also WAC 173–503–025 (defining water use for "[m]unicipal water supply purposes" as "[f]or residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year"); WAC 173–505–030 (same definition); WAC

246–290–010 (same definition); WAC 246–292–010 (defining a Group B system as a system with "less than fifteen residential connections" that serves less than 25 people a day).

***4** Lei also notes that the publication prepared by the Department of Health to assist small water system operators provides that a system that does not "*primarily serve a residential community* " is a Group A water system if it serves 25 or more people per day for 60 or more days and a Group B water system if it serves less than 25 people per day for 60 or more days. Preparing for a Sanitary Survey: Information to Help Small Water Systems, DOH PUB. # 331–328, at 27 (revised 2005). Lei adds that, not only did the **motel** not have "15 or more residential connections," it also did not fall under the State's definition of a Group A TNC water system because the **motel** did not serve "[t]wenty-five or more different people each day for sixty or more days within a calendar year." WAC 246–290–020(5)(b)(ii). The **Victory Motel** water system also did not meet the federal definition of such a water system. 40 C.F.R. § 141 .2 ("Transient non-community water system or TWS means a non-community water system that does not regularly serve at least 25 of the same persons over six months per year.") (emphasis omitted).

The Program responds that Table 1 in WAC 246–290–020 was intended to mirror the federal code's language that a Group A water "system has at least fifteen service connections or regularly serves at least twenty-five individuals." 42 U.S.C. § 300f(4)(A) (1996). The Program contends that the language in Table 1 is erroneous and that the phrase "residential connection" was meant to be "service connection." AR at 469 (testimony by state employee that the table contains typographical errors).[6] Thus, because the **motel** has 18 service connections, it is a Group A water system. WAC 246–290–020(4) (relying on federal law to define a Group A water system).

The regulations and table at issue contain inconsistencies. Rules of statutory construction apply to administrative rules and regulations. *Hayes v. Yount,* 87 Wash.2d 280, 290, 552 P.2d 1038 (1976). One rule of statutory construction is that absurd results should be avoided. *In Re Point Allen Svc. Area,* 128 Wash.App. 290, 299, 115 P.3d 373 (2005). Another rule is that the spirit or purpose of an enactment should prevail over the express but inept wording. *Alderwood Water Dist. v. Pope & Talbot, Inc.,* 62 Wash.2d 319, 321, 382 P.2d 639 (1963). Moreover, if a statute contains a term that was "obviously intended to be a different one," we must give effect to the intent of the drafter, since it is presumed the legislature did not intend to do an "absurd or meaningless thing." *Ernst v. Kootros,* 196 Wash. 138, 144, 82 P.2d 126 (1938). Here, regardless of the arguable inconsistencies or inept drafting in the administrative code, Lei's system met the definition of a Group B water system and did not meet either the state or federal government's definition of a TNC water system.

A water system is a Group B water system if it has "less than fifteen residential connections [and serves] less than twenty-five people per day." WAC 246–291–010. **Victory Motel** had 18 connections, but only one residential connection and served approximately 378 to 418 occupants

per month, or an average of 12.6 to 13.9 occupants per day, when using a 30 day month for the calculation.

***5** Moreover, even were Lei's **motel** not within the Group B water system definition, it also did not fall within the definition of a Group A TNC water system. WAC 246–290–416(1)(b) does not require that Group A water systems be tested every five years; rather, it provides that "*%[f]or transient noncommunity water systems,*" a survey needs to occur "every five years unless the system uses only disinfected ground water and has an approved wellhead protection program." WAC 246–290–416(1)(b) (emphasis added). WAC 246–290–020(5)(b)(ii) provides that TNC water systems serve "[t]wenty-five or more different people each day for sixty or more days within a calendar year." Here, fewer than 14 people per day used the **motel** water connections and the State does not argue that **Victory Motel** served 25 or more people per day. Thus, fewer than 25 different people per day used the **motel** water system and it was not a Group A TNC system.[7] WAC 246–290–020(5)(b)(ii).[8]

The regulations and other materials demonstrate that the **Victory Motel** water system was not subject to the Group A TNC water testing requirements in WAC 246–290–416(1)(b). Consequently, the HLJ erred in affirming the Program's imposition of penalties. *Providence Hosp.,* 112 Wash.2d at 355–56, 770 P.2d 1040 (stating that although we give weight to an agency's interpretation regarding law within the agency's area of expertise, we review the agency's legal conclusions de novo). We, therefore, vacate the imposition of penalties.

III. Bad Faith and Constitutional Claims

Lei argues that the Program unfairly penalized him because he sought to challenge the categorization of his water system. He asserts that the HLJ improperly stated that Lei had to prove he performed a survey in 2000. He contends that the Program deliberately destroyed documents, refused to allow him to change his water system's categorization to a Group B water system, and denied telephone conversations occurred. He also argues that the HLJ excluded critical evidence.

To support a constitutional challenge, Lei must present clear argument supported by legal authority. *City of Tacoma v. Price,* 137 Wash.App. 187, 200–01, 152 P.3d 357 (2007). Lei, however, merely presents a list of alleged procedural failures by the Program and the HLJ. Generally, we will not review unsupported constitutional arguments. RAP 10.3(a)(5)-(6); *State v. Johnson,* 119 Wash.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issues unsupported by reasoned argument). Nevertheless, we address the merits of Lei's procedural and bad faith arguments.

A. Burden of Proof

Lei argues that he should not have to prove that he conducted the 2000 water system survey. He argues that he should be presumed innocent and that he should not have to produce records of the inspection to support his claim that he is in compliance with Group A water system testing requirements. RCW 34.05.570(1)(a), however, provides that it is the challenger's burden (here, Lei's) to prove an agency acted incorrectly.

B. HLJ Evidentiary Rulings

***6** The HLJ's prehearing order excluded some of Lei's proposed witnesses. Lei stated he wanted to present them to show that the Program did not send him the form he needed to challenge his Group A water system categorization. The HLJ considered these witnesses irrelevant; Lei eventually received and submitted the form and "[w]hether the Department was negligent in its response to his request for a form is not an issue for this proceeding." AR at 206. At the hearing, the HLJ admitted all of Lei's documents except those that merely copied relevant statutes and regulations.

Based on this record, the HLJ did not arbitrarily exclude Lei's witnesses or evidence. The issue before the HLJ was whether the Program could penalize Lei for failing to comply with Group A water system testing regulations. Lei submitted a form to the Program to challenge the Group A classification water system in 2004 and argued to the Program, the HLJ, and the superior court that the **motel** was not a Group A water system. Thus, his evidentiary arguments fail.

C. The Program's Actions

Lei's arguments that the Program acted in bad faith and penalized him for trying to change his water system's categorization similarly fail. Lei was on notice, beginning in 1999, that the Program considered his system to be a Group A water system. He had a right to correct information about his water system that he deemed incorrect and did so in 2004. The Program examined the information and concluded that the **motel** was a Group A water system because it had over 15 service connections.

Simply because the Program disagreed with Lei does not mean it acted in bad faith or singled him out for punishment. Correspondence between Lei and various state agencies, including the governor's office, demonstrates that the Program understood Lei's position but disagreed with it on legal, not personal or malicious, grounds. Thus, we reject Lei's bad faith argument.

We hold that the **Victory** **Motel's** water system was not a Group A water system and vacate the imposition of penalties.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: QUINN–BRINTNALL and PENOYAR, JJ.

Parallel Citations

2009 WL 684950 (Wash.App. Div. 2)

Footnotes

1 We learned during oral argument that the **motel** was demolished during the pendency of this case, therefore we discuss it in the past tense.

2 Essentially, it required an inspection of the water system and well by the local health department or a qualified third party.

3 The Department of Health issued a second "red" operating permit for the **motel** in November 2006. AR at 126.

4 An agency action is arbitrary and capricious when it is " 'willful and unreasoning, and taken without regard to the attending facts or circumstances.' " *Children's Hosp. & Med. Ctr. v. Dep't of Health,* 95 Wash.App. 858, 871, 975 P.2d 567 (1999) (quoting *ITTRayonier, Inc. v. Dalman,* 122 Wash.2d 801, 809, 863 P.2d 64 (1993)).

5 The corresponding federal definition of a TNC water system is:

> Non-community water system means a public water system that is not a community water system. A non-community water system is either a "transient non-community water system (TWS)" or a "non-transient non-community water system (NTNCWS)."
>
> ....
>
> Transient non-community water system or TWS means a non-community water system that does not regularly serve at least 25 of the same persons over six months per year.

40 C.F.R. § 141.2.

6 The Program notes that on January 14, 2008, the language in Ttable 1 was changed to read that a Group A water system "regularly serves 15 or more service connections." WAC 246–290–020, Table 1 (2008).

7 The State conceded at oral argument that **Victory Motel** did not fall within the state or federal definition of a TNC water system. It also conceded that no other Group A subcategory would include the **motel**.

8 The Department of Health's publication also defines Group B and Group A TNC water systems in terms of the number of people served. In relevant part, it states that a Group A TNC water system provides "access to water for 25 or more different people each day for 60 or more days ... and do[es] not primarily serve a residential community" or provides "access to water for 1,000 or more people for two or more consecutive days." It defines a Group B water system "with a transient population" as a system that provides "access to water for less than 25 people per day for at least 60 days per year or for more than 25 people per day for 59 days or less per year and do[es] not primarily serve a residential community." Preparing for a Sanitary Survey at 27.