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OREGON SUPREME COURT DETERMINATION CONCERNING APPELLATE COURT JURISDICTION FOR JUDICIAL REVIEW OF NONFINAL ORDERS ARISING OUT OF CONTESTED CASES

Oregon Health Care Association v. Health Division and Jill D. Laney, Hearing Officer

Monique Shamun*

I. INTRODUCTION

On December 3, 1999, in *Oregon Health Care Association v. Health Division and Jill D. Laney, Hearing Officer*, the Oregon Supreme Court reversed the decision of the Oregon Court of Appeals by holding that the Court of Appeals did not have jurisdiction to review the nonfinal order of the Health Division.¹ The Court held that neither Oregon Revised Statute (ORS) 183.482(1),² nor 183.480(1),³ nor 183.480(2)⁴ authorized the Court of Appeals to review nonfinal agency orders.⁵ Moreover, it held that a party shall make any showings required by the second and third exceptions in ORS 183.480 (3) before the Circuit Court and not on judicial review.⁶ Thus, the Court concluded that the Court of Appeals retained jurisdiction for judicial

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¹Oregon Health Care Association v. Health Division and Jill D. Laney, Hearing Officer, 992 P. 2d. 434 (Or. 1999).

²ORS 183.482(1) concerns judicial review of a contested case. It provides in pertinent part: "Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals." Oregon Revised Statutes 183.482 (1991).

³ORS 183.480(1) provides in pertinent part: "...any person adversely aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form." Oregon Revised Statutes 183.480 (1997).

⁴ORS 183.480 (2) provides: "Judicial review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500." ORS 183.480.

⁵Oregon Health Care Assn at 436, 441.

⁶*Id.* at 440.

review only for final orders arising out of contested cases.⁷

II. PROCEDURAL HISTORY

Providence Medical Center (Providence) had applied for a Certificate of Need to establish a skilled nursing facility, which the Health Division granted.⁸ Oregon Health Care Association (the Association but not its members), had sought a reconsideration hearing⁹ before the Health Division pursuant to ORS 442.315(5)(b).¹⁰ At the hearing, the Health Division hearing officer authorized Providence to serve subpoenas duces tecum on the members, which the members moved to quash.¹¹ Subsequently, the hearing officer denied the motions to quash and issued orders modifying the subpoenas.¹²

The Association and its members (OHCA)¹³ had sought judicial review of the hearing officer's orders, contending that the modified subpoenas required that members produce extensive records, some of which included patient medical records and others which constituted trade secrets.¹⁴ OHCA had sought such review in the Court of Appeals, pursuant to ORS 183.482(1).¹⁵ It provides in pertinent part: "Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals."¹⁶ Alternatively, OHCA had also sought review in the Marion County Circuit Court pursuant to ORS 183.484(1).¹⁷ It provides in pertinent part: "Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County..."¹⁸

OHCA requested a determination from the Court of Appeals of whether the Circuit Court or the Appellate Court was the appropriate

⁷*Id.* at 441.

⁸*Id.* at 436.

⁹ A reconsideration hearing under ORS 442.315(5)(b) is a "contested case" for purposes of the Administrative Procedure Act (APA), ORS 183.310 to 183.550. *Id.* (Citing Oregon Revised Statutes 442.315(5)(b) (1995)).

¹⁰Oregon Health Care Assn, 992 P.2d at 436.

¹¹*Id.*

¹²*Id.*

¹³The Association and its members are collectively referred to as "OHCA."

¹⁴*Id.*

¹⁵*Id.*

¹⁶ORS 183.482(1).

¹⁷992 P. 2d at 436.

¹⁸ Oregon Revised Statutes 183.484(1).

tribunal to review the orders.¹⁹ OHCA claimed that the Court of Appeals was the proper forum for judicial review pursuant to two statutes.²⁰ First, OHCA argued that ORS 183.480(3) allowed them to seek judicial review of a nonfinal order upon a showing that they had suffered “substantial and irreparable harm if interlocutory relief is not granted.”²¹ ORS 183.480(3) states that judicial review of agency orders is limited only to those orders that are “final.”²² The statute does, however, provide three exceptions to this rule: (1) a proceeding for judicial review of a “final order” as provided in this section; (2) a proceeding in which the party challenging the agency order makes a showing that the agency is proceeding without probable cause; and (3) a proceeding in which the party challenging an agency order makes a showing that the party will suffer substantial and irreparable harm if interlocutory relief is not granted.²³

Second, OHCA contended that ORS 183.482(1) granted jurisdiction to the Court of Appeals for orders issued during a contested case.²⁴ Conversely, the Health Division claimed that since the orders were not final, it was the Circuit Court that had jurisdiction to review the orders and not the Court of Appeals.²⁵

The Court of Appeals held that it had jurisdiction to review the orders because they generated the orders during a contested case and if the subpoenas were enforced, they would cause substantial and irreparable harm to OHCA.²⁶

The Health Division had appealed to the Oregon Supreme Court.²⁷

III. OREGON SUPREME COURT DECISION

The Oregon Supreme Court considered three issues: (1) whether

¹⁹992 P. 2d at 436.

²⁰*Id.*

²¹*Id.*

²²ORS 183.480(3).

²³*Id.*

²⁴992 P. 2d at 437.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

it retained jurisdiction for judicial review in the present case;²⁸ (2) whether the Court of Appeals retained jurisdiction for judicial review of the hearing officer's nonfinal orders;²⁹ and (3) whether the Court of Appeals was the proper forum for making the showings required by the exceptions in ORS 183.480(3).³⁰

A. The Oregon Supreme Court's jurisdiction to hear this case

OHCA preliminarily asserted that the Oregon Supreme Court did not retain jurisdiction for judicial review in the present matter pursuant to ORS 2.520.³¹ OHCA supported this contention by citing *Tjernlund and Tjernlund*.³² In *Tjernlund*, the Oregon Supreme Court denied review of an Appellate Court decision because it was not a final disposition of the case.³³ OHCA noted that the Oregon Supreme Court has reviewed nonfinal orders of the Appellate Court in instances where a case involved "issues of sufficient public importance" to justify reviewability.³⁴ OHCA claimed, however, that this was not such a case.³⁵

The Oregon Supreme Court disagreed, finding that the present case did present an issue of sufficient public importance to justify its review.³⁶ The Court supported this finding by citing *Oregon Business Planning Council v. LCDC*.³⁷ In *LCDC*, the Oregon Supreme Court held that the nonfinal decision of the Court of Appeals was reviewable because it was deciding important issues related to the scope of review of the Land Conservation and Development Commission (LCDC).³⁸

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at 439.

³¹ORS 2.520 allows aggrieved parties to seek Supreme Court review of a decision of the Appellate Court. ORS 2.520. Oregon Health Care Assn at 437; (Citing Oregon Revised Statutes 2.520 (1983)).

³²Oregon Health Care Assn, 992 P.2d. at 437. (Citing *Tjernlund and Tjernlund*, 275 Or. 483, 485 (1976)).

³³*Id.*

³⁴*Id.* (Citing *Garganese v. Dept. of Justice*, 318 Or. 181, 185 (1993); *Oregon Peaceworks Green, PAC v. Sec. of State*, 311 Or. 267, 270 n. 2 (1991)).

³⁵Oregon Health Care Assn. 992 P.2d. at 437.

³⁶*Id.*

³⁷*Id.* (Citing *Oregon Business Planning Council v. LCDC*, 290 Or. 741 (1981)).

³⁸*Id.*

Accordingly, the Oregon Supreme Court found the LCDC's scope of review to be an issue of public importance and the Court granted review although the decision was not final.³⁹ Similarly, in this case, the Oregon Supreme Court noted that the authority of the Court of Appeals to review nonfinal agency orders during a contested case was of equal public importance as to justify review.⁴⁰

B. The Appellate Court's jurisdiction concerning agency nonfinal orders

On the merits of the case, OHCA argued that the Court of Appeals was the proper forum for judicial review of nonfinal orders arising out of contested cases pursuant to ORS 183.482(1).⁴¹ Conversely, they argued that the Circuit Court was the proper forum for judicial review of nonfinal orders in other than contested cases pursuant to ORS 183.484(1).⁴² Thus, OHCA contended that the Court of Appeals was the proper forum for judicial review of the Health Division's orders in the present case because the orders were nonfinal and originated from a contested case.⁴³

In deciding this question, the Supreme Court examined the statutory scheme as a whole and focused on the legislature's intent.⁴⁴ The Court conceded that ORS 183.482(1) and ORS 183.484(1) bifurcate the categories subject to review, the former conferring jurisdiction upon the Court of Appeals and the latter on the Circuit Court.⁴⁵ However, the Court noted that neither of the statutes stated whether the order under review must be final or nonfinal.⁴⁶ The Court found that ORS 183.480 clarified the issue by conferring judicial review of final orders only.⁴⁷ More specifically, ORS 183.480(1) restricts judicial review to final orders only, ORS 183.480(2) restricts

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at 438.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.* at 437.

⁴⁵*Id.* at 438. (Citing ORS 183.482(1); ORS 183.484(1)).

⁴⁶*Id.*

⁴⁷*Id.*

judicial review of final orders to the rules specified in ORS 183.482 and ORS 183.484, and the first exception in ORS 183.480 (3) forbids any challenge “to any agency order except a final order as provided in this section” as well as ORS 183.482 and ORS 183.484.⁴⁸ The Court thus concluded that a final order must be a prerequisite for judicial review since the only references to judicial review in ORS 183.480 mandated that all orders must be final.⁴⁹

Despite the Supreme Court’s conclusions, OHCA went on to contend that the second and third exceptions in ORS 183.480(3) described additional complaints about nonfinal agency actions that a Court may examine on judicial review.⁵⁰ OHCA argued that the phrase “any agency order” in ORS 183.480(3) referred both to final and nonfinal orders.⁵¹ Additionally, they argued that the phrase “in this section” embodied the second and third exceptions in ORS 183.480(3) and reasoned that this phrase made those challenges available for judicial review.⁵²

The Supreme Court agreed that the second and third exceptions in ORS 183.480(3) applied to nonfinal orders but disagreed that they provided grounds for judicial review.⁵³ The Court found that the term “in this section” effectively referred to the process of judicial review rather than incorporating the last two exceptions.⁵⁴ It further found that the legislature set out the second and third exceptions in a separate clause than the first exception, which is the only exception that cites the statutes governing judicial review.⁵⁵ The Court also noted that the showings required in the second and third exceptions did not correspond with any errors listed in other statutes describing agency errors that may lead to relief on judicial review.⁵⁶ Thus, the Court concluded that this format indicated that the second and third

⁴⁸*Id.*

⁴⁹*Id.* at 439.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.* ORS 183.482(8) and ORS 183.484(4) contain lists of legal errors made by an agency that may justify relief on judicial review in the Court of Appeals and the Circuit Court respectively. ORS 183.482; ORS 183.484.

exceptions described complaints about agency action that did not invoke judicial review.⁵⁷

C. The Appellate Court's jurisdiction over agency actions not subject to judicial review

Contrary to the Supreme Court holding, the Oregon Court of Appeals had held that it was properly equipped to conduct evidentiary proceedings through a master by which a party could make either of the showings illustrated in ORS 183.480(3).⁵⁸ The Court of Appeals advanced three points to support its holding.⁵⁹ First, the Court asserted that ORS 183.482(5) allowed parties in a judicial review proceeding to supplement an incomplete agency record and, second, that ORS 183.482(7) allowed the Appellate Court to refer "disputed allegations of irregularities in procedure before the agency not shown in the record" to the Court-appointed Master.⁶⁰ Finally, the Court asserted that its contention finds support in *Lane Council Govts v. Emp. Assn.*, where the Court considered and rejected alternative claims by a public body that it was entitled to judicial review based on a showing of the second and third exceptions in 183.480(3).⁶¹

The Supreme Court rejected the Appellate Court's first point, finding that the legislature implemented the procedure described in ORS 183.482(5) to foster judicial review and was not an opportunity to create a record designed to support the showings required in ORS 183.480(3).⁶² In addition, the Supreme Court rejected the Appellate Court's second point, finding that the legislature implemented the

⁵⁷Oregon Health Care Assn., 992 P. 2d at 439.

⁵⁸*Id.* at 439-440.

⁵⁹*Id.*

⁶⁰ORS 183.482(7) provides in pertinent part: "In the case of disputed allegations of irregularities in procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a Master appointed by the Court to take evidence and make findings of fact upon them. The Court shall remand the order for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." ORS 183.482.

⁶¹Oregon Health Care Assn., 992 P. 2d at 440. (Citing *Lane Council Govts v. Emp. Assn.*, 277 Or. 631 reh'g denied 278 Or. 335 (1977)).

⁶²*Id.*

procedure described in ORS 183.482(7) for the sole purpose of allowing judicial review of the alleged procedural error; similarly, this was not an opportunity to make the showings required in ORS 183.480(3).⁶³ Lastly, the Court held that the Appellate Court's reliance on *Lane* was erroneous because no party challenged the court's jurisdiction on the alternative claims and, thus, the Court devoted no analysis to that issue.⁶⁴

Finally, OHCA claimed that if the Oregon Supreme Court's interpretation of the statutes was correct, it would lead to the conclusion that the legislature had provided no direction concerning the appropriate forum for judicial review of nonfinal orders.⁶⁵ The Supreme Court found no merit in this contention for two reasons.⁶⁶ First, as previously noted, ORS 183.482 and ORS 183.484 disallowed judicial review for a nonfinal order and, second, the text in 183.480(3) provided guidance as to the proper forum for challenging a nonfinal order.⁶⁷ The Court noted that ORS 183.480(3) indicated that a party must make the showings required by the second and third exceptions in an "action or suit" and that this phrase referred to forms of action that a Circuit Court may hear under other statutory grants of jurisdiction.⁶⁸ Moreover, the Court stated that "showing,"⁶⁹ by definition, consists of a presentation of evidence and argument that a party may make for the first time in a Circuit Court.⁷⁰ Furthermore, ORS 183.480(3) institutes no limitations on the scope of evidence that a party can present.⁷¹ To support its holding, the Supreme Court also cited *Brian v. Oregon Government Ethics Commission*, in which a party made the showings required in ORS 180.480(3) in the Circuit Court.⁷²

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.* at 441.

⁶⁹The term "showing" is defined as follows: "A statement or presentation of a case or an interpretation of a set of facts...appearance, evidence...proof or prima facie proof of a matter of fact or law..." *Id.*(Citing WEBSTER'S THIRD NEW INT'L DICTIONARY, at 2106 (unabridged ed. 1993)).

⁷⁰Oregon Health Care Assn., 992 P.2d at 441.

⁷¹*Id.*

⁷²*Id.*(Citing *Brian v. Oregon Government Ethics Commission*, 320 Or. 676 (1995)).

IV. CONCLUSION

The decision of the Oregon Supreme Court holding that the Court of Appeals did not have jurisdiction to review the nonfinal order of the Health Division is significant precedent explicating the scope of judicial review of the Appellate Court. The Court found that ORS 183.482 and ORS 183.484 granted judicial review to the Court of Appeals only for final orders.⁷³ In addition, the Court found that a party may make any showing required in 183.480(3) in the Circuit Courts and not on judicial review.⁷⁴ This decision effectively curtails the jurisdiction of the Court of Appeals on judicial review. It reflects a considered and careful examination of the complex statutory provisions regarding review of agency actions in Oregon.

⁷³Oregon Health Care Assn., 992 P.2d at 441.

⁷⁴*Id.*

