IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

R.G., Appellant, v. STATE OF ALASKA, DIVISION OF VOCATIONAL REHABILITATION, Appellee.	))))))))))	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY KJK: ON: JUNE 20, 2017 Case No. 1JU-16-00542CI

DECISION ON APPEAL

I. INTRODUCTION

R.G.,[1] who suffers from Posttraumatic Stress Disorder, anxiety, a learning disability, and back pain, sought assistance from the State of Alaska, Division of Vocational Rehabilitation (DVR) to be trained as a truck driver. Although the State of Alaska, Division of Vocational Rehabilitation, paid for four separate training programs for a Class A commercial driver's license (CDL-A), R.G. failed the driving test for a CDL-A four times. R.G. was able to pass the test to obtain a Class B license (CDL-B), but this did not result in suitable employment. R.G. asked DVR to pay for a fifth training program to obtain a CDL-A, but DVR refused. R.G. challenged the denial of further CDL-A training through an administrative hearing with an Administrative Law Judge, who affirmed DVR's decision.[2] The Commissioner of the Department of Labor and Workforce Development adopted the ALJ's decision. R.G. appeals this decision to the Superior Court.

[1] The court uses initials to protect R.G.'s privacy.
[2] This appeal concerns only R.G.'s request for additional training for the CDL-A test. DVR has not refused R.G. training for a different vocational goal.

R.G. argues that the prior truck driving training she received was inadequate given her disabilities. She further argues that a CDL-B is insufficient for her to obtain employment. She contends that, with additional training, she would be able to pass the CDL-A test and obtain employment as a truck driver.

DVR, on the other hand, argues that there was substantial evidence supporting the Commissioner's decision that DVR properly denied R.G.'s request for additional CDL-A training. As a result, DVR asks the court to affirm the Commissioner's decision.

II. STANDARD OF REVIEW

The court reviews the Administrative Law Judge's findings of fact under the "substantial evidence" test.[3] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the whole record.[4] Under this standard, "it is not the function of the (reviewing) court to reweigh the evidence or choose between competing inferences," but instead "to determine whether such evidence exists."[5] A court does not evaluate the "strength of the evidence, but merely notes its presence."[6]

The court's review of an agency's application of its own regulations to the facts is limited to whether that agency's decision was "arbitrary, unreasonable, or an abuse of discretion."[7] The "reasonable basis" standard is used for questions of law involving agency expertise, while a "substitution of judgment" standard is used for questions of law that fall outside of an agency's

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[3] *Kingik v. State, Dept. of Admin., Div. of Retirement & Benefits*, 239 P.3d 1243, 1248 (Alaska 2010).
[4] *Id.*
[5] *Blas v. State,* 331 P.3d at 370.
[6] *Handley v. State, Dept. of Revenue,* 838 P.2d 1231, 1233 (Alaska 1992).
[7] *Griffiths v. Andy's Body & Frame, Inc.,* 165 P.3d 619, 623 (Alaska 2007).

expertise.[8] Under the "reasonable basis" standard, a court gives deference to an agency's determination as long as it is reasonable, supported by evidence in the record as a whole, and there is no abuse of discretion.[9]

III. CLAIMS ON APPEAL

R.G. presents two basic arguments. First, she claims that the Division of Vocational Rehabilitation (DVR) did not present sufficient evidence to support the denial of her request to re-write an Individualized Plan of Employment (IPE) to cover a six-week CDL-A training program. As part of this argument, she questions the amounts of money DVR spent to provide her services, and claims that the four CDL-A trainings that she previously attended were not adequate training to prepare her for the four CDL-A examinations she failed. Second, she argues that the administrative law judge erred in reaching certain findings. Specifically, she questions his findings on her previous jobs, his findings on her PTSD, and his ultimate decision on her ability to find or gain employment. To support this argument, she claims that there was no proof in the record that she would not be successful with the requested training had she been provided the requested accommodations. Having considered the briefs submitted by both parties and carefully reviewed the record, I conclude that the decision of the Commission must be affirmed for the reasons set forth below.[10]

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[8] *Blas v. State, Dept. of Labor & Workforce Dev., Div. of Employm. Sec.,* 331 P.3d 363, 369 (Alaska 2014).
[9] *Ellis v. State, Dept. of Nat. Resources.,* 944 P.2d 491, 493 (Alaska 1997).
[10] Neither party moved for oral argument under Alaska R. App. P. 605.5. Accordingly, only the briefs and OAH record presented to this court were considered in this appeal. R.G. submitted a number of documents to this court that were not included in the agency record. Those materials are not considered in reaching this decision unless they were already included in the agency record. *See,* Appellate Rule 604(b)(1)(A); *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 793 (Alaska 2015).

IV. DISCUSSION

A. <u>The Commissioner's Findings are Supported by Substantial Evidence</u>:

In this case, DVR presented both agency records and testimony in support of its decision not to rewrite R.G.'s IPE. DVR provided over 1,000 pages of agency records to demonstrate that DVR had previously instituted twelve (12) IPE plans, amendments, or revisions since 2009 for R.G.; that DVR had spent over $102,000 providing services to R.G. (including over $28,580 for training); that R.G. had already attended four separate CDL-A trainings subsidized, in whole or in part, by DVR; and that R.G. had previously failed four separate CDL-A tests after receiving training.

In addition, DVR presented testimony in support of its decision not to fund R.G.'s six-week training for a CDL-A license. First, DVR presented the testimony of James Swanson, a vocational rehabilitation manager with the division. Mr. Swanson observed that from 2000 to 2009, DVR had paid over $41,000 for employment services to R.G. In addition, between 2009 and the hearing in November 2015, DVR had provided another $58,736 to assist R.G. in reaching her employment goals. Mr. Swanson testified that of that total amount, DVR had spent $28,216 on training for R.G.

Mr. Swanson explained that DVR's mission is to help individuals with disabilities obtain or maintain employment. As part of this mission, Mr. Swanson observed that DVR pays for some employment training, but added that this is a discretionary service. He noted that "training is a service of vocational rehabilitation and is not – we are not a training program."[11] He observed that training is time-limited and is not necessarily an on-going service. Mr. Swanson

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[11] Later, he reiterated this point, stating that "Training is a service that we may provide. But we're an employment agency that helps individuals with disabilities."

observed that DVR had already paid for training which enabled R.G. to receive her CDL-B license, and had funded four separate CDL-A trainings for R.G. with no success:

> The – the main basis [for DVR's decision not to pay for the additional training] was that [DVR] ha[s] provided assistance in this training multiple times and in different – with different trainers and also different methods of training, to help address any of the disability-related issues.
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> And unfortunately, even in – in each situation, no matter if it's different, [R.G.] was unable to be successful in this training. And so, as a result, that – we felt that she does not have the skill sets or the aptitude to successfully complete the CDL Class A training. And also, she does have transferable skills in – with her Class B CDL – CDL Class B license, that does make her employable within the labor market.

Mr. Swanson went on to explain DVR's policy of informed choice, and noted that choices "have to make rehab sense, and [] must match [the client]'s skills and abilities." He observed that DVR was willing to continue to work with R.G., but did not want to provide funding for her fifth CDL-A training, primarily because she had been unsuccessful with prior trainings and now has an employable skill with her CDL-B license.

Next, DVR presented the testimony of Mariah Krueger, chief of services of DVR. Ms. Krueger explained that R.G. had three individualized plans (IPE)s, with several amendments, since 2009. She noted that the denial of R.G.'s request for a new IPE with the goal of being a heavy tractor-trailer truck driver was the reason for the appeal. Ms. Krueger stated that DVR's vocational training policy states that "DVR will not provide financial assistance for courses that must be repeated due to a failing grade or withdrawal from the course." She noted that R.G. was, nonetheless, provided with additional hours and trainings, through funding from DVR and other

agencies. She noted: “I think we paid for – one full training, one one-on-one, and then another full training, essentially.”[12]

Ms. Krueger also reiterated the concept of informed choice with DVR:

> We encourage [consumers] to actively participate and make those meaningful decisions in conjunction with their counselor. But it doesn’t mean that they have complete control over their program. Because sometimes there are things that we just can’t necessarily support, given our thorough understanding of what some of the limitations might be.

Ms. Krueger noted that in this case, “based on R.G.’s history, her inability to obtain her CDL-A license due to errors during the test, that, essentially, the goal is incompatible with her abilities, capabilities, and limitations; and that no accommodation or rehabilitation technology or other service can – can bridge that gap.” She observed that although informed choice allows a consumer to be involved in setting a particularized IPE, DVR still has “to balance the legal principles of individualization and reasonable and necessary costs.” In support of DVR’s position in this case, she observed:

> Continuing to pay for something that we have already paid for, more than probably—more often than we probably should have, is not necessarily reasonable. And – and, in all honesty, she has been able to obtain and maintain employment with the CDL-B, which is, ultimately the goal of our program is to obtain and maintain employment. It’s resulted in an employment outcome. . .
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> [W]ith regards to the cost, the number of times that she’s taken this test, but . . . not been able to pass it due to errors during the test, the driven test, I think that we are completely within our rights to – to no longer support the heavy – heavy-truck driver job goal.

She also reiterated that training is not a mandatory service, and instead is a discretionary service dependent on the consumer’s vocational goal.

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[12] On cross examination, Ms. Krueger clarified that R.G. had previously attended a 3-week course, not a 6-week course, as was originally represented.

Finally Ms. Cindy Murphy-Fox, regional vocational rehabilitation manager who had conducted the initial administrative review within the agency, also testified for DVR. She observed, based on her review of R.G.'s record with DVR, that R.G. had "multiple means of training provided to her – in different modes. So not only classroom, but on-the-road, you know, hands-on, on-the-job training, one-on-one." She explained that these various services provided to R.G. over several years perhaps demonstrated that R.G. was "experiencing some functional limitations when it comes to completing the training for the CDL Class A." She noted that she didn't believe, based on R.G.'s testing history, that with additional training that there was a likelihood that R.G. would pass a CDL-A test, or that if she did, it was unlikely that she would hold a job that required that training.

R.G. relied primarily upon the testimony of Larry Corbin to argue that DVR's denial of her request was unreasonable. Mr. Corbin, who was experienced with the trucking industry and described himself as R.G.'s "rehabilitation provider"[13] had worked one-on-one with R.G. In his testimony, Mr. Corbin noted that R.G. was a "pretty good driver" but that she needed more time for training to get her CDL-A. He testified, contrary to DVR's witnesses, that R.G. *was* capable of getting a CDL-A license if provided the proper training. Moreover, R.G. provided her own testimony and argument, asserting that the previous trainings that she had been provided were not comparable to the one being requested, that the training she received was not tailored for someone with her particular disabilities, and that a CDL-A (not just a CDL-B) license was necessary for her to obtain work. She claimed that with additional specialized training tailored

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[13] Mr. Corbin stated that he was a certified rehabilitation provider through the State of Alaska, and that R.G. was his only client. However, James Swanson, vocational rehabilitation manager with DVR, specifically noted that Mr. Corbin was <u>not</u> a certified rehabilitation counselor.

for someone with her disabilities, she would be able to pass her CDL-A test. However, R.G. did not dispute that she had previously received extensive services from DVR, or that she had been unable to pass four previous CDL-A tests.

In this case, the administrative law judge found it was more likely than not that the additional training that was denied for R.G. would not result in her passing the CDL-A driving test. In support of this finding, the judge noted that R.G. had previously received multiple trainings, and had previously failed multiple CDL-A exams. The testimony and agency record documenting R.G.'s history with not passing multiple CDL-A tests, after engaging in multiple CDL-A classes and trainings, supports this finding. Therefore, the court concludes that there is substantial evidence to support the finding that additional training would not necessarily result in R.G. passing her CDL-A test.

The administrative law judge went beyond the scope of just that training and testing history in making this finding, additionally looking to R.G.'s employment and medical records. The judge observed that based in part due to her "history of failing to hold onto jobs," it could "reasonably be inferred that insufficient training [was] not what was primarily responsible for her failure to pass the test." However, little testimony or other agency record directly linked R.G.'s employment history with her previous ability or inability to pass the CDL-A test.

The judge then concluded, based on R.G.'s medical and other agency records, that "it is probably [R.G.]'s PTSD that is the primary reason she has been unable to pass the test, rather than insufficient training." There was little testimony on PTSD at the hearing. Mr. Corbin, R.G.'s witness and former driving teacher, was one of the only witnesses to note that PTSD could affect driving. But Mr. Corbin was no expert in PTSD; he is a truck driver and instructor, not a medical doctor. In his testimony, he detailed his experience driving with R.G. and related that he personally had suffered PTSD, but provided no other qualifications for a medical

analysis of how PTSD could relate to R.G. passing or not passing a CDL-A test. In addition, the DVR provided little testimony on the issue of PTSD and driving.[14]

Substantial evidence, however, is a low bar. The court does not reweigh the evidence; it merely has to determine whether such evidence exists. Such evidence exists here. Therefore, a reasonable mind could conclude, particularly in light of R.G. previously engaging in multiple classes and failing multiple tests, that providing training for an additional CDL-A test would not necessarily result in R.G. passing the test and gaining employment in this case.

The judge then found that even if she were to pass the CDL-A driving test, R.G. would not be successful in holding onto a job that required such a license. The judge concluded that DVR correctly determined that "such employment [was] not compatible with her abilities and limitations" in making its decision on her IPE. In making this finding, the judge looked to R.G.'s employment history of failing to hold onto jobs, as well as testimony from R.G. and Mr. Corbin. The court also inferred, based on R.G.'s training history, that R.G. "would unlikely be able to successfully deal with the stress of employment as a CDL-A driver."

This court finds that there is relevant evidence to support this second finding. R.G. and Mr. Corbin observed that R.G. did not perform well in stressful situations, was sensitive to negative feedback, and had difficulty dealing with strangers. DVR presented witnesses and an agency record to support that even if R.G. were to pass the test, based on her employment history, she would not necessarily hold onto the job that required a CDL-A license. The court therefore finds that substantial evidence exists to support this finding.

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[14] DVR presented testimony and agency records that indicated that one of the reasons R.G. was enrolled in vocational rehabilitation services was due to her PTSD.

As noted above, the applicable standard of review requires this court to review the administrative law judge's findings under the "substantial evidence" test.[15] Substantial evidence, as provided above, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the whole record.[16] It is not the function of this court to reweigh the evidence, but instead "to determine whether such evidence exists."[17] Thus it is not the place of this court to decide whether to adopt R.G.'s view of the evidence. Instead, it is only the court's role to decide whether there is substantial evidence supporting the view of the evidence adopted below. Here, relevant evidence existed to support the judge's findings.

Because the Commissioner's view of the evidence was supported by substantial evidence, the Commissioner's findings adopting the findings of the Administrative Law Judge must be affirmed.

B. Did the Administrative Law Judge Abuse His Discretion?

In light of that conclusion, the court must next turn to the question of whether the decision of the Administrative Law Judge upholding the decision by DVR not to re-write an Individualized Plan of Employment (IPE) for R.G. that covered the cost of a 6-week CDL-A training was "arbitrary, unreasonable, or an abuse of discretion."

AS 23.15.095 provides that DVR's "primary objective and preferred outcome" is to help each consumer "become gainfully employed" in an integrated workplace.[18] DVR uses a practice of "informed choice," meaning that individuals participating in the vocational rehabilitation

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[15] *Kingik v. State, Dept. of Admin., Div. of Retirement & Benefits*, 239 P.3d 1243, 1248 (Alaska 2010).
[16] *Id.* at 1248.
[17] *Blas v. State,* 331 P.3d at 370.
[18] The statute defines "gainfully employed" as part time or full time work that is at or above minimum wage and not less than the compensation paid by the employer for the same or similar work performed by an individual who is not disabled. AS 23.14.095(c).

program have the opportunity to obtain information about options and can make decisions about their vocational goals.[19] However, the policy does not provide unlimited control to the consumer; instead, choices should be made based on "realistic options" and "within the constraints" otherwise outlined in the policy. [20] The policy provides that a vocational rehabilitation counselor may not be able to support a consumer's choice if there is substantial evidence that the decision will not lead to an employment outcome, or if the goal "is incompatible with the individual's abilities, capabilities, and limitations."[21] Moreover, vocational rehabilitation counselors are directed to only provide for costs that are "reasonable and necessary" to address the employment needs of the individual consumer.[22]

As provided above, an appellate court's review of an agency's application of its own regulations to the facts is limited to whether that agency's decision was arbitrary, unreasonable, or an abuse of discretion.[23] A "reasonable basis" standard is appropriate for questions of law involving agency expertise.[24] The court gives deference to the agency's decision provided it is reasonable, supported by evidence in the record as a whole, and there is no abuse of discretion.[25]

Upon reviewing the record, DVR policies, statutes and regulations, I conclude that the decision of the Administrative Law Judge upholding DVR's decision was not "arbitrary,

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[19] DVR policy defines "informed choice" as a process that "provides an individual the opportunity to be an active and knowledgeable participant in his/her rehabilitation program and to make meaningful decisions in all phases of the vocational rehabilitation process." State of Alaska, Department of Labor and Workforce Development, Alaska Division of Vocational Rehabilitation Policy 3.0, Informed Choice, § 2.0, 3.1 (Sept. 16, 2009), http://www.labor.state.ak.us/dvr/policy_temp.htm.
[20] *Id.* at § 3.1.
[21] *Id.* at § 3.2.
[22] *Id.*at § 3.4.
[23] *Griffiths v. Andy's Body & Frame, Inc.,* 165 P.3d 619, 623 (Alaska 2007).
[24] *Blas v. State, Dept. of Labor & Workforce Dev., Div. of Employm. Sec.,* 331 P.3d 363, 369 (Alaska 2014).

unreasonable, or an abuse of discretion." From the record, DVR does not appear to have violated its internal policies or procedures. DVR's primary objective is to help each consumer to become gainfully employed, and the evidence supports the conclusion that providing this additional training—after DVR previously paid, at least in part, for 4 trainings and tests on the same subject matter—would help R.G. to reach that goal of gainful employment. DVR did not broadly assert that it would no longer provide services for R.G., or that it would not write a new IPE for her; instead, it declined to issue a new IPE that would cover the cost of this one specific CDL-A training.

Moreover, the fact that DVR encourages consumers to participate in setting their own employment goals and actively engaging in their own vocational rehabilitation through "informed choice" does not give the consumer ultimate power to make unlimited or unreasonable decisions. Some discretion must be afforded to DVR to decide how to allocate its limited resources, especially if the costs requested are unreasonable or out of line with DVR's employment goals. In this case, DVR had already spent over $102,000 providing services to R.G., had already paid for 4 trainings of this same subject matter, and had already paid for 4 CDL-A tests without success. As testified to by Mr. Swanson, DVR is an employment program, not a training program. R.G. was not entitled to unlimited trainings of her choice. DVR policy provides that employment choices should be made based on "realistic options" and "within the constraints" otherwise outlined in the policy. [26] Based on the costs already spent providing trainings to R.G., the variety and number of unsuccessful trainings and CDL-A tests, as well as R.G.'s employment history, DVR could reasonably conclude that further CDL-A training would

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[25] *Ellis v. State, Dept. of Nat. Resources.,* 944 P.2d 491, 493 (Alaska 1997).

not be productive, or would otherwise be "incompatible with the individual's abilities, capabilities, and limitations."[27]

Based on the factual findings of the Administrative Law Judge, which were supported by substantial evidence, the decision below is not "arbitrary, unreasonable, or an abuse of discretion." As a result, that decision must be affirmed.

V. CONCLUSION

For the reasons provided above, the Commissioner's decision adopting Administrative Law Judge Mark T. Handley's decision in *R.G. v. Division of Vocational Rehabilitation* in OAH 15-964-VOC is hereby AFFIRMED.

Entered at Juneau, Alaska this 20 day of June, 2017

Signed
Philip M. Pallenberg
Superior Court Judge

[This document has been modified to conform to the technical standards for publication.]

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[26] State of Alaska, Department of Labor and Workforce Development, Alaska Division of Vocational Rehabilitation Policy 3.0, Informed Choice, § 3.1 (Sept. 16, 2009), http://www.labor.state.ak.us/dvr/policy_temp.htm.
[27] *Id.* at § 3.2.