Superior Court of Washington
County of CLARK

JOHN LEY; NW RETIREMENT , SOLUTIONS, LLC and NW SAFE RETIREMENT LLC, Petitioner, and WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondent.	**No. 18-2-06616-06** **DECISION ON PETITION FOR REVIEW OF FINAL DECISION AND ORDER ON DFI'S STATEMENT OF CHARGES 06-2016-DFI-00011** **Clerk's Action Required**

Appellant JOHN LEY; NW RETIREMENT, SOLUTIONS, LLC and NW SAFE RETIREMENT LLC, ("Ley") seeks an order overturning the ALJ initial order and OAH final order affirming the Department of Financial Institutions, Securities Division, ("DFI") statement of charges. Ley alleges the statement of charges and subsequent affirmation of the charges violated a) due process; b) agency jurisdiction for out of state sales; c) right to time enlargement to conduct discovery and defense; d) error of law regarding securities and recklessness; e) substantial evidence requirement; and h) order was arbitrary or capricious in its application.

FACTS

John Ley formed an LLC, became a licensee of Life Partners, Inc. ("LPI"), and

from 2006 to 2014 he sold LPI's life settlement products. Ley sold approximately 93% of the products to non-Washington residents. LPI products, life and viatical settlements, offered persons with life insurance a chance to sell their policies for an immediate cash benefit. Buyers like Ley and his clients could purchase a fractional share in those policies. Once the policy matured thy would receive a proportionate share.

Life settlements, like LPI's products were not included in the definition of a security under the Washington State Securities Act ("WSSA"). RCW 21.20.005. At the time Ley made sales in Washington, neither DFI nor any Washington court had determined that LPI's life settlements were securities under WSSA.

DFI opened two investigations into Ley's actions, one in 2007 and one in 2010 without determining that LPI life settlements were securities under Washington law. DFI never issued a cease and desist order or otherwise attempted to stop Ley from selling or marketing LPI's products. DFI's financial legal examiner, Adam Yeaton, testified that DFI closed its investigation in 2007 because it "didn't have enough information to substantiate a violation".

Ley retained attorney Ralph Smith, former DFI attorney, who opined to DFI that the life settlements were not securities under Washington Law.

In 2014, Ley made his last sale. He has not sold LPI's products or similar product for the years since. On March 7, 2016, DFI issued a statement of charges against sellers of LPI's products alleging violations of Washington's Securities Act. DFI sought an order that Ley cease and desist any further violation and requested a fine of $50,000.

On November 15, 2017 Administrative Law Judge ("ALJ") found that LPI's products qualified as securities under Washington Law. On April 2, 2018 the ALJ issued an initial order affirming DFI's statement of charges, including the $50,000 fine. OAH review affirmed the

order and issued the Final Order, this appeal followed.

ISSUE:

Did Ley "recklessly" violate the Washington Securities Act?

DISCUSSION

Appellant wants this court to reverse the Office of Administrative Hearings Review Division's November 21, 2018 Final Decision and Order.

The Washington Administrative Procedure Act, ("APA") chapter 34.05 RCW, establishes judicial review of an agency action. RCW 34.05.510. The party challenging an agency decision has the burden of demonstrating the invalidity of the agency's action. RCW 34.05.570(1)(a).

The APA provides nine grounds for invalidating an agency decision. Ley relies on two: The OAH erroneously interpreted or applied the law, and the OAH's decision is in violation of constitutional provision on its face or as applied. This court reviews issues of statutory construction de novo under an error of law standard. *Ryan v Dep't of Soc. & Health Servs.,* 171 Wn.App. 454 (2012). Similarly, whether an agency order, or the statute supporting the order violates constitutional provision is a question of law that we review de novo.

This case presents legal issues involving complicated securities regulations. DFI argues that WSSA as a "remedial" statute supports a less than robust analysis of recklessness necessary to find a violation, and in favor of this court giving considerable weight to agency interpretation. The provisions of the WSSA are to be broadly construed in order to maximize the act's remedial purpose of protecting the public. *McClellan v* Sundholm, 89 Wash.2d 527 (1978). A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Remedial statutes are generally enforced as soon as they are effective, even if they

relate to transactions predating their enactment. As such, remedial statutes are an exception to the general rule that statutes operate prospectively. If a statute is remedial in nature and retroactive application would further its remedial purpose, "it will be enforced retroactively." *Macumber v. Shafter,* 96 Wash.2d 568 (1981). The WSSA, this action is based upon, does not violate the ex post facto analysis. However, WSSA's underlying purpose is to protect the general public and is "remedial" to afford the injured party a remedy in addition to other remedies in contract or tort that may be inadequate. Remedial is defined as giving or intended as a remedy or cure.

The court is not aware of any injured parties, whereas DFI is enforcing the statute as a general public policy obligation. The statute provides for discretion when the agency will enforce, and when the agency declines to enforce the provisions of the WSSA. This discretion becomes central to the facts of this case, and ultimate conclusion of recklessness, because of the multiple declinations by DFI to exercise its discretion on the determination of Life Settlement products as a security, subject to RCW 21.20. As a remedial statute the goal of RCW 21.20 is to provide a remedy to victims and to protect the general public from Ley's actions. Because the $50,000 fine will not provide anything to the victims or remedy any losses, the effect of the fine is a punitive penalty requiring an analysis of recklessness.

DFI's authority to investigate and produce cease and desist orders and the fact that a $50,000 punishment was levied two (2) years after Ley's last sale of the product is inherently punitive. The punitive nature of the assessment requires the court to robustly analyze the legal requirement that Ley knowingly or recklessly violated the WSSA.

ALJ determined "[Ley] acted **recklessly** in choosing to disregard the multiple warnings from the Department and its counterpart in Oregon that Life Partners' life settlements were or **may be** securities." [Emphasis added] AR 76.

Recklessness is a state of mind that is determined both subjectively and objectively. There are two types of reckless behavior. The first looks at what the actor knew or is believed to have been thinking when the act occurred (subjective test). The second considers what a reasonable person would have thought in the defendant's position (objective test). In both situations, the issue turns on conscious awareness, or whether the person knew (or should have known) his actions may cause harm to another.

Facts known to DFI and ALJ was that for many years beginning in 2007 and then 2010 the debatable question of whether Life Settlements are securities had been unresolved by any judicial decision. In fact, in the 2007 investigation Ley's attorney (prior DFI employee) advised his client and DFI that Life Settlements are not securities. DFI declined to enforce after this debate. In addition, in the 2010 investigation DFI declined to exercise its discretion to pursue formal enforcement action due to an extremely heavy caseload for enforcement staff. DFI did not inform Ley why they were not proceeding with enforcement (after taking his testimony on the subject). DFI appears to argue that Ley was obligated to inquire the reasons for DFI's decision, and his failure to inquire was reckless.

Where a statute is within DFI's special expertise, the agency's interpretation is accorded great weight, provided the statute is ambiguous. An agency's interpretation of an ambiguous statute is **not entitled to deference, however, if the interpretation is entirely inconsistent with the agency's prior administrative practice**. *Skamania County v Columbia River Gorge*

Com'n, 144 Wash.2d 30 (2001) citing *Bowen v Georgetown Univ. Hosp.*, 488 U.S.204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). [Emphasis added].

Based upon the facts, there is insufficient evidence in this record to determine as a matter of law that Ley was reckless in conducting his business prior to 2014. To find otherwise would result in all debatable questions resulting in a finding of recklessness upon the judicial determination resolving the debate. Prior to 2018, whether or not Life Settlement products were a security subject to WSSA had not been resolved by the courts. In addition, DFI's decision not to conclusively resolve the debatable question regarding the life settlement status under WSSA results in Ley being entitled to rely on DFI's decision to not seek enforcement of this debatable question. Substantial evidence, in this record, supports Ley's reasonable (subjective) belief that the products were not securities therefore not reckless. In addition, there is insufficient evidence in the record what a reasonable person would have known or should have known his actions would cause harm to another.

The substantial fine two (2) years after termination of sales is inherently punitive and will do little to protect the public. This is especially true when DFI failed to meet its quasi-prosecutorial role of enforcing the statute for seven (7) years (2007to 2014).

There is insufficient evidence in the record to support Findings by the ALJ and the OAH and as such they erred as matter of law finding that Ley violated WSSA by recklessly selling Life Settlement products.

Therefore, the decision of the ALJ and OAH which affirmed DFI's statement of charges is REVERSED and remanded to vacate the sanction.

The court does not address other claims of jurisdiction for assessment of out-of-state sales and reserves any future argument on this issue consistent with this ruling.

Dated: 1/21/2020

JUDGE DANIEL L. STAHNKE