

No. 128354

IN THE
SUPREME COURT OF ILLINOIS

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| <p>GRANT NYHAMMER,</p> <p style="padding-left: 40px;">Plaintiff-Appellee,</p> <p>v.</p> <p>PAULA BASTA, in her official capacity as Director of the Illinois Department on Aging,</p> <p style="padding-left: 40px;">Defendant-Appellant.</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois</p> <p>No. 19-MR-1106</p> <p>The Honorable DONNA R. HONZEL, Judge Presiding.</p> |
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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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NATURE OF THE ACTION

In 2019, the Northwestern Illinois Area Agency on Aging (“NIAAA”), a nonprofit entity that receives federal and state grant funds from the Illinois Department on Aging (“Department”), submitted two petitions requesting hearings on the Department’s alleged withholding of grant funds and its rejection of NIAAA’s recommendations for service providers under the Adult Protective Services Act, 320 ILCS 20/1 *et seq.* (2020). The Department denied those requests because neither petition presented a contested case for which an administrative hearing was necessary under the Illinois Administrative Procedure Act (“APA”), 5 ILCS 100/1-1 *et seq.* (2020).

Grant Nyhammer, NIAAA’s Executive Director, later initiated this *mandamus* action against Paula Basta, in her official capacity as the Department’s Director, seeking to compel her to provide NIAAA with hearings on the two petitions and promulgate rules of procedure to govern the hearings. Basta filed a motion to dismiss this action under section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2020), arguing that neither petition constituted a contested case under the APA because a dispute only presents a contested case if a source of law independent of the APA (*e.g.*, a statute or the constitution) affords a party a right to a hearing, and NIAAA identified no law conferring such a right as to either petition. The circuit court granted Basta’s motion and dismissed Nyhammer’s action, concluding that he alleged no facts

showing that NIAAA had a right to a hearing on either petition. Nyhammer appealed.

The appellate court *sua sponte* construed the Department's denials of hearings as final administrative decisions subject to the Administrative Review Law ("ARL"), 735 ILCS 5/3-101 *et seq.* (2020), and held that the Department failed to make sufficient factual findings for judicial review under that statute. It then held that both petitions presented contested cases under the APA for which the Department was required to provide NIAAA with hearings and promulgate rules of procedure to govern them. Rather than remanding Nyhammer's *mandamus* action to the circuit court — where he initiated it — the appellate court remanded the case to the Department with directions to hold hearings on both petitions. This Court allowed Basta's petition for leave to appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether Nyhammer failed to state a claim for *mandamus* because NIAAA's petitions did not present contested cases under the APA.
2. Whether, even if Nyhammer stated a claim for *mandamus*, this Court should remand this action to the circuit court for further proceedings rather than remanding to the Department for hearings on the petitions.

JURISDICTION

On February 28, 2020, the circuit court entered a final order dismissing Nyhammer’s action with prejudice under section 2-615. C120.¹ He filed a motion to vacate the circuit court’s judgment on March 6, 2020, C121, which was timely because it was filed within 30 days of that judgment, *see* 735 ILCS 5/2-1203(a) (2020). The circuit court denied the motion to vacate on July 21, 2020, C158-59, and Nyhammer filed a notice of appeal on August 17, 2020, C160, which was timely because it was filed within 30 days of the denial of his timely post-judgment motion, *see* Ill. Sup. Ct. R. 303(a)(1). The appellate court had jurisdiction over the circuit court’s final judgment under Illinois Supreme Court Rule 301.

On February 8, 2022, the appellate court issued an order under Illinois Supreme Court Rule 23, reversing the circuit court’s judgment and remanding to the Department. A16-A28. On February 16, 2022, Nyhammer filed a timely motion to publish that order and, on February 24, 2022, Basta filed a timely petition for rehearing. A87; Pet.; *see* Ill. Sup. Ct. Rs. 23(f), 367(a). On February 28, 2022, the appellate court denied Basta’s petition for rehearing and, on March 2, 2022, granted Nyhammer’s motion to publish, issuing its published opinion the same day. A1-A15, A29-A30. On April 5, 2022, Basta

¹ This brief cites the one-volume common law record as “C___,” the one-volume report of proceedings as “R___,” Nyhammer’s opening brief in the appellate court as “AT Br. ___,” Basta’s response brief in the appellate court as “AE Br. ___,” Basta’s petition for rehearing in the appellate court as “Pet. ___,” and the appendix to this brief as “A___.”

filed a timely petition for leave to appeal, which this Court allowed on May 25, 2022. *See* Ill. Sup. Ct. R. 315(b).

STATUTES INVOLVED

Section 1-30 of the APA states:

“Contested case” means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

5 ILCS 100/1-30 (2020).

Section 10-5 of the APA states:

All agencies shall adopt rules establishing procedures for contested case hearings.

5 ILCS 100/10-5 (2020).

Section 10-50(a) of the APA states, in relevant part:

A final decision or order adverse to a party (other than the agency) in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

5 ILCS 100/10-50(a) (2020).

Section 3-101 of the ARL states, in relevant part:

“Administrative decision” or “decision” means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency.

735 ILCS 5/3-101 (2020).

STATEMENT OF FACTS

The Department and NIAAA

The Department administers several programs for older adults in Illinois, including by receiving and disbursing federal grant funds under the Older Americans Act (“OAA”), 42 U.S.C. § 3001 *et seq.* *See id.* § 3025(a)(1); 20 ILCS 105/4 (2020). Under the OAA, the Department distributes funds to several nonprofit organizations designated as “area agenc[ies] on aging” based on a formula set by the Department and approved by the federal government. 42 U.S.C. § 3025(a)(2)(A); 45 C.F.R. § 1321.37; 89 Ill. Admin. Code § 230.45. To obtain federal funds, the Department periodically submits state plans to the United States Department of Health and Human Services’ Assistant Secretary for Aging, *see* 42 U.S.C. § 3027(a); the state plans include, among other information, the identity of each area agency on aging in the State and how the Department will distribute funds to them, *see* 45 C.F.R. § 1321.17(c), (d). *See also* Ill. Dep’t on Aging, State Plan on Aging for FY2017-FY2019, <https://bit.ly/3GRU1HG>, at 36-37, 77 (last visited June 29, 2022) (hereinafter, “State Plan FY2017-19”); Ill. Dep’t on Aging, FY2013-FY2015 State Plan on Aging, <https://bit.ly/3PYFHBr>, at 40-41, 93 (last visited June 29, 2022) (hereinafter, “State Plan FY2013-15”).²

² This Court may take judicial notice of the Department’s state plans, which are public documents available on its website. *People v. Johnson*, 2021 IL 125738, ¶ 54.

Every three years, each area agency on aging must develop an “area plan” for the provision of services to older adults in its area. 20 ILCS 105/3.07 (2020); 89 Ill. Admin. Code § 230.130(a), (e). After the area plans are approved by the Department and federal funds are distributed to the area agencies on aging, the agencies use OAA funds to “make subgrants or contracts to service providers” that deliver services to older adults. 45 C.F.R. § 1321.1(c).

Along with administering the OAA in Illinois, the Department administers the Adult Protective Services Act, which creates a program for older adults “who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect.” 320 ILCS 20/3(a) (2020). To implement that program, the Department contracts with nonprofit entities designated as “regional administrative agencies.” *Id.* §§ 20/2(i), 20/3(a).

Among other responsibilities, a regional administrative agency must recommend “provider agencies within its planning and service area,” *id.* § 20/3(b), to “receive and assess reports of alleged or suspected abuse, neglect, or financial exploitation,” *id.* § 20/2(h). But a provider agency may operate only with the Department’s “prior approval.” *Id.* §§ 20/2(h), 20/3(b). The Department’s regulations state that it will not “unreasonably” reject a regional administrative agency’s recommendations, but the Department otherwise “reserves the right to . . . reject recommendations . . . of a regional administrative agency in the designation of . . . provider agencies.” *Id.* § 270.215(b)(1). The regulations further provide that the Department’s

rejection of a provider agency “will be authorized” when “there is a State or federal contracting prohibition with the proposed provider agency,” the provider agency has a “conflict of interest,” the provider agency “does not meet minimum qualifications,” or there are “any similar circumstances” preventing the Department from contracting with the provider agency. *Id.*

The NIAAA serves as both the area agency on aging and regional administrative agency for Area 1 (Boone, Carroll, DeKalb, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago Counties). C4-5, C32. According to the Department’s state plans, Area 1 received \$2,956,399 in OAA funding each fiscal year from 2013 through 2016, and \$3,070,011 in OAA funding each fiscal year from 2017 through 2019. State Plan FY2013-15 at 93; State Plan FY2017-19 at 77.³

Nyhammer’s complaints regarding the Adult Protective Services Standards and Procedures Manual and the termination of NIAAA’s Adult Protective Services Act grant

In July 2013, Nyhammer, NIAAA’s executive director, e-mailed the Department’s then-Director John Holton, asserting that the Department’s Adult Protective Services Standards and Procedures Manual (“Manual”) should have been submitted through the APA’s notice-and-comment

³ These amounts reflect the “Title III Funds,” “Other Federal Funds,” and “Other OAA Funds” listed in the Department’s state plans for fiscal years 2013 through 2015 and 2017 through 2019. *See* State Plan FY2013-15 at 93; State Plan FY2017-19 at 77. The fiscal year 2013 to 2015 state plan “was extended into [fiscal year] 2016,” so Area 1 received the same amount in fiscal year 2016 as fiscal years 2013 through 2015. State Plan FY2017-19 at 67.

rulemaking process. C15, C25. Three months later, Nyhammer e-mailed Holton again, this time attaching a draft complaint that NIAAA was “considering filing” in court regarding the Manual. C15, C26.⁴

In December 2013, Holton informed Nyhammer that the Department was terminating a grant awarded to NIAAA under the Adult Protective Services Act, citing a provision of the grant agreement allowing it to cancel the agreement “without cause.” C27. Holton stated that the Department would assume the functions of the regional administrative agency for Area 1. *Id.* At some point after February 2014 — Nyhammer’s complaint in this action did not allege when, *see* C7, C32-39 — NIAAA was renamed as the regional administrative agency for Area 1 for purposes of the Adult Protective Services Act, *see* C32, C42.

NIAAA’s request for a hearing on the withholding of “Other Funding” and the termination of the Adult Protective Services Act grant

In June 2019, NIAAA submitted a document titled, “Petition for Hearing,” to the Department, which alleged that the Department had withheld grant funding “to retaliate for NIAAA’s advocacy regarding the Manual.” C7, C12, C15. More specifically, NIAAA alleged that the Department awarded “\$3.79 million in Other Funding” to other area agencies on aging, while NIAAA received none. C16. NIAAA described this “Other Funding” as

⁴ The proposed complaint was not attached as an exhibit to Nyhammer’s *mandamus* complaint, and does not appear in the record, in this action. *See* C11-51.

distinct from “OAA funding,” but did not specify the Other Funding’s source. C13, C22. NIAAA also claimed that the Department improperly terminated its Adult Protective Services Act grant. C15, C20.

One month later, the Department’s deputy general counsel e-mailed NIAAA a letter stating that the Department would hold no hearing on its petition and could not issue “a final decision or order” because the petition did not present a contested case under the APA. C31. The letter explained that, despite NIAAA’s counsel having offered to “provide additional support for [its] claim that it is entitled to an administrative hearing,” the Department had received nothing else from NIAAA’s counsel. *Id.*

Nyhammer’s attempt to file an original action in this Court

On August 22, 2019, Nyhammer filed a motion for leave to file an original action for *mandamus* in this Court, seeking an order compelling Basta to provide him with a hearing on NIAAA’s “Petition for Hearing.” A31-A32, A38. In support, Nyhammer cited a provision of the OAA affording an area agency on aging a ““public hearing”” before the Department makes a ““final determination . . . withholding funds.”” A38, A40, A53 (quoting 42 U.S.C. § 3026(f)(2)). In response, Basta argued that an original action for *mandamus* should not be used to circumvent the normal litigation process and, regardless, Nyhammer’s petition alleged that unspecified Other Funding and an Adult Protective Service Act grant, not OAA funds, were withheld. A69-A77, A82-84.

This Court denied Nyhammer's motion and later denied his motion to reconsider. A85-A86.⁵

NIAAA's request for a hearing on the rejection of NIAAA's provider recommendations under the Adult Protective Services Act

In June 2019, as a regional administrative agency for purposes of the Adult Protective Services Act, NIAAA solicited bids from prospective provider agencies and recommended certain agencies to the Department. C35, C42. On July 31, 2019, Basta wrote to Nyhammer, explaining that the Department rejected NIAAA's recommendations because of errors in NIAAA's bidding process such as NIAAA incorrectly describing the procurement process, using vague and improper criteria to evaluate applications, making errors in the scoring process, and incorrectly describing the criteria for provider agencies in the Department's regulations. C42-49. Basta further explained the Department's recommended revisions to NIAAA's bidding process. C49-50.

Twenty-three days later, NIAAA submitted a second "Petition for Hearing" to the Department requesting a hearing on the rejection of its provider recommendations. C7, C32. On September 24, 2019, the Department's deputy general counsel e-mailed Nyhammer a letter stating that the second petition did not "present a contested case that would support the right to an adjudicatory hearing" and emphasizing that the Department had

⁵ This Court may take judicial notice of its own records in this original action. *Fox v. Fox*, 9 Ill. 2d 509, 518 (1956).

“discretion” over NIAAA’s provider recommendations under the Adult Protective Services Act. C51.

Circuit court proceedings

On November 5, 2019, Nyhammer initiated this *mandamus* action in the circuit court, seeking to compel Basta to provide him with hearings on NIAAA’s two petitions, which he attached to the complaint, along with the Department’s correspondence denying those hearings. C4, C8-9, C11-51. In the complaint, Nyhammer noted that the first petition alleged that the Department withheld funding from NIAAA, and for the first time alleged that “[i]t is believed the Department withheld OAA funding from NIAAA” with no further explanation or detail. C7. Nyhammer also alleged that the Department’s procedural regulations, *see* 89 Ill. Admin. Code §§ 220.500-220.520 (2002), omitted certain provisions that were required by the APA such as rules for the selection of administrative law judges and service by e-mail. C8. Nyhammer thus sought to compel the Department to promulgate additional procedural rules to govern the hearings on NIAAA’s petitions. C9.⁶

Basta moved to dismiss the action under section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2020), arguing that Nyhammer failed to state a claim for *mandamus* because no law afforded him a right to a hearing on the issues raised in his petitions. C74, C83-87. In response, Nyhammer

⁶ While this action was pending, the Department promulgated new procedural rules. 45 Ill. Reg. 10767, 10769-93 (eff. Aug. 10, 2021).

argued that NIAAA was entitled to a hearing under three Department regulations, two provisions of the OAA, and the constitutional right to due process. C91-92.

The circuit court rejected Nyhammer’s arguments and granted Basta’s motion to dismiss because neither Nyhammer nor NIAAA had a right to a hearing on the petitions. C120, R20-24, R29. As for the first petition regarding the alleged withholding of grant funds, the circuit court noted that the Department’s regulations only provided for hearings when it proposed to disapprove of an area plan or withdraw an area agency on aging’s designation as such, neither of which was alleged in the first petition. R20-21. As for Nyhammer’s contention that there was a right to a hearing on the first petition under the OAA, the circuit court found that the complaint failed to allege sufficient facts to support a claim that OAA funds were withheld; instead, the complaint included only a “conclusory” allegation in support of the OAA claim. R29. And the remaining allegations in the first petition and *mandamus* complaint only related to “other funding as opposed to federal funding under the OAA” that also were “conclusory.” R21. The circuit court further held that NIAAA had no due process right to a hearing on the first petition because it had no “protected entitlement” to such funding — the Department’s funding decisions were “discretionary.” R22. And as for the second petition regarding the rejection of NIAAA’s service provider recommendations, the court concluded that the Department had “discretion to

accept or reject” NIAAA’s service provider recommendations, so it was an inappropriate subject for an order of *mandamus*. R24.

After the circuit court denied Nyhammer’s postjudgment motion, he appealed. C121-26, C158-61.

Appellate court proceedings

On appeal, Nyhammer argued that the Department was required to promulgate rules of procedure under section 10-5 of the APA and provide NIAAA with hearings on his two petitions. AT Br. at 13-21. Nyhammer recognized that the APA required the Department to promulgate rules for “contested case hearings” and that a “contested case . . . means any circumstance where Defendant is required by another law . . . to provide a hearing.” *Id.* at 18 (quoting 5 ILCS 100/10-5 (2020)). According to Nyhammer, the OAA, the Department’s regulations, and the constitutional right to due process required the Department to provide hearings on his two petitions. *Id.* at 14, 16-17.⁷

In her response brief, Basta first noted that a plaintiff seeking *mandamus* relief must establish a clear right to relief and a clear duty on the defendant to act. AE Br. at 14. In this case, then, Nyhammer had to show that NIAAA had a clear right to a hearing on its petitions and the Department had a clear duty to promulgate rules of procedure to govern those hearings. *Id.*

⁷ Nyhammer did not specify whether he was claiming that the alleged due process violation arose under the United States or Illinois Constitution. AT Br. at 14.

at 14-15. And the Department’s duty to promulgate rules also depended on whether NIAAA had a right to a hearing on its petitions because section 10-5 of the APA states that the Department must adopt rules ““for *contested case* hearings,”” and section 1-30 defines a contested case as an ““an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an opportunity for a hearing.”” *Id.* (quoting 5 ILCS 100/1-30, 10-5 (2020)) (emphases in original).

To support that argument, Basta cited decisions by the First and Fourth Districts that had interpreted the phrase “required by law” to mean that a dispute presents a contested case only if a source of law other than the APA affords a party a right to an administrative hearing on it. *Id.* at 15 (citing *Callahan v. Sledge*, 2012 IL App (4th) 110819; *Key Outdoor, Inc. v. Dep’t of Transp.*, 322 Ill. App. 3d 316 (4th Dist. 2001); *Munoz v. Dep’t of Registration & Educ.*, 101 Ill. App. 3d 827 (1st Dist. 1981)). Basta then argued that neither the OAA, the Adult Protective Services Act, the Department’s regulations, nor due process required the Department to hold a hearing on NIAAA’s petitions. *Id.* at 15-24.

The appellate court reversed the circuit court’s judgment, purported to “vacate[]” the Department’s “final decision,” and remanded the action “to the Department for further review, evaluation, findings, and decision consistent with this opinion.” A13. In the section of its order setting forth the standards

of review, the appellate court noted that the circuit court dismissed this *mandamus* action under section 2-615, but then outlined the standards of review applicable to “Administrative Review” actions and stated that the Department’s “final decision” must ““include findings of fact and conclusions of law”” that are ““specific enough to permit an intelligent review of its decision.”” A8-10 (quoting 5 ILCS 100/10-50(a) (2020) and *Lucie B. v. Dep’t of Human Servs.*, 2012 IL App (2d) 101284, ¶ 17). And the appellate court criticized the Department’s “final decision” for not making sufficient findings or conclusions to permit “meaningful judicial review.” A9-10.

Without addressing *Munoz*, *Key Outdoor*, or *Callahan*, the appellate court then stated that it was “patently obvious” that NIAAA’s petitions presented contested cases because they sought “a determination of [NIAAA’s] rights, duties, or privileges by seeking a hearing with the Department.” A12. To support that conclusion, the appellate court noted that section 10-5 of the APA establishes a “public policy . . . that there should be some form of administrative review,” and asserted that the Department should have conducted an “investigation” and made “findings” as to why the petitions did not present contested cases. A12-13.

Basta filed a timely petition for rehearing, arguing that the appellate court’s decision overlooked and misapprehended two points. Pet. at 1-2. First, Basta noted that the court overlooked the First and Fourth District decisions establishing that a contested case exists only when a party has a right to a

hearing under some source of law other than the APA. *Id.* at 1, 4-10. Basta explained that rather than addressing her arguments that NIAAA had no right to a hearing, the appellate court relied on a supposed public policy favoring administrative review in section 10-5 of the APA, but even that section states that the Department must promulgate rules of procedure only ““for contested case hearings.”” *Id.* at 6-7 (quoting 5 ILCS 100/10-5 (2020)). Thus, Basta argued, the appellate court should address the question whether NIAAA had a right to a hearing outside the APA itself. *Id.* at 6-7, 10.

Second, Basta argued that the appellate court misunderstood Nyhammer’s *mandamus* action to be an administrative review action, and therefore erroneously applied standards of review for appeals arising under the ARL, even though the ARL had not been adopted in this situation. Pet. at 2, 11-14. And the appellate court’s confusion prejudiced Basta because, rather than remanding to the circuit court — where the case originated — it remanded to the Department to hold hearings on NIAAA’s petitions, effectively awarding Nyhammer the ultimate relief he sought in his *mandamus* complaint before Basta had an opportunity to file an answer or raise any affirmative defenses. *Id.* at 13-14.

The appellate court denied Basta’s petition for rehearing on February 28, 2022, and on March 2, 2022, granted Nyhammer’s motion to publish its decision. A29-30. This Court allowed Basta’s petition for leave to appeal.

ARGUMENT

- I. This Court should reinstate the circuit court’s dismissal of Nyhammer’s *mandamus* action because NIAAA had no clear right to a hearing on either of its petitions and the Department had no clear duty to promulgate additional rules governing any such hearing.

Under the APA, administrative agencies are required to promulgate rules of procedure, provide parties with hearings, and issue final decisions in “contested case[s].” *See* 5 ILCS 100/10-5, 10-25(a), 10-50(a) (2020). And a contested case is defined as “an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an opportunity for a hearing.” *Id.* § 1-30 (emphasis added). Applying that definition, the First and Fourth Districts of the appellate court have held that the phrase “required by law” means that a dispute only presents a contested case if a source of law other than the APA — such as a statute, an agency’s regulations, or the United States or Illinois Constitution — requires an agency to hold a hearing on the dispute. *Callahan*, 2012 IL App (4th) 110819, ¶ 29; *City of Chi. v. Ill. Lab. Rels. Bd.*, 396 Ill. App. 3d 61, 71-73, 76 (1st Dist. 2009); *Key Outdoor*, 322 Ill. App. 3d at 322-23; *Munoz*, 101 Ill. App. 3d at 829-30.

Consistent with that precedent, the circuit court dismissed Nyhammer’s *mandamus* action because he failed to show that NIAAA had a right to a hearing on either of the petitions that it had submitted to the Department. C120, R20-29. But the appellate court, ignoring cited precedent, held that both petitions presented contested cases without identifying any statutory,

regulatory, or constitutional provision that afforded a right to a hearing. Instead, the appellate court concluded that those petitions were contested cases because they sought a determination of a party's rights, duties, or privileges and because the APA reflects a public policy that agencies provide parties with "some form of administrative review." A12. This Court should reverse the appellate court's judgment, which disregarded both the APA's plain language and well-reasoned precedent, and reinstate the circuit court's judgment because NIAAA had no clear right to a hearing on its petitions and the Department had no clear duty to promulgate additional rules of procedure to govern such hearings.

- A. This Court should apply *de novo* review and uphold the dismissal of Nyhammer's *mandamus* action because he alleged no facts showing that NIAAA had a clear right to hearings on its petitions and that the Department had a clear duty to promulgate procedural rules.**

The circuit court dismissed Nyhammer's *mandamus* action under section 2-615 of the Code of Civil Procedure, which is a judgment that this Court reviews *de novo*. *McFatrige v. Madigan*, 2013 IL 113676, ¶ 16. Section 2-615 permits a party to file motions raising "objections to pleadings," including a motion requesting that "the action be dismissed." 735 ILCS 5/2-615(a) (2020). In reviewing the circuit court's dismissal under section 2-615, this Court asks whether the allegations of the complaint, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. In

addition to considering the complaint’s “well-pleaded facts,” *id.*, this Court should consider the exhibits attached to the complaint, *Dent v. Constellation Newenergy, Inc.*, 2022 IL 126795, ¶ 25, including the two petitions and the Department’s correspondence stating that it was denying NIAAA’s requests for hearings on those petitions, *see* C11-51. And because “Illinois is a fact-pleading jurisdiction,” the complaint was required to “allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions.” *Doe v. Coe*, 2019 IL 123521, ¶ 32 (citation omitted).

Nyhammer sought an order of *mandamus* in his complaint, which is “an extraordinary remedy used to compel a public officer to perform nondiscretionary official duties.” *McFatridge*, 2013 IL 113676, ¶ 17 (internal quotation marks omitted). “In order to obtain a *mandamus* remedy, the plaintiff must establish a clear right to the requested relief, a clear duty of the public officer to act, and clear authority of the public officer to comply with the order.” *Id.*

Relevant here, Nyhammer sought an order of *mandamus* compelling the Department to provide NIAAA with hearings on its two petitions and “[a]dopt administrative rules for contested hearings.” C8-9. Accordingly, he was required to allege facts showing that NIAAA had a clear right to a hearing on those petitions and the Department had a clear duty to promulgate additional procedural rules. As detailed below, Nyhammer did not allege facts sufficient

to make the required showings, and so the circuit court correctly dismissed this action for failure to state a claim.

B. For a dispute to present a “contested case” under the APA, the party seeking a hearing must have a right to a hearing under a source of law other than the APA.

To state a claim that NIAAA had a clear right to a hearing and that the Department had a clear duty to promulgate rules, Nyhammer had to allege facts showing that his petitions presented “contested case[s]” under the APA because the APA only requires agencies to provide hearings and promulgate procedural rules in “contested case[s].” *See* 5 ILCS 100/10-5 (2020) (“All agencies shall adopt rules establishing procedures for *contested case* hearings.”) (emphasis added); *id.* § 10-25(a) (“In a *contested case*, all parties shall be afforded an opportunity for a hearing after reasonable notice.”) (emphasis added). The meaning of a contested case under the APA is an issue of statutory construction, which requires this Court “to ascertain and give effect to the intent of the legislature.” *Thomas v. Khoury*, 2021 IL 126074, ¶ 11. And “[t]he most reliable indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning.” *Id.* Additionally, the APA “must be read as a whole, with words and phrases considered in context.” *Id.*

The APA defines a contested case in relevant part as “an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an

opportunity for a hearing.” 5 ILCS 100/1-30 (2020) (emphasis added). Under section 1-30’s plain language, to constitute a contested case, a dispute both must involve a party’s legal rights, duties, or privileges, and the law must require an agency to determine those rights through a hearing.

But nothing in the APA compels agencies to hold hearings on all disputes. Again, the APA requires agencies to hold hearings and promulgate rules of procedure governing such hearings only in “contested case[s].” 5 ILCS 100/10-5, 10-25(a) (2020). Read as a whole, then, the phrase “required by law” must refer to some source of law other than the APA itself. Indeed, in the appellate court, Nyhammer agreed that a “contested case . . . means any circumstance where Defendant is required by *another law* . . . to provide a hearing.” AT Br. at 18 (emphasis added).

And that is how the First and Fourth Districts have construed the meaning of a “contested case.” For example, in *Munoz*, the First District held that a dispute over the denial of a physician’s license “was not a contested case” because the Medical Practice Act did “not require a hearing,” 101 Ill. App. 3d at 829-30. In *Key Outdoor*, the Fourth District held that a challenge to an agency’s denial of a commercial driveway permit did not present a contested case because neither the Highway Code nor due process required the agency to hold a hearing on that denial, 322 Ill. App. 3d at 322-23. In *City of Chicago*, the First District held that, because the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.* (2020), did not provide a right to a hearing

on the Illinois Labor Relations Board’s decision to certify a union as the exclusive bargaining representative of certain employees, the employer’s challenge to such a decision was not a contested case under the APA, 396 Ill. App. 3d at 71-73, 76. And in *Callahan*, the Fourth District held that a state employee’s challenge to the denial of health insurance coverage was not a contested case because the “Group Insurance Act contains no . . . requirement” for a hearing and the employee had failed to identify any law requiring the agency “to conduct a hearing when reviewing the denial of coverage,” 2012 IL App (4th) 110819, at ¶ 29.

Other States’ courts have interpreted similar statutory language in the same way. *See Better Gov’t Ass’n v. Office of the Special Prosecutor*, 2019 IL 122949, ¶ 55 (“case law from other states construing similar . . . statutes may be persuasive”). Those courts have held that the phrase “required by law” means that some source of law outside of their State’s administrative procedure statutes must require an agency to hold a hearing on a dispute for that dispute to present a contested case. *See Welcker v. Ga. Bd. of Exam’rs of Psychs.*, 798 S.E.2d 368, 371 (Ga. Ct. App. 2017); *E & J Lounge Operating Co. v. Liquor Comm’n of City & Cnty. of Honolulu*, 189 P.3d 432, 442 (Haw. 2008); *Travelers Indem. Co. v. Comm’r of Ins.*, 767 N.W.2d 646, 650 (Iowa 2009); *Med. Waste Assocs. v. Md. Waste Coalition*, 612 A.2d 241, 247 (Md. 1992); *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 664-66 (Minn. 1984); *Nye v. Dep’t of Livestock*, 639 P.2d 498, 501 (Mont.

1982); *State of Nev. Dep't of Health & Human Servs. v. Samantha, Inc.*, 407 P.3d 327, 329-30 (Nev. 2017); *In re Support Enf't Officers*, 781 A.2d 1021, 1024 (N.H. 2001); *Lynch v. Gontarz*, 386 A.2d 184, 187 (R.I. 1978); *In re Keystone XL Pipeline*, 914 N.W.2d 550, 556 (S.D. 2018); *Parker v. Town of Milton*, 726 A.2d 477, 482 (Vt. 1998); *State ex rel. W. Va. Bd. of Educ. v. Perry*, 434 S.E.2d 22, 25 (W. Va. 1993); *In re Bd. of Cnty. Comm'rs*, 33 P.3d 107, 112-14 (Wyo. 2001); *see also Singleton v. D.C. Dep't of Corrs.*, 596 A.2d 56, 56-57 (D.C. 1991). More specifically, these courts looked to whether a hearing was required by statute, agency regulation, or due process principles to determine if a hearing is required by law. *See, e.g., E & J Lounge*, 189 P.3d at 442 (“an agency hearing is required by law if there is a statutory, rule-based, or constitutional mandate for a hearing”) (internal quotation marks omitted); *Support Enf't Officers*, 781 A.2d at 1024 (“there are three ways that a hearing can be required by law: (1) a statutory requirement, (2) an agency rule requirement, or (3) a due process constitutional requirement”) (internal quotation marks omitted); *Keystone XL Pipeline*, 914 N.W.2d at 556 (“a hearing is ‘required by law’ when required by a statute, an agency rule, or a due-process constitutional requirement”).

Contradicting this binding and persuasive authority, the appellate court held that NIAAA’s petitions presented contested cases merely because they sought “a determination of [NIAAA’s] rights, duties, or privileges” with respect to its grant funding and service provider recommendations. A12. In

reaching that conclusion, the appellate court did not interpret the phrase “required by law” in section 1-30, explain why it had declined to follow the First or Fourth District’s interpretations of that phrase, or reject Basta’s arguments that NIAAA had no clear right to a hearing under the OAA, the Department’s regulations, or due process. *See* A12-13. Instead, the court looked to the “enunciated public policy recognizing that there should be some form of administrative review,” citing section 10-5 of the APA. A12.

For several reasons, this Court should adopt the First and Fourth Districts’ interpretation of a contested case and reject the Second District’s interpretation. First, as discussed, the former gives effect to the phrase “required by law” in section 1-30 of the APA, whereas the latter renders that phrase meaningless by requiring only that a dispute involve a party’s rights, duties, or privileges. *See Palm v. Holocker*, 2018 IL 123152, ¶ 21 (statutes should be “construed so as to give effect to every word, clause, and sentence; we must not read a statute so as to render any part superfluous or meaningless”).

Second, the Second District’s view that the APA includes an enunciated public policy requiring agency hearings for all disputes over a party’s rights, duties, or privileges misconstrues its language. Again, the APA requires an agency to hold a hearing only in a “contested case,” not in any dispute between an outside party and the agency over the party’s rights, duties, and privileges. 5 ILCS 100/10-25(a) (2020). If anything, the General Assembly intended to

limit agency hearings to situations where it decided to afford parties with rights to hearings or due process compelled such hearings.

Third, the First and Fourth Districts' approach provides clear guidance to agencies as to when their adjudicatory duties are triggered. *See People v. Gaytan*, 2015 IL 116223, ¶ 23 (“[I]n determining legislative intent, a court may consider . . . the consequences that would result from construing the statute one way or the other.”). Under the First and Fourth Districts' interpretation, agencies may look to their enabling statutes, their own regulations, or due process case law to determine if a dispute constitutes a contested case. By contrast, the Second District's opinion requires agencies to determine if a party's rights, duties, or privileges are at issue, but those terms are not defined in the APA or well developed in case law. Thus, the Second District's interpretation would leave agencies without clear guidance with respect to when a hearing is required.

Finally, the Second District's interpretation of a contested case would strain agency resources and slow agencies' administration of crucial programs. *See Roberts v. Alexandria Transp., Inc.*, 2021 IL 126249, ¶ 29 (court construing statute should presume that the General Assembly “did not intend absurdity, inconvenience, or injustice”); *Gaytan*, 2015 IL 116223, ¶ 23 (in construing statutes, courts may consider consequences of particular construction). Under that interpretation, any time a party alleged that any right, duty, or privilege had been affected — no matter how trivially or

insignificantly — an agency would be required to hold a formal hearing on the party’s complaint and issue a final decision. In turn, this could increase agencies’ adjudicatory caseloads, require agencies to retain additional administrative law judges or hearing officers, and slow agency operations by requiring formal hearing processes to play out before they can implement the programs they are tasked with administering.

This Court should give effect to the phrase “required by law” in section 1-30 of the APA and hold that, to constitute a contested case, a party’s dispute with an administrative agency must be required by a statute other than the APA, the agency’s regulations, or the United States or Illinois Constitutions. And as discussed below, it should affirm the circuit court’s dismissal of this *mandamus* action because none of those sources of law afforded NIAAA a right to a hearing on its petitions.

C. NIAAA had no clear right to a hearing on its petitions under any relevant statute, regulation, or the Due Process Clause.

Applying the correct definition of a “contested case,” this Court should affirm the circuit court’s dismissal of Nyhammer’s *mandamus* action because he failed to allege facts showing that NIAAA had a clear right to a hearing on its petitions under the OAA, the Illinois Act on the Aging, the Adult Protective Services Act, the Department’s regulations, or the United States or Illinois Constitution.

1. NIAAA had no clear right to a hearing under any statute.

NIAAA's first petition alleged that the Department withheld grant funds in retaliation for Nyhammer's complaints about the Department's Manual. Although the OAA requires a "public hearing" before the Department makes a "final determination withholding funds," 42 U.S.C. § 3026(f)(2), NIAAA's first petition made clear that NIAAA was not seeking a hearing on any alleged order to withhold OAA funds. *See* C12-30. Instead, the petition stated that "[i]n addition to OAA funding," the Department usually awarded unspecified "Other Funding" to NIAAA. C13. It further alleged that, pursuant to an order "to withhold funding from NIAAA to retaliate for NIAAA's advocacy regarding the Manual," NIAAA "received zero in Other Funding" between 2014 and 2015, while other area agencies on aging received "over \$3.79 million in Other Funding." C15-16. And the petition mentioned the Department's termination of the fiscal year 2014 Adult Protective Services Program grant, *see* C15, C27, which is a state, not federal, grant, *see* 320 ILCS 20/3(a) (2020) (directing Department to "contract with or fund" regional administrative agencies); *see also* A82-84. Thus, NIAAA had no right to a hearing on the first petition under the OAA.

Nor did any Illinois statute afford NIAAA a right to a hearing on its first petition. As for the "Other Funding," NIAAA never identified its source, so it was impossible to determine if it had been awarded under a statute providing NIAAA with a right to a hearing before it was withheld. C15-16, C27. Indeed, even after the Department gave NIAAA's counsel the opportunity to offer

additional support for its contention it had a right to a hearing on the alleged withholding of grant funds, NIAAA neglected to provide any further information about the source of this alleged funding. *See* C31. Nor did Nyhammer’s *mandamus* complaint add any detail on the funding’s source. C4-10.

As for the Adult Protective Services Act grant, the only hearing required by that statute is a hearing on whether a “caregiver” should be placed on or removed from the “Adult Protective Services Registry,” which is a list identifying “caregivers against whom a verified and substantiated finding was made . . . of abuse, abandonment, neglect, or financial exploitation.” 320 ILCS 20/7.5(a), (a-5), (g), (i) (2020); *see also* 89 Ill. Admin. Code § 270.414 *et seq.* (prescribing procedures for appeals of registry placement). But NIAAA, as a regional administrative agency, was not a caregiver and not at any risk of being placed on the registry. *Compare* 320 ILCS 20/2(a-7) (2020) (defining “[c]aregiver” as “a person who either as a result of a family relationship, voluntarily, or in exchange for compensation has assumed responsibility for all or a portion of the care of an eligible adult”) *with id.* § 2(i) (defining “[r]egional administrative agency” as “any public or nonprofit agency in a planning and service area that provides regional oversight and performs functions” outlined in Adult Protective Services Act). And the fact that the General Assembly expressly afforded caregivers with rights to hearings shows that, if it had intended to provide regional administrative agencies with a similar right as to

the denial of grant funds, it would have done so. *See People v. Clark*, 2019 IL 122891, ¶ 23 (“When the legislature includes particular language in one section of a statute but omits it in another section of the same statute, courts presume that the legislature acted intentionally and purposely in the inclusion or exclusion, and that the legislature intended different meanings and results.”) (citations and internal quotation marks omitted).

NIAAA’s second petition claimed that the Department improperly rejected its recommendations for service providers under the Adult Protective Services Act, but that statute simply requires that a provider have the Department’s “prior approval.” *See* 320 ILCS 20/2(h), 20/3(b) (2020). It does not afford regional administrative agencies with rights to hearings if such approval is withheld, nor does it include any guidelines for the Department’s approval process. *See id.* Thus, nothing in NIAAA’s petitions showed that it had a clear right to a hearing under any federal or Illinois statute.

And although Nyhammer’s *mandamus* complaint stated that “[i]t is believed the Department withheld OAA funding from NIAAA,” C7, this conclusory allegation did not satisfy the fact-pleading standard, *see Patrick Eng’g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40 (allegations made on information and belief are “not equivalent to an allegation of relevant fact”); *Whitley v. Frazier*, 21 Ill. 2d 292, 295 (1961) (“proof that the plaintiffs were informed of or believed certain facts could not support a finding that they are true in fact”). Nor was this a circumstance where, because of a lack of

information, Nyhammer could justifiably plead on information and belief. *See Patrick Eng'g*, 2012 IL 113148, ¶ 40 (plaintiff “may be forced to present allegations . . . upon information and belief” when it lacks information necessary to make factual allegations); *Bryson v. News Amer. Publ'ns*, 174 Ill. 2d 77, 110 (1996) (“a plaintiff need not plead facts with precision when the information needed to plead those facts is within the knowledge and control of the defendant rather than the plaintiff”). The amount of OAA funding that NIAAA should have received in the years preceding the initiation of this *mandamus* action were set forth in the Department’s regulations and its publicly-available state plans. *See* 89 Ill. Admin. Code § 230.45; State Plan FY2017-19 at 67, 77; State Plan FY2013-15 at 93. Based on that information, Nyhammer should have known exactly how much OAA funding NIAAA was supposed to receive and, if it received less than that amount, made specific allegations of fact regarding what OAA funding was withheld.

2. NIAAA had no clear right to a hearing under the Department’s regulations.

Nor did the Department’s regulations afford NIAAA a right to a hearing on either of its petitions. Whether the Department’s regulations afforded NIAAA a right to a hearing requires this Court to interpret those regulations, which it does using “the same canons as statutes.” *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 38. Thus, this Court’s “primary objective is to ascertain and give effect to the intent of the agency,” and the “most reliable indicator of intent is the language of the regulation itself.” *People ex rel.*

Madigan v. Ill. Com. Comm’n, 231 Ill. 2d 370, 380 (2008). If that language is clear and unambiguous, this Court will “apply it as written.” *Id.*

The Department’s regulations that were in effect when NIAAA submitted its petitions for hearings stated that the Department “shall provide an opportunity for a hearing to” an area agency on aging when it proposed to: (1) disapprove of the area agency on aging’s area plan or an amendment to its area plan; or (2) withdraw an entity’s designation as an area agency on aging. 89 Ill. Admin. Code § 230.410(a) (2002). But neither petition claimed that the Department proposed to reject NIAAA’s area plan or withdraw its status as an area agency on aging. Instead, the petitions claimed that grant funding was withheld and NIAAA’s service provider recommendations were rejected. Under the plain language of the Department’s hearing regulations, NIAAA had no right to a hearing on either petition.

In 2021, while this case was pending in the appellate court, the Department promulgated a regulation allowing an area agency on aging to appeal the Department’s rejection of its “recommendation to designate a service provider.” *See* 45 Ill. Reg. at 10787. But as the appellate court recognized, that regulation did not apply retroactively to afford NIAAA a right to a hearing on petitions the Department had rejected two years before the 2021 regulation was promulgated, for at least three reasons. *See* A7-8.

First, the General Assembly has not expressly conferred on the Department the authority to make retroactive rules. *See Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *see also* 20 ILCS 105/4.01(11) (2020) (granting Department general authority “[t]o make and enforce rules and regulations necessary and proper to the performance of its duties”); 320 ILCS 20/10 (2020) (authorizing Department to “adopt such rules and regulations as it deems necessary to implement [the Adult Protective Services] Act”).

Second, the new regulation contains no language rebutting the presumption that it should apply prospectively. *See Perry v. Dep’t of Fin. & Pro. Regul.*, 2018 IL 122349, ¶ 42 (when statutory amendment’s language does not expressly state its temporal reach, “a presumption arises that the amended statute is not to be applied retroactively”); *Pressed Steel Car Co. v. Lyons*, 7 Ill. 2d 95, 106 (1955) (“The policy considerations against retroactive legislation apply with equal force to retroactive administrative regulations which have the force of law.”); *Gonzales-Blanco v. Clayton*, 110 Ill. App. 3d 197, 204 (1st Dist. 1982) (“Although an administrative agency may change its rules and practices, it may apply its rules retroactively only in the proper cases.”).

And third, the regulation could not apply retroactively even if it had such language because it conferred a new, substantive right on area agencies on aging by permitting them to challenge Department decisions that were previously unreviewable, while also imposing a new duty on the Department to

hold hearings on these issues. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (amendment that did not “merely allocate jurisdiction among fora,” but rather “*create[d]* jurisdiction where none previously existed,” was substantive change in law that could not apply retroactively) (emphasis in original); *Perry*, 2018 IL 122349, ¶ 70 (“‘Substantive law’ is . . . defined as ‘[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties.’”) (quoting Black’s Law Dictionary 1658 (10th ed. 2014)).

And, in any event, even if the regulation could be applied retroactively, NIAAA had no clear right to a hearing under it because the Department’s rules require an administrative appeal to be filed with the Department within 15 calendar days after notice of an adverse action, 89 Ill. Admin. Code § 230.430(a)(2), but NIAAA submitted its second petition 23 days after being notified that the Department had rejected its service provider recommendations, C7, C42, C51. Thus, NIAAA had no clear right to a hearing on its second petition under the Department’s new regulation even if it could be applied retroactively.

For its part, the appellate court noted that the Department’s regulations stated that it would not “‘unreasonably’” reject service provider recommendations and “whether a party acted reasonably is a question of fact.” A12 (quoting 89 Ill. Admin. Code § 270.215(b)(1)). But the APA does not state that contested cases arise any time an agency must resolve a question of fact.

Rather, they arise only when a “hearing” is “required by law.” 5 ILCS 100/1-30 (2020). Again, the Department’s regulations required it to hold hearings only if it disapproved of an area agency on aging’s area plan or withdrew an area agency on aging’s designation as such. *See* 89 Ill. Admin. Code § 230.410(a) (2002). If the Department had intended to confer a right to a hearing on every time it rejected provider recommendations, it would have done so expressly, as it did when it afforded area agencies on aging the right to a hearing on certain specified issues. *See Clark*, 2019 IL 122891, ¶ 23 (use of particular language in one section of statute and omission of similar language from another suggests that omission was intentional).

3. NIAAA had no clear right to a hearing under due process.

Without a right to a hearing under any statute or Department regulation, Nyhammer was left with his contention that due process required a hearing. Nyhammer did not specify whether his due process arguments were grounded in the United States or Illinois Constitution, so this brief treats those rights as coextensive. *See, e.g., People v. Molnar*, 222 Ill. 2d 495, 510 (2006) (treating federal and state procedural due process principles as coextensive where “neither party . . . argued that the state due process clause provides greater protection than that provided by the federal constitution”).

“Procedural due process protections are triggered only when a constitutionally protected liberty or property interest is at stake, to which a person has a legitimate claim of entitlement.” *Hill v. Walker*, 241 Ill. 2d 479,

485 (2011); *see also* U.S. Const. amend. XIV, § 1; Ill. Const. art. I, § 2. The constitutional right to due process does not itself create such protected interests — “[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). And “[t]he presumption is that laws do not create vested rights,” so the party asserting that it possesses such a right “bears the burden of overcoming this presumption” by showing “more than a unilateral expectation that he or she will receive benefits under the law.” *Big Sky Excavating, Inc. v. Ill. Bell. Tel. Co.*, 217 Ill. 2d 221, 242 (2005).

Such a showing cannot be made “if government officials may grant or deny [a benefit] in their discretion.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005). In other words, a protected property interest exists only “where substantive criteria clearly limit discretion such that the plaintiff cannot be denied the interest unless specific conditions are met.” *Rock River Health Care, LLC v. Eagleson*, 14 F.4th 768, 773-74 (7th Cir. 2021) (internal quotation marks omitted); *see also Hill*, 241 Ill. 2d at 486-88 (parole statute did not create legitimate claim of entitlement because it lacked “specific criteria” that were “sufficiently objective” to limit agency discretion) (internal quotation marks omitted); *Polyvend, Inc. v. Puckorius*, 77 Ill. 2d 287, 294-95 (1979) (sole bidder for government contract that had received prior contracts did not have claim of entitlement to contract where State had discretion to

reject bids); *I-57 & Curtis, LLC v. Urbana & Champaign Sanitary Dist.*, 2020 IL App (4th) 190850, ¶ 89 (statute or regulation does not confer a protected property interest unless it sets forth “objectively ascertainable criteria” that “eliminate . . . governmental discretion”).

Here, NIAAA’s first petition challenged the Department’s alleged withholding of grant funds, but it identified no objective criteria limiting the Department’s discretion to award such funding. Indeed, it failed to identify the source of the allegedly withheld “Other Funding,” so it is impossible to tell if that funding was awarded under a statute with any objective criteria that could create a legitimate claim of entitlement. *See* C13, C16. And as for the Adult Protective Services Act grant, that statute gave the Department discretion to “contract with or fund . . . regional administrative agencies” without specifying objective criteria for awarding that funding. 320 ILCS 20/3(a) (2020); *see also id.* § 2(i) (giving Department discretion to “deem[]” area agency on aging “unwilling or unable” to serve as regional administrative agency without specifying objective criteria for determination); 89 Ill. Admin. Code § 270.215(a) (same).

NIAAA’s second petition challenged the Department’s rejection of its service provider recommendations under the Adult Protective Services Act, but that statute also places no limits on the Department’s discretion to approve or reject provider recommendations, simply stating that a provider must have the Department’s “prior approval.” *See* 320 ILCS 20/2(h), 20/3(b)

(2020). Although the Department’s regulations clarified that its approval of service providers would not “unreasonably” reject provider recommendations, 89 Ill. Admin. Code § 270.215(b)(1), that criterion still afforded the Department significant discretion in deciding whether to reject NIAAA’s recommended providers, *see Jacobs, Visconsi & Jacobs Co., v. City of Lawrence, Kan.*, 927 F.2d 1111, 1116 (10th Cir. 1991) (“[S]tate law’s requirement that zoning decisions be reasonable . . . is insufficient to confer upon the applicant a legitimate claim of entitlement.”). Nor did the Department’s regulations promise that, unless specific, objective criteria were met, it would approve a regional administrative agency’s recommendations. Indeed, the regulations expressly “reserve[d]” the Department’s “right to . . . reject recommendations” and “direct [the] action of a regional administrative agency in the designation of . . . provider agencies.” *Id.* § 270.215(b)(1). *See Polyvend*, 77 Ill. 2d at 294 (no legitimate claim of entitlement to government contract where “the State reserved the right to reject any or all bids”).

It is true that the Department’s regulations identify a few situations in which it will not approve a recommended provider — when “there is a State or federal contracting prohibition with the proposed provider agency” or the Department has a “conflict of interest.” 89 Ill. Admin. Code § 270.215(b)(1). But the regulations also state that the Department will reject recommendations if the agency does not meet unspecified “minimum qualifications” or “any similar circumstances” exist that would prevent the

Department from contracting with the agency. *Id.* These broad examples of circumstances in which the Department would reject a proposed provider agency were not sufficiently objective to “eliminate” the Department’s discretion, *I-57 & Curtis*, 2020 IL App (4th) 190850, ¶ 89, nor did the regulations commit the Department to accepting a provider recommendation so long as these circumstances were absent, *see Rock River Health Care*, 14 F.4th at 773-74. *Cf. Chamberlain v. Civ. Serv. Comm’n*, 2014 IL App (2d) 121251, ¶ 35 (employee had legitimate claim of entitlement to promotion where statute provided that employer “*shall* appoint the highest-ranking person on the promotion list . . . *unless* it ha[d] reason to conclude that it should pass over that person due to substantial work-performance shortcomings or misconduct”) (emphases in original). Thus, NIAAA’s petitions identified no protected property interest giving rise to a due process right to a hearing.

D. Because neither petition presented a contested case, the Department was not required to provide NIAAA with hearings, promulgate rules of procedure, or make findings of fact or reach conclusions of law.

Because neither petition presented a contested case, the Department had no clear duty to provide NIAAA with hearings on either petition or promulgate rules of procedure to govern such hearings. *See* 5 ILCS 100/10-5, 10-25(a) (2020). Nor did it have a duty to make “findings of fact and conclusions of law” in a written “final decision,” as that duty also arises only “in a contested case.” 5 ILCS 100/10-50(a) (2020). The appellate court thus

erred in compelling the Department to hold hearings on NIAAA's petitions, concluding that the Department's denials of NIAAA's petitions for hearings "were insufficient for meaningful judicial review," and criticizing the Department for not making "findings of fact" before denying those petitions. A10, A13. This Court should reverse the appellate court's judgment and reinstate the circuit court's dismissal of this *mandamus* action.

II. Alternatively, this Court should remand for additional proceedings on Nyhammer's *mandamus* complaint in the circuit court rather than remanding to the Department.

If this Court, however, were to conclude that either of NIAAA's petitions presented a contested case, then it still should at least reverse the portion of the appellate court's judgment remanding this case to the Department for hearings on those petitions. *See* A13. In denying the requests for hearings on NIAAA's two petitions, the Department explained that those petitions did not present contested cases, so it had decided not to provide NIAAA with hearings, or issue "a final decision or order," on them. C31, C51. Without a final administrative decision to be reviewed under the ARL or a common-law writ of *certiorari*, Nyhammer sought a "writ of mandamus[] pursuant to 735 ILCS 5/14-101, *et seq.*" in the circuit court, C4, requesting that the court "enter a mandamus [sic] ordering [Basta] to" provide NIAAA with "a hearing on its" petitions and "[a]dopt administrative rules for contested hearings" to govern those hearings, C9.

Yet the appellate court *sua sponte* characterized the Department's denial of a hearing as a "final decision" reviewable under the ARL, applied the standards applicable to actions brought under the ARL, and criticized the Department for not making sufficient factual findings or legal conclusions in denying a hearing based on case law interpreting the ARL. *See* A9-10, A12-13. As a result of the appellate court's misapprehension regarding the nature of Nyhammer's action, it reversed the dismissal of Nyhammer's *mandamus* action, but rather than remanding to the circuit court, it remanded to the Department with directions to hold hearings on NIAAA's petitions. A13. In doing so, the appellate court effectively granted Nyhammer the ultimate *mandamus* relief sought by his complaint, depriving Basta of the opportunity to answer the complaint and raise potentially meritorious affirmative defenses. Because the appellate court's mischaracterization of this action will prejudice Basta, this Court should reverse its judgment and remand this action to the circuit court for further proceedings even if it concludes that Nyhammer stated a claim for *mandamus* relief.

A. Nyhammer's *mandamus* action was not an action for administrative review.

Under the APA, an agency presented with a contested case holds a hearing, 5 ILCS 100/10-25(a) (2020), and then issues "[a] final decision or order" that includes its "findings of fact and conclusions of law," *id.* § 10-50(a). A party adversely affected by that "final decision" may then seek judicial review under the ARL, if "the Act creating or conferring power on such

agency, by express reference, adopts” it. 735 ILCS 5/3-102 (2020); *see also Bettis v. Marsaglia*, 2014 IL 117050, ¶ 30 (ARL “applies only where it is adopted by express reference”).

Here, neither the Illinois Act on the Aging nor the Adult Protective Services Act expressly adopt the ARL. 20 ILCS 105/1 *et seq.* (2020); 320 ILCS 20/1 *et seq.* (2020). Nor did the Department make a final decision that could be subject to review under the ARL — instead, it declined to make such a decision because it concluded that NIAAA’s petitions did not present contested cases. C31, C51; *see* 5 ILCS 100/10-50(a) (2020).

Indeed, in *Shempf v. Chaviano*, 2019 IL App (1st) 173146, the First District held that an agency’s “denial of a hearing was not, itself, a final administrative decision” subject to review under the ARL, *id.* at ¶ 47. There, a union member filed an action for administrative review of the Department of Labor’s denial of his request for a hearing on its alleged failure to post prevailing wage rates as required by the Prevailing Wage Act, 820 ILCS 130/0.01 *et seq.* (2020). *Shempf*, 2019 IL App (1st) 173146, ¶ 14. In upholding the dismissal of the administrative review claim, the First District noted that the Department of Labor “refused to hold a hearing . . . that would ultimately *lead* to a final administrative decision”; it did not actually hold a hearing or issue a final administrative decision subject to review under the ARL. *Id.* at ¶ 46 (emphasis in original). Because the agency’s “refusal to hold a hearing did not fix the rights of the parties or terminate the proceedings” — in fact, such

proceedings “had not yet even begun” — “[t]he denial of a hearing was not, itself, a final administrative decision.” *Id.* at ¶ 47; *see also* 735 ILCS 5/3-101 (2020) (defining “[a]dministrative decision” or “decision” as “any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency”).

This Court should follow the well-reasoned analysis of *Shempf* rather than the appellate court’s flawed characterization of the Department’s denials as final administrative decisions. Read together, the APA and ARL create a process by which agencies consider parties’ arguments and evidence, then issue written decisions detailing their findings of fact and conclusions of law that, when the ARL is adopted, are subject to judicial review. *See 1010 Lake Shore Ass’n v. Deutsche Bank Nat’l Tr. Co.*, 2015 IL 118372, ¶ 37 (statutes relating to same subject should be read as “consistent and harmonious” when “reasonably possible”). But as *Shempf* recognizes, that process never begins if the agency declines to hold a hearing in the first place, since the agency has not heard evidence or considered legal arguments that would produce a final decision amenable to judicial review. Nor does *Shempf*’s holding leave a party who is entitled to, but denied, an administrative hearing without an avenue for relief: instead, “[a] suit for mandamus, seeking to compel the [agency] to take that first step, [is] a viable option.” 2019 IL App (1st) 173146, ¶ 48. And that is exactly the option that Nyhammer chose here. C4, C9.

By characterizing the Department's denials of hearings as final decisions, the appellate court upended the orderly process of administrative decision-making and review laid out in the APA and ARL. The appellate court applied the ARL and case law interpreting it to the Department even though its enabling statutes do not adopt the ARL, contradicting the ARL's plain language and this Court's precedent. 735 ILCS 5/3-102 (2020); *Bettis*, 2014 IL 117050, ¶ 30. The appellate court stated that the Department should have made "findings of fact and conclusions of law" *before* holding a contested case hearing, even though such findings and conclusions must *follow* a contested case hearing at which parties are given notice and an opportunity to be heard. *See* 5 ILCS 100/10-25(a), 10-50 (2020). And it purported to exercise jurisdiction under the ARL even though Nyhammer initiated this action well after the 35-day period for seeking review under that statute would have expired if it had been adopted. *See* C4, C31, C51; *see also* 735 ILCS 5/3-103 (2020) ("Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision."); *Fredman Bros. Furniture Co. v. Dep't of Revenue*, 109 Ill. 2d 202, 211 (1985) ("filing of [a] complaint for administrative review within the time period specified is a jurisdictional requirement and . . . judicial review of the administrative decision is barred if the complaint is not filed within the time specified").

And the appellate court erroneously suggested that the standards for ARL and *mandamus* actions can apply simultaneously, *see* A8-10, even though they are entirely different and incompatible. For example, a circuit court conducting administrative review is confined to the record developed before the agency — it may not engage in fact-finding. *See* 735 ILCS 5/3-110 (2020) (“No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court.”). By contrast, there is no agency record on review in a *mandamus* action, and the circuit court may make factual findings. *See* 1350 Lake Shore Assocs. v. Healey, 223 Ill. 2d 607, 614 (2006) (noting that factual findings in *mandamus* action will not be reversed unless they are against the manifest weight of the evidence); Pioneer Tr. & Sav. Bank v. Cnty. of Cook, 71 Ill. 2d 510, 517 (1978) (noting that circuit court held trial on *mandamus* action and that its “findings” would be upheld “unless against the manifest weight of the evidence”). And on appeal, reviewing courts evaluate different decisions — on administrative review, an appellate court considers only the propriety of the agency’s decision, *Provena Covenant Med. Ctr. v. Dep’t of Revenue*, 236 Ill. 2d 368, 386 (2010), but an appellate court reviews a circuit court’s judgment in a *mandamus* action, *see* *Healey*, 223 Ill. 2d at 614.

Finally, for at least two reasons, Nyhammer’s complaint cannot be characterized as an attempt to seek review via a common law writ of *certiorari*, which may be available to review an agency’s quasi-judicial decisions when the

ARL has not been expressly adopted. *Outcom, Inc. v. Ill. Dep't of Transp.*, 233 Ill. 2d 324, 333 (2009). First, Nyhammer sought only *mandamus* relief, not a writ of *certiorari*, C4, C9, thus forfeiting any such request, *see 1010 Lake Shore*, 2015 IL 118372, ¶ 14 (“Issues not raised in either the [circuit] court or the appellate court are forfeited.”); *Eagan v. Chi. Transit Auth.*, 158 Ill. 2d 527, 534-35 (1994) (issue not raised in complaint was “not properly before” this Court on appeal from its dismissal). Second, even if he had sought *certiorari*, the Department’s denials of NIAAA’s petitions for hearings were not the type of “quasi-judicial” decisions reviewable via a writ of *certiorari* because, as explained, the Department did not hear evidence or arguments and issue written decisions containing findings of fact or conclusions of law. *Reichert v. Ct. of Claims*, 203 Ill. 2d 257, 260 (2003); *see also Brown v. Duncan*, 361 Ill. App. 3d 125, 133 (1st Dist. 2005) (agency action was not quasi-judicial decision subject to review via *certiorari* because it “did not conduct an adjudicatory hearing, or any hearing at all”); *E. St. Louis Sch. Dist. No. 189 Bd. of Educ. v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 349 Ill. App. 3d 445, 450 (5th Dist. 2004) (finding *certiorari* “wholly inappropriate” to review agency decision when “[t]here was no adjudicatory hearing held to determine individual rights or disputed facts” and thus “an insufficient record on which a reviewing court could base a determination regarding the propriety of the [agency’s] action”).

The appellate court, therefore, erred in construing the Department's actions as final decisions subject to judicial review through the ARL. And as discussed below, its error prejudiced Basta by precluding her from answering the *mandamus* complaint and raising affirmative defenses.

B. The appellate court prejudiced Basta by awarding Nyhammer *mandamus* relief before Basta had an opportunity to answer his complaint.

As a result of the appellate court's misapprehension that the ARL applied here, it purported to "vacate[]" the Department's "final decision" and "remand[]" this action to the Department "for a hearing on [NIAAA's] petitions." A13; *see* 735 ILCS 5/3-111(a)(6) (2020) (authorizing court in administrative review action to reverse agency decision and remand for further proceedings). Had Nyhammer stated a claim for *mandamus* (which he did not, *see supra* pp. 19-41), the appropriate relief would have been to reverse the circuit court's dismissal under section 2-615 and remand to the circuit court for further proceedings, *see, e.g., O'Connell v. Cnty. of Cook*, 2022 IL 127527, ¶¶ 40, 42 (remanding to circuit court when plaintiff stated claim for *mandamus*).

By remanding to the Department with directions that it hold hearings on NIAAA's petitions, however, the appellate court awarded the ultimate relief that Nyhammer sought in his *mandamus* action. C9. And it did so before Basta had an opportunity to file an answer in the circuit court that included

her affirmative defenses. *See* 735 ILCS 5/14-103 (2020) (defendant “shall answer or otherwise plead” when served with *mandamus* complaint).

This result was particularly prejudicial because Basta may have viable affirmative defenses to Nyhammer’s *mandamus* action that require further factual development in the circuit court. For example, Basta may be able to raise a *laches* defense to Nyhammer’s claim that NIAAA was denied a hearing on the alleged withholding of funding in 2013 because he failed to request a hearing from the Department or initiate this action until 2019. *See PNC Bank, N.A. v. Kusmierz*, 2022 IL 126606, ¶ 31 (“six-year delay” sufficient to establish *laches* defense); *People ex rel. Casey v. Health & Hosps. Governing Comm’n*, 69 Ill. 2d 108, 113 (1977) (*laches* is an affirmative defense to *mandamus* action that usually must be raised in answer). And Basta likely could establish prejudice as a result of that delay, since NIAAA’s petition sought to reallocate grant funds that the Department had allegedly awarded to other area agencies on aging. C16, C20; *see Tillman v. Pritzker*, 2021 IL 126387, ¶ 28 (prejudice for purposes of *laches* defense may be established when plaintiff waits until after public official “has expended large sums of money” or “made irrevocable transactions rendering it impossible to return circumstances to the status quo”).

As for Nyhammer’s claims about the sufficiency of the Department’s procedural rules and NIAAA’s service provider recommendations, Basta could raise a mootness defense now that the Department has new procedural rules,

89 Ill. Admin. Code § 230.400 *et seq.*, and a new provider selection process has begun for the next three-year period covered by NIAAA’s area plan. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008) (issues of “justiciability” including “mootness” may be raised as a defense in a motion to dismiss under section 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-619 (2020)). Indeed, Nyhammer’s motion for attorney fees in the appellate court conceded that the “2019 designation [is now] irrelevant as the results from the 2019 process are not a valid basis for NIAAA designating . . . providers in 2022.” A91.

In sum, the appellate court prejudiced Basta’s ability to defend against Nyhammer’s *mandamus* claims by remanding this action to the Department rather than the circuit court based on its misapprehension that the ARL applied. If this Court concludes that Nyhammer’s complaint stated a claim for *mandamus*, therefore, it should reverse that portion of the appellate court’s judgment and remand this action to the circuit court for further proceedings.

CONCLUSION

For these reasons, Defendant-Appellant Paula Basta, Director of the Illinois Department on Aging, requests that this Court reverse the appellate court's judgment and affirm the circuit court's dismissal of this *mandamus* action or, alternatively, remand to the circuit court for further proceedings.

Respectfully submitted,

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June 29, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a), is 12,059 words.

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APPENDIX

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2022 IL App (2d) 200460
 No. 2-20-0460
 Opinion filed March 2, 2022

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT

| | | |
|---|---|-------------------------------|
| GRANT NYHAMMER, as Executive Director |) | Appeal from the Circuit Court |
| of the Northwestern Illinois Area Agency on |) | of Winnebago County. |
| Aging, |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 19-MR-1106 |
| |) | |
| PAULA BASTA, in Her Official Capacity as |) | |
| Director of Aging, |) | Honorable |
| |) | Donna R. Honzel, |
| Defendant-Appellee. |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court, with opinion.
 Presiding Justice Bridges and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 After the Illinois Department on Aging (Department) denied the Northwestern Illinois Area Agency on Aging (NIAAA) administrative hearings on two petitions, plaintiff, Grant Nyhammer, the NIAAA's executive director, filed a *mandamus* complaint seeking an order for hearings on the petitions and other relief. The trial court dismissed plaintiff's *mandamus* complaint for failure to state a cause of action. On appeal, plaintiff argues that the trial court erred by dismissing its complaint. For the reasons that follow, we vacate the trial court's order and remand the matter to the Department for rulings with findings of fact and conclusions of law regarding the NIAAA's two petitions.

¶ 2

I. BACKGROUND

¶ 3

A. The Parties

¶ 4 Defendant, Paula Basta, is the current director of the Department. The Department is mandated by the Adult Protective Services Act to “establish, design, and manage” a protective services program to assist eligible, adult victims of elder abuse, neglect, self-neglect, and exploitation. 320 ILCS 20/3(a) (West 2018). The Department designates area agencies on aging as regional administrative agencies. *Id.* § 2(i). A regional administrative agency is a public or nonprofit agency in a planning and service area that provides regional oversight in implementing Adult Protective Services Act programs in a geographical region of the state. See *id.*

¶ 5 The Department designated the NIAAA as the regional administrative agency for planning and service area one.¹ The NIAAA is also the area agency on aging (AAA) for planning service and service area one.

“ ‘Area agency on aging’ means any public or non-profit private agency in a planning and service area designated by the Department, which is eligible for funds available under the Older Americans Act [(42 U.S.C. § 3001 *et seq.*)] and other funds made available by the State of Illinois or the federal government.” 20 ILCS 105/3.07 (West 2018).

Plaintiff is the executive director of and general counsel for the NIAAA, a private nonprofit entity.

¶ 6 Under the Older Americans Act Amendments of 2006 (Older Americans Act) (42 U.S.C. § 3001 *et seq.* (2018)), the federal government distributes funds to the states each year. The states use these funds to provide a wide range of services to their “ ‘older individual[s],’ ” whom the

¹ Area one is comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, De Kalb, Whiteside, and Lee. 20 ILCS 105/3.08 (West 2018).

statute defines as individuals “60 years of age or older.” *Id.* § 3002(40). The Older Americans Act requires each state to designate an agency responsible for creating a formula to determine the intrastate distribution of Older Americans Act funds. *Id.* § 3025(a)(1)(A). That state agency must, in turn, divide the state into subdivisions known as “planning and service areas” and must designate an AAA for each planning and service area. *Id.* § 3025(a)(2)(A); see also 20 ILCS 105/3.07, 3.08 (West 2018). In Illinois, the state agency is the Department. Illinois is divided into 13 planning and service areas. 20 ILCS 105/3.08 (West 2018).

¶ 7

B. Plaintiff’s First Petition

¶ 8 In June 2019, the NIAAA, through plaintiff, filed a petition for a hearing with the Department, alleging that it was responsible for complying with the Older Americans Act and that the Department improperly withheld funding to the NIAAA. In particular, the petition alleged the following. In July 2013, plaintiff e-mailed defendant’s predecessor, John Holton, stating that the Department’s Adult Protective Services Standards and Procedures Manual (manual) was invalid because the Department enacted the manual without the public notice and comment requirements of the Illinois Administrative Procedure Act (Procedure Act). See 5 ILCS 100/5-40 (West 2012). In October 2013, plaintiff e-mailed Holton again, this time attaching a draft complaint for *mandamus* that the NIAAA was “considering filing” and stating that he hoped to “find a solution [short] of litigation.”

¶ 9 In December 2013, Holton sent plaintiff a letter stating that the Department was terminating the NIAAA’s grant for fiscal year 2014, effective January 31, 2014, citing a provision of its grant agreement allowing the Department to cancel that agreement “without cause” upon 30 days’ written notice. Holton stated that, as of February 1, 2014, the Department would take over as the regional administrative agency for area one.

¶ 10 In April 2019, plaintiff met with defendant and three Department employees, including Betsy Creamer. At the meeting, Creamer told plaintiff that she was given an order to “withhold funding from [the] NIAAA to retaliate for [the] NIAAA’s advocacy regarding the Manual.” Although Creamer did not say who gave that order, the NIAAA alleged that the Department awarded “\$3.79 million in Other Funding” to other area agencies on aging in 2014-2015, while the NIAAA received nothing. The NIAAA sought a hearing on the alleged order to withhold funding, claiming that this was done in retaliation for plaintiff’s complaints about the manual.

¶ 11 The nine-count petition alleged that (1) the Department failed to enact administrative rules that comply with article 10 of the Procedure Act (5 ILCS 100/10-5 through 10-75 (West 2018)); (2) the Department violated the Older Americans Act of 2006 by withholding funds from the NIAAA without, *inter alia*, providing due process; (3) the Department withheld funds from the NIAAA for an improper purpose and as retaliation; (4) by withholding funds from the NIAAA for an improper purpose, the Department violated the Older Americans Act by failing to improve the capacity of serving older adults by concentrating resources, act in the clients’ best interests, give preference to clients with the greatest economic need, and consider the needs of rural clients (42 U.S.C. §§ 3021(a)(1), 3025(a)(1)(D), 3025(a)(2)(E), 3027(a)(10)); (5) Creamer, acting under the color of state law, deprived the NIAAA of its federal due process right by withholding funds; (6) the Department violated Illinois law by withholding funds from the NIAAA for the improper purpose of interfering with its State mandated advocacy responsibilities (89 Ill. Adm. Code 230.150, adopted at 5 Ill. Reg. 3722 (eff. Mar. 31, 1981)); (7) the Department violated Illinois law by retaliatorily terminating the NIAAA as the regional administrative agency (Ill. Const. 1970, art. I, § 2; 320 ILCS 20/2(i) (West 2018)); (8) the Department violated Illinois law by improperly terminating the NIAAA as the regional administrative agency, because that action interfered with

its state mandated advocacy responsibilities (89 Ill. Adm. Code 230.150, adopted at 5 Ill. Reg. 3722 (eff. Mar. 31, 1981)); and (9) the Department violated Illinois law by withholding funds from the NIAAA under the order given to Creamer.

¶ 12 In July 2019, the Department denied the NIAAA a hearing on its first petition, stating in an e-mail that the petition did not present a contested case.

¶ 13 C. The NIAAA's Second Petition

¶ 14 In August 2019, the NIAAA, through plaintiff, filed a second petition for a hearing with the Department. This second, five-count petition alleged the following. The Department designated the NIAAA as the AAA for planning service area one and the regional administrative agency for the adult protective services program for area one. As the regional administrative agency for the adult protective services program (program), the NIAAA had broad authority to manage the program, including designating program providers. The Department rejected the NIAAA's designations of providers and, in doing so, improperly intruded on the NIAAA's authority granted by the Illinois General Assembly. In addition, the Department used conflicting standards to govern the program by rejecting the NIAAA's designation and unlawfully managed the program with invalid rules. Also, the Department had no administrative rules for hearings that comply with the Procedure Act, which prevented the NIAAA from receiving a fair hearing on this petition. In June 2019, the NIAAA "designated" adult protective service providers for area one. In July 2019, the Department, through defendant, sent a letter to the NIAAA, stating that it rejected its "recommendations" of providers because of "errors in the instructions and application used for scoring purposes."

¶ 15 Count I of the NIAAA's second petition alleged that the Department violated the Adult Protective Services Act by rejecting the NIAAA's designation of providers, in violation of section

3(b) of the Adult Protective Services Act (320 ILCS 20/3(b) (West 2018)). Count II alleged that the Department unreasonably rejected the NIAAA's designation of providers, in violation of Title 89, Part 270, of the Illinois Administrative Code (89 Ill. Adm. Code 270). Count III alleged that the Department "tainted the process" by unlawfully rejecting the NIAAA's designation of providers. Count IV alleged that the manual was not adopted under the rulemaking process specified in the Procedure Act. Count V alleged that the Department did not have administrative rules for contested hearings that comply with article 10 the Procedure Act.

¶ 16 In September 2019, the Department denied the NIAAA a hearing, again via e-mail, stating that the second petition "did not present a contested case that would support the right to an adjudicatory hearing."

¶ 17 D. Plaintiff's *Mandamus* Complaint

¶ 18 On November 5, 2019, plaintiff filed a three-count *mandamus* action against defendant in the trial court. Count I alleged that the Department had a legal duty to enact administrative rules for hearings that complied with article 10 of the Procedure Act and that defendant had not enacted such rules. See 5 ILCS 100/10-5 through 10-75 (West 2018).

¶ 19 Count II alleged that the Department had a duty to provide plaintiff with an administrative hearing on the first petition. Plaintiff incorporated paragraphs of the first petition into count II and attached the first petition to the complaint. The first petition alleged that in July 2013 plaintiff sent an e-mail to the current director of the Department, John Holton. Plaintiff stated that the Department's new manual was invalid and that it should be recalled. In October 2013, plaintiff e-mailed Holton, stating that the NIAAA was considering litigation regarding the manual. In December 2013, Holton sent a letter to plaintiff, stating that the Department was terminating the NIAAA as the regional AAA effective February 1, 2014. The NIAAA received no funding from

the Department for fiscal year 2014-2015. The Department improperly withheld funding for the purpose of retaliation. The first petition also alleged that the Department failed to enact administrative rules for hearings that complied with article 10 of the Procedure Act. See *id.*

¶ 20 Count III alleged that the Department had a duty to provide the NIAAA with an administrative hearing on its second petition. Plaintiff incorporated paragraphs of the second petition into III three and attached the second petition to the complaint.

¶ 21 On February 28, 2020, after hearing argument, the trial court dismissed plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Plaintiff filed a "motion to vacate," which the court denied as a motion to reconsider on July 29, 2020. Plaintiff filed a timely notice of appeal on August 17, 2020.

¶ 22 II. ANALYSIS

¶ 23 A. Initial Matters

¶ 24 Initially, we address plaintiff's motion to vacate the trial court's dismissal of count III based on a recently adopted regulation. See 89 Ill. Adm. Code 230.420(d), amended at 45 Ill. Reg. 10780 (eff. Aug. 10, 2021). The recently adopted amendment to section 230.420(d)(2) provides that the Department will allow appeals by "[a]ny AAA when the Department proposes to: *** [r]eject the AAA's recommendation to designate a service provider." *Id.* Here, there is absolutely no language overcoming the presumption of prospective, rather than retroactive, application. See *Doe Three v. Department of Public Health*, 2017 IL App (1st) 162548, ¶ 37 (the appellate court applied an administrative regulation prospectively because there was no language suggesting retroactivity). Therefore, we deny plaintiff's motion.

¶ 25 In a related motion, plaintiff seeks sanctions against defendant and counsel pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018) and Rule 361 (eff. Dec. 1, 2021) for delaying

this litigation, making false representations to this court, and concealing the implementation of the recently adopted regulation (see 45 Ill. Reg. 10780 (eff. Aug. 10, 2021)). Plaintiff's motion is premised on the false belief that the recently adopted regulation applies retroactively. Because the enactment of the regulation at issue is not retroactive, it does not affect this litigation, and thus, we deny plaintiff's motion for sanctions.

¶ 26

B. Standard of Review

¶ 27 Our review in this appeal is guided by the procedural context from which it arose, a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Motions to dismiss under section 2-615 challenge the legal sufficiency of a complaint, based on defects apparent on its face. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 5. When reviewing whether a motion to dismiss under section 2-615 should have been granted, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Id.* An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. *Invenenergy Nelson LLC v. Rock Falls Township High School District No. 301*, 2020 IL App (2d) 190374, ¶ 14. Where an exhibit contradicts the allegations in a complaint, the exhibit controls. *Id.* Whether the trial court erred in granting or denying a section 2-615 motion presents a question of law and, therefore, our review is *de novo*. *Ferris, Thompson & Zweig, Ltd.*, 2017 IL 121297, ¶ 5.

¶ 28

C. Mandamus

¶ 29 *Mandamus* is an “extraordinary remedy” that compels a public official to perform a purely ministerial duty that does not involve an exercise of discretion. *People ex rel. Berlin v. Bakalis*, 2018 IL 122435, ¶ 16. A court will award *mandamus* relief only when the plaintiff “ ‘establishes a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply.’ ” (Internal quotation marks omitted.) *Id.* (quoting *People ex rel. Glasgow v. Carlson*, 2016 IL 120544, ¶ 15).

¶ 30 D. Administrative Review

¶ 31 With administrative cases, we review the administrative agency’s decision, not the trial court’s decision. *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers’ Retirement System*, 2012 IL App (4th) 110843, ¶ 20. The applicable standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Kouzoukas v. Retirement Board of the Policemen’s Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). An administrative agency’s decision on a question of law is not binding on a reviewing court and is subject to *de novo* review. *Engle v. Department of Financial & Professional Regulation*, 2018 IL App (1st) 162602, ¶ 29. In contrast, we will not disturb an agency’s findings of fact unless they are against the manifest weight of the evidence. *Id.* ¶ 30. Finally, an agency’s conclusion on a mixed question of fact and law is reviewed for clear error. *Id.* ¶ 31.

¶ 32 Further, when, as here, an agency is subject to the Procedure Act, a final decision by the agency “shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” 5 ILCS 100/10-50(a) (West 2018). “Therefore, while an agency is not required to make a finding on each evidentiary fact or claim, its findings must be

specific enough to permit an intelligent review of its decision.” *Lucie B. v. Department of Human Services*, 2012 IL App (2d) 101284, ¶ 17.

¶ 33 Here, we determine that the Department’s summary dismissals of the NIAAA’s petitions and its conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review. A decision that contains no findings of facts “is simply insufficient to permit an intelligent review of that decision.” *Violette v. Department of Healthcare & Family Services*, 388 Ill. App. 3d 1108, 1112 (2009).

¶ 34 Defendant argues that the Procedure Act only requires the Department to “adopt rules establishing procedures for contested case hearings.” See 5 ILCS 100/10-5 (West 2018). Defendant notes that a contested case is defined as “an adjudicatory proceeding *** in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” *Id.* § 1-30.

¶ 35 Both petitions alleged, *inter alia*, that the Department failed to comply with the Procedure Act because it did not implement rules for administrative hearings as required in article 10 (5 ILCS 100/10-5 through 10-75 (West 2018)).

¶ 36 The Procedure Act’s provisions apply to the Department. 20 ILCS 105/5.02 (West 2018) (“The provisions of the Illinois Administrative Procedure Act [(5 ILCS 100/1-1 *et seq.*)] are hereby expressly adopted and shall apply to all administrative rules and procedures of the Department under this Act ***.”). The Procedure Act provides that “each agency shall *** adopt rules of practice setting forth the nature and requirements of all formal hearings.” 5 ILCS 100/5-10(a) (West 2018). Section 10-5 of the Procedure Act states, “[a]ll agencies *shall* adopt rules establishing procedures for contested case hearings.” (Emphasis added.) *Id.* § 10-5. Section 10-10 provides,

“[a]ll agency rules establishing procedures for contested cases *shall* at a minimum comply with the provisions of this Article 10.” (Emphasis added.) *Id.* § 10-10.

¶ 37 The NIAAA alleged that defendant failed to adopt administrative rules for hearings that complied with article 10 of the Procedure Act for:

- “a. The qualifications of administrative law judges [(*id.* § 10-20)];
- b. The necessary details required in a hearing notice [(*id.* § 10-25)];
- c. The disqualification of an administrative law judge [(*id.* § 10-30(b))];
- d. Bias or conflict of interest [(*id.*)];
- e. What must be included in the record for a contested hearing [(*id.* § 10-35)];
- f. The rules of evidence at a hearing [(*id.* § 10-40)];
- g. The proposal for decision [(*id.* § 10-45)];
- h. What must be in the decision and orders [(*id.* § 10-50)];
- i. Expenses and attorney fees in contested hearings [(*id.* § 10-55)];
- j. *Ex parte* communications after a notice of hearing [(*id.* § 10-60)];
- k. Staying contested hearings for military service [(*id.* § 10-63)];
- l. Waiving compliance with [the Procedure Act] [(*id.* § 10-70)]; and
- m. Service by email [(*id.* § 10-75)].”

¶ 38 Defendant argues that the Department had no obligation to enact rules pursuant to article 10 of the Procedure Act because the NIAAA had no right to hearings on its first and second petitions. Thus, defendant does not dispute that the Department failed to enact the rules at issue. The Department argues only that the NIAAA was not entitled to hearings because the petitions failed to present a contested case.

¶ 39 The NIAAA's first petition alleged, *inter alia*, that the Department withdrew funding and terminated the NIAAA as an adult service provider for an improper purpose. The NIAAA alleged that the Department took these actions to retaliate against plaintiff after plaintiff told the Department's executive director that the Department's manual was invalid because it was enacted without the public notice and comment requirements of the Procedure Act. See *id.* § 5-40.

¶ 40 The NIAAA's second petition alleged that the Department improperly denied approval of the NIAAA's recommended providers. Section 270.215(b)(1) of the Department's regulations is instructive. That section provides "[t]he Department reserves the right to *** reject recommendations *** of a regional administrative agency in the designation of *** provider agencies; however, the Department will not do so *unreasonably*." (Emphasis added.) 89 Ill. Adm. Code 270.215(b)(1) (2018). The Department's regulations further provide that its approval "shall not be *unreasonably* withheld." (Emphasis added). *Id.* § 270.220(d). Generally, whether a party acted reasonably is a question of fact. See, e.g., *Cole v. Byrd*, 167 Ill. 2d 128, 136-37 (1995) (stating whether medical expenses are reasonable is a question of fact); *Wells v. State Farm Fire & Casualty Insurance Co.*, 2021 IL App (5th) 190460, ¶ 37 ("whether a party has employed *** 'reasonable efforts' is a question of fact"). However, here, the Department made no findings of fact and there was no hearing to allow the presentation of evidence regarding the allegedly unreasonable action.

¶ 41 Here, it is patently obvious that the NIAAA was seeking a determination of its rights, duties, or privileges by seeking a hearing with the Department. Contrary to the enunciated public policy recognizing that there should be some form of administrative review (5 ILCS 100/10-5 (West 2018)), the Department summarily determined that there was no need for a hearing. The

Department denied the NIAAA's petitions without investigation, findings, or explanation, but somehow concluded that the petitions failed to present contested cases.

¶ 42 In doing so, the Department failed and refused to provide a means for administrative review for the determination of the NIAAA's rights, duties, and responsibilities because it failed to grant a hearing where findings of fact and conclusions of law were determined after an opportunity to be heard. See *id.* § 1-30. The Department dismissed the petitions without providing any means to effectively appeal or review the decisions and without enacting rules to even validate its actions. We do not believe that the legislature ever intended a system for the adjudication of rights, duties, or privileges as simplistic as conceived by the Department.

¶ 43 The Department was required to give the NIAAA adjudicatory hearings and determine the merits of its petitions. It refused to do so. We determine that the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected.

¶ 44 E. Delay in Proceedings

¶ 45 Finally, plaintiff argues that the trial court erred by unnecessarily causing delays in the resolution of this matter. Because we are reversing and remanding for a hearing on plaintiff's petitions, we need not address this argument.

¶ 46 III. CONCLUSION

¶ 47 In conclusion, plaintiff's first and second petitions presented contested cases. Therefore, for the foregoing reasons, the order of the circuit court of Winnebago County is reversed, the final decision by the Department is vacated, and this cause is remanded to the Department for further review, evaluation, findings, and decision consistent with this opinion.

¶ 48 Circuit court judgment reversed.

¶ 49 Department decision vacated and remanded.

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No. 2-20-0460

Cite as: *Nyhammer v. Basta*, 2022 IL App (2d) 200460

Decision Under Review: Appeal from the Circuit Court of Winnebago County, No. 19-MR-1106; the Hon. Donna R. Honzel, Judge, presiding.

**Attorneys
for
Appellant:** Timothy Scordato, of Northwestern Illinois Area Agency on Aging, of Rockford, for appellant.

**Attorneys
for
Appellee:** Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Carson R. Griffis, Assistant Attorney General, of counsel), for appellee.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--|---|--|
| GRANT NYHAMMER, as Executive Director of the Northwestern Illinois Area Agency on Aging, |) | Appeal from the Circuit Court of Winnebago County. |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 19-MR-1106 |
| |) | |
| PAULA BASTA, In Her Official Capacity as Director of the Illinois Department on Aging, |) | |
| |) | Honorable |
| |) | Donna R. Honzel, |
| Defendant-Appellee. |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Bridges and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's order affirming the Illinois Department on Aging's decisions that a petitioner did not present contested cases was vacated, and the matter was remanded to the Department, where it failed to make findings of fact and conclusions of law sufficient for appellate review on all matters before it.

¶ 2 After the Illinois Department on Aging (Department) denied the Northwestern Illinois Area Agency on Aging (NIAAA) administrative hearings for two petitions, plaintiff, Grant Nyhammer, the NIAAA's executive director, filed a *mandamus* complaint seeking an order for hearings on the petitions and other relief. The trial court dismissed plaintiff's *mandamus* complaint for failure to

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state a cause of action. On appeal, plaintiff argues that the trial court erred by dismissing its complaint. For the reasons that follow, we vacate the trial court's order and remand the matter to the Department for rulings with findings of fact and conclusions of law regarding the NIAAA's two petitions.

¶ 3

I. BACKGROUND

¶ 4

A. The Parties

¶ 5 Defendant, Paula Basta, is the current director of the Department. The Department is mandated by the Adult Protective Services Act to “establish, design, and manage” a protective services program to assist eligible, adult victims of elder abuse, neglect, self-neglect, and exploitation. 320 ILCS 20/3 (West 2018). The Department designates area agencies on aging as regional administrative agencies. *Id.* § 2(i). A regional administrative agency is a public or nonprofit agency in a planning and service area that provides regional oversight in implementing Adult Protective Services Act programs in a geographical region of the state. See *id.*

¶ 6 The Department designated the NIAAA as the regional administrative agency for planning and service area one.¹ The NIAAA is also the area agency on aging (AAA) for planning service and service area one. “‘Area agency on aging’ means any public or non-profit private agency in a planning and service area designated by the Department, which is eligible for funds available under the Older Americans Act [42 U.S.C. § 3001 *et seq.*] and other funds made available by the State of Illinois or the federal government.” 20 ILCS 105/3.07 (West 2018). Plaintiff is the executive director of and general counsel for the NIAAA, a private nonprofit entity.

¹ Area one is comprised of the counties of Jo Davies, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside, and Lee. 20 ILCS 105/3.08 (West 2018).

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¶ 7 Under the Older Americans Act, 42 U.S.C. §§ 3001, *et seq.*, the federal government distributes funds to the states each year. The states use these funds to provide a wide range of services to their “older individual[s],” whom the statute defines as individuals “60 years of age or older.” 42 U.S.C. § 3002(38). The Older Americans Act requires each state to designate an agency responsible for creating a formula to determine the intrastate distribution of Older Americans Act funds. *Id.* § 3025(a)(1)(A). That state agency must, in turn, divide the state into subdivisions known as “planning and service areas,” and must designate an area agency on aging for each PSA. *Id.* § 3025(a)(2)(A). See also 20 ILCS 105/3.07, 3.08 (West 2018). In Illinois, the state agency is the Department. Illinois is divided into 13 planning and service areas. 20 ILCS 105/3.08 (West 2018).

¶ 8 B. Plaintiff’s First Petition

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¶ 12 The nine-count petition alleged, that (1) the Department failed to enact administrative rules that comply with article 10 of the Illinois Administrative Hearing Act (Act) (5 ILCS 100/10-10 through § 10-75 (West 2018)), (2) the Department violated the Older Americans Act of 2006 by withholding funds from the NIAAA without, *inter alia*, providing due process; (3) the Department withheld funds from plaintiff for an improper purpose and as retaliation; (4) by withholding funds from the NIAAA for an improper purpose, the Department violated the Older Americans Act of 2006 by failing to improve the capacity of serving older adults by concentrating resources, act in the clients’ best interests, give preference to clients with the greatest economic need, and consider the needs of rural clients (42 U.S.C. §§ 3021(a)(1), 3025(a)(1)(D), 3025(a)(2)(E), 3027(a)(10)); (5) Creamer, acting under the color of State law, deprived NIAAA its federal due process right by withholding funds; (6) the Department violated Illinois law by withholding funds from the NIAAA for the improper purpose of interfering with its State mandated advocacy responsibilities (89 Ill. Admin. Code § 230.150); (7) the Department violated Illinois law by terminating the NIAAA in retaliation as the regional administrative agency (Ill. Const., Art. I, Sec. 2, 320 ILCS 2/2(i) (West 2018)); (8) the Department violated Illinois law by improperly terminating the NIAAA as the

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regional administrative agency because it interfered with its state mandated advocacy responsibilities (89 Ill. Admin. Code § 230.150); and (9) the Department violated Illinois law by withholding funds from the NIAAA under the order given to Creamer.

¶ 13 In July 2019 the Department denied the NIAAA a hearing on its first petition, stating in an email that the petition did not present a contested case.

¶ 14 C. The NIAAA’s Second Petition

¶ 15 In August 2019, the NIAAA, through plaintiff, filed a second petition for a hearing with the Department. This second five-count petition alleged the following. The Department designated the NIAAA as the area on aging for planning service area one and the regional administrative agency for the adult protective services program for area one. As the regional administrative agency for the adult protective services program (program), the NIAAA had broad authority to manage the program, including designating program providers. The Department rejected the NIAAA’s designations of providers and in doing so, it improperly intruded on the NIAAA’s authority granted by the Illinois General Assembly. In addition, the Department used conflicting standards to govern the program by rejecting the NIAAA’s designation, and unlawfully managed the program with invalid rules. Also, the Department had no administrative rules for hearings that comply with the Illinois Administrative Procedure Act, which prevented the NIAAA from receiving a fair hearing on this petition. In June 2019, the NIAAA “designated” adult protective service providers for area one. In July 2019, the Department, through defendant, sent a letter to the NIAAA stating that it rejected its “recommendations” of providers because of “errors in the instructions and application used for scoring purposes.”

¶ 16 Count one of the NIAAA’s second petition alleged that the Department violated the Adult Protective Services Act by rejecting the NIAAA’s designation of providers in violation of section 3(b) of the Adult Protective Services Act (320 ILCS 20/3(b) (West 2018)). Count two alleged that

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the Department unreasonably rejected the NIAAA's designation of providers in violation of Part 270 of the Illinois Administrative Code (Code) (89 Ill. Adm. Code 270). Count three alleged that the Department "tainted the process" by unlawfully rejecting the NIAAA's designation of providers. Count five alleged that the Department did not have administrative rules for contested hearings that comply with article 10 the Act.

¶ 17 In September 2019 the Department denied the NIAAA a hearing, again *via* email, stating that the second petition "did not present a contested case that would support the right to an adjudicatory hearing."

¶ 18 D. Plaintiff's *Mandamus* Complaint

¶ 19 On November 5, 2019, plaintiff filed a three-count *mandamus* action against defendant in the trial court. Count one alleged that the Department had a legal duty to enact administrative rules for hearings that complied with the article 10 of the Act and the defendant had not enacted such rules. See 5 ILCS 100/10-20, 25, 30(b), 35, 40, 50, 55, 60, 63, 70, and 75 (West 2018).

¶ 20 Count two alleged that the Department had a duty to provide plaintiff with an administrative hearing on the first petition. Plaintiff incorporated paragraphs of the first petition into count two and attached the first petition to the complaint. The first petition alleged that in July 2013 plaintiff sent an email to the current director of the Department, John Holton. Plaintiff stated that the Department's new adult protective service program manual (manual) was invalid and that it should be recalled. In October 2013, plaintiff emailed Holton stating that the NIAAA was considering litigation regarding the manual. In December 2013 Holton sent a letter to plaintiff stating that the Department was terminating the NIAAA as the regional area agency on aging effective February 1, 2014. The NIAAA received no funding from the Department for fiscal year 2014-2015. The Department improperly withheld funding for the purpose of retaliation. The first petition also alleged that the Department failed to enact administrative rules for hearings that

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complied with article 10 of the Act. See 5 ILCS 100/10-20, 25, 30(b), 35, 40, 50, 55, 60, 63, 70, and 75 (West 2018).

¶ 21 Count three alleged that the Department had a duty to provide the NIAAA with an administrative hearing on its second petition. Plaintiff incorporated paragraphs of the second petition into count three and attached the second petition to the complaint.

¶ 22 On February 28, 2020, after hearing argument, the trial court dismissed plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 LCS 5/2-615 (West 2018)). Plaintiff filed a "motion to vacate," which the court denied as a motion to reconsider on July 29, 2020. Plaintiff filed a timely notice of appeal on August 17, 2020.

¶ 23 II. ANALYSIS

¶ 24 A. Initial Matters

¶ 25 Initially, we address plaintiff's motion to vacate the trial court's dismissal of count three based on a recently adopted regulation. See 45 Ill. Reg. 10780 (eff. Aug. 10, 2021) (amending 89 Ill. Admin. Code § 230.420(d) (West 2022)). The recently adopted amendment to section 230.420(d)(2) provides that the Department will allow appeals by "[a]ny AAA when the Department proposes to: *** [r]eject the AAA's recommendation to designate a service provider." *Id.* Here, there is absolutely no language overcoming the presumption of prospective, rather than, retroactive application. See *Doe Three v. Department of Public Health*, 2017 IL App (1st) 162548, ¶ 37 (the appellate court applied an administrative regulation prospectively because there was no language suggesting retroactivity). Therefore, we deny plaintiff's motion.

¶ 26 In a related motion, plaintiff seeks sanctions against defendant and counsel pursuant to Illinois Supreme Court Rules 137 (eff. Jan. 1, 2018) and 361 (eff. Dec. 1, 2021), for delaying this litigation, making false representations to this court, and concealing the implementation of the recently adopted regulation (see 45 Ill. Reg. 10780 (eff. Aug. 10, 2021)). Plaintiff's motion is

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premised on the false belief that the recently adopted regulation applies retroactively. Because the enactment of the regulation at issue is not retroactive, it does not affect this litigation, and thus, we deny plaintiff's motion for sanctions.

¶ 27

B. Standard of Review

¶ 28 Our review in this appeal is guided by the procedural context from which it arose, a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Motions to dismiss under section 2-615 challenge the legal sufficiency of a complaint based on defects apparent on its face. *Ferris, Thompson & Zweig, Ltd., v. Esposito*, 2017 IL 121297, ¶ 5. When reviewing whether a motion to dismiss under section 2-615 should have been granted, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Id.* An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. *Invenergy Nelson LLC v. Rock Falls Township High School District No. 301*, 2020 IL App (2d) 190374 ¶ 14. Where an exhibit contradicts the allegations in a complaint, the exhibit controls. *Id.* Whether the trial court erred in granting or denying a section 2-615 motion presents a question of law and, therefore, our review is *de novo*. *Ferris, Thompson & Zweig, Ltd.*, 2017 IL 121297, ¶ 5.

¶ 29

C. *Mandamus*

¶ 30 *Mandamus* is an “extraordinary remedy” that compels a public official to perform a purely ministerial duty that does not involve an exercise of discretion. *People ex. rel. Berlin v. Bakalis*, 2018 IL 122435, ¶ 16. A court will award *mandamus* relief only when the plaintiff “establishes a

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clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply.” *Id.* (quoting *People ex. rel. Glasgow v. Carlson*, 2016 IL 120544, ¶ 15.

¶ 31 D. Administrative Review

¶ 32 With administrative cases we review the administrative agency’s decision, not the trial court’s decision. *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers’ Retirement System*, 2012 IL App (4th) 110843, ¶ 20. The applicable standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Kouzoukas v. Retirement Board of the Policemen’s Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). An administrative agency’s decision on a question of law is not binding on a reviewing court and is subject to *de novo* review. *Engle v. Department of Financial & Professional Regulation*, 2018 IL App (1st) 162602, ¶ 29. In contrast, we will not disturb an agency’s findings of fact unless they are against the manifest weight of the evidence. *Id.* ¶ 30. Finally, an agency’s conclusion on a mixed question of fact and law is reviewed for clear error. *Id.* ¶ 31.

¶ 33 Further, when, as here, an agency is subject to the Procedure Act, a final decision by the agency “shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” 5 ILCS 100/10-50(a) (West 2018). “Therefore, while an agency is not required to make a finding on each evidentiary fact or claim, its findings must be specific enough to permit an intelligent review of its decision.” *Lucie B. v. Department of Human Services*, 2012 IL App (2d) 101284 ¶ 17.

¶ 34 Here, we determine that the Department’s summary dismissals of the NIAAA’s petitions and its conclusory statements that the petitions failed to present contested cases were insufficient

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for meaningful judicial review. A decision that contains no findings of facts “is simply insufficient to permit an intelligent review of that decision.” *Violette v. Department of Healthcare & Family Services*, 388 Ill. App. 3d 1108, 1112 (2009).

¶ 35 Defendant argues that the Procedure Act only requires the Department to “adopt rules establishing procedures for contested case hearings.” See 5 ILCS 100/10-5 (West 2018). Defendant notes that a contested case is defined as “an adjudicatory proceeding *** in which the individual legal rights, duties, or privileges of a party are required as law to be determined by an agency only after an opportunity for a hearing.” *Id.* § 1-30.

¶ 36 Both petitions alleged, *inter alia*, that the Department failed to comply with the Procedure Act because it did not implement rules for administrative hearings as required in article 10 (5 ILCS 100/10-10 *et seq.* (West 2018)).

¶ 37 The Procedure Act’s provisions apply to the Department. 20 ILCS 105/5.02 (West 2018) (“The Provisions of the Illinois Administrative Procedure Act [5 ILCS 100/1-1 *et seq.*] are hereby expressly adopted and shall apply to all administrative rules and procedures of the Department under this Act[.]”). The Procedure Act provides that “each agency shall *** adopt rules of practice setting forth the nature and requirements for all formal hearings.” 5 ILCS 100/5-10 (West 2018). Section 10-5 of the Act states, “[a]ll agencies *shall* adopt rules establishing procedures for contested case hearings.” (Emphasis added.) *Id.* § 10-5. Section 10-10 provides, “[a]ll agency rules establishing procedures for contested cases *shall* at a minimum comply with Article 10.” (Emphasis added.) *Id.* § 10-10.

¶ 38 The NIAAA alleged that defendant failed to adopt administrative rules for hearings that complied with article 10 of the Act for:

“a. The qualifications of administrative law judges; [*id.* § 10-20]

b. The necessary details required in a hearing notice; [*id.* § 10-25]

- c. The disqualification of an administrative law judge; [*id.* § 10-30(b)]
- d. Bias or conflict of interest; [*id.*]
- e. What must be included in the record for a contested hearing; [*id.* § 10-35]
- f. The rules of evidence at a hearing; [*id.* § 10-40]
- g. The proposal for decision; [*id.* § 10-45]
- h. What must be in the decision and orders; [*id.* § 10-50]
- i. Expenses and attorney fees in contested hearings; [*id.* § 10-55]
- j. *Ex parte* communications after a notice of hearing; [*id.* § 10-60]
- k. Staying contested hearings for military service; [*id.* § 10-63]
- l. Waiving compliance with [the Act]; [*id.* § 10-70] and
- m. Service by email. [*id.* § 10-75]”

¶ 39 Defendant argues that the Department had no obligation to enact rules pursuant to article 10 of the Procedure Act because the NIAAA had no right to hearings on its first and second petitions. Thus, defendant does not dispute that the Department failed to enact the rules at issue. The Department argues only that the NIAAA was not entitled to hearings because the petitions failed to present a contested case.

¶ 40 The NIAAA’s first petition alleged, *inter alia*, that the Department withdrew funding and terminated the NIAAA as an adult service provider for an improper purpose. The NIAAA alleged that the Department took these actions to retaliate against plaintiff after plaintiff told the Department’s executive director that the Department’s manual was invalid because it was enacted without the public notice and comment requirements of the Procedure Act (see 5 ILCS 100 5/40 (West 2018)).

¶ 41 The NIAAA’s second petition alleged that the Department improperly denied approval of the NIAAA’s recommended providers. Section 270.215.(b)(1) of the Department’s regulations is

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instructive. That section provides “[t]he Department reserves the right to *** reject recommendations *** of a regional administrative agency in the designation of *** provider agencies; however, the Department will not do so *unreasonably*.” (Emphasis added.) 89 Ill. Admin. Code § 270.215(b)(1) (West 2018)). The Department’s regulations further provide that its approval “shall not be *unreasonably* withheld.” (Emphasis added). *Id.* § 270.220(d). Generally, whether a party acted reasonably is a question of fact. See, e.g., *Cole v. Byrd*, 167 Ill. 2d 128, 136-37 (1995) (stating, whether medical expenses are reasonable is a question of fact); *Wells v. State Farm Fire & Casualty Insurance Co.*, 2021 IL App (5th) 190460, ¶ 37 (“whether a party has employed *** ‘reasonable efforts’ is a question of fact”). However, here, the Department made no findings of fact and there was no hearing to allow the presentation of evidence regarding the allegedly unreasonable action.

¶ 42 Here, it is patently obvious that the NIAAA was seeking a determination of its rights, duties, or privileges by seeking a hearing with the Department. Contrary to the enunciated public policy recognizing that there should be some form of administrative review (*id.* § 10-5), the Department summarily determined that there was no need for a hearing. The Department denied the NIAAA’s petitions without investigation, findings, or explanation, but somehow concluded that the petitions failed to present contested cases.

¶ 43 In doing so, the Department failed and refused to provide a means for administrative review for the determination of the NIAAA’s rights, duties, and responsibilities because it failed to grant a hearing where findings of fact and conclusions of law were determined after an opportunity to be heard. See 5 ILCS 100/1-30 (West 2018). The Department dismissed the petitions without providing any means to effectively appeal or review the decisions and without enacting rules to even validate its actions. We do not believe that the legislature ever intended a system for the adjudication of rights, duties, or privileges as simplistic as conceived by the Department.

¶ 44 The Department was required to give the NIAAA adjudicatory hearings and determine the merits of its petitions. It refused to do so. We determine that the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected.

¶ 45 E. Delay in Proceedings

¶ 46 Finally, plaintiff argues that the trial court erred by unnecessarily causing delays in the resolution of this matter. Because we are reversing and remanding for a hearing on plaintiff's petitions, we need not address this argument.

¶ 47 III. CONCLUSION

¶ 48 In conclusion, plaintiff's first and second petitions presented contested cases. Therefore, for the foregoing reasons, the order of the circuit court of Winnebago County is reversed, the final decision by the Illinois Department on Aging is vacated, and this cause is remanded to the Department for further review, evaluation, findings, and decision consistent with this opinion.

¶ 49 Judgment reversed; final administrative decision vacated; cause remanded to the Illinois Department on Aging.



**ILLINOIS APPELLATE COURT
SECOND DISTRICT**

**55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750**

March 2, 2022

Timothy Scordato
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

RE: Nyhammer, Grant v. Basta, Paula
Appeal No.: 2-20-0460
County: Winnebago County
Trial Court No.: 19MR1106

The court has this day, March 02, 2022, entered the following order in the above entitled case:

Motion by appellant, Grant Nyhammer, to publish the Rule 23 Decision filed February 8, 2022, as an opinion, and for attorney fees and costs. Appellant's motion to publish the Rule 23 filed February 8, 2022, is allowed. The Rule 23 is withdrawn and the Opinion is filed in its stead. The request for attorney's fees and costs is denied.
(McLaren, Bridges, Hutchinson, JJ).

Jeffrey H. Kaplan
Clerk of the Court

cc: Carson Reid Griffis
Hon. Donna R. Honzel
Grant Nyhammer, as Executive Director of the NIAAA
Paula Basta, in her official capacity as Director of the Illinois Department on Aging



**ILLINOIS APPELLATE COURT
SECOND DISTRICT**

**55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750**

February 28, 2022

Carson Reid Griffis
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601

RE: Nyhammer, Grant v. Basta, Paula
Appeal No.: 2-20-0460
County: Winnebago County
Trial Court No.: 19MR1106

The court today denied the petition for rehearing filed in the above cause. The mandate of this court will issue 35 days from today unless otherwise ordered by this court or a petition for leave to appeal is filed in the Illinois Supreme Court.

Honorable Susan Fayette Hutchinson
Honorable George Bridges
Honorable Robert D. McLaren

Jeffrey H. Kaplan
Clerk of the Court

cc: Timothy Scordato

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|----------|
| Grant Nyhammer as Executive Director of the |) | |
| Northwestern Illinois Area Agency on Aging, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. |
| v. |) | |
| |) | |
| Paula Basta, in her capacity as |) | |
| Director of the Illinois Department on Aging, |) | |
| |) | |
| Defendant |) | |

Motion For Leave To File Complaint for Mandamus

Plaintiff, Grant Nyhammer as Executive Director & General Counsel of the Northwestern Illinois Area Agency on Aging (NIAAA), requests leave to file a Complaint for Mandamus (Complaint), pursuant to Illinois Supreme Court Rule 381 and article VI, § 4(a) of the Illinois Constitution. In support of this Motion, Plaintiff states the following:

1. The Illinois Department on Aging (Department) is denying NIAAA its rights to challenge unjust actions of the Department, which oversees a billion dollar aging network.¹
2. As stated in the Complaint, NIAAA is responsible for managing the aging network and the Department is statutorily obligated to assist NIAAA in that effort.
3. Despite the Illinois Administrative Procedure Act² (Procedure Act) applying to the Department and the Procedure Act requiring certain basic provisions for hearings,³ the Department has ignored their statutory responsibilities by failing to update their hearing rules since 2002.⁴
4. For example, the Department has an administrative rule that states that "all requests for hearings or appeals to the Department shall be filed with the Hearing Coordinator, Department on Aging, 421 East Capitol Avenue, Springfield, Illinois 6270."⁵
 - a. It is believed that the Department moved from 421 East Capital Avenue over nine years ago,⁶ so it is doubtful that any hearing requests sent to that address will reach the Department.
 - b. It is believed that it has also been at least nine years since the Department had a "Hearing Coordinator" position, so it is unknown what would happen even if a hearing request reaches the Department.

01

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Carolyn Taft Grosboll
SUPREME COURT CLERK

5. As alleged in the Complaint, NIAAA requested a hearing under seven separate provisions of federal and state law that require the Department to give NIAAA a hearing.
6. Despite the Department having the duties to assist NIAAA and provide NIAAA a hearing, it refused to give NIAAA a hearing, refused to assign the matter to an administrative law judge to determine if NIAAA was entitled to a hearing, and refused to give NIAAA a final determination so that NIAAA could seek judicial review.
7. The Department's conduct as alleged in the Complaint, unfortunately, is likely indicative of what happens to anyone requesting a hearing.
8. The Complaint presents purely legal issues of the Department refusing to:
 - a. Adopt administrative rules for hearings in compliance with the Procedure Act; and
 - b. Provide a hearing to NIAAA in compliance with statutory duties.
9. The issues presented in the Complaint are of great public importance because:
 - a. The Department is discouraging anyone, including our older citizens receiving crucial welfare benefits from the Department, from challenging unjust actions of the Department; and
 - b. Adopting administrative rules for hearings that comply with the Procedure Act helps ensure fair hearings for anyone wanting to challenge unjust actions of the Department.

WHEREFORE, Plaintiff requests that this Court grant Plaintiff's Motion For Leave To File Complaint For Mandamus.

Respectfully submitted,

/s/ Timothy Scordato

Timothy Scordato,

Attorney Registration #6322807

Staff Attorney, NIAAA

1111 S. Alpine Road, Suite 600

Rockford, IL 61108

tscordato@nwilaaa.org (815) 226-4901 (815) 226-8984 fax

¹ The Department's 2020 Budget is \$1,185,541,102. See Illinois Department on Aging, *Fiscal Year 2020 Enacted Budget*, 3 https://www2.illinois.gov/aging/Documents/Final%20IDOA%20FY20%20Revised%20w%20enacted_0612.pdf.

² See 20 ILCS 105/5.02.

³ "All agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this Article 10 [of the Procedure Act]." 5 ILCS 100/10-10.

⁴ The legislative notes to 89 Ill. Adm. Code § 220 state that they were last "amended at 26 Ill. Reg. 9652, effective July 1, 2002."

⁵ 89 Ill. Adm. Code § 220.503(a).

⁶ Doug Finke, *Department on Aging to move offices despite questions*, THE STATE JOURNAL-REGISTER (Mar. 12, 2010) <https://www.sj-r.com/x673415983/Department-on-Aging-to-move-offices-despite-questions>.

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 22, 2019, the foregoing **Motion For Leave To File Complaint For Mandamus**, which complies with the proposed order requirement of Supreme Court Rule 361(b)(2), was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

Paula Basta
Illinois Department on Aging
One Natural Resources Way, Suite 100
Springfield, IL 62701-1271
paula.basta@illinois.gov

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|----------|
| Grant Nyhammer as Executive Director of the |) | |
| Northwestern Illinois Area Agency on Aging, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. |
| v. |) | |
| |) | |
| Paula Basta, in her capacity as |) | |
| Director of the Illinois Department on Aging, |) | |
| |) | |
| Defendant |) | |

Complaint for Mandamus

Plaintiff, Grant Nyhammer as Executive Director & General Counsel of the Northwestern Illinois Area Agency on Aging (NIAAA) requests this Court, pursuant to 735 ILCS 5/14-101 *et seq.*, Supreme Court Rule 381, and article VI, § 4(a) of the Illinois Constitution, issue a mandamus ordering the Defendant, Paula Basta in her capacity as Director of the Illinois Department on Aging (Department), to have rules for contested hearings that comply with the Administrative Procedure Act (Procedure Act)¹ and provide NIAAA an administrative hearing.

The Parties

1. The Department is the Illinois state agency responsible for “providing services for senior citizens” and for complying with the Older Americans Act.²
2. The Department has designated NIAAA as the area agency on aging³ (AAA) for planning service area 1.⁴
3. “Responsibilities of . . . [the AAAs] shall include the development of an area plan that provides for the development of a comprehensive and coordinated service delivery system for social and nutrition services needed by older persons.”⁵
4. “The Department shall have the following duties . . . to provide . . . assistance to . . . area agencies on aging⁶ . . . to establish multipurpose senior centers through area agencies on aging⁷ . . . to make grants to area agencies on aging⁸ . . . to distribute, through its area agencies on aging, information alerting seniors on safety issues⁹ . . . to develop guidelines for the organization and implementation of Volunteer Services Credit Programs to be administered by Area Agencies on Aging.”¹⁰
5. Paula Basta is the Director of the Department.

6. Grant Nyhammer is the Executive Director & General Counsel for NIAAA.

The Department's legal duties under the Procedure Act

7. "The provisions of the Illinois Administrative Procedure Act are hereby expressly adopted and shall apply to all administrative rules and procedures of . . . [the Department]." ¹¹
8. "Each agency shall . . . adopt rules of practice setting forth the nature and requirements of all formal hearings." ¹²
9. "All [Department] agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this Article 10 [of the Procedure Act]." ¹³
10. Article 10 of the Procedure Act requires that the Department have hearing procedures for:
 - a. The qualifications of administrative law judges; ¹⁴
 - b. The necessary details required in a hearing notice; ¹⁵
 - c. The disqualification of an administrative law judge; ¹⁶
 - d. Bias or conflicts of interests; ¹⁷
 - e. What must be included in the record for a contested hearing; ¹⁸
 - f. The rules of evidence at a hearing; ¹⁹
 - g. The proposal for decision; ²⁰
 - h. What must be in the decision and orders; ²¹
 - i. Expenses and attorney fees in contested hearings; ²²
 - j. Ex parte communications after a notice of hearing; ²³
 - k. Staying contested hearings for military service; ²⁴
 - l. Waiving compliance with Procedure Act; ²⁵ and
 - m. Service by email. ²⁶

The Department's legal duty to give NIAAA a hearing

11. To receive a hearing, "a written request for a hearing shall be filed by the aggrieved agency . . . within 30 days following receipt of the notice of adverse action." ²⁷
12. "[The Department] will . . . afford an opportunity for a hearing upon request . . . to any area agency on aging submitting a plan under [the Older Americans Act]." ²⁸
13. "[The Department] shall not make a final determination [about] withholding funds . . . without first affording the area agency . . . a public hearing concerning the action." ²⁹
14. "Every person who [acting on behalf of a state agency] . . . causes . . . [a] deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in . . . [a] proper proceeding for redress." ³⁰

15. Procedure Act requires a hearing because “all rulemaking authority exercised . . . [by the Department] is conditioned on the rules being adopted in accordance with all provisions of . . . [the Procedure Act]; any purported rule not so adopted . . . is unauthorized.”³¹

The Department’s denial of a hearing

16. On June 26, 2019, NIAAA filed the attached Petition for Hearing (Petition) with the Department.³²
17. The Petition requests a hearing under multiple provisions of federal and state law that require the Department to give NIAAA a hearing.
18. The Petition requests a hearing to determine NIAAA’s legal rights, duties, or privileges.
19. On July 29, 2019, the Department emailed a letter (Letter) to NIAAA.³³
20. In the Letter, the Department refuses to give NIAAA a hearing on the Petition.

Count I.

21. Paragraphs 1-20 above are incorporated into Count I.
22. Defendant does not have administrative rules for hearings that comply with the Procedure Act.³⁴
23. Defendant does not have administrative rules for hearings that comply with Article 10 of the Procedure Act for:
- a. The qualifications of administrative law judges;³⁵
 - b. The necessary details required in a hearing notice;³⁶
 - c. The disqualification of an administrative law judge;³⁷
 - d. Bias or conflicts of interests;³⁸
 - e. What must be included in the record for a contested hearing;³⁹
 - f. The rules of evidence at a hearing;⁴⁰
 - g. The proposal for decision;⁴¹
 - h. What must be in the decision and orders;⁴²
 - i. Expenses and attorney fees in contested hearings;⁴³
 - j. Ex parte communications after a notice of hearing;⁴⁴
 - k. Staying contested hearings for military service;⁴⁵
 - l. Waiving compliance with Procedure Act;⁴⁶ or
 - m. Service by email.⁴⁷

24. Defendant not having valid administrative rules for hearings violates the Procedure Act.

Count II.

25. Paragraphs 1-20 above are incorporated into Count II.

26. Defendant has a duty to provide Plaintiff an administrative hearing on the Petition.⁴⁸

27. Defendant refuses to provide Plaintiff with an administrative hearing.

WHEREFORE, the Plaintiff, Grant Nyhammer as Executive Director of NIAAA, requests that this Court enter a mandamus ordering the Defendant to:

- A. Adopt administrative rules for contested hearings that comply with the Procedure Act;
- B. Provide Plaintiff a hearing on the Petition;
- C. Pay NIAAA's damages and costs;
- D. Pay NIAAA reasonable attorneys fees under Illinois Supreme Court Rule 137; and
- E. Any other just order the Court deems appropriate.

Respectfully submitted,

/s/ Timothy Scordato

Timothy Scordato,

Attorney Registration #6322807

Staff Attorney, NIAAA

1111 S. Alpine Road, Suite 600

Rockford, IL 61108

tscordato@nwilaaa.org (815) 226-4901 (815) 226-8984 fax

¹ 5 ILCS 100/1-1 *et seq.*

² The Department has "the following . . . duties . . . to receive and disburse State and federal funds made available directly to the Department including those funds made available under the Older Americans Act...for providing services for senior citizens...and shall develop and administer any State Plan for the Aging required by federal law." 20 ILCS 105/4.01

³ An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

⁴ The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

⁵ 20 ILCS 105/3.07.

⁶ 20 ILCS 105/4.01(6).

⁷ 20 ILCS 105/4.01(16).

⁸ 20 ILCS 105/4.01(21).

⁹ 20 ILCS 105/4.01(22).

¹⁰ 20 ILCS 105/4.01(23).

¹¹ 20 ILCS 105/5.02.

¹² 5 ILCS 100/5-10(b).

¹³ 5 ILCS 100/10-10. The term contested case “means an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30. Contested case, therefore, means any circumstance where the Department is required by law to provide a hearing to determine a party’s legal rights, duties, or privileges.

¹⁴ “All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings.” 5 ILCS 100/10-20.

¹⁵ 5 ILCS 100/10-25.

¹⁶ “The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest.” 5 ILCS 100/10-30(b).

¹⁷ *Id.*

¹⁸ 5 ILCS 100/10-35.

¹⁹ 5 ILCS 100/10-40.

²⁰ 5 ILCS 100/10-45.

²¹ 5 ILCS 100/10-50.

²² 5 ILCS 100/10-55.

²³ 5 ILCS 100/10-60.

²⁴ 5 ILCS 100/10-63.

²⁵ 5 ILCS 100/10-70.

²⁶ 5 ILCS 100/10-75.

²⁷ 89 Ill.Adm.Code § 230.440(a).

²⁸ 42 U.S.C. § 3027(a)(5).

²⁹ 42 U.S.C. § 3026(f)(2)(b).

³⁰ 42 U.S.C. § 1983.

³¹ 5 ILCS 100/5-6.

³² *See* Ex. A, “Petition.”

³³ *See* Ex. B, “July 29, 2019 Letter.”

³⁴ *See* Ex. A, “Petition,” Count I.

³⁵ “All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings.” 5 ILCS 100/10-20.

³⁶ The Department rules state that “each hearing shall be conducted at a reasonable time, date and place.” 89 Ill.Adm.Code §220.507. The Procedure Act requires more information be included in the notice such as: the nature of the

hearing; the legal authority and jurisdiction; relevant substantive and procedural statutes; a short plain statement of the matters asserted; addresses of parties, etc. 5 ILCS 100/10-25.

³⁷ “The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest.” 5 ILCS 100/10-30(b).

³⁸ *Id.*

³⁹ 5 ILCS 100/10-35.

⁴⁰ 5 ILCS 100/10-40.

⁴¹ 5 ILCS 100/10-45.

⁴² 5 ILCS 100/10-50.

⁴³ 5 ILCS 100/10-55.

⁴⁴ 5 ILCS 100/10-60.

⁴⁵ 5 ILCS 100/10-63.

⁴⁶ 5 ILCS 100/10-70.

⁴⁷ 5 ILCS 100/10-75.

⁴⁸ *See* Ex. A “Petition,” 1 n.1-5.

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

PROOF OF FILING AND SERVICE

Under penalties as provide by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 22, 2019, the foregoing **Complaint for Mandamus** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

Paula Basta
Illinois Department on Aging
One Natural Resources Way, Suite 100
Springfield, IL 62701-1271
paula.basta@illinois.gov

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

Northwestern Illinois Area Agency on Aging,)
 Petitioner,)
 v.)
 The Illinois Department on Aging,)
 Respondent

Petition for Hearing

The Petitioner, the Northwestern Illinois Area Agency on Aging (NIAAA), through its attorney Grant Nyhammer, is requesting a hearing regarding this Petition for Hearing (Petition) against the Respondent, the Illinois Department on Aging (IDoA). NIAAA is requesting a hearing on this Petition pursuant to two provisions¹ of the Older Americans Act² (OAA), a federal civil rights statute³, the Illinois Administrative Procedure Act⁴ (Procedure Act), and three provisions⁵ of the Illinois Administrative Code. In support of this Petition, NIAAA states the following:

Parties

1. IDoA is the state agency responsible for complying with the OAA.⁶
2. Paula Basta is the Director of IDoA.
3. Betsy Creamer is a former employee at IDoA.
4. Ms. Creamer retired in December 2018 after decades of being employed by IDoA.
5. Ms. Creamer is currently serving as a consultant with IDoA.
6. IDoA has designated NIAAA as the area agency on aging⁷ (AAA) for planning service area 1 (Area 1).⁸
7. Area 1 encompasses the nine counties in northwestern Illinois.⁹
8. Grant Nyhammer is the Executive Director & General Counsel for NIAAA.

Legal Authority

NIAAA as independent advocate

9. IDoA "may not designate any regional or local office of the State as an area agency."¹⁰
10. NIAAA is the "public advocate"¹¹ for older adults (Clients) living in Area 1.

11. NIAAA is required to "represent the interests of older persons to public officials [and] public...agencies."¹²

IDoA funding AAAs

12. IDoA is the state agency responsible for disbursing funding for aging programs including funding to the AAAs.¹³
13. IDoA must "award the funds made available under...[the OAA] to designated area agencies on aging according to the formula".¹⁴
14. In addition to OAA funding, IDoA awards other funding¹⁵ (Other Funding) to AAAs.

IDoA's obligations under the OAA

15. IDoA must improve the capacity to serve older adults by concentrating resources.¹⁶
16. IDoA may not withhold funding from NIAAA without providing due process.¹⁷
17. Due process is a federal right.¹⁸
18. A state agency employee who "causes...any...deprivation of any rights...secured by... laws, shall be liable to the party injured in an action at law...or other proper proceeding for redress."¹⁹
19. Before withholding funding from NIAAA, IDoA must give NIAAA:
- a. Notice that IDoA intends to withhold funding; and
 - b. Documentation of why IDoA is intending to withhold funding.²⁰
20. When IDoA is allocating funding to the AAAs, IDoA must:
- a. Act in the best interests of older adults;²¹
 - b. Give preference to older adults in greatest need;²² and
 - c. Consider the needs of rural older adults.²³

IDoA's obligations under Illinois law

21. "The provisions of the Illinois Administrative Procedure Act are hereby expressly adopted and shall apply to all administrative rules and procedures of...[IDoA]."²⁴
22. "All...[IDoA] rules establishing procedures for contested...[hearings] shall...comply with the [Procedure Act]."²⁵

23. The IDoA administrative rules for contested hearings have not been updated since 2002.²⁶
24. IDoA has an administrative rule that states that "all requests for hearings or appeals to the Department shall be filed with the Hearing Coordinator, Department on Aging, 421 East Capitol Avenue, Springfield, Illinois 6270."²⁷
25. The Illinois Constitution states that "no person shall be deprived of...property without due process of law."²⁸
26. In the Illinois Adult Protective Services (APS) Program, the regional administrative agency (RAA) is the "nonprofit agency in a planning and service area that provides regional oversight and performs functions."²⁹
27. Illinois law in 2014 stated that, "the designated Area Agency on Aging shall be designated the regional administrative agency [in the APS Program] if it so requests."³⁰

Allegations of Fact

28. Mr. Nyhammer makes the following factual allegations in Paragraphs 29-60 based on information and belief.

Area 1 Information

29. In 2018 IDoA approved NIAAA's area plan (Plan) for the years 2019-2021.
30. As part of the Plan, NIAAA described how it would demonstrate effective leadership in advocating for the interests of Clients.³¹
31. On June 20, 2019, NIAAA submitted to IDoA an amendment to the Plan.
32. Area 1 has an estimated 100,000³² older adults who are considered greatest need and over 63,000³³ rural older adults.

IDoA administrative rules for hearings

33. The address given in the IDoA administrative rule³⁴ for filing a hearing request is incorrect.
34. The position identified in the IDoA administrative rules for receiving hearing requests³⁵ is incorrect.

IDoA terminating NIAAA from APS Program in 2014

35. On July 16, 2013, NIAAA sent an email to then IDoA Director John Holton. The email is attached and labeled as Petition Exhibit A.
36. In Exhibit A, Mr. Nyhammer stated that the new APS Program manual (Manual) was invalid and requested that IDoA recall the Manual.
37. On October 21, 2013, Mr. Nyhammer sent an email to IDoA Director Holton. The email is attached and labeled as Petition Exhibit B.
38. In Exhibit B, Mr. Nyhammer stated that NIAAA is considering litigation regarding the Manual.
39. IDoA Director Holton sent NIAAA a letter dated December 30, 2013. The letter is attached and labeled as Petition Exhibit C.
40. In Exhibit C, IDoA states that it is terminating NIAAA as RAA without cause.
41. Prior to being terminated as the RAA as stated in Exhibit C, NIAAA had been the RAA for Area 1 for over a decade.
42. IDoA terminating NIAAA as the RAA in 2014-2015 was contrary to NIAAA's request.

April 2019 meeting at IDoA

43. On April 8, 2019, a meeting (Meeting) was held at the IDoA offices in Chicago with IDoA Director Basta and Mr. Nyhammer.
44. Attending the Meeting by phone were Ms. Creamer and two current IDoA employees (Jose Jimenez and Lora McCurdy).
45. During the Meeting, Mr. Nyhammer brought up the issue of NIAAA being terminated as the RAA in 2014.
46. Ms. Creamer responded to Mr. Nyhammer by stating that she had been given an "order" (Order) in 2014 to withhold funding from NIAAA to retaliate for NIAAA's advocacy regarding the Manual.
47. Ms. Creamer did not say who gave her the Order or give any details about the funding she subsequently withheld from NIAAA.

IDoA's conduct after the Order

48. IDoA had failed to disclose the Order to NIAAA until it was admitted to by Ms. Creamer at the Meeting.
49. NIAAA has not received a notice regarding the funding withheld because of the Order.
50. IDoA has not provided NIAAA with documentation regarding the funding withheld because of the Order.
51. In 2014 -2015, IDoA awarded over \$3.79 million in Other Funding to the AAAs.
52. In 2014-2015, NIAAA received zero in Other Funding.

2019 Correspondence

53. On April 15, 2019, NIAAA sent an email letter to IDoA Director Basta. NIAAA's letter is attached and labeled as Petition Exhibit D.
54. In Exhibit D, Mr. Nyhammer asks IDoA to investigate funding being withheld from NIAAA because of the Order.
55. IDoA Director Basta sent an email letter to NIAAA dated June 11, 2019. IDoA Director Basta's email letter is attached and labeled as Exhibit E.
56. In Exhibit E, IDoA Director Basta states that she "cannot speak to the past practices" of IDoA.
57. IDoA has refused NIAAA's request to investigate the Order.
58. IDoA has refused to disclose to NIAAA how much funding was withheld from NIAAA because of the Order.
59. IDoA has not taken adequate measures to ensure that future funding will not be improperly withheld from NIAAA.
60. IDoA has not taken adequate measures to ensure that NIAAA will not be improperly terminated as the RAA.

Count I

61. Paragraphs 1-60 are incorporated into Count I.

62. IDoA does not have administrative rules for contested hearings that comply with the Procedure Act.

63. IDoA does not have administrative rules that comply with Procedure Act for:

- a. The qualifications of administrative law judges³⁶;
- b. The necessary details required in a hearing notice³⁷;
- c. The disqualification of an administrative law judge³⁸;
- d. Bias or conflicts of interests³⁹;
- e. What must be included in the record for a contested hearing⁴⁰;
- f. The rules of evidence at a hearing⁴¹;
- g. The proposal for decision⁴²;
- h. What must be in the decision and orders⁴³;
- i. Expenses and attorney fees in contested hearings⁴⁴;
- j. Ex parte communications after a notice of hearing⁴⁵;
- k. Staying contested hearings for military service⁴⁶;
- l. Waiving compliance with Procedure Act⁴⁷; or
- m. Service by email.⁴⁸

64. IDoA not having valid administrative rules for contested hearings is an impediment to NIAAA receiving a fair hearing for this Petition.

65. IDoA not having valid administrative rules for contested hearings discourages AAAs from challenging actions of IDoA.

66. IDoA's administrative rules for contested hearings are invalid under the Procedure Act.

67. IDoA has violated the Procedure Act because it does not have the required valid administrative rules for contested hearings.

Count II

68. Paragraphs 1-60 are incorporated into Count II.

69. IDoA violated the OAA⁴⁹ by withholding funding from NIAAA pursuant to the Order because IDoA did not provide NIAAA:

- a. Due process;
- b. Notice of the intended withholding; or
- c. Documentation of the intended withholding.

Count III

70. Paragraphs 1-60 are incorporated into Count III.
71. IDoA failing to take adequate measures to prevent funding from being improperly withheld from NIAAA continues to have a chilling effect on NIAAA's advocacy.
72. IDoA violated the OAA⁵⁰ by withholding funding from NIAAA pursuant to the Order as it was done for the improper purpose of retaliating against NIAAA for NIAAA's advocacy.

Count IV

73. Paragraphs 1-60 are incorporated into Count IV.
74. It is an improper purpose for IDoA to withhold funding from NIAAA because of the Order.
75. In withholding funding from NIAAA for an improper purpose, IDoA violated the OAA by failing to:
- a. Improve the capacity of serving older adults by concentrating resources;⁵¹
 - b. Act in the Clients best interests;⁵²
 - c. Give preference to Clients with greatest economic need;⁵³ and
 - d. Consider the needs of rural Clients in funding AAAs.⁵⁴

Count V

76. Paragraphs 1-60 are incorporated into Count V.
77. Ms. Creamer acted under the color state law when she withheld funding from NIAAA because of the Order.
78. Ms. Creamer has deprived NIAAA of its federal due process rights⁵⁵ by withholding funding from NIAAA pursuant to the Order.

Count VI

79. Paragraphs 1-60 are incorporated into Count VI.
80. IDoA failing to take adequate measures to prevent funding from being improperly withheld from NIAAA continues to have a chilling effect on NIAAA's advocacy.

81. IDoA has violated Illinois law by withholding funding from NIAAA for the improper purpose of interfering with NIAAA's state mandated⁵⁶ advocacy responsibilities.

Count VII

82. Paragraphs 1-60 are incorporated into Count VII.
83. IDoA terminated NIAAA as the RAA on January 31, 2014 as retaliation for NIAAA's advocacy efforts.
84. It was improper for IDoA to terminate NIAAA as the RAA in retaliation for NIAAA's advocacy.
85. IDoA violated Illinois law⁵⁷ by terminating NIAAA as the RAA.

Count VIII

86. Paragraphs 1-60 are incorporated into Count VIII.
87. IDoA failing to take adequate measures to prevent NIAAA from being improperly terminated as the RAA continues to have a chilling effect on NIAAA's advocacy.
88. IDoA has violated Illinois law by improperly terminating NIAAA as the RAA as it interferes with NIAAA's state mandated⁵⁸ advocacy responsibilities.

Count IX

89. Paragraphs 1-60 are incorporated into Count IX.
90. Implicit in IDoA's obligation to disburse funding⁵⁹ to the AAAs is that the allocation not be done for an improper purpose.
91. IDoA withholding funding from NIAAA because of the Order is an improper purpose.
92. IDoA violated Illinois law⁶⁰ by withholding funding from NIAAA under the Order.

WHEREFORE, NIAAA requests that the administrative law judge/hearing officer order that IDoA has:

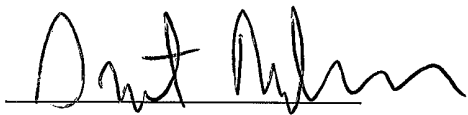
- A. Violated the Procedure Act because it does not have the required administrative rules for contested hearings.

- B. Invalid administrative rules for contested hearings.
- C. To adopt administrative rules pursuant to the Procedure Act for contested hearings.
- D. Violated the OAA by withholding funding from NIAAA pursuant to the Order because IDoA did not provide NIAAA;
 - a. Due process;
 - b. Notice of the intended withholding; or
 - c. Documentation of the intended withholding.
- E. Violated the OAA by withholding funding from NIAAA pursuant to the Order as it was done for the improper purpose of retaliating against NIAAA for NIAAA's advocacy efforts.
- F. To take adequate measures to ensure that future funding will not be improperly withheld from NIAAA.
- G. Violated the OAA in withholding funding from NIAAA pursuant to the Order. In so doing, IDoA failed to:
 - a. Improve the capacity of serving older adults by concentrating resources;
 - b. Act in the Clients best interests;
 - c. Give preference to Clients with greatest economic need; and
 - d. Consider the needs of rural Clients in funding AAAs.
- H. Violated Illinois law by interfering with NIAAA's state mandated advocacy responsibilities.
- I. Violated Illinois law by improperly terminating NIAAA as the RAA in 2014-2015.
- J. To take adequate measures to ensure that NIAAA will not be improperly terminated as the RAA in the future.
- K. Violated Illinois law by not giving NIAAA due process in withholding funding because of the Order.
- L. Denied NIAAA a federally protected right in violation of 42 U.S.C. § 1983.
- M. Caused a financial loss to NIAAA for which NIAAA should be compensated.

- N. To pay the costs of litigating this Petition as IDoA has failed to adopt valid administrative rules for contested hearings⁶¹ and NIAAA has incurred attorney fees⁶² in litigating this Petition.
- O. To adopt administrative rules pursuant to the Procedure Act for awarding future funding to AAAs.
- P. To comply with any other determination that the administrative law judge/hearing officer deems just and equitable.

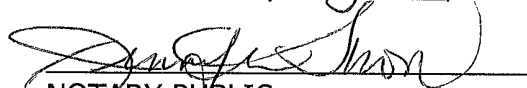
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in Paragraphs 29-60 above are true and correct, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Respectfully submitted,



Grant Nyhammer,
Attorney Registration #6239576
Executive Director & General Counsel for the Petitioner
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
gnyhammer@nwilaaa.org
(815) 226-4901
(815) 226-8984 fax

Subscribed and sworn to before me
this 26th day of June, 2019.


NOTARY PUBLIC

¹ "[IDoA] will...afford an opportunity for a hearing upon request...to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. § 3027(a)(5). As alleged in the Petition, NIAAA is submitting a Plan amendment. NIAAA is also requesting a hearing under and 42 U.S.C. § 3026(f)(2)(b) which states "[IDoA] shall not make a final determination [about] withholding funds...without first affording the area agency...a public hearing concerning the action." As alleged in the Petition, IDoA has withheld funding from NIAAA.

² 42 U.S. Code § 3001 *et.seq.* References in the Petition to the OAA means the federal statute and corresponding regulations at 45 CFR § 1321.

³ "Every person who [acting on behalf of a state agency]... causes...[a] deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in...[a] proper proceeding for redress." 42 U.S.C. § 1983. As alleged in the Petition, Ms. Creamer has deprived NIAAA of federal due process rights.

⁴ 5 ILCS 100 *et.seq.* "All agencies shall adopt rules establishing procedures for contested case hearings." 5 ILCS 100/10-5.

⁵ NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code § 230.440(a) which states that "a written request for a hearing shall be filed by the aggrieved agency...within 30 days following receipt of the notice of adverse action." As alleged in the Petition, on June 11, 2019 IDoA took the adverse action of declining NIAAA's request to do an investigation. NIAAA is also requesting a hearing pursuant to 89 Ill.Adm.Code § 220.502 which states that "the request for a hearing...shall be in writing." Finally, NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code § 230.410(a)(1) which states that "the Department shall provide an opportunity for a hearing to...Any area agency on aging when the Department proposes to...disapprove the area plan." The Petition alleges that IDoA is interfering with NIAAA's advocacy which is an effective disapproval of the advocacy section in NIAAA's area plan.

⁶ IDoA has "the following...duties...to receive and disburse State and federal funds made available directly to the Department including those funds made available under the Older Americans Act...for providing services for senior citizens...and shall develop and administer any State Plan for the Aging required by federal law." 20 ILCS 105/4.01

⁷ An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

⁸ The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

⁹ "Area 1, which is comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside and Lee." 20 ILCS 105/3.08.

¹⁰ 45 CFR § 1321.33.

¹¹ 45 CFR § 1321.61(a).

¹² 45 CFR § 1321.61(b)(1). Similarly, Illinois law states that "an area agency on aging shall throughout the planning and service area...monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons...[and] represent the interests of older persons to public officials, public and private agencies or organizations." 89 Ill.Adm.Code § 230.150(a)(1)-(3).

¹³ IDoA "shall be the single State agency for receiving and disbursing federal funds made available under the [OAA]". 20 ILCS 105/4.

¹⁴ 45 CFR § 1321.63(b).

¹⁵ AAA are "eligible for...other funds made available by the State of Illinois or the federal government." 20 ILCS 105/3.07.

¹⁶ "It is the purpose of...[the OAA for]...State agencies...to concentrate resources in order to develop greater capacity...to serve older individuals." 42 U.S.C. § 3021(a)(1).

¹⁷ IDoA cannot withhold AAA funds "without first affording the area agency on aging due process." 42 U.S.C. § 3026(f)(2)(b).

¹⁸ Due process requires that "at a minimum ... deprivation of...property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1949).

¹⁹ 42 U.S.C. § 1983.

²⁰ AAAs are entitled to due process which "shall include procedures for...providing notice of an action to withhold funds; providing documentation of the need for such action; and at the request of the area agency on aging, conducting a public hearing concerning the action." 42 U.S.C. § 3026(f)(2)(b).

²¹ "The State shall...serve as an effective...advocate for older individuals." 42 U.S.C §3025(a)(1)(D).

²² "The State agency shall...provide assurance that preference will be given to providing services to older individuals with greatest economic need and older individuals with greatest social need." 42 U.S.C §3025(a)(2)(E).

²³ "The [IDoA state] plan shall provide assurances that the special needs of older individuals residing in rural areas will be taken into consideration and shall describe how those needs have been met and describe how funds have been allocated to meet those needs." 42 U.S.C §3027(a)(10).

²⁴ 20 ILCS 105/5.02.

²⁵ 5 ILCS 100/10-10.

²⁶ The legislative notes to 89 Ill.Adm.Code §220 state that they were last "amended at 26 Ill. Reg. 9652, effective July 1, 2002."

²⁷ 89 Ill.Adm.Code §220.503(a).

²⁸ Illinois Constitution, Article I, Section 2.

²⁹ 320 ILCS 20/2(i).

³⁰ "Regional administrative agency" means...the designated Area Agency on Aging shall be designated the regional administrative agency if it so requests." 320 ILCS 20/2(i).

³¹ Exhibit 2(A) of the Plan requires NIAAA to "provide a description of the activities the Area Agency on Aging will engage in as it provides leadership...for the elderly through...advocacy."

³² Area 1 has 160,037 older adults based on the 2017 Census estimate. Most of these older adults fit multiple categories of greatest need so 100,000 is a conservative estimate for Area 1.

³³ According to the 2017 Census estimate, Area 1 has 63,079 older adults living in rural counties.

³⁴ 89 Ill.Adm.Code §220.503(a).

³⁵ *Id.*

³⁶ "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings." 5 ILCS 100/10-20.

³⁷ The IDoA rules state that "each hearing shall be conducted at a reasonable time, date and place." 89 Ill.Adm.Code §220.507. The Procedure Act requires more information be included in the notice such as: the nature of the hearing; the legal authority and jurisdiction; relevant substantive and procedural statutes; a short plain statement of the matters asserted; addresses of parties, etc. 5 ILCS 100/10-25.

³⁸ "The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-30(b).

³⁹ *Id.*

⁴⁰ 5 ILCS 100/10-35.

⁴¹ 5 ILCS 100/10-40.

⁴² 5 ILCS 100/10-45.

⁴³ 5 ILCS 100/10-50.

⁴⁴ 5 ILCS 100/10-55.

⁴⁵ 5 ILCS 100/10-60.

⁴⁶ 5 ILCS 100/10-63.

⁴⁷ 5 ILCS 100/10-70.

⁴⁸ 5 ILCS 100/10-75.

⁴⁹ 42 U.S.C. § 3026(f)(2)(b).

⁵⁰ 45 CFR § 1321.61(b)(1).

⁵¹ 42 U.S.C. §3021(a)(1).

⁵² 42 U.S.C §3025(a)(1)(D).

⁵³ 42 U.S.C §3025(a)(2)(E).

⁵⁴ 42 U.S.C §3027(a)(10).

⁵⁵ 42 U.S.C. § 3026(f)(2)(b).

⁵⁶ 89 Ill.Adm.Code §230.150.

⁵⁷ 320 ILCS 20/2(i); Illinois Constitution, Article I, Section 2.

⁵⁸ 89 Ill.Adm.Code §230.150.

⁵⁹ 20 ILCS 105/4.01.

⁶⁰ 20 ILCS 105/4.01. and the Illinois Constitution, Article I, Section 2.

⁶¹ "In any case in which a party has any administrative rule invalidated by a court for any reason, including...the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." 5 ILCS 100/10-55(c).

⁶² "In any action or proceeding to enforce a provision of sections...1983...of this title...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

NIAAA Petition Exhibit A

From: Grant Nyhammer
Sent: Tuesday, July 16, 2013 4:41 PM
To: Holton, John K. (John.K.Holton@Illinois.gov)
Cc: Moorman, Lois (Lois.Moorman@Illinois.gov)
Subject: RE: Updated Standards Chapters 1, 2, 3, and 10

Director Holton:

I just received the new Adult Protective Services Standard and Procedures Manual (Manual) which I understand did not go through the rulemaking process contained in the Illinois Administrative Procedure Act (Act), 5 ILCS 100 *et. seq.* I believe this was, unfortunately, a mistake and the Illinois Department on Aging (IDoA) should recall the Manual as I believe it is invalid under the Act.

As you know, the Act delineates the process that IDoA must follow in promulgating a 'rule' which is broadly defined as any:

Agency statement of general applicability that implements, applies, interprets, or prescribes law or policy. 5 ILCS 100/1-70.

This essentially means that the Act applies to any statement by a state agency about how a public program is managed regardless of how the statement is classified. For example, a federal court deemed a letter interpreting an Illinois statute sent to a private insurance company from the Illinois Department of Insurance to be a rule subject to the Act. *Com-Co Insurance Agency, Inc. v. West Bend Mutual Insurance Company*, 666 F. Supp. 1126, 1128 (ND IL 1987).

The Manual states that it is procedures for "Regional Administrative Agencies and APS Provider Agencies" for "conducting activities under the Adult Protective Services Act" (Manual, Page 1). By its own terms, the Manual is an IDoA statement implementing a program created by state statute which affects the rights of external parties. The Manual is, consequently, the quintessential rule subject to the Act.

[Note that while the Act does exclude from rulemaking *internal* IDoA policies ("statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency"), the Manual does not fit this exception as its whole purpose, as stated above, is affecting external parties including the rights of victims and perpetrators.]

Since a rule failing to comply with the Act is unauthorized (5 ILCS 100/5-6) and invalid (5 ILCS 100/5-35(b)), the Manual should be withdrawn as it creates tremendous uncertainty for those of us managing the APS program.

If you decide to put the Manual through the rulemaking process, I am happy to help in any way needed. Please contact me if you have any questions.

Thanks,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road
Rockford, IL 61108

NIAAA Petition Exhibit B

From: Grant Nyhammer
Sent: Monday, October 21, 2013 4:34 PM
To: Holton, John K. (John.K.Holton@Illinois.gov)
Cc: sonia.bhagwakar@illinois.gov
Subject: Mandamus Compliant

Director Holton:

In hopes that we can find a solution sort of litigation, please find attached a Mandamus Complaint (and exhibits) that NIAAA is considering filing. I have also attached a press release that explains why we think this unusual step is necessary in the event we cannot reach a mutually agreeable resolution.

NIAAA is willing to work with IDoA to solve this problem but we are resolved to do what is necessary to protect our grantees and clients. Please respond within 14 days.

Sincerely,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging

NIAAA Petition Exhibit C

Illinois Department
on Aging

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 217-785-3356, Fax: 217-785-4477, Web: www.state.il.us/aging

December 30, 2013

Grant Nyhammer, Executive Director
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108-1605

Dear Mr. Nyhammer:

This letter is being sent to notify you that the Department on Aging will be terminating its Fiscal Year 2014 Adult Protective Services Program Grant with Northwestern Illinois Area Agency on Aging (NIAAA), effective January 31, 2014.

This letter serves as written notice, as required by the Department on Aging's current grant agreement with Northwestern Illinois Area Agency on Aging (IDoA No. APS 1401) Item #31, which states:

"This Grant may be terminated without cause by either party upon thirty (30) days' written notice."

Effective February 1, 2014, the Department on Aging will assume the functions of the "regional administrative agency" in Planning and Service Area (PSA) 01, as outlined in Section 303 of the Adult Protective Services (APS) Standards and Procedures Manual.

The Department on Aging appreciates the work of NIAAA staff, Janet Williams, on behalf of the APS Program in PSA 01. The decision to terminate this grant does not reflect any concern for the quality of her performance in completing the functions of the regional administrative agency's role in the program.

If you or your staff has any questions in the weeks ahead related to NIAAA's responsibilities associated with closing out the grant, please contact Lois Moorman, Program Administrator for the Department's Office of Adult Protective Services.

Sincerely,

Handwritten signature of John K. Holton in black ink.

John K. Holton
Director

JKH:lm Handwritten signature of Kim James in black ink.
cc: Kim James, Chairperson, NIAAA Board of Directors

Respect for yesterday. Support for today. Hope for tomorrow.

The Illinois Department on Aging does not discriminate in admission to programs or treatment of employment in programs or activities in compliance with appropriate State and Federal statutes. If you feel you have been discriminated against, call the Senior HelpLine at 1-800-252-8986; 1-888-206-1327 (TTY).

NIAAA Petition Exhibit D

April 15, 2019

Paula Basta, Director
Illinois Department on Aging
One Natural Resources Way #100
Springfield, IL 62702-1271

Director Basta:

Thank you for meeting with me on April 8, 2019. I appreciate that the Illinois Department on Aging (IDoA) is interested in improving relationships with the area agencies on aging (AAAs) so we are asking as a first step that you initiate an investigation regarding how IDoA has been denying funding to the Northwestern Illinois Area Agency on Aging (NIAAA). As you know, Betsy Creamer admitted at our April 8, 2019 meeting that IDoA has been denying NIAAA funding to punish us for advocating for our clients. Ms. Creamer said this has been occurring since at least 2014 -2015 when NIAAA was excluded from over \$3.79 million in funding that was awarded to the other AAAs.¹ If IDoA has used millions of dollars to punish AAAs, then the integrity of the entire aging network is threatened as it is premised on AAAs being independent advocates protecting the best interests of our clients from actions of IDoA.²

The conduct admitted to by Ms. Creamer, unfortunately, appears to have been ongoing as IDoA regularly engaged in secret negotiations with AAAs and then made surprise funding announcements such as:

- On August 30, 2017 at the IDoA/AAA meeting, IDoA announced that it had awarded three AAAs \$309,000 in funding for the Alzheimer's Disease Supportive Service Program; and
- On August 22, 2017, IDoA announced that two AAAs had agreed to pilot a version of the Community Reinvestment Program (CRP). IDoA has refused to disclose the amount of the funding.

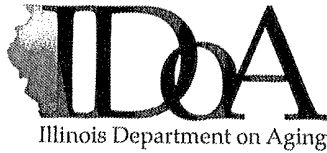
NIAAA was unaware of either funding opportunity until IDoA made the above announcements. Further, the CRP announcement was inexplicable because it was made during the CRP administrative rule process which prohibits IDoA from discussing the CRP with AAAs. In order to determine how IDoA chose the two CRP pilot AAAs, NIAAA did a Freedom of Information Act request and, as you can see from the attached, the Illinois Attorney General (AG) determined that IDoA is continuing to improperly withhold that information from NIAAA. (Note that the AG also stated that IDoA counsel "should be mindful of its statutory obligation to cooperate" with the AG.) Given this, we believe it is prudent to bring in outside counsel to investigate because Ms. Creamer's admission likely involves wrongdoing during the previous administration by high level staff who may still be working at IDoA.

Please acknowledge receipt and respond within 14 days.

Sincerely,

Grant Nyhammer

Grant Nyhammer,
Executive Director & General Counsel

NIAAA Petition Exhibit E

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

June 11, 2019

Grant Nyhammer
Executive Director
Northwestern IL. Area Agency on Aging
1111 S. Alpine Road
Rockford, IL 61108

Dear Grant:

Thanks again for meeting with me and sharing your perspective about past practices here at the Department on Aging specific to funding allocation decisions that impact the Area Agencies on Aging (AAA) network. While I cannot speak to the past practices referenced, I can assure you that the Department is committed to strengthening our relationships with the Aging Network, including our partnership with the AAAs.

In the spirit of collaboration and transparency, I can assure you that this Administration and the Department are committed to ensuring that the AAAs are notified of **every** funding opportunity that becomes available through both federal and state initiatives. As you know, the Governor's introduced budget included new funding opportunities for the AAA network to expand services to address social isolation, gap filling funds to enhance services for older adults with Alzheimer's and other forms of dementia, and funding to increase the availability of home delivered meals. I am very happy to share that the proposed funding was approved by the General Assembly and the Department is working hard to allocate those resources to **all** 13 of our AAAs.

As we discussed during our initial meeting, the Department is very interested in continued collaboration with your AAA and strengthening our partnership to provide quality based services to older adults across Illinois.

Sincerely,



Paula Basta, M.Div.
Director, IDoA

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www.illinois.gov/aging

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JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

July 29, 2019

Via Electronic Mail Only

Grant Nyhammer
Executive Director & General Counsel
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108

Re: June 26, 2019, Petition for Hearing and July 24, 2019 Inquiry

Dear Mr. Nyhammer:

This correspondence is in follow up to the July 23, 2019, telephone conversation with Attorney Scordato, and in response to your July 24, 2019, email. As General Counsel Armstead and I discussed with Attorney Scordato of your office, it does not appear that your Petition presents a "contested case" as defined in the Illinois Administrative Procedure Act. Attorney Scordato graciously agreed to provide additional support for your agency's claim that it is entitled to an administrative hearing; however, such additional information has not been received to date. In the absence of a "contested case," the Illinois Department on Aging ("Department") is unable to issue a final decision or order (See 5 ILCS 100/10-50).

The Department is happy to discuss all of the issues referred to in your "Petition for Hearing" in an effort to resolve your concerns. If you would like to schedule a telephone conference or meeting, please let me know.

Sincerely,

Paulette F. Dove
Deputy General Counsel

Cc: Paula A. Basta, M.Div.
Lora McCurdy
Rhonda Armstead

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www.illinois.gov/aging

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No. 125201

E-FILED
9/26/2019 8:44 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|-------------------------------------|
| GRANT NYHAMMER, as Executive |) | Original Action for <i>Mandamus</i> |
| Director of the Northwest Illinois Area |) | Under Illinois Supreme Court |
| Agency on Aging, |) | Rule 381 |
| |) | |
| Movant, |) | |
| |) | |
| v. |) | |
| |) | |
| PAULA BASTA, in her capacity as |) | |
| Director of the Illinois Department on |) | |
| Aging, |) | |
| |) | |
| Respondent. |) | |

RESPONSE TO MOTION FOR LEAVE TO FILE COMPLAINT FOR *MANDAMUS*

PAULA BASTA, in her capacity as Director of the Illinois Department on Aging (“Department”), by and through her attorney Kwame Raoul, Attorney General of the State of Illinois, hereby responds to the Motion for Leave to File Complaint for *Mandamus* filed by Grant Nyhammer, as Executive Director of the Northwest Illinois Area Agency on Aging (“NIAAA”). In support, she states as follows:

STATEMENT OF FACTS

Background of the Department and NIAAA

1) The Department is an administrative agency that administers several programs to benefit senior citizens in Illinois, including receiving and disbursing federal funds made available to it under the federal Older Americans Act (“OAA”) (42 U.S.C. § 3001 *et seq.*). *See* 42 U.S.C. § 3025(a)(1) (requiring states to designate

agency to receive OAA funds); 20 ILCS 105/4 (2018) (“[T]he Department . . . shall be the single state agency for receiving and disbursing federal funds made available under the [OAA].”).

2) In implementing the OAA, the Department designates public and private nonprofit organizations throughout Illinois as “area agencies on aging,” each of which provides services to seniors within a specific geographic area. 42 U.S.C. § 3025(a)(2)(A); 20 ILCS 105/3.07, 3.08 (2018).

3) Every three years, each area agency on aging develops an “area plan” for the provision of social and nutritional services to seniors in its area. 20 ILCS 10-5/3.07 (2018); 89 Ill. Admin. Code § 230.130(a). The area agencies on aging submit these area plans, and any amendments to their area plans, to the Department for approval. 89 Ill. Admin. Code § 230.130(e).

4) The Department distributes federal OAA funds to each area agency on aging based on a mathematical formula codified in the Department’s regulations, which takes into account factors such as population, poverty levels, the number of seniors in the area, and the extent to which the area is urban or rural. *See* 89 Ill. Admin. Code § 230.45.

5) NIAAA, a private nonprofit entity, is the area agency on aging for Area 1, which encompasses Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside, and Lee Counties. 20 ILCS 105/3.08 (2018); *Mandamus Compl.*, Ex. A, ¶ 6.¹

¹ This response cites Nyhammer’s Motion for Leave to File Complaint for *Mandamus* as, “Mot. for Leave”; Nyhammer’s proposed Complaint for *Mandamus* as, “*Mandamus Compl.*”; NIAAA’s Petition

6) Along with receiving and disbursing OAA funds, the Department also administers the Adult Protective Services Act, *see* 320 ILCS 20/3 (2018), which requires it to establish and administer “a protective services program of response and services for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect.” 320 ILCS 20/3(a) (2018).

7) Under the Adult Protective Services Act, the Department contracts with and funds public or private nonprofit entities designated as “regional administrative agencies” that implement the Adult Protective Services Act program in a given region. 320 ILCS 20/2(i) (2018); 320 ILCS 30/3(a) (2018).

8) In fiscal year 2014, NIAAA was the regional administrative agency for Area 1 under the Adult Protective Services Act. *See* Pet. for Hearing, Ex. C.

9) At the time NIAAA was a regional administrative agency, the area agency on aging for a given region could request to be designated as the regional administrative agency for the same region. 320 ILCS 20/2(i) (2012). Alternatively, the Department could serve as a regional administrative agency if the area agency on aging did not request to be designated as the regional administrative agency. *Id.*

Nyhammer’s complaints regarding the Adult Protective Services Standards and Procedures Manual

10) On July 16, 2013, Nyhammer emailed the then-Director of the Department, John Holton, claiming that the Department did not comply with the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq.* (2018)) when it

for Hearing, which is attached as Exhibit A to Nyhammer’s proposed Complaint for *Mandamus*, as, “Pet. for Hearing,”; and the exhibits attached to the Petition for Hearing as, “Pet. for Hearing, Ex. ____.” The exhibits attached to this response are cited as, “Ex. 1,” and “Ex. 2,” respectively.

published an Adult Protective Services Standards and Procedures Manual (“Manual”) without submitting it through the formal administrative rulemaking process set forth in the Illinois Administrative Procedure Act (5 ILCS 100/Art. 5 (2018)). Pet. for Hearing, Ex. A. Nyhammer asked the Department to withdraw the Manual and submit it through the rulemaking process. Pet. for Hearing, Ex. A.

11) On October 21, 2013, Nyhammer emailed Holton again, this time attaching a draft complaint for *mandamus* that NIAAA was “considering filing.” Pet. for Hearing, Ex. B.² But Nyhammer said he hoped to “find a solution short of litigation” and a “mutually agreeable resolution.” *Id.*

12) Neither Nyhammer’s Motion for Leave to File Complaint for *Mandamus* nor his proposed Complaint for *Mandamus* state whether he ever filed the draft complaint for *mandamus* attached to his October 21, 2013 email.

The Department terminates NIAAA as a regional administrative agency under the Adult Protective Services Act

13) On December 30, 2013, the Department sent Nyhammer a letter stating that it was terminating the Fiscal Year 2014 Adult Protective Services Program Grant issued to NIAAA. Pet. for Hearing, Ex. C. It noted that its grant agreement with NIAAA permitted either party to terminate the grant without cause with 30 days’ notice. *Id.*; see also Ex. 2, ¶ 31. The Department said that it would serve as the regional administrative agency for Area 1 in NIAAA’s stead. Pet. for Hearing, Ex. C.

² It is unclear what the attached draft complaint for *mandamus* alleged because Nyhammer did not include it as an exhibit to his Motion for Leave to File Complaint for *Mandamus* or proposed Complaint for *Mandamus*.

14) Neither Nyhammer's Motion for Leave to File Complaint for *Mandamus*, proposed Complaint for *Mandamus*, nor the exhibits attached to the proposed complaint state whether NIAAA responded to the Department's termination of the grant in any way.

The April 2019 meeting

15) On April 8, 2019, Nyhammer met with Basta and Department employees Betsy Creamer, Jose Jimenez, and Lora McCurdy at the Department's Chicago office. Pet. for Hearing, ¶¶ 3, 43-44.

16) According to Nyhammer, Creamer told him that, sometime in 2014, an unnamed individual gave her an order "to withhold funding from NIAAA to retaliate for NIAAA's advocacy regarding the Manual." Pet. for Hearing, ¶¶ 46-47.

17) According to Nyhammer, between 2014 and 2015, the Department awarded \$3.79 million in unspecified "Other Funding" to area agencies on aging other than NIAAA. Pet. for Hearing, ¶¶ 51-52.

18) Nyhammer did not specify whether this was the funding withheld as a result of the order allegedly given to Creamer or where the "Other Funding" came from. *Id.* ¶¶ 49-52. But this "Other Funding" is not federal "OAA funding." *Id.* ¶ 14.

19) On April 15, 2019, Nyhammer wrote to Basta and asked her to "initiate an investigation regarding how [the Department] has been denying funding to [NIAAA]." Pet. for Hearing, Ex. D.

20) On June 11, 2019, Basta replied to Nyhammer, stating that she could not speak to those funding decisions, since they were made by her predecessor. Pet. for

Hearing, Ex. E. She assured Nyhammer that the Department was “committed to strengthening [its] relationships with” NIAAA and to making sure that every area agency on aging was aware of grant opportunities. *Id.*

Nyhammer’s Petition for Hearing

21) On June 26, 2019, Nyhammer, acting on behalf of NIAAA, filed a “Petition for Hearing” with the Department. *Mandamus* Compl., ¶ 16; Pet. for Hearing at 10.

22) The Petition for Hearing requested that the Department provide NIAAA with a hearing on the Department’s alleged decision to withhold “Other Funding” from NIAAA and the Department’s decision to terminate NIAAA as a regional administrative agency. Pet. for Hearing, at 8-10. It also requested that the Department award NIAAA the funds that the Department allegedly withheld. *Id.*

23) On July 12, 2019, the Department wrote to Nyhammer in response to the Petition for Hearing. Ex. 1. It said that it would not provide NIAAA a hearing because the petition “fail[ed] to state any claims supporting the right to a hearing.” *Id.* at 1. The Department noted that the petition did not adequately explain what “Other Funding” the Department allegedly withheld from NIAAA or allege that any OAA funds had been withheld. *Id.* It also noted that it properly terminated NIAAA’s Adult Protective Services Program Grant in compliance with the grant agreement. *Id.* at 2. In a subsequent letter, the Department added that Nyhammer’s Petition for Hearing did not present a “contested case” requiring a hearing under the Illinois Administrative Procedure Act. *Mandamus* Compl., Ex. B.

Nyhammer's Motion for Leave to File Complaint for *Mandamus*

24) Nyhammer sought leave to file an original action for *mandamus* in this Court, alleging that the Department improperly denied NIAAA a hearing. Mot. for Leave, ¶ 6.

25) This Court ordered Basta to respond to Nyhammer's motion.

ARGUMENT

26) This Court should deny Nyhammer's Motion for Leave to File Complaint for *Mandamus* for two independent reasons: (1) there is no reason why Nyhammer must pursue an original action in this Court rather than proceeding through the normal litigation process; and (2) his proposed *mandamus* complaint fails to allege facts showing that NIAAA had a clear right to a hearing.

I. Nyhammer Has Failed To Allege That An Original Action Is Necessary Because He Cannot Pursue His *Mandamus* Action Through The Normal Litigation Process.

27) Nyhammer should have brought this *mandamus* action in circuit court instead of this Court. An original action for *mandamus* may not be used "to circumvent the normal appellate process" or "as a substitute for appeal." *People ex rel. Foreman v. Nash*, 118 Ill. 2d 90, 97 (1987). Rather, a party must pursue the normal course of litigation unless the original action "presents an issue that is novel and of crucial importance to the administration of justice." *Orenic v. Ill. State Labor Relations Bd.*, 127 Ill. 2d 453, 468 (1989); *see also Lara v. Schneider*, 75 Ill. 2d 63, 64 (1979) (denying motion for leave to file original action for *mandamus* where movant "had time to and did seek review of the electoral board action in the circuit court of

Cook County”); *People ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. Clark*, 12 Ill. 2d 515, 520 (1957) (“For mere error, however gross or manifest, the remedy is an appeal . . . , and the writ of *mandamus* will not lie for its correction”).

28) Nyhammer has failed to allege that the normal litigation process is unavailable to him. He has not explained why he could not proceed with his action in circuit court rather than seeking leave to file an original action in this Court. *See* 735 ILCS 5/14-101 *et seq.* (2018) (describing procedures for *mandamus* actions in circuit court).

29) Nor does Nyhammer’s proposed complaint present issues of extraordinary importance to the administration of justice. Although he speculates that the Department “is discouraging anyone, including . . . older citizens receiving crucial welfare benefits from the Department, from challenging unjust actions of the Department,” *see* Mot. for Leave, ¶ 9(a), he does not allege that any senior citizens have been denied a hearing to which they are entitled. Nor does he explain what “unjust actions” the Department has taken toward the individuals that it is dedicated to serving. Indeed, he does not allege that any senior citizens in Area 1 have been injured by any lack of funding or critical services — he simply claims that NIAAA has been deprived of the opportunity to serve as the *conduit* for grant money. At most, this action deals with an injury to NIAAA alone, not a widespread issue affecting the proper administration of justice.

II. Nyhammer's Proposed *Mandamus* Complaint Does Not Allege That NIAAA Had A Clear Right to a Hearing

30) *Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty when no discretion on her part is involved. *People ex rel. Glasgow v. Kinney*, 2012 IL 113197, ¶ 7. To obtain an order of *mandamus*, a party must establish “a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the [order].” *Cordrey v. Prisoner Rev. Bd.*, 2014 IL 117155, ¶ 18 (internal quotation marks omitted). And a complaint for *mandamus* “must allege facts” establishing each of these requirements. *Noyola v. Bd. of Educ. of City of Chi.*, 179 Ill. 2d 121, 133 (1997).

31) Nyhammer's proposed Complaint for *Mandamus* fails to allege facts establishing that NIAAA has a clear right to a hearing. The proposed complaint and its exhibits generally allege that the Department withheld grant money from NIAAA. But no provision of the Illinois Act on the Aging (20 ILCS 105/1 *et seq.* (2018)) or the Adult Protective Services Act requires a hearing when an area agency on aging or regional administrative agency is denied grant funds.

32) And under the Department's regulations, an area agency on aging has a right to a hearing with the Department only if the Department: (1) disapproves of an area plan or an amendment to an area plan submitted by the area agency on aging; or (2) seeks to withdraw an area agency on aging's designation as an area agency on aging. 89 Ill. Admin. Code § 230.410(a). Nyhammer's proposed Complaint for *Mandamus* does not allege that the Department disapproved of NIAAA's area plan,

rejected a proposed amendment to its area plan, or attempted to withdraw NIAAA's designation as an area agency on aging.

33) Nor does Nyhammer's proposed Complaint for *Mandamus* allege facts showing that NIAAA had a clear constitutional right to a hearing under procedural due process principles. "Procedural due process protections are triggered only when a constitutionally protected liberty or property interest is at stake, to which a person has a legitimate claim of entitlement." *Hill v. Walker*, 241 Ill. 2d 479, 485 (2011). Organizations do not have a legitimate claim of entitlement to the award of future government contracts or funds where the government has discretion to decide what organization, if any, will receive the contract or funds. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987) ("[A] disappointed bidder for a [government] contract in Illinois lacks a property interest."); *Polyvend, Inc. v. Puckorius*, 77 Ill. 2d 287, 294 (1979) (sole bidder for government contract that had received prior contracts did not have claim of entitlement to contract where state reserved discretion to reject any and all bids).

34) Here, NIAAA's Petition for Hearing shows that it had no claim of entitlement to the Adult Protective Service Program Grant the Department terminated in late 2013, as the grant agreement gave the Department the discretion to cancel it without cause. *See* Pet. for Hearing, Ex. C; Ex. 2, ¶ 31. And Nyhammer fails to even identify the source of the "Other Funding" the Department allegedly

withheld, thus failing to allege that NIAAA had a legitimate claim of entitlement to this funding under any statute, regulation, or contract. Pet. for Hearing, ¶¶ 14, 49-52; *see also Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972) (state law determines whether party has claim of entitlement to benefit); *C. Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶ 26 (“A legitimate claim of entitlement may arise from statute, regulation, municipal ordinance, or express or implied contract.”) (internal quotation marks omitted). Because Nyhammer has not alleged facts showing that NIAAA was entitled to receive the grants allegedly withheld from it, he has failed to allege that NIAAA had a clear right to a hearing under the Due Process Clause.

35) Nyhammer’s Complaint for *Mandamus* alleges that NIAAA had a clear right to a hearing under five statutes and regulations. *Mandamus* Compl., ¶¶ 11-15. But NIAAA has not alleged facts showing that it is entitled to a hearing under any of these provisions.

36) First, Nyhammer cites the Department’s regulation requiring an area agency on aging to file a written request for a hearing within 30 days of receiving “notice of adverse action.” 89 Ill. Admin. Code § 230.440(a). But as noted, NIAAA was not entitled to a hearing under the Department’s regulations, which provide that the Department must hold a hearing only if it rejects an area agency on aging’s area plan, rejects an amendment to an area plan, or withdraws an agency on aging’s designation as such. *See* 89 Ill. Admin. Code § 230.410(a). And even if Nyhammer alleged that NIAAA had a right to a hearing under the Department’s regulations, NIAAA failed to request a hearing within 30 days of any adverse action. To the

contrary, the exhibits to the proposed Complaint for *Mandamus* show that Nyhammer learned of the Department allegedly withholding funds in early April 2019, *see* Pet. for Hearing, Ex. D, but NIAAA did not request a hearing with the Department until late June 2019. *See* Pet. for Hearing at 10. Thus, this regulation does not afford NIAAA a clear right to a hearing.

37) Second, Nyhammer cites a provision of the OAA that requires the Department to afford a hearing “to any area agency on aging *submitting a plan under this subchapter.*” 42 U.S.C. § 3027(a)(5) (emphasis added). Again, Nyhammer does not allege that the Department improperly rejected NIAAA’s area plan or amendments to its area plan. Rather, he claims that the Department withheld grant funds. Section 3027(a)(5) does not afford NIAAA a right to a hearing.

38) Third, Nyhammer cites 42 U.S.C. § 3026(f)(2), which states that the Department may not “make a final determination withholding funds . . . without first affording the area agency on aging due process,” including “a public hearing concerning the action.” But Nyhammer has not alleged that the Department withheld any federal OAA funds that would give rise to a right to a hearing under § 3026(f)(2). Rather, he has alleged that the Department withheld unspecified “Other Funding” that was distinct from “OAA funding,” *see* Pet. for Hearing, ¶¶ 14, 48-52, and terminated a state-funded grant under Illinois’s Adult Protective Services Act. *See* Pet. for Hearing, Ex. C. Because no federal OAA funds were withheld from NIAAA, Nyhammer has failed to allege it had a right to a hearing under § 3026(f)(2).

39) Fourth, Nyhammer cites section 5-6 of the Illinois Administrative Procedure Act (100 ILCS 100/5-6 (2018)), but that provision simply requires agency *rulemaking* to comply with the Illinois Administrative Procedure Act. It does not afford NIAAA, or any other party, with a right to an adjudicatory hearing. Indeed, the Illinois Administrative Procedure Act requires an agency to hold a hearing only in a “contested case,” *see* 5 ILCS 100/10-25(a) (2018), which is “an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30 (2018) (emphasis added). As noted, neither the Illinois Act on the Aging nor the Adult Protective Services Act require the Department to hold a hearing when an area agency on aging is denied grant funds. Thus, the Department’s decisions were not “contested cases” under the Illinois Administrative Procedure Act. *See, e.g., Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 29 (agency decision to deny coverage for medical expenses not a “contested case” where Group Insurance Act did not require agency to hold hearing on decision); *Key Outdoor, Inc. v. Dep’t of Transp.*, 322 Ill. App. 3d 316, 322-23 (4th Dist. 2001) (denial of commercial driveway permit not “contested case” where Highway Code did not require agency to hold hearing on issuance of permit); *Munoz v. Dep’t of Registration & Educ.*, 101 Ill. App. 3d 827, 829-30 (1st Dist. 1981) (decision to deny applicant medical license not a “contested case” where Medical Practice Act did not require hearing on issuance of license).

40) Finally, Nyhammer cites 42 U.S.C. § 1983, but he fails to allege any facts to support a claim that NIAAA was deprived of a right under the United States Constitution or any federal statute. *See* 42 U.S.C. § 1983 (providing cause of action for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws”). Section 1983 “is not itself a source of substantive rights”; it simply provides “a method for vindicating” rights under the United States Constitution or federal statutes. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). As noted, Nyhammer has failed to allege facts showing that NIAAA had a procedural due process right to a hearing. Nor has Nyhammer alleged facts showing that NIAAA possessed a federal statutory right to a hearing — indeed, Nyhammer has not alleged that the Department withheld any OAA funds or other federal funds. Thus, Nyhammer has not alleged facts showing that NIAAA has a clear right to a hearing that could be enforced through § 1983.

IV. Conclusion

41) For these reasons, this Court should deny Nyhammer's motion for leave to file a *mandamus* complaint.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

BY: /s/Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
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12th Floor
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Primary e-service:
CivilAppeals@atg.state.il.us
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cgriffis@atg.state.il.us

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this response are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Executed on September 26, 2019

/s/Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
Primary e-service:
CivilAppeals@atg.state.il.us
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CERTIFICATE OF FILING AND SERVICE

I certify that on September 26, 2019, I electronically filed the foregoing Response to Motion for Leave to File Complaint for *Mandamus* with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other participant in this original action, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Timothy Scordato
tscordato@nwilaaa.org

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
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JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

July 12, 2019

Grant Nyhammer
Executive Director & General Counsel
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108

Re: June 26, 2019, Petition for Hearing

Dear Mr. Nyhammer:

On or about June 26, 2019, the Illinois Department on Aging (Department) received the document entitled "Petition for Hearing" (Petition) submitted on behalf of Northwestern Illinois Area Agency on Aging (NIAAA). **The Department is unable to provide a hearing because the Petition fails to state any claims supporting the right to a hearing.** It appears NIAAA is alleging NIAAA had a right to some unknown amount or source of funding in 2014, and that the Department inappropriately withheld the funding; however, the Petition fails to sufficiently define the issues or to reasonably inform the Department of the basis for NIAAA's hearing request.

The Petition includes several references to the federal Older Americans Act, including 42 U.S.C. 3026(f), which sets forth a requirement notice and opportunity for public hearing when a state Department withholds area funds as a result of finding that "an area agency on aging has failed to comply with Federal or State laws..." The Petition does not allege area funds have been withheld from NIAAA, and in fact, no area funds have been withheld. Moreover, the Department is unaware of any finding that NIAAA has failed to comply with Federal or State laws. The Department recognizes your reference in paragraph 31 to NIAAA's June 20, 2019, plan amendment, but as you are aware, this submission is under review pursuant to the Department's regular processes.

The Petition also asserts civil rights and constitutional violations; however, there are no facts presented indicating NIAAA was entitled to or guaranteed the allegedly withheld funding.

The Department takes notice of NIAAA's allegations that Department rules may need to be updated; however, these allegations do not give rise to a hearing right.

Respect for yesterday. Support for today. Planning for tomorrow.
www.illinois.gov/aging

The Illinois Department on Aging does not discriminate in admission to programs or treatment of employment in programs or activities in compliance with appropriate State and Federal statutes. If you feel you have been discriminated against, call the Senior HelpLine at 1-800-252-8966; 1-888-206-1327 (TTY)

Page 2 of 2
July 12, 2019
Correspondence to G. Nyhammer

The Petition also appears to demand a promise that the Department will properly provide funding to NIAAA in the future (paragraphs 59-60, prayer for relief F). This demand/allegation is not ripe or appropriate for a hearing, but please note that the Department has every intention of continuing to properly exercise its duties.

Counts VII and VIII allege IDoA improperly withheld "RAA" funding; however, NIAAA's Exhibit C attached to the Petition sets forth evidence showing IDoA properly terminated the funding by exercising a "without cause" termination provision of the grant agreement.

The Department has carefully reviewed NIAAA's Petition in coming to the conclusion no hearing is warranted.

Sincerely,



Paulette F. Dove
Deputy General Counsel

Cc: Paula A. Basta, M.Div.
Lora McCurdy
Rhonda Armstrong

A81

ILLINOIS DEPARTMENT ON AGING
FISCAL YEAR 2014
ADULT PROTECTIVE SERVICES PROGRAM

This Grant made by and between the Illinois Department on Aging (hereinafter referred to as IDoA or the Department) and Northwestern Illinois Area Agency on Aging (hereinafter referred to as the Regional Administrative Agency [RAA]) sets forth each and every one of the following as conditions for provision of services and receipt of payment for Adult Protective Services (APS) Program activities and services.

1. This Grant shall become effective July 1, 2013, and shall terminate June 30, 2014.
2. The RAA shall perform or assure the performance of activities of the APS Program within and throughout the geographical location(s) listed below.

Boone, Carroll, DeKalb, JoDaviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago Counties

3. The RAA shall contract with the provider agencies that have been appointed by the RAA with prior approval from the IDoA to perform intake, assessment, casework, follow-up, and Early Intervention Services requirements consistent with the IDoA rules, standards, policies and procedures. The RAA shall include in the contract an assurance that each provider agency shall agree to meet all rules, standards, policies, and procedures issued by the IDoA as well as administrative rules pertaining to the APS Program. The RAA shall retain a copy of each contract it has entered into with a provider agency. Such contracts shall be available for review upon request from IDoA.

In the case of a report of alleged or suspected abuse or neglect that places an eligible adult at risk of injury or death, a provider agency shall respond to the report on an emergency basis in accordance with guidelines established by the Department by standard policies and procedures and administrative rule and shall ensure that it is capable of responding to such a report 24 hours per day, 7 days per week. A provider agency may use an on-call system to respond to reports of alleged or suspected abuse or neglect after hours and on weekends. The APS Program is providing additional funding as specified in Paragraph 5. The Department will reimburse each provider agency \$100/week for 24 hour availability, payable at the end of each quarter. Provider agencies will also be reimbursed an enhanced assessment amount of \$642.00 for assessments on Priority One cases that are conducted during non-business hours.

4. The RAA agrees to accept payment not to exceed **\$39,432.00** for the period of the Grant ending June 30, 2014 for the RAA activities and responsibilities to be carried out in accordance with the IDoA rules, standards, policies and procedures. Payment will be made in two installments. The first installment will be processed July 31, 2013 and the second installment will be processed January 31, 2014. The RAA must submit quarterly progress reports and quarterly fiscal reports (if applicable).
5. The RAA shall agree to accept payment from the IDoA for the following activities to be performed or purchased by the appointed provider agency in accordance with rules, standards, policies, and procedures. In accepting payment from the IDoA, the RAA shall reimburse each provider agency for the amount the provider agency has earned according to the State generated "Voucher Processing" computer report. Prior to the IDoA releasing payment, an APS Payment Reconciliation Form (IL 402-0936) must be received at the IDoA. If there are no discrepancies for the month, the provider agency must send in a blank reconciliation form (IL-402-0936) to the IDoA signed and dated by the provider agency supervisor, which would indicate to the IDoA that the Voucher Processing Report was reviewed, and there were no reconciliations for the month. Any discrepancies shall be reported to the IDoA each month.

| <u>Payment Amount</u> | <u>Service Activity</u> |
|---------------------------|--|
| \$428 | Assessment |
| \$642 | Enhanced Assessment |
| \$538 | Case Work |
| \$ 92 | Follow-up |
| Up to \$1,000/year/client | Early Intervention Services |
| Up to \$5,200/year/agency | 24 Hour On Call |
| \$107.07 | Money Management Assessment |
| \$132.07 | Money Management Assessment/Translator |
| \$ 22.81 | Money Management Services |

6. The IDoA reserves the right to adjust the above payment amounts based on the actual number of hours spent on a service activity.
7. Obligations of the State will cease immediately without penalty of further payment being required if in any fiscal year the Illinois General Assembly or federal funding source fails to appropriate or otherwise make available sufficient funds for this Grant.
8. Time is of the essence when any action is required under this Grant to be completed by a stated time. Failure by the RAA to complete such actions within the required time limits may result in a disallowance of payment for services rendered under this Grant, unless a written Amendment is executed by the IDoA and the RAA.
9. The RAA agrees to abide by all rules, standards, policies, procedures and direction promulgated by the IDoA and applicable administrative rules for the activities under this Grant.
10. This Grant shall be governed and construed in accordance with the laws of the State of Illinois as well as in compliance with Illinois Grants Funds Recovery Act (30 ILCS 705).

11. The RAA understands that the IDoA has the exclusive right, power and privilege to develop and interpret State rules, policy and procedures.
12. The RAA certifies that they are not barred from being awarded a Grant under 30 ILCS 500. Section 50-11 prohibits a person from entering into a Grant with a State agency if they know or should know that they are delinquent in the payment of any debt to the State as defined by the Debt Collection Board. The RAA further acknowledges that the granting state agency may declare the Grant void if this certification is false or if the RAA is determined to be delinquent in the payment of any debt during the term of the Grant.
13. In the event any provision, term or condition of this Grant is declared void, unenforceable or against public policy, said agreement shall be construed as though said term did not exist.
14. The RAA is expressly prohibited from contracting or otherwise arranging for transfer of activities under this Grant without prior written approval from the IDoA, unless expressly indicated in this Grant. This Grant including the rights, benefits and duties hereunder, shall not be assigned.
15. The RAA certifies that it is not (circle one) a Charitable organization subject to the Illinois Charitable Trust or Solicitation Acts and, if subject to either of these Acts, that all appropriate registration materials and annual reports have been filed with the State of Illinois Attorney General.
16. The RAA certifies that he/she/the firm has not been convicted of bribery or attempting to bribe an officer or an employee of the State of Illinois, nor has the RAA made an admission of guilt of such conduct which is a matter of record.
17. The RAA shall abide by the Federal Civil Rights Act of 1964, the Federal Rehabilitation Act of 1973, the Illinois Human Rights Act, and all other Federal and State Laws, regulations, or orders which prohibit discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, or physical or mental handicap, including the non-discrimination policies and procedures promulgated by the IDoA with respect to Civil Rights Compliance.
18. The RAA certifies that neither it nor any substantially-owned affiliated company is participating or shall participate in an international boycott in violation of the provisions of the U.S. Export Administration Act of 1979 or the regulations of the U.S. Department of Commerce promulgated under that Act.
19. The RAA certifies in accordance with 301 ILCS 500/50-10.5 that no officer, partner or other managerial agent of the RAA has been convicted of a felony under the Sarbanes-Oxley Act of 2002 or a Class 3 or Class 2 felony under Illinois Securities Law of 1953 for a period of five years prior to the date of the Grant. The Grantee acknowledges that IDoA shall declare the Grant void if this certification is false.
20. The IDoA assumes no liability for the actions of the RAA under this Grant. Although the RAA is an independent agency, the RAA and any individual representatives of the RAA designated by IDoA shall be entitled to state representation and indemnification as employees pursuant to the provisions of the State Employee Indemnification Act (5 ILCS 350/1) for any claims or actions filed against them in the performance of their duties under the Adult Protective Services Act.
21. The terms and conditions of this Grant constitute the entire present agreement between the IDoA and the RAA and shall be considered public information in accordance with provisions of the Freedom of Information Act (5 ILCS 140, et. seq.).
22. The RAA shall abide by the Federal Immigration Reform and Control Act of 1986.
23. The RAA certifies that it is not in default of an educational loan as provided in Public Act 85-827.
24. The RAA certifies that it has not been barred from contracting with a unit of State or local government as a result of a violation of Section 33E-3 or 33E-4 of the Criminal Code of 1961.
25. This Grant may be amended by the mutual consent of both parties at any time during its term. Amendments to this Grant shall be in writing, signed by both parties or their authorized representatives. Non-compliance with the terms of this Grant by the RAA may result in its immediate termination.
26. The RAA shall agree to include a clause in the contract(s) with their Provider Agency(s) regarding payment for costs incurred with the maintenance of a Multi-Disciplinary Team in accordance with the IDoA standards and procedures and Title VII of the Older Americans Act. In addition, the RAA shall agree to include a clause in the contract with the Provider Agency regarding obligations of the RAA and the IDoA ceasing immediately without penalty of further payment if, in any fiscal year, the state or federal funding source fails to appropriate sufficient funds for the program.
27. The RAA certifies to the following in fulfilling the requirements of the Drug Free Workplace Act:
(Please check one:)
 - ☐ That I am doing business as an individual and I certify that I will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the Grant.
 - ☐ The Drug Free Workplace Act **does not** apply (either the Grant is less than \$5,000 or the contractor/grantee is a corporation, partnership or other entity that has less than 25 employees).
 - ☒ The Drug Free Workplace Act **does** apply and I have completed the attached required certification form. (The Drug Free Workplace

Act applies to Grants of \$5,000 or more with corporations, partnerships, or other entities with 25 or more employees at the time the Grants are awarded).

28. The RAA shall maintain, for a minimum of 3 years after the completion of the Grant, adequate books, records, and supporting documents to verify the amounts, recipients, and uses of all disbursements of funds passing in conjunction with the Grant and all books, records, and supporting documents related to the Grant shall be available for review and audit by the Auditor General; and the RAA agrees to cooperate fully with any audit conducted by the Auditor General and to provide full access to all relevant materials. Failure to maintain the books, records, and supporting documents required by this Section shall establish a presumption in favor of the State for the recovery of any funds paid by the State under the Grant for which adequate books, records, and supporting documentation are not available to support their purported disbursement.
29. The RAA certifies, under oath, that all information in the Grant agreement is true and correct to the best of the RAA's knowledge, information, and belief; that the funds shall be used only for the purposes described in the Grant agreement; and that the award of Grant funds is conditioned upon such certification.
30. Upon the determination by the IDoA, the RAA shall promptly refund any amount that has been advanced for which the RAA has not earned according to the terms of the Grant.
31. This Grant may be terminated without cause by either party upon thirty (30) days' written notice.
32. All notices required or desired to be sent by either party shall be sent to the following respective addresses:

Illinois Department on Aging
One Natural Resources Way
Springfield, Illinois 62702-1271

NIAAA
111 S. Alpine Rd., Ste. 600
Rockford, IL 61108

Payee name and address if different from above:

33. In witness whereof, the parties hereto have caused this Grant to be executed by their duly authorized representatives:

Illinois Department on Aging

John K. Holton
Signature

7-24-13
Date

John K. Holton, Ph.D.

Director

Deb Shipley
Signature of Designee

Deb Shipley, Chief of Staff
Typed/Printed Name AND Title of Authorized Designee

Northwestern Illinois Area Agency on Aging

Grant Nyhammer
Signature

7-18-13
Date

Grant Nyhammer, Ex. Dir.
Typed Name of Authorized Representative

This state agency is requesting disclosure of information that is necessary to accomplish the statutory purpose as outlined under 20 ILCS 435/5 and 435/5.1. Disclosure of this information is MANDATORY as required by Federal Office of Management and Budget OMB Circulars A-102 and A-122. Failure to comply will result in Federal and/or State funding being withheld.

The Illinois Department on Aging does not discriminate in admission to programs or treatment of employment in programs or activities in compliance with the appropriate State and Federal Statutes. If you feel you have been discriminated against, you have a right to file a complaint with the Illinois Department on Aging. For information, call the Senior HelpLine: 1-800-252-8966 (Voice & TTY).



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

October 02, 2019

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

Timothy Scordato
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

In re: Nyhammer v. Basta
125201

Today the following order was entered in the captioned case:

Motion by Petitioner for leave to file a petition for an original writ of mandamus. Denied.

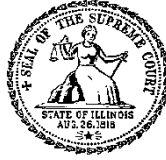
Order entered by the Court.

Very truly yours,

A handwritten signature in cursive script that reads "Carolyn Taft Grosboll".

Clerk of the Supreme Court

cc: Carson Reid Griffis



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

October 16, 2019

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

Timothy Scordato
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

In re: Nyhammer v. Basta
125201

Today the following order was entered in the captioned case:

Motion by Petitioner to reconsider the order denying motion for leave to file a petition for an original writ of mandamus. Denied.

Order entered by the Court.

Very truly yours,

A handwritten signature in cursive script that reads "Carolyn Taft Grosboll".

Clerk of the Supreme Court

cc: Carson Reid Griffis



128354

2-20-0460

E-FILED

Transaction ID: 2-20-0460
File Date: 2/16/2022 3:06 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | |
|--|--|
| Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, |) Mandamus on Appeal from the) Seventeenth Judicial Circuit,) Winnebago County, Illinois |
| Plaintiff-Appellant, |) |
| v. |) |
| Paula Basta, in her capacity as Director of the Illinois Department on Aging, |) No. 19-MR-1106) |
| Defendant-Appellee. |) The Honorable) DONNA R. Honzel,) Judge Presiding. |

Motion for Publication and Attorney Fees

Plaintiff, Grant Nyhammer as the Director of the Northwestern Illinois Area Agency on Aging (NIAAA), through his attorney Timothy Scordato, files this Motion for Publication and Attorney Fees pursuant to Illinois Supreme Court Rule 23(f) and 735 ILCS 5/14-105, which Defendant Basta intends to oppose. In support of this motion the Plaintiff states the following:

1. On February 8, 2022 this court entered an order (Order) in this matter in favor of the Plaintiff pursuant to Illinois Supreme Court Rule 23(b) in 2022 IL App (2d) 20001460-U.

Publication of Order

2. The Order should be published pursuant to Illinois Supreme Court Rule 23(a) because the Order explains an existing rule of law to the Defendant and to future courts confronted with the issue of a state agency denying access to the administrative hearing process.
3. It is crucial that Defendant understand her statutory duties as she administers a billion-dollar state agency upon which hundreds of thousands¹ of vulnerable older adults are reliant for essential services.

¹ Over 500,000 Illinois residents annually receive services from Department funded programs. Paula Basta, *Illinois Department on Aging FY21 Strategic Budget Overview*, https://www.icmha.org/wp-content/uploads/2020/03/IDoA_FY21_StrategicBudgetPresentation_Overview2020.pdf

4. This litigation was necessary because the Defendant ignored her “patently obvious” statutory responsibilities (“it is patently obvious that NIAAA was seeking a determination of its rights...[and] the Department failed and refused to provide a means for administrative review for the determination of the NIAAA’s rights....”). Order ¶ 42-43.
5. By blatantly ignoring her statutory duties the Defendant has for years effectively closed the administrative hearing process to 2.3 million vulnerable older adults in Illinois. C 52.
6. It is likely the Defendant will just continue denying access to the administrative hearing process for everyone if the Order remains unpublished.
 - a. For example, on or about September 29, 2021, NIAAA again requested an administrative hearing with the Defendant in the attached *Request for Appeal for Failing to Comply with the OAA* with the Department. The request is attached and labelled as Exhibit A. The Defendant again has refused to give NIAAA an administrative hearing by sending NIAAA a letter dated December 15, 2021. The letter is attached and labeled as Exhibit B.
7. The Defendant, unfortunately, has demonstrated she will continue denying access to the administrative hearing process on other issues unless the Order is published.
8. Finally, the Order should be published because the circuit court’s decision dismissing the case demonstrated a complete misunderstanding about the nature of a mandamus and the responsibilities of the Defendant.
9. Since a “mandamus is an extraordinary remedy” (Order ¶ 30), and therefore not well known, other Illinois courts are also likely confused about mandamus actions, so publishing the Order would be a beneficial guide for all future courts adjudicating state officials’ refusal to perform their statutory duties.

Attorney Fees

10. To prevent the Defendant from continuing to violate NIAAA’s rights, this court should order that NIAAA be awarded its attorney fees under the mandamus statute (Mandamus Statute) which states that "If judgment is entered in favor of the plaintiff, the plaintiff *shall* recover damages and costs." 735 ILCS 5/14-105.

11. The Mandamus Statute allows for the prevailing party to recover fees “if independently authorized elsewhere by [another] law.” *Shempf v. Chaviano*, 2019 IL App (1st) 173146.
12. In other words, if the statute under which the mandamus is sought specifically allows for the recovery of attorney fees against the state agency, then the Mandamus Statute *requires* that the prevailing plaintiff be awarded damages and costs.
13. NIAAA sought the mandamus under the Illinois Administrative Procedure Act (Procedure Act), 5 ILCS 100/1-1 *et seq.* because the Defendant has invalid administrative hearing regulations (“count one [of NIAAA’s mandamus complaint] alleged that the Department had a legal duty to enact administrative rules for hearings that complied with the article 10 of the [Procedure] Act”). Order ¶ 19.
14. The Defendant conceded that the Department’s administrative hearing rules when this litigation was initiated were “outdated, confusing, duplicative, unnecessarily overlapping, un navigable” and therefore invalid. 5 ILCS 100/10-55(c).
 - a. During the pendency of this litigation on August 27, 2021, the Defendant published a new hearing regulation that repealed and amended the prior Department rules for hearings. 45 Ill. Reg. 10,767 – 793 (Aug. 27, 2021) (https://www.cyberdriveillinois.com/departments/index/register/volume45/register_volume45_issue_35.pdf).
 - b. In an explanation to Illinois Joint Committee on Administrative Rules about why the Defendant needed to change its hearing regulations, the Defendant stated:

Upon reviewing current departmental rules for appeals and hearings, it was determined that the rules were outdated, confusing, duplicative, unnecessarily overlapping, and un navigable. Supplement to Motion for Sanctions, E 4 – 6.
15. The Order determined that the Department’s administrative hearing rules are invalid under the Procedure Act, as it stated:
 - a. “The Procedure Act provides that...[the Department] shall adopt rules of practice setting forth the nature and requirements for all formal hearings.” Order ¶ 37.

- b. "Defendant does not dispute that the Department failed to enact the rules [required by the Procedure Act for administrative hearings]." Order ¶ 39.
 - c. "The Department [improperly] dismissed the petitions without providing any means to effectively appeal or review the decisions and without enacting rules [under the Procedure Act] to even validate its actions." Order ¶ 43.
16. Since the Order deems the Department's hearing rules invalid, then the Procedure Act specifically *requires* this court to award attorney fees ("in any case in which a party has any administrative rule invalidated by a court for any reason...the court *shall* award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees [emphasis added].") 5 ILCS 100/10-55(c).
17. The reason the Procedure Act mandates awarding attorney fees is to discourage state agencies from using invalid administrative rules and to give a financial incentive for parties to challenge those invalid administrative rules:
- The purpose of the fee-shifting provisions of...[Procedure Act] is to discourage enforcement of invalid rules and give those subject to regulation an incentive to oppose doubtful rules where compliance would otherwise be less costly than litigation. If you are a party who has brought *any* case and you succeed in that case in having *any* administrative rule invalidated by a court for *any* reason, you are entitled to recover all of your reasonable litigation expenses, including attorney fees. It is difficult to see how any law could be more straightforward or less encumbered by qualification or restriction. (Emphases in original.) *Rodriguez v. Dep't of Fin. & Prof'l Regulation*, 2011 IL App (1st) 102775.
18. Since the Procedure Act allows for the recovery of attorney fees, NIAAA is, therefore, entitled to be awarded fees and costs under the Mandamus Statute.
19. Further, NIAAA should be awarded attorney fees because there have been no consequences for the Defendant forcing NIAAA to engage in three years of costly litigation just to get what the Order deems a "patently obvious" right. Order ¶ 42 - 43.
20. Further, the Defendant denying NIAAA hearings on the petitions for nearly three years has benefited the Defendant and significantly damaged NIAAA.

- a. Regarding NIAAA's Second Petition (Order ¶ 14) about NIAAA designating the Adult Protective Service (APS) providers from a public bid process in June 2019 (Order ¶ 15), the Defendant delaying a hearing on the Second Petition has made NIAAA's 2019 designation irrelevant as the results from the 2019 process are not a valid basis for NIAAA designating APS providers in 2022. NIAAA using the 2019 bid process to award contracts in 2022 would almost certainly result in a legal challenge from one of the losing bidders, so the Department delaying a hearing on the Second Petition has forced NIAAA to conduct a new public bid process for APS providers in 2022.
 - b. Regarding NIAAA's First Petition (Order ¶ 8), the circumstances of the Department improperly withholding funding from NIAAA now date back to at least eight years to 2013 (Order ¶ 10) when the Department illegally terminated NIAAA from the APS program. Many of the Department employees who could provide evidence about the Department's misconduct starting in 2013 have now been gone from the Department for years which decreases the likelihood of NIAAA being able to prove the misconduct and prevailing on the First Petition.
21. While the Defendant delaying hearings on the petitions for years has injured NIAAA, it has had no impact on the Defendant as she has not even had to pay the costs of hiring counsel to delay resolution of the petitions.
22. Attorney fees should be awarded to NIAAA, therefore, so that there is some incentive for the Defendant to stop denying access to the administrative hearing process for NIAAA and millions of older adults.
23. Plaintiff has incurred \$229,525 in attorneys' fees (401.75 hours from attorney Tim Scordato and 218 hours from attorney/attorney supervisor Grant Nyhammer) and \$497.32 in court costs from all litigation of this matter in this Court and previous courts.
- a. NIAAA's mission is to provide free services to vulnerable older adults and is a nonprofit with limited resources.
 - b. Any fee award to Plaintiff will be given to NIAAA to provide services to older adults consistent with NIAAA's mission.

- c. NIAAA would agree to make any fee award subject to any condition this court deems appropriate.

Wherefore, Plaintiff requests that this Court:

- A. Publish the Order, 2022 IL App (2d) 20001460;
- B. Award Plaintiff fees and costs;
- C. Any just order this court deems appropriate.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Respectfully submitted,

/s/ Timothy Scordato

Timothy Scordato, NIAAA Staff Attorney

Attorney Registration #6322807

1111 S. Alpine Road, Suite 600, Rockford, IL 61108

tscordato@nwilaaa.org, (815) 226-4901



128354

2-20-0460

E-FILED

Transaction ID: 2-20-0460
File Date: 2/16/2022 3:06 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 15, 2022, Plaintiff emailed Defendant, at CGriffis@atg.state.il.us and Carson.Griffis@ilag.gov, the foregoing **Motion for Publication and Attorney Fees** pursuant to Local Rule 102(b), and Counsel for Defendant stated that he plans to oppose the motion. Further, on February 16, 2022 the foregoing **Motion for Publication and Attorney Fees** was electronically filed with the Clerk, Appellate Court of Illinois, Second Judicial District, and served upon the following by email:

CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
CivilAppeals@atg.state.il.us
Carson.Griffis@ilag.gov
Carson.griffis@illinois.gov

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

Northwestern Illinois Area Agency on Aging,)
 Petitioner,)
 v.)
 The Illinois Department on Aging,)
 Respondent)

Request for Appeal for Failing to Comply with the OAA

The Petitioner, the Northwestern Illinois Area Agency on Aging (NIAAA) through its' attorney, Grant Nyhammer, is requesting an administrative hearing with a hearing officer for this *Request for Appeal for Failing to Comply with the OAA* (Request). In support of this Request, NIAAA states the following:

Authority relied upon for Request

1. This Request is being made because the Illinois Department on Aging's (Department) 2022-2024 State Plan¹ (State Plan) fails to comply with the Older Americans Act² (OAA).
 - a. The OAA requires that:

The [State] plan contains assurances...that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter [of the OAA].³
 - b. This provision in the OAA is a restriction on using funding (Restriction on Using Funding) that requires that OAA funding be used only if an OAA legal services provider (Legal Provider) has no other funding sources available to serve an older adult.
 - i. This means, for example, that the three Illinois Legal Providers who are currently getting the vast majority of OAA funding (Prairie State Legal Services, Land of Lincoln Legal Services, and Legal Aid Chicago) and funding from the Legal Services Corporation⁴, generally may not use OAA funding to serve low-income older adults.
 - c. The purpose of the Restriction on Using Funding is to ensure that the maximum level of legal services are being provided to older adults by requiring that OAA funding be used only as a last resort by Legal Providers.
 - d. Since the Legal Providers typically have multiple other sources of funding to serve older adults, the State Plan must contain, therefore, assurances that the Legal Providers will be required to account for how they will comply with the Restriction on Using Funding.

¹ The State Plan is available at: https://www2.illinois.gov/aging/Documents/State-Plan_2022-2024_July2021_FINAL-VERSION.pdf, last visited on September 28, 2021.

² 42 U.S.C. § 3001 *et seq.*

³ 42 USC 3027(a)11(D).

⁴ The Legal Services Corporation is a federal agency which provides funding to legal service organizations to provide free legal services to low-income clients which includes older adults. See 42 U.S.C. 2996f.

- e. The State Plan, as alleged below, does not contain adequate assurances regarding the Restriction on Using Funding.
- f. The ongoing failure of the Legal Providers to comply with the Restriction on Using Funding likely deprive vulnerable older adults from receiving potentially millions of dollars of legal services over the next three years.
- g. This failure has potentially dire impacts for Illinois older adults as "legal assistance provided under...[the OAA] is part of the essential core of...[the federal government's] legal assistance and elder rights programs."⁵

Parties

- 2. The Department has designated NIAAA as the area agency on aging⁶ (AAA) for planning service area 1 (Area 1).⁷
 - a. NIAAA is the "public advocate"⁸ for older adults (Clients) living in Area 1 and as such is required by both federal and Illinois law to "represent the interests of older persons to public officials [and] public...agencies."⁹
 - b. NIAAA contracts with Prairie State Legal Services (Prairie State) to provide OAA legal services to older adults in Area 1.
 - c. NIAAA has submitted to the Department a 2022-2024 area plan (NIAAA Area Plan), which is slated to begin on October 1, 2021.
 - i. The local initiative in the NIAAA Area Plan is to evaluate Prairie State's performance for the purpose of improving and increasing the delivery of legal services to older adults in Area 1 in 2022-2024.
 - d. Grant Nyhammer is the Executive Director & General Counsel of NIAAA and is the authorized representative of NIAAA.
 - e. NIAAA's and Mr. Nyhammer's contact information is below.

⁵ The Administrative on Community Living, <https://acl.gov/programs/legal-help/legal-services-elderly-program>, last visited on September 28, 2021.

⁶ An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

⁷ The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

⁸ 45 CFR § 1321.61(a).

⁹ 45 CFR § 1321.61(b)(1). Similarly, Illinois law states that "an area agency on aging shall throughout the planning and service area...monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons...[and] represent the interests of older persons to public officials, public and private agencies or organizations." 89 Ill. Adm. Code §230.150(a)(1)-(3).

3. The Department is the state agency responsible for the State Plan,¹⁰ complying with the OAA¹¹, and for providing hearings to NIAAA.¹²

Authority relied on for requesting an Administrative Hearing

4. NIAAA is entitled to an administrative hearing under the OAA which requires the Department to give NIAAA a hearing if requested.¹³
 - a. The only condition for NIAAA getting a hearing under the OAA is that NIAAA has submitted an area plan to the Department.
 - b. Since NIAAA has submitted an area plan to the Department, NIAAA is entitled to a hearing under the OAA.
 - i. While the OAA does not require NIAAA to state the grounds for the hearing request, NIAAA is asking for a hearing because, as alleged in this Request, the State Plan violates the OAA.
5. Since the only Department regulation under which NIAAA can now request a hearing regarding the OAA is the Department's new hearing regulation¹⁴ (Hearing Regulation), NIAAA is requesting a hearing under a provision of the Hearing Regulation for protecting the welfare of older adults.
 - a. The Hearing Regulation applies to hearings regarding OAA services.¹⁵
 - b. The Hearing Regulation states the Department will give a hearing to protect the welfare of older adults.¹⁶
 1. As alleged in this Request, the State Plan failing to comply with the Restriction on Using Funding has potentially dire consequences for older adults.
 2. NIAAA entitled to a hearing, therefore, to protect the welfare of older adults under 89 Ill. Admin. Code § 230.450(b).

¹⁰ Department "shall develop and administer any State Plan for the Aging required by [the OAA]." 20 ILCS 105/4.01

¹¹ *Id.*

¹² 89 Ill. Adm. Code § 230.400.

¹³ The Department "will...afford an opportunity for a hearing upon request...to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. § 3027(a)(5).

¹⁴ 89 Ill. Adm. Code § 230.400 *et seq.*

¹⁵ "The purpose of this Subpart E is to set forth grievance and appeal requirements for entities...that administer...services...under an area plan." 89 Ill. Admin. Code § 230.400.

¹⁶ 89 Ill. Admin. Code § 230.450(b). Since the OAA requires that NIAAA be given a hearing, reading the Hearing Regulation consistent with this federal requirement means that there must be some provision in the Hearing Regulation that requires NIAAA be given a hearing. That provision in the Hearing Regulation appears to be Section 230.450(b). If the Department disagrees, then it should substitute another provision in the Hearing Regulation (or any other source it wishes to use) which affords NIAAA a hearing as required by the OAA.

6. Further, NIAAA should be given an administrative hearing because it is preferred by courts in resolving disputes such as this so that the Department can:
 - a. Develop and consider all relevant facts;
 - b. Use their expertise in resolving differences;
 - c. Settle differences in an informal setting;
 - d. Protect state agency operations by avoiding interruptions;
 - e. Correct mistakes; and
 - f. Converse judicial time by avoiding piecemeal appeals.¹⁷

Alleged Facts

7. The following alleged facts are based on belief and/or knowledge of Mr. Nyhammer.
8. Mr. Nyhammer worked as a Staff Attorney at Prairie State between 2000-2004 and has supervised NIAAA's OAA funding to Prairie State since 2009 as Executive Director of NIAAA.
9. NIAAA has repeatedly requested since 2010 that Prairie State account for how it is complying with the Restriction on Using Funding.
 - a. In the judgment of NIAAA, Prairie State has never complied with the Restriction on Using Funding.
 - b. NIAAA has been unable to enforce the Restriction on Using Funding on Prairie State because, in large part, it has not been included in the past State Plans.
10. On October 30, 2020, therefore, NIAAA sent an email to the Department requesting that the State Plan address the Restriction on Using Funding. The email is attached and labelled as Exhibit A.
11. On September 13, 2021, in a virtual meeting between Department and the AAAs, Amy Lulich, Senior Policy Advisor with the Department, stated that the State Plan had been approved and the Department would soon be sending a copy of the State Plan to the AAAs.
 - a. To date, the Department has not sent the State Plan to NIAAA.
 - b. To date, the Department has not sent the State Plan to any AAA.
12. Despite the Department's promise, NIAAA first discovered the approved State Plan when Mr. Nyhammer checked the Department's website on September 27, 2021.
 - a. It is believed that the State Plan was made public when it was posted on the Department's website sometime within the past 15 days.

¹⁷ *Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 547 N.E.2d 437, 439 (1989).

- b. The Department posting the State Plan on the website is an adverse action¹⁸ as it is the Departments final decision refusing NIAAA's request that the State Plan address the Restriction on Using Funding.

13. On September 27, 2021, NIAAA asked the Department to explain its adverse action of failing to include the Restriction on Using Funding in the State Plan.

14. On September 27, 2021, Ms. Lulich responded claiming that Objectives 1.3 and 5.5 of the State Plan address the Restriction on Using Funding. Ms. Lulich's email is attached and labelled as Exhibit B. Objectives 1.3 and 5.5 are detailed in Exhibit B.

Reasons for Relief Requested

15. Objectives 1.3 and 5.5 are not adequate assurances in the State Plan that the Restriction on Using Funding will be followed by the Legal Providers.

16. The Restriction on Using Funding is a specific rule imposed on Legal Providers which mandates that they account for using other funding sources before using OAA funding to provide legal services to older adults.

17. Objectives 1.3 and 5.5, unfortunately, do not address the Restriction on Using Funding.

- a. Funding is not mentioned in Objective 1.3 so it is irrelevant.

- b. The only mention of funding in Objective 5.5 is that the Department vows it will "work with Legal Providers...and others to advocate for funding".

- i. The Department's vague promise to work with Legal Providers to seek more funding is obviously immaterial to how the Legal Providers account for expending OAA funding as required by the Restriction on Using Funding.

18. Objectives 1.3 and 5.5, therefore, are not adequate assurances that the Restriction on Using Funding will be followed by Legal Providers.

19. The State Plan, consequently, does not comply with the OAA regarding the Restriction on Using Funding.

Relief Requested

20. For the reasons stated above, NIAAA is requesting an administrative hearing before a hearing officer to determine if the State Plan contains adequate assurances regarding the Restriction on Using Funding.

¹⁸ 89 Ill. Adm. Code §230(a)(2).

21. If the hearing officer determines that the State Plan is deficient, then NIAAA is requesting that the hearing officer recommend to the Director of the Department that the State Plan be revised to be compliant with the OAA.

Proof of Service

On September 29, 2021, this *Request for Appeal for Failing to Comply with the OAA* was served by email to Aging.OAS@illinois.gov, Office of General Counsel, Illinois Department on Aging.

Respectfully submitted,

/s/ Grant Nyhammer

Grant Nyhammer,
Attorney Registration #6239576
Executive Director & General Counsel for the Petitioner
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
gnyhammer@nwilaaa.org
(815) 226-4901
(815) 226-8984 fax

Exhibit A to Request

From: Grant Nyhammer <gnyhammer@nwilaaa.org>
Sent: Friday, October 30, 2020 12:35 PM
To: aging.feedback@illinois.gov
Subject: State plan

The Northwestern Illinois Area Agency on Aging (NIAAA) is asking that an Older Americans Act (OAA) legal services obligation be added to the proposed Illinois Department on Aging State Plan (Plan). The OAA requires that funding be used only if a Legal Provider has no other funding sources available to serve the client by stating:

The [State] plan contains assurances...that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter [of the OAA]. 42 USC 3027(a)(11)(D).

This means, for example, that the three legal service providers (Providers) who are currently getting OAA funding (Prairie State Legal Services, Land of Lincoln Legal Services, and Legal Assistance Foundation) and funding from the Legal Services Corporation under 42 USC 2996f, may not use OAA funding to serve low-income older adults. The Providers also have multiple other sources of funding to serve older adults which must be used before the Providers can use OAA funding so the State Plan should detail a process that the Providers should use to fulfill the above OAA obligation. Since this OAA legal services requirement is missing from the current Plan (and has been missing from the State Plan the past four decades), NIAAA asks that it be added.

Sincerely,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging

Exhibit B to Request

From: Lulich, Amy <Amy.Lulich@Illinois.gov>
Sent: Monday, September 27, 2021 1:56 PM
To: Grant Nyhammer <gnyhammer@nwilaaa.org>
Cc: Ackermann, Desirey <Desirey.Ackermann@Illinois.gov>; Salmon, Willis <Willis.Salmon@Illinois.gov>; Peters, Chelsey <Chelsey.Peters@Illinois.gov>
Subject: RE: Suggestion for State Aging Plan

Grant,

Thank you for your feedback on the FY22-24 State Plan on Aging. We received your comment during our stakeholder feedback process last year. We included the below feedback to your comment, which is included in the final plan "summary of stakeholder feedback." As you know, we received final approval for the plan from ACL earlier this month on September 3. ACL did not provide any specific feedback about the comment you submitted.

I've included our response to your comment below, and the sections of the plan that we reference. If you have any further questions, please let me know.

Best,
 Amy

| | | | |
|--|--|---|--|
| Northwestern Illinois Area Agency on Aging | Potential new objective (and strategies) under Goal 5 or 7 | The Northwestern Illinois Area Agency on Aging (NIAAA) is asking that an Older Americans Act (OAA) legal services obligation be added to the proposed Illinois Department on Aging State Plan (Plan). The OAA requires that funding be used only if a Legal Provider has no other funding sources available to serve the client by stating... | Thank you for this comment. Several comments were submitted related to legal services for older adults. In response to comments regarding legal services, IDoA has added objectives 1.3 and 5.5. |
|--|--|---|--|

Objective 1.3: Evaluate current legal services offerings in order to maximize services for those with the greatest economic and social needs.

Strategy 1.3a: Utilize the findings from the recently completed survey of Older Americans Act Title III Legal Providers to identify priority areas for the legal services working group.

Strategy 1.3b: Convene working group of AAA representatives to identify gaps and barriers that older adults are experiencing when accessing legal services.

Strategy 1.3c: Continue to work with Area Agencies on Aging and Legal Providers to prepare for Federal Fiscal Year 2022 reporting changes and recognize legal concerns about chilling effects in capturing additional sensitive personal information unless related to underlying request for assistance.

Strategy 1.3d: Continue use of brief surveys on specific topics to increase understanding of needs and issues affecting legal service providers in order to advocate for system improvements.

Outcomes for Objective 1.3

- Workgroup convened.
- Surveys are conducted annually.
- Prioritization of recommendations from legal services survey.

Objective 5.5: Work with Legal Providers, legal advocacy organizations and others to advocate for funding and resources to provide legal assistance to older adults so they can access social services that allow them to live independently.

Strategy 5.5a: Establish subcommittee of the Older Adult Services Advisory Committee to identify gaps and barriers that older adults are experiencing when accessing legal services.

Strategy 5.5b: Revise the listings under the provider profile to include legal service providers. Ensure this information is also shared with staff on the Senior HelpLine.

Strategy 5.5c: Explore options for education and training on legal issues spotting for Aging network.

Outcomes for Objective 5.5

- Subcommittee established.
- IDoA website is updated with listings of legal service providers.
- At least one legal services training module is developed.

Amy C. Lulich, MHA (*she/her/hers*)

Senior Policy Advisor

Illinois Department on Aging

December 15, 2021

Via email: gnyhammer@nwilaaa.org
Grant Nyhammer, Executive Director
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

RE: Appeal Request

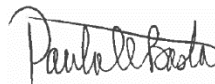
Mr. Nyhammer,

The Illinois Department on Aging ("IDoA") conducted a review of your appeal request regarding your allegation that IDoA's State Plan does not comply with the Older Americans Act.

After reviewing the record, IDoA determined that your request does not meet the requirements established in Administrative Rule. Rules governing Grievances, Appeals, and Hearings may be found in 89 Ill. Adm. Code 230.400 – 230.495. Specifically, 89 Ill. Adm. Code 230.420(d) provides that IDoA will allow an appeal from an Area Agency on Aging ("AAA") when the Department proposes to 1) disapprove the area plan or any amendment to the area plan that has been submitted to the Department by the AAA, or 2) reject the AAA's recommendation to designate a service provider. Here, your request involves allegations concerning the State Plan, rather than, the Area Plan or a service provider designation.

Accordingly, pursuant to 89 Ill. Adm. Code 230.440(b), your appeal is dismissed for not meeting the requirements of 89 Ill. Adm. Code 230.420. You may seek judicial review, if available.

Sincerely,



Paula Basta, Director
Illinois Department on Aging

cc: *Desirey Ackermann, IDoA; Desirey.Ackermann@illinois.gov*



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2-20-0460

E-FILED

Transaction ID: 2-20-0460
File Date: 2/17/2022 3:40 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

No. 2-20-0460

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | | |
|--|---|-------------------------------------|
| GRANT NYHAMMER, |) | On Appeal from the Circuit Court of |
| |) | the Seventeenth Judicial Circuit, |
| Plaintiff-Appellant, |) | Winnebago County, Illinois |
| |) | |
| v. |) | |
| |) | No. 19-MR-1106 |
| PAULA BASTA, in her official capacity |) | |
| as Director of the Illinois Department |) | |
| on Aging, |) | The Honorable |
| |) | DONNA R. HONZEL, |
| Defendant-Appellee. |) | Judge Presiding. |

**DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S
MOTION FOR PUBLICATION AND ATTORNEY FEES**

Defendant-Appellee Paula Basta, in her official capacity as Director of the Illinois Department on Aging ("Department"), submits the following response under Illinois Supreme Court Rule 361(b)(3) to Plaintiff-Appellant Grant Nyhammer's combined Motion for Publication and Attorney Fees.

BACKGROUND

1. This is an appeal from the dismissal of a complaint for *mandamus*, filed in the circuit court, in which Nyhammer sought to compel the Department to promulgate rules of procedure for hearings under the Illinois Administrative Procedure Act ("IAPA"), 5 ILCS 100/1-1 *et seq.* (2020), and to provide the Northwestern Illinois Area Agency on Aging ("NIAAA") with hearings on two petitions alleging that the Department withheld

grant funds from NIAAA and improperly rejected its service provider recommendations under the Adult Protective Services Act, 320 ILCS 20/1 *et seq.* (2020). *See* C4, C9.*

2. On February 8, 2022, this court issued an unpublished order under Illinois Supreme Court Rule 23, reversing the dismissal of the complaint and remanding to the Department — rather than the circuit court — for hearings on those issues. *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶¶ 48-49.

3. On February 16, 2022, Nyhammer filed a motion in this court seeking to publish the Rule 23 order and to collect \$229,525 in attorney fees and \$497.32 in costs from Basta under section 10-55(c) of the IAPA, 5 ILCS 100/10-55(c) (2020). Mot. ¶ 23.

4. For at least the following reasons, this court should deny both requests.

DISCUSSION

Motion for Attorney Fees

5. First, Nyhammer has no legal right to attorney fees in this action. “Illinois generally follows the ‘American Rule’: absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary.” *Morris B. Chapman & Assocs. v. Kitzman*, 193 Ill. 2d 560, 572 (2000). Nyhammer correctly recognizes that the *mandamus* statute does not provide such authority. *See* Mot. ¶¶ 11-12; *see also Shempf v. Chiaviano*, 2019 IL App (1st) 173146, ¶ 66 (“The *mandamus* statute . . . does not specifically provide for attorney fees, and we have refused to read that remedy into it.”). Instead, he seeks attorney fees under section 10-55(c), which allows for

* This response cites the common-law record as “C ____” and Nyhammer’s motion as “Mot. ____.”

“reasonable attorney[] fees” if a “party has any administrative rule invalidated by a court for any reason, including but not limited to the agency’s exceeding its statutory authority or the agency’s failure to follow statutory procedures in the adoption of the rule.” 5 ILCS 100/10-55(c) (2020). But Nyhammer does not seek to *invalidate* any existing Department rule in this action — he seeks to compel the Department to “*adopt* administrative rules for contested hearings” and “provide [him] with a hearing” on NIAAA’s petitions. C9 (emphasis added). The appellate court has held that section 10-55(c) does not apply under very similar circumstances. *See Shempf*, 2019 IL App (1st) 173146, ¶ 68 (rejecting claim for attorney fees under section 10-55(c) because agency’s “denial of a hearing could not remotely be considered an ‘administrative rule’” and the “whole point of the mandamus count was that the Department *hadn’t* [promulgated a rule] yet”) (emphasis in original).

6. Second, even if a legal right to attorney fees existed in this case, Nyhammer has failed to bear his burden of proving that his fees are “reasonable” under section 10-55(c). 5 ILCS 100/10-55(c) (2020); *see also Kroot v. Shu Chan*, 2017 IL App (1st) 162315, ¶ 37 (“A party seeking an award of attorney fees bears the burden of presenting sufficient evidence from which a trial court can make a determination as to their reasonableness.”). To meet that burden, “more must be presented than a mere compilation of hours multiplied by a fixed hourly rate or bills issued to the client”; the petition for fees “must specify the services performed, the attorney who performed the services, the time expended, and the hourly rate charged.” *Kroot*, 2017 IL App (1st) 162315, ¶ 37. Nyhammer’s motion falls far short of meeting his burden because it fails to specify any services that he and his counsel allegedly performed in this matter — it simply lists the total numbers of hours that he and his attorney allegedly spent on legal work and the total

sum of attorney fees he is seeking without any further information. Mot. ¶ 23; *see Kroot*, 2017 IL App (1st) 162315, ¶ 38 (fee petition supported by document with “brief description[s] of the services performed,” the dates on which they were performed, the initials of the person performing the services, and the hourly rate charged was “too and general to support a determination as to the reasonableness of the time expended”).

7. Such detail is especially important here given the significant sum that Nyhammer seeks for an appeal from a dismissal of his complaint by the circuit court under section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2020), which necessarily occurred at an early stage of litigation. And such detail is always necessary so as to allow the opposing party to make informed objections to the reasonableness of each entry. *Cf. 900 N. Rush LLC v. Intermix Holdco, Inc.*, 2019 IL App (1st) 181914, ¶ 21 (“record reflects that the trial court carefully considered” “objections to the fee petition” for “duplicative work”).

8. Finally, Nyhammer’s request for court costs against a State official in her official capacity is barred by sovereign immunity. *See Shempf*, 2019 IL App (1st) 173146, ¶¶ 61-63 (sovereign immunity barred claim for costs in *mandamus* action alleging that agency failed to promulgate rule under IAPA and provide plaintiff with hearing); *see also Parmar v. Madigan*, 2018 IL 122265, ¶ 21 (“A suit against a State official in his or her official capacity is a suit against the official’s office and is therefore no different than a suit against the State.”).

Motion to Publish

9. This court also should deny Nyhammer’s motion to publish for at least two reasons.

10. First, this court’s order creates a split of authority regarding the definition of a “contested case” under section 1-30 of the IAPA, 5 ILCS 100/1-30 (2020). The order overlooks the definition of “contested case” applied by the First and Fourth Districts of the Illinois Appellate Court and cited in Basta’s response brief. *See* AE Br. at 15. Those courts have held that a contested case exists only when a party — here, Nyhammer — can show that he has a right to a hearing under some source of law other than the IAPA. *See Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 29; *Key Outdoor, Inc. v. Dep’t of Transp.*, 322 Ill. App. 3d 316, 322-23 (4th Dist. 2001); *Munoz v. Dep’t of Registration & Educ.*, 101 Ill. App. 3d 827, 829-30 (1st Dist. 1981). Despite that well-established precedent, this court overlooked Basta’s argument that Nyhammer lacked a right to a hearing on either petition under due process principles, any relevant statute, or the Department’s regulations, *see* AE Br. at 15-24, and cited no other source of law affording Nyhammer a clear right to a hearing on the petitions. Instead, this court cited the “enunciated public policy” in favor of administrative review in section 10-5 of the IAPA, but that provision states that “[a]ll agencies shall adopt rules establishing procedures for *contested case* hearings,” 5 ILCS 100/10-5 (2020) (emphasis added), further begging the question of whether Nyhammer’s petitions presented contested cases in the first place. This court should not publish its order because doing so would create further confusion in Illinois law regarding the definition of a contested case.

11. Second, this court’s order creates confusion about the procedures applicable to a *mandamus* action as it remanded this *mandamus* action to the Department rather than the circuit court. *Nyhammer*, 2022 IL App (2d) 200460-U, ¶¶ 48-49. Again, this appeal arose from the circuit court, where Nyhammer initiated this *mandamus* action.

C4. The circuit court dismissed Nyhammer’s action under section 2-615, before Basta had filed an answer. C74, C105, C120. Yet in reversing the circuit court’s judgment, this court directed the case to be remanded to the Department — not the circuit court — for hearings on NIAAA’s petitions. *Nyhammer*, 2022 IL App (2d) 200460-U, ¶¶ 48-49. This was not an appeal in an administrative review action in which it would make sense for this court to bypass the circuit court and remand the case to the agency. *See* 735 ILCS 5/3-111, 3-112 (2020) (setting forth powers of circuit and appellate courts on administrative review, including authority to remand case to agency); *see also Medponics Ill., LLC v. Dep’t of Agric.*, 2021 IL 125443, ¶ 28 (on “administrative review” court “review[s] the decision of the administrative agency rather than that of the” court).

12. And in remanding the case directly to the Department, this court effectively entered final judgment for Nyhammer in this *mandamus* action and awarded him the ultimate relief he sought in his complaint, *see* C9, depriving Basta of any opportunity to raise any affirmative defenses to the *mandamus* action. *See Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (2d Dist. 1997) (“affirmative defenses may not be raised in a section 2-615 motion”). Publishing the order, therefore, will create confusion as to the appropriate remedy when a section 2-615 dismissal is reversed by a circuit court in a *mandamus* action.

WHEREFORE, Defendant-Appellee requests that this court deny Plaintiff-Appellant’s Motion for Publication and Attorney Fees.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

By: /s/ Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575 (office)
(773) 590-7116 (cell)
CivilAppeals@ilag.gov (primary)
Carson.Griffis@ilag.gov (secondary)



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2-20-0460

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Transaction ID: 2-20-0460
File Date: 2/17/2022 3:40 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

CERTIFICATE OF FILING AND SERVICE

I certify that on February 17, 2022, I electronically filed the foregoing Response to Plaintiff-Appellant's Motion for Publication and Attorney Fees with the Clerk of the Court for the Illinois Appellate Court, Second Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Timothy Scordato
tscordato@nwilaaa.org

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
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A112

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

GRANT NYHAMMER AS EXECUTIVE
DIRECTOR OF THE NORTHWESTERN
ILLINOIS AREA AGENCY ON AGING,

Plaintiff/Petitioner

Reviewing Court No: 2-20-0460

Circuit Court No: 2019MR001106

Trial Judge: DONNA R. HONZEL

v.

PAULA BASTA, IN HER CAPACITY AS
DIRECTOR OF THE ILLINOIS DEPARTMENT
ON AGING,

Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

GRANT NYHAMMER AS EXECUTIVE
DIRECTOR OF THE NORTHWESTERN
ILLINOIS AREA AGENCY ON AGING,

Plaintiff/Petitioner

Reviewing Court No: 2-20-0460

Circuit Court No: 2019MR001106

Trial Judge: DONNA R. HONZEL

v.

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PAULA BASTA, IN HER CAPACITY AS
DIRECTOR OF THE ILLINOIS DEPARTMENT
ON AGING,

Defendant/Respondent

E-FILED
Transaction ID: 2-20-0460
File Date: 10/19/2020 8:42 AM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT



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| R 2-R 36 |

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on June 29, 2022, I electronically filed the foregoing **Brief and Appendix of Defendant-Appellant** with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other participant in this matter, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Timothy Scordato
tscordato@nwilaaa.org

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Carson R. Griffis
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