DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-AA-241

BERNARD RENARD, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

RENOVEX, ET AL., INTERVENORS.

Petition for Review of a Decision of the
District of Columbia Department of Employment Services

(Submitted June 15, 1999 Decided July 1, 1999)

Benjamin T. Boscolo for petitioner.

Michael D. Dobbs for intervenors.

Jo Anne Robinson, Interim Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Mary T. Connelly*, Assistant Corporation Counsel, filed a supplemental memorandum on behalf of the District of Columbia Department of Employment Services.

Before STEADMAN and FARRELL, *Associate Judges*, and LEVIE, *Associate Judge, Superior Court of the District of Columbia*.*

FARRELL, *Associate Judge*: Before us is what purports to be a petition for review of a decision of the Department of Employment Services (DOES) denying petitioner's application for a change of physician pursuant to D.C. Code § 36-307 (b)(4) (1997), part of the District of Columbia Workers' Compensation Act (DCWCA). *Sua sponte*, we requested supplemental briefing on whether the agency's denial of the request presented a "contested case" within the meaning of D.C. Code § 1-1502 (8) (1992),

* Sitting by designation pursuant to D.C. Code § 11-707 (a) (1995).

a prerequisite to our jurisdiction under the District's Administrative Procedure Act (DCAPA).[1] *See* D.C. Code § 1-1510 (a). We now hold that it did not, and accordingly dismiss the petition for lack of jurisdiction.

As defined by the DCAPA, a "contested case" is "a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law . . . or by constitutional right, to be determined after a hearing before the Mayor or before an agency." D.C. Code § 1-1502 (8). "This court has interpreted the nature of the hearing referred to in the contested case definition to be 'a trial-type hearing where such is implicitly required by either the organic act or by constitutional right . . . .'" *Bd. of Zoning Adjustment*, *supra* note 1, 644 A.2d at 997 (citations omitted). An illustration of the sort of proceeding that does *not* meet this requirement is the bid protest procedure for government contract awards reviewed in *Jones & Artis Constr. Co. v. District of Columbia Contract Appeals Bd.*, 549 A.2d 315, 318 (D.C. 1988). In holding that the contractor's "protest" to the Contract Appeals Board of the cancellation of an invitation for bids did not result in a contested case, we pointed out first that "[t]he statute [in question] (and certainly the Constitution) does not require a hearing, let alone a trial-type hearing, to resolve a protest." *Id*. (citation omitted). Moreover, the Board administering the statute "ha[d] adopted no regulations . . . pursuant to statutory authority that would suggest the Board might use a trial-type hearing to resolve a protest." *Id.* (citation omitted). Instead, we explained, traditional government contract protests "are decided on the written submissions, coupled on occasion with a 'conference,' not a formal hearing, attended by interested parties." *Id.*; *see also Singleton v. District of Columbia Dep't of Corrections*, 596 A.2d 56, 57 (D.C. 1991) ("Because the regulations do not bestow on prisoners the 'full panoply' of trial-type procedural rights, we necessarily conclude that

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[1] *See United States v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 995, 999 (D.C. 1994) ("[O]ur appellate jurisdiction is limited by statute to contested cases. No matter how practically desirable another procedure might be, this court's authority is circumscribed by the statutes involved" (statutory citations omitted)).

the proceeding before the prison housing board at issue here was not a trial-type hearing and hence not a contested case." (footnotes omitted)).

From the jurisdictional standpoint, the procedure by which petitioner requested a change of physician under the DCWCA reflects the same shortcomings as did the protest procedure in *Jones & Artis*. The DCWCA gives an employee "the right to choose an attending physician to provide medical care under this chapter," D.C. Code § 36-307 (b)(3), but then provides, simply, that the Mayor "may order a change of physician . . . when in his judgment such change is necessary or desirable." *Id.* § 36-307 (b)(4). Plainly the statute does not require a hearing before the decision whether to permit a change is made.[2] And the regulations issued pursuant to it do not do so either. Besides prohibiting a change "to another medical care provider . . . without authorization of the insurer or the Office [of Workers' Compensation]," 7 DCMR § 212.12 (1994), they provide only that:

> If the employee is not satisfied with medical care, a request for change may be made to the Office. The office may order a change where it is found to be in the best interest of the employee.

7 DCMR § 212.13. This discretionary decision ("may") need not be preceded by any sort of hearing, let alone a trial-type one. In fact, the DCWCA requires trial-type hearings only with respect to "claim[s] for

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[2] Nor, equally plainly, does the Constitution.

> To have a [constitutionally protected] property interest in a benefit, a person . . . must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of *entitlement* to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added) (quoted in *Rones v. District of Columbia Dep't of Hous. & Community Dev.*, 500 A.2d 998, 1001 (D.C. 1985)). As the statute permits a change of physician only in the discretion of the agency, it creates no such entitlement.

compensation," D.C. Code § 36-320; *see* 7 DCMR § 220 — of which a request for change of physician self-evidently is not one[3] — and disputes over medical fees. *See* 7 DCMR § 212.10. For all that appears from the statute and regulations, requests for change of physician are customarily decided in just the same way they were here — on written submission by the claimant, including any exhibits, and a written opposition by the employer.

Petitioner points to the order denying his request for a change of physician, which purported to authorize appeal from the denial administratively to the Director of DOES, *see* D.C. Code § 36-322 (b)(2), followed by review in this court under the DCAPA. *See id.* § 36-322 (b)(3). But, as we have repeatedly held, "the Council of the District of Columbia," and so necessarily the District's administrative agencies, "may not enlarge the congressionally prescribed limitations on our jurisdiction, most significantly the contested case limitation in the DCAPA." *Jones & Artis*, 549 A.2d at 318; *see also Capitol Hill Restoration Soc'y v. Moore*, 410 A.2d 184, 188 (D.C. 1979).[4]

The petition for review is, accordingly,

Dismissed.

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[3] A "claim" is defined as "an application for benefits made by an injured employee . . . under [D.C. Code §§ 36-307, -308, -309 (1991)]." 7 DCMR § 299 (incorrectly cited as § 229 in the 1994 amendments). Although change of physician is provided for in § 36-307, the *benefit* which that section confers is the right initially to select a physician; a change of physician is left to the Mayor's discretion. In any event, a request to change physicians cannot be considered a "claim for compensation," *see* D.C. Code § 36-301 (6) (defining "compensation"), without a severe distortion of ordinary meaning.

[4] Nothing in the DCWCA itself purports to grant appeal rights beyond those covered by the DCAPA. Indeed, as noted, the appeal provision of the DCWCA specifically references the DCAPA. *See* D.C. Code § 36-322 (b)(3).