NO. 94545-4

**SUPREME COURT OF THE STATE OF WASHINGTON**

SHANTANU NERAVETLA, M.D.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH, MEDICAL QUALITY ASSURANCE COMMISSION,

Respondent.

# ANSWER TO PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

ROBERT W. FERGUSON
Attorney General

TRACY L. BAHM
Assistant Attorney General
WSBA No. 22950
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Rules**



**Regulations**

## I. INTRODUCTION

This is a case about a medical student who refuses to acknowledge his own mental condition and its impact on his ability to safely practice medicine. Dr. Shantanu Neravetla seeks review of the Court of Appeals decision upholding the Medical Quality Assurance Commission's (Commission's) Order. The Commission determined that Neravetla had a mental condition that affected his ability to practice with reasonable skill and safety. The Court of Appeals correctly determined that the Commission did not err in its interpretation of the term "mental condition" and that the statute was not unconstitutionally vague. The Court of Appeals further determined that the Commission did not violate Neravetla's due process rights, sufficient evidence supported its decision, the decision was not arbitrary and capricious, and there was no violation of the appearance of fairness doctrine.

Neravetla raises the same contentions in this Court, seeking a third level of court review. He claims his appeal presents a significant constitutional question or issues of substantial public interest, but that claim lacks merit. The Court of Appeals correctly determined that the term "mental condition" is not unconstitutionally vague. Given that his other arguments raise issues that are inextricable from the unique facts of

this case, the case does not involve issues of broader public interest warranting this Court's review.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commission err by improperly conflating RCW 18.130.170 and 18.130.180 when it determined that Neravetla had a mental condition for purposes of section .170, which it based on an assessment of his behaviors?

2. Did the Commission and the Court of Appeals properly determine that the term "mental condition" under RCW 18.130.170 did not require a diagnosis of a mental illness or disorder in order to conclude that Neravetla was not safe to practice with reasonable skill and safety?

3. Did the Court of Appeals correctly determine that the term "mental condition" as used in RCW 18.130.170(1) was not unconstitutionally vague?

## III. COUNTERSTATEMENT OF THE CASE[1]

Neravetla began a one-year residency program at Virginia Mason Medical Center (VMMC) in June 2011. AR 1603 (Commission Order)[2], 1924. Almost immediately, his supervisor received complaints about his

[1] The Respondent endorses the facts as set forth in the Findings of Fact in the Commission's Final Order and in the Court of Appeals published decision as clear and correct. We provide these now simply for the ease of the Court in reviewing this matter.

[2] The Commission's Order is found at AR 1601-1614. The Court of Appeals referenced it as CP 22-35.

performance, including his attendance, professionalism, accountability, communication, and patient care. AR 2213-15. Neravetla was given a verbal warning to no avail. He was then given a written warning and placed on probation. AR 1439-40, 1791-93. When the problems continued, Neravetla was assigned a communication skills coach/psychologist to work with him. The coach found him to be completely unreceptive to coaching and to receiving feedback in general. AR 1604, 2078, 2090-91.

Following these problems, in February 2012 VMMC decided to send Neravetla for an assessment by the Washington Physician's Health Program (WPHP) after a Patient Safety Alert was issued based on Neravetla's belligerent interactions with a nurse and his failure to take accountability for his actions. AR 1604, 1962. WPHP is an "independent, nonprofit organization that assists healthcare professionals with medical conditions that may affect their ability to practice medicine safely." *See* http://wphp.org/. Neravetla exhibited the same behaviors during his brief time with the clinical staff at WPHP. They found him to be "upset, argumentative, angry, blaming others for his situation, and disconnected from the seriousness of the reports about him." AR 1610, 1604. WPHP told Neravetla they could not endorse him as safe to practice without a more comprehensive assessment, and gave him the names of three

facilities where he could get that evaluation. Neravetla left their office in anger and did not communicate any plan to follow their direction. AR 1604, 2123-30.

Without informing either VMMC or WPHP, Neravetla presented himself several weeks later at Pine Grove Behavioral Health Center, one of the three evaluators recommended by WPHP. AR 1605, 2133, 2243. Pine Grove found Neravetla to be "defensive, lacking insight, blame-shifting, denying and minimizing". AR 1605. Neravetla was difficult to fully assess because he was not completely cooperative in the process. For example, he only gave Pine Grove permission to speak with a limited number of persons about him. AR 1606. Pine Grove diagnosed Neravetla with an "Occupational problem (disruptive behavior) (Axis I); and prominent obsessive-compulsive and narcissistic traits (R/O personality disorder NOS with obsessive-compulsive and narcissistic traits) (Axis II)" having found that there was not enough cooperation from Neravetla to diagnose him with a disorder. AR 1605. Pine Grove recommended that Neravetla participate in a six-week residential treatment program before they were comfortable endorsing him as safe to practice. AR 1606.

Meanwhile, unaware that Neravetla had followed its recommendation to contact Pine Grove, WPHP notified the Commission that they did not endorse Neravetla as safe to practice, and the

Commission started its investigation in this case. In March 2013, after receiving the report from Pine Grove, the Commission filed a Statement of Charges against Neravetla that alleged he was unsafe to practice with reasonable skill and safety due to a physical or mental condition pursuant to RCW 18.130.170(1). AR 5.

A full hearing was held in 2014 before a panel from the Medical Commission. Following the hearing, the Commission entered a final order that determined Neravetla suffered from the mental condition of Disruptive Physician Behavior, an occupational problem. AR 1610. In reaching that conclusion, the Commission evaluated the testimony of the various witnesses, including both parties' multiple experts, and the exhibits. The Commission determined that the testimony of Neravetla's experts deserved little weight because such testimony was limited and aimed at ruling out a psychiatric or personality disorder. AR 1608. The Commission found that a condition does not have to be a diagnosable disorder to qualify as a triggering event for a RCW 18.130.170(1) action. AR 1608. In fact, on cross examination, one of Neravetla's experts conceded that Neravetla had a mental condition of an occupational problem. AR 1607, 2659-60. Moreover, none of Neravetla's experts contacted any of the staff at VMMC or WPHP when they conducted their evaluations of Neravetla. AR 2620, 2636, 2651. Experts in the field of

Disruptive Physician Behavior, however, recognize that information from collateral sources in the workplace is crucial to any evaluation of such a doctor, because it is the provider's conduct that leads to the proper diagnosis. AR 1609-10, 2258, 2261.

To address its conclusion, the Commission imposed a very limited sanction. Before Neravetla could again seek a credential in Washington State, he would need to "undergo a psychological evaluation by a WPHP approved evaluator and follow whatever recommendations are contained in that evaluation." AR 1612.

Neravetla's petition for reconsideration to the Commission was denied. AR 1775-79. He then sought judicial review in Thurston County Superior Court. Review of the agency action taken by the Commission is under the Administrative Procedure Act (APA). RCW 34.05.510. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). The validity of agency action is determined in accordance with the standards of review provided in RCW 34.05.570, "as applied to the agency action at the time it was taken." RCW 34.05.570(1)(b). Thus, the superior court acted in a limited appellate capacity, where it could reverse only if the person challenging the agency order establishes that the order is invalid for one of the nine

reasons specifically enumerated in RCW 34.05.570(3). *See generally Ames v. Washington State Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009) (describing grounds for reversal of adjudicative order under the APA). Applying the APA standards to the record, the Superior Court upheld the Commission's Final Order.

Neravetla next sought review in the Court of Appeals. Again, Neravetla failed to meet his burden under the APA in the Court of Appeals, which properly upheld the Commission's Order in a unanimous published decision, which is attached to the Petition.

## IV. REASONS WHY THE COURT SHOULD DENY REVIEW

This Court will not take review of a case unless it meets the criteria of RAP 13.4(b). This case fails to satisfy any of those criteria. The Court of Appeals decision does not conflict with a decision of the Supreme Court, or with a published decision of that court. Neravetla asserts that a question of law is presented under the Constitution. Neravetla's constitutional question, however, is readily answered under well-established law and does not warrant this Court's review. Finally, although Neravetla contends that this case is one of substantial public interest, he fails to show any issues of substantial public interest, much less any errors, in the resolution of this fact-specific case. Thus, review

is unwarranted because any ruling on his other issues would have little precedential value because they would be inextricable from the specific findings and conclusions of this case.

### A. Using Behaviors As Part Of The Basis For A Determination Of A Mental Condition Is Appropriate Under RCW 18.130.170 And Does Not Amount To An Erroneous Conflation Of That Statute With Section .180

Neravetla claims that the Court of Appeals erred by conflating RCW 18.130.170 (.170), which regulates mental conditions, with 18.130.180 (.180), which regulates unprofessional conduct. Petition for Review at 13. Neravetla has challenged the Commission's action on this basis at every level. But this theory is inherently flawed because it depends on the premise that behaviors have no connection to mental conditions and cannot be used to determine if someone has a mental condition. As a result, Neravetla's argument against application of RCW 18.130.170 to his case has no merit and does not warrant a third level of appellate review.

The Medical Quality Assurance Commission is the state agency that regulates the practice of physicians, chapter 18.71 RCW, in Washington. The Commission's mandate is to protect the public's health and safety and to promote the welfare of the state by regulating the competency and quality of physicians. RCW 18.71.002, .003. Once

licensed to practice in Washington, even on a limited license, the Commission retains jurisdiction and authority under the Uniform Disciplinary Act (UDA), chapter 18.130 RCW, to discipline the licensee for either unprofessional conduct under RCW 18.130.180, or, as in this case, to sanction the licensee who is suffering from "any mental or physical condition" that impairs the capacity of the license holder to practice with reasonable skill and safety under RCW 18.130.170(1). RCW 18.71.002, 18.71.095, 18.71.230.

Therefore, upon receipt and investigation of a complaint, the Commission must decide which of the following actions to take:

(1) charge the case under RCW 18.130.170 if the licensee lacks the capacity to practice due to any mental or physical condition;

(2) charge the licensee with unprofessional conduct under one of the 25 enumerated types of unprofessional conduct under RCW 18.130.180; or

(3) close the case without charging.[3]

If the Commission finds, after a hearing, that the licensee is in violation of either the unprofessional conduct or impaired capacity provisions, it must issue an appropriate sanction under RCW 18.130.160.

[3] The Commission could also enter into an information form of discipline with the licensee, upon his/her agreement.

Those sanctions are designed to first protect the public health and safety, and then, if possible, to rehabilitate the licensee. WAC 246-16-800(2)(a).

The Commission explicitly charged Neravetla under RCW 18.130.170(1). AR 5. Despite Neravetla's arguments to the contrary, RCW 18.130.180 has never been at issue in this case. The fact that Neravetla's conduct, both at the hospital and in the evaluation process, contributed to the determination that he had a mental condition does not somehow transform the proceeding from a .170 action to a .180 action for unprofessional conduct. And, the record of the hearing here showed that experts on both sides evaluated and "diagnosed" disruptive physician behavior by looking at the physician's behavior. That use of relevant evidence to determine a mental condition does not show "conflation" or misapplication of section .170, as claimed by Neravetla.

To make this "conflation" argument, Neravetla contends that charging him under RCW 18.130.170(1) required a showing of a diagnosis of a mental disorder and that the absence of that diagnosis supports his argument. Petition for Review at 10. This argument does not warrant this Court's further review because it patently misconstrues the statute, and relies on a misguided, unduly narrow, and unreasonable interpretation of RCW 18.130.170(1). The plain language of that statute demonstrates legislative intent to provide the Commission authority to exercise its

expertise and remove from practice those physicians who lack the capacity to safely practice, regardless how that mental condition manifests itself or which criteria were used to determine such a condition exists. That is exactly what the Commission did here.

### B. The Court Of Appeals And The Commission Properly Determined That The Term "Mental Condition" Did Not Require A Diagnosis Of A Mental Illness Or Disorder

Neravetla asserts that the Court of Appeals decision constitutes an improper expansion of the definition of "mental condition" as used in .170. Petitioner's Brief at 9. That argument does not warrant review because the statute is clear on its face and was properly interpreted by the Commission. The Court of Appeals also reasonably concluded that RCW 18.130.170 does not require a diagnosis of a mental illness under the Diagnostic and Statistical Manual (DSM) before a physician's mental condition can be found to affect the physician's ability to practice safely.

Neravetla claims the statute requires a finding of some diagnosable mental disorder because RCW 18.130.170(2) allows the disciplining authority to require a license holder to submit to an evaluation. *See* Petitioner's Brief at 10. This point does not support Neravetla's strained interpretation. Under RCW 18.130.170(2) the disciplining authority may require a licensee to get an evaluation when there is a legitimate question about a health care provider's fitness to practice. The statute does not in

any way compel a conclusion that a "mental condition" must be narrowly limited to a mental illness in the DSM. In this case, there was no need to send Neravetla for that type of evaluation because one had already been conducted by Pine Grove. The Commission possessed that evaluation when it charged Neravetla under RCW 18.130.170(1).

Neravetla's further assertions that the evaluations he sought from his own experts should suffice as meeting the intent of RCW 18.130.170(2) and negating the Commission's action under RCW 18.130.170(1) are meritless, and do not raise an issue that warrants review by this Court. Petition for Review at 11. He was not asked or ordered to undergo those evaluations, nor are such evaluators professionals "designated by the disciplining authority" as set forth in RCW 18.130.170(2)(a). Neravetla paid these professionals to assess him and provide testimony. Significantly, those experts did not take the critical step of speaking to VMMC or WPHP and show nothing to support Neravetla's argument that a "mental illness" diagnosis under the DSM is needed. To a great extent, their evaluations were merely a strawman set up by Neravetla to avoid the demonstrated evidence of disruptive physician behavior found by the Commission and supported by the evidence.

Neravetla also argues for review by claiming that doctors who are quietly uncooperative or who speak out against problematic conditions are susceptible to being sanctioned under this statute. Petition for Review at 13. This argument is meritless. First, Neravetla's parade of imagined horribles has no basis in facts—there is nothing to suggest that any such charging has or would occur. Before this type of imagined concern warrants review as an issue of substantial public interest, Neravetla needs to show something more than speculation about facts that are entirely different than the case at hand. *Cf. In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001) (Attorney disciplinary case found to present an issue of substantial public interest on the issue of whether a prosecuting attorney may offer an inducement to a defense witness to not testify at a criminal proceeding); *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005) (Court found case to be a "prime example of an issue of substantial public interest," where the Court of Appeals held that a memo issued by the prosecuting attorney regarding DOSA sentencing was an ex parte communication, and could affect "every sentencing proceeding in Pierce County after November 26, 2001.").

Not only do Neravetla's arguments lack merit, he has consistently ignored, at every level of review, that RCW 18.130.170(1) has two criteria

that must be met. The Commission must find that the practitioner has a mental or physical condition, and that condition must render them unable to practice with reasonable skill and safety. There are likely many practitioners with various mental or physical conditions that do not impair their ability to practice. They would not be chargeable under this statute. Rather, doctors who are unable to safely practice for other reasons (without any evidence of a mental or physical condition) would not be charged under RCW 18.130.170, but would likely be charged under RCW 18.130.180(4).[4]

In short, the Court of Appeals correctly determined, as did the Commission, that "[t]he plain language provides that any mental condition that causes the license holder to be unable to practice safely would satisfy the statute. RCW 18.130.170(1). The goal of the statute is to protect consumers and insure that the license holder practices with reasonable skill and safety." Opinion at 8. Based on the facts and these rulings, the Commission was very careful not to overreach its authority.

Moreover, the Commission also took care not to sanction Neravetla beyond the minimum necessary to protect the public. At the

[4] RCW 18.130.180(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed.

present time, Neravetla has a mental condition and no proof of any treatment for that condition. When considering public safety, it would be reckless to allow him to practice without some evidence of treatment (or a cure) for his condition, or a new evaluation indicating it was no longer warranted.

### C. The Term "Mental Condition" In RCW 18.130.170 Is Not Unconstitutionally Vague When The Statute Is Read As A Whole

Neravetla contends that RCW 18.130.170 is unconstitutionally vague because it uses the term "condition" and does not require a diagnosable mental illness. Petitioner's Brief at 16. His contention fails. "A statute is void for vagueness only if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Haley v. Med. Disciplinary Board,* 117 Wn.2d. 720, 739, 818 P.2d 1062 (1991). Statutes are presumed to be constitutional. *Id.* In a vagueness challenge, courts do not analyze portions of a statute in isolation from the context in which they appear. If a statute can be interpreted so as to have the required degree of specificity, then it can withstand a vagueness challenge despite its use of a term which, when considered in isolation, has no determinate meaning. *Haley*, 117 Wn.2d at 741. Given this well-established legal precedent, Neravetla's constitutional argument does not warrant review.

This case is akin to *Haley*, where the term "moral turpitude" in RCW 18.130.180(1) was challenged as unconstitutionally vague. The statute states in pertinent part that unprofessional conduct is violated by "(1) [t]he commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not." RCW 18.130.180(1). The *Haley* Court refused to look at whether the term is vague if read in isolation. Instead, it rejected the vagueness challenge on the basis that the term is to be understood by its context. The term "moral turpitude" derived concrete meaning from the context of the purposes of professional discipline as demonstrated in the statutory framework, in a specific application, and with the shared knowledge and understanding of the medical profession:

> When RCW 18.130.180(1) is construed in relation to the purposes of professional discipline, considered in the context of a specific application, and supplemented by the shared knowledge and understanding of medical practitioners, its content is sufficiently clear as to put persons of common understanding on notice that certain conduct is prohibited. Physicians no less than teachers, as in *Morrison*, veterinarians, as in *Hand*, or police officers, as in *Cranston*, will be able to determine what kind of conduct indicates unfitness to practice their profession.

*Haley*, 117 Wn.2d at 743.

Another analogous disciplinary action by the Bar Association further reinforces this analysis. *See In re Ryan*, 97 Wn.2d 284, 644 P.2d 675 (1982). Mr. Ryan was put on inactive status after he engaged in a series of delusional and paranoid behaviors concerning his legal practice, including some court filings which were contrary to his client's interest. He was transferred to inactive status under a disciplinary rule requiring restriction from practice due to "insanity, mental illness, senility, excessive use of alcohol or drugs, or other mental incapacity. DRA 4.1(b)." *In re Ryan*, 97 Wn.2d at 2808. Like Neravetla, Ryan was not diagnosed with a mental illness. Rather, the disciplinary officer relied on the testimony of Ryan's colleagues and friends that he was suffering from a "mental problem" to find that he was incapable of practicing law due to having an "unstable mental state." *Id.* at 287. He also found that Ryan's own testimony supported the allegations as he still had no insight into the unstable nature of his actions. *Id.* at 287-88.

On appeal, Ryan challenged the terms "mental illness" and "other mental incapacity" as unconstitutionally vague. This Court disagreed, based on the rest of the statutory language modifying those terms:

> Ryan overlooks, however, the qualifying condition of the rule; that the mental condition must cause the attorney to be unable to conduct his/her law practice adequately. DRA 4.1(b). Thus, the Bar must establish that an attorney is unable to conduct the practice of law adequately because

> of insanity, mental illness, senility, excessive use of alcohol or drugs, or other mental incapacity. DRA 4.1(b). Given the inherently uncertain nature of mental illness and the broad ranges of the practice of law, we fail to perceive how a more definite standard could be articulated, and Ryan has suggested none.

*Ryan*, 97 Wn.2d at 287-88.

RCW 18.130.170(1) similarly does not suffer from vagueness because the remainder of the language in the statute clarifies the type of mental condition intended: that the mental condition must cause the physician to be unable to practice with reasonable skill and safety. And, like the attorney disciplinary rule, there is no more narrow way to define "mental condition" and still capture those types of impairment which may render a physician unsafe to practice.

Thus, *Haley* and *Ryan* together show how the term "any mental condition" is not vague as used in the statute and context of professional discipline. As in *Haley* and *Ryan*, this Court should reject Neravetla's argument that he has demonstrated the Commission's application of RCW 18.130.170(1) to be unconstitutionally vague beyond a reasonable doubt. He cannot meet his burden for relief under RCW 34.05.570(3)(a), and there is no need for this issue to be reviewed by this Court.

## V. CONCLUSION

The Court of Appeals properly applied RCW 18.130.170(1). Nothing in the Court of Appeals decision raises a significant constitutional question or involves an issue of substantial public interest. Accordingly, discretionary review should be denied.

RESPECTFULLY SUBMITTED this 12th day of June, 2017.

ROBERT W. FERGUSON
Attorney General

TRACY L. BAHM, WSBA No. 22950
Assistant Attorney General
1125 Washington Street SE
PO Box 40100
Olympia WA 98504-0100
(360) 664-9006

NO. 94545-4

**SUPREME COURT OF THE STATE OF WASHINGTON**

| | |
|---|---|
| SHANTANU NERAVETLA, M.D.,<br><br>Petitioner,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF HEALTH, MEDICAL QUALITY ASSURANCE COMMISSION,<br><br>Respondent. | DECLARATION OF SERVICE |

I, Darla Aumiller, make the following declaration:

1. I am over the age of 18, a resident of Lewis County, and not a party to the above action.

2. On June 12, 2017, I caused to be served a true and correct copy of *Answer to Petition for Review by the Washington Supreme Court* and this *Declaration of Service* by placing same in the U.S. mail via state Consolidated Mail Service and via e-mail to:

Shawna L. Parks
Law Office of Shawna L. Parks
4470 W Sunset Blvd Ste 107-347
Los Angeles CA 90027
sparks@parks-law-office.com

Michael C. Subit
Frank Freed Subit & Thomas LLP
705 Second Avenue, Ste 1200
Seattle WA 98104
msubit@frankfreed.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of June, 2017, at Olympia, Washington.

Darla Aumiller

DARLA AUMILLER
Legal Assistant