

No. 63318-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CHRISTOPHER A. WODJA DMD

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, DENTAL
QUALITY ASSURANCE COMMISSION

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

In 2007, a panel of Department of Health, Dental Quality Assurance Commission (DQAC) acted to summarily suspend the dental license of Dr. Wodja based upon information related to Dr. Wodja's treatment of one Patient. In determining to suspend Dr. Wodja's license, the Commission considered the Department of Health's inflammatory characterization of Dr. Wodja's prior criminal conviction. Dr. Wodja ultimately requested a full hearing to protect his dental license and, in addition, asked for a new panel of Commission members to ensure his case was decided upon the facts, rather than being subjected to prejudice because of the Commission's knowledge of his prior conviction. Dr. Wodja was deprived of this opportunity and the Commission sitting in judgment of him ultimately "convicted" him, suspending his professional license.

Compounding this error, Dr. Wodja was unable to present any mitigating factors surrounding his conviction to the Commission and, instead, the Commission decided the case with only their prior knowledge of the Department's "version" of the facts pertaining to the conviction.

The Commission's prejudice inheres in their decision where it imposed sanctions related directly to the prior conviction, not to the allegations of the current case.

The biased Commission panel ultimately rendered Findings that are simply contrary to the evidence and fail to reflect undisputed mitigating circumstances.

Sadly, affording Dr. Wodja an opportunity to be "tried" before an unbiased panel and to present mitigating evidence would pose no burden upon the Commission. Regrettably, the decision was made to merely disregard Dr. Wodja's licensure rights in the name of expediency. Such cannot be upheld and reversal is appropriate.

B. ASSIGNMENTS OF ERROR

Dr. Wodja assigns error to the following factual findings: 1.2, 1.5, 1.6, 1.7, 1.8, 1.10, 1.12, 1.13, 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, 1.27, 1.28, 1.29, 1.30, 1.32, 1.33, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.40, 1.41, 1.42, 1.43, 1.44, 1.45, 1.46, 1.47, 1.48, 1.49, 1.50, 1.51, 1.52 and 1.53. Dr. Wodja also assigns error to Conclusions of Law 2.5 through 2.13.

C. ISSUES PRESENTED FOR REVIEW

1. Should a disciplinary panel who has knowledge of a licensee's prior, criminal conviction be permitted to sit in judgment of that licensee when the criminal conviction has been ruled inadmissible?
2. Should a licensee be permitted to present evidence explaining the circumstances surrounding prior misconduct prior to the Commission's use of misconduct as ground for harsh sanction?
3. Should the Commission be permitted to render factual findings and legal conclusions which are not based upon evidence in the record, fail to reflect mitigating factors and illustrate general confusion of the issues?
4. Should sanctions be upheld which fail to reflect the evidence and mitigating factors produced at hearing?

D. STATEMENT OF THE CASE

The allegations in this matter arise out of Dr. Wodja's dental treatment of Patient A¹ on October 16- 17, 2007. Patient A's roommates, Stephanie Behrens and Janeel Adams were present for the majority of Dr. Wodja's treatment.

¹ To protect the confidentiality of the complainant, the Patient is referred to by letter.

1. The Parties

Dr. Christopher Wodja

Dr. Wodja, a double degreed dental practitioner, received his license to practice dentistry in Washington in August 2002.² In August 2006, he purchased North City Dental and began the process of building a practice. At North City Dental, Dr. Wodja provided general dentistry services including periodontal procedures and oral surgery.³

Patient A

At the time of her treatment by Dr. Wodja in 2007, Patient A was a recovering drug addict residing at a clean and sober house, the Oxford House.⁴ Her dental health was severely compromised due to her history of abusing drugs; primarily methamphetamines.⁵ Shortly after her treatment with Dr. Wodja, Oxford House discharged Patient A because she possessed prescription medications.⁶

² Report of Proceedings (RP) 396, ll 14-20. For ease of reference, the Report of Proceedings at pages 1322 through 1861 of the Administrative Record (AR) is referenced by transcript page number.

³ RP 303, ll 18-23

⁴ RP 120, ll 3-11

⁵ RP 119, ll 19-25

⁶ RP 66, ll 2-6

2. The Fact Witnesses

Stephanie Behrens

In 2007, Stephanie, a recovering drug addict, resided at Oxford House with Patient A.⁷ In 2006 Stephanie received a misdemeanor conviction for lying to police.⁸

Janeel Adams

In 2007, Janeel, a recovering drug addict, resided at Oxford House with Patient A.⁹ In 2005, Janeel was arrested for shoplifting and received a deferred prosecution.¹⁰

Gaylene Davis

Gaylene is the sister of Janeel Adams.¹¹ Gaylene works part time as an accountant in a dental office.¹²

3. The Experts

Dr. Bart Johnson (Department of Health Expert)

Dr. Johnson is a general practitioner who, until December 2007 (one month prior to his testimony in the instant case) primarily practiced in

⁷ RP 50, II 3-15

⁸ RP 50, II 20-25

⁹ RP 78, II 1-15

¹⁰ RP 78, II 21-25

¹¹ RP 113, II 19-23

¹² RP 113, II 10-13

the hospital setting.¹³ Dr. Johnson confirmed that he would defer to the findings of a more experienced practitioner regarding drug dosages.¹⁴ He works as an expert primarily on behalf of the Department of Health.¹⁵

Dr. Deeann Isackson (expert on behalf of Dr. Wodja)

Dr. Isackson is a dual degreed, medical and dental, practitioner.¹⁶ She is board certified in both medicine and dentistry.¹⁷ She has twelve years experience in office based anesthesia services.¹⁸

Dr. Brian Judd (expert on behalf of Dr. Wodja)

Dr. Judd is a psychologist and sexual deviancy evaluator who performed a sexual deviancy evaluation on Dr. Wodja addressing the allegation of “improper touching” of Patient A.¹⁹ Notably, Dr. Wodja voluntarily undertook the sexual deviancy evaluation prior to hearing and without being forced to do so. As part of his evaluation, Dr. Judd reviewed a polygraph test which established “no deception” by Dr. Wodja when he denied touching Patient A in a sexual manner.²⁰ Dr. Judd testified that Dr.

¹³ RP 232, ll 18-21

¹⁴ RP 233, ll 5-20

¹⁵ RP 246, ll 24-25; RP 246, ll 1-3

¹⁶ RP 251, ll 15-25, RP 252, ll 1-11

¹⁷ RP 252, ll 12-13

¹⁸ RP 252, ll 1-12

¹⁹ RP 414-417

²⁰ RP 420, ll 2-12

Wodja had a “strong pass” to the polygraph test as, typically, polygraph tests are weighted towards a finding of deception.²¹

Dr. Robert Julien²² (expert on behalf of Dr. Wodja)

Dr. Julien is a medical doctor specializing in anesthesia drugs and their impact on the body.²³ He has published three textbooks in the area of pharmacology and all books address the impact of Triazolam on the body.²⁴

4. Chronology of Patient A’s Treatment

During the weekend of October 12, 2007, Patient A entered a walk-in medical clinic for dental treatment complaining of extreme pain resulting from a dental abscess.²⁵ The physician at the walk-in clinic, Dr. Royster, prescribed Hydrocodone and Clindamycin (antibiotics) for the purpose of controlling Patient A’s symptoms.²⁶ Dr. Royster also recommended Patient A follow up with a dentist.²⁷ Patient A began taking the Hydrocodone and thereafter appointed with Dr. Wodja on October 16, 2007.²⁸

²¹ RP 421, ll 13-25

²² The final order contains a clerical error by spelling Dr. Julien’s name with an “a” rather than an “e”.

²³ RP 431, ll 2-24

²⁴ RP 432, ll 1-12; RP 432, ll 24-25, RP 433, ll 1-5

²⁵ RP 18, ll 8-14)

²⁶ RP 118 ll 15-23

²⁷ *Id.*

²⁸ RP 119, ll 6-10

On October 16, Dr. Wodja met with Patient A and recommended that she continue on the prescribed antibiotics and scheduled her for further treatment on October 17.²⁹ At the Patient's request, Dr. Wodja prescribed Acetaminophen 3 for the purpose of "stepping down" from the Hydrocodone³⁰ On that date, the Patient filled out a patient history form and falsely represented that she did not have a drug addiction/abuse history.³¹

On October 17, Patient A contacted Dr. Wodja's office and cancelled her scheduled appointment; however was insistent on being seen that evening (after business hours).³² Dr. Wodja advised his staff to schedule the patient for a daytime appointment; however, the Patient pleaded to be seen that evening.³³ Dr. Wodja prescribed .25mg of Triazolam (a conscious sedation agent which can be used to relax a dental patient) for Patient A and directed her to take two tablets in advance of her appointment.³⁴ Dr. Wodja told Patient A to have a friend drive her to and from the appointment.³⁵

²⁹ RP 121, ll 10-23

³⁰ RP 320, ll 10-24

³¹ RP 129, ll 10-25, RP 130 ll 1-8

³² RP 121, ll 10-25

³³ RP 323, ll 5-12

³⁴ Dr. Wodja testified that he prescribed .125 mg dosage of Triazolam; however, due to a cell phone connection and pharmacist error/confusion, .25 mg is reflected in the prescription record. RP 326, ll 3-5

³⁵ RP 330, ll 10-24

Patient A and her roommate, Janeel, arrived at the parking lot of Dr. Wodja's dental office at approximately 7pm.³⁶ Dr. Wodja arrived approximately fifteen minutes later.³⁷ Janeel came in the office, as chaperone for the Patient.³⁸ She then told Dr. Wodja that she needed to leave to pick up a friend.³⁹ Dr. Wodja told her that she needed to stay as chaperone and, accordingly, advised her to return as soon as possible.⁴⁰

Patient A entered the office and Dr. Wodja provided her with a gown to put on and a blanket to use for warmth. Dr. Wodja did not directly watch Patient A putting on the gown.⁴¹

Based upon Dr. Wodja's clinical judgment, Patient A was not sufficiently sedated to proceed with treatment and, accordingly, he directed her to take an additional dosage of Triazolam.⁴² Dr. Wodja then performed an incision and drain procedure to address the Patient's abscess.⁴³

At the request of Dr. Wodja, Patient A's roommates (Janeel and Stephanie) were present in the dental office for the majority of treatment.⁴⁴

At the close of treatment, at 8:30pm, Dr. Wodja, Janeel and Stephanie

³⁶ RP 81, ll 12-16

³⁷ *Id.*

³⁸ RP 331, ll 1-18

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ RP 135, ll 24; RP 136, ll 1

⁴² AR 1213-1264; AR 1230

⁴³ *Id.*

⁴⁴ RP 82, ll 8-25; AR 1213-1264

noted that Patient A was not wearing pants.⁴⁵ Dr. Wodja told Patient A to immediately put her pants back on. The Patient was discharged at approximately 8:30pm.⁴⁶ Dr. Wodja provided Janeel with post operative instructions and released Patient A to the care of her roommates.⁴⁷

Gaylene, Janeel's sister, testified that she spoke with Janeel at 8:30pm on October 17.⁴⁸ At that time, Janeel called Gaylene because she noted that Patient A was not wearing pants and she wanted Gaylene's advice on what to do.⁴⁹ Gaylene advised Janeel to stay with Patient A.⁵⁰ Gaylene and Janeel spoke again at 9:15pm and, at that time, Gaylene advised Janeel to call the police.⁵¹

At approximately 9:15pm, Janeel and Stephanie called the police alleging Dr. Wodja had sexually assaulted Patient A.⁵² Patient A was transported to Harborview for evaluation.⁵³ The Washington State Toxicology report performed indicated "no drugs (*i.e.*, no Triazolam) detected" in Patient A's blood.⁵⁴ Shortly after Harborview released Patient

⁴⁵ RP 348, ll 9-25; RP 348, ll 1-25; RP 349, ll 1-4

⁴⁶ AR 1213-1264

⁴⁷ RP 353, ll 5-7

⁴⁸ RP 113, ll 25, RP 114, ll 1

⁴⁹ RP 113, ll 2-9

⁵⁰ *Id.*

⁵¹ RP 115, ll 14-19

⁵² RP 64, ll 2-19; AR 1265-1288; RP 171, ll 15-20

⁵³ AR 1265-1288

⁵⁴ AR 1289

A, Oxford House evicted her because she had relapsed on prescription medications.⁵⁵

On October 26, 2007, Department of Health investigator Gary Reed appeared at Dr. Wodja's office for purposes of observing a King County Sheriff's Office investigation regarding the claimed assault on Patient A.⁵⁶ Gary removed Patient A's chart, with Dr. Wodja's full cooperation, from the office on that date.⁵⁷ Gary did not take any notes on October 26; instead, he wrote up his report three days subsequent based solely upon memory.⁵⁸

On October 31, 2007, the Department of Health sent Dr. Wodja a Letter of Cooperation (*i.e.*, written notification of its investigation) requesting documentation and a written response to the allegations by the King County Sheriff's Office.⁵⁹ On November 27, 2007, counsel for Dr. Wodja contacted Gary by telephone and indicated that Dr. Wodja could not respond to the request for a written statement due to the pending

⁵⁵ RP 99, ll 15-21

⁵⁶ RP 160, ll 10-15

⁵⁷ RP 174, ll 17-23

⁵⁸ RP 170, ll 12-20

⁵⁹ RP 167, ll 7-17

criminal matter.⁶⁰ Ultimately, no criminal charges were brought against Dr. Wodja.⁶¹

On November 29, 2007, DQAC issued an Ex Parte Order summarily suspending the dental license of Dr. Wodja.⁶² The Commission found, without a hearing or opportunity for Dr. Wodja to be heard, that Dr. Wodja treated Patient A below the standard of care.⁶³

Dr. Wodja requested a hearing on the allegations and the Department of Health scheduled the hearing for January 16-18, 2008. On February 25, 2008, the Commission issued its Findings of Fact, Conclusions of Law and Final Order suspending Dr. Wodja's dental license.⁶⁴ Dr. Wodja appealed the ruling to the King County Superior Court and, on April 2, 2009, the court affirmed the ruling of the Dental Quality Assurance Commission.⁶⁵

E. ARGUMENT

1. Standard for Review

Licensing and disciplinary procedures for the health professions are established by the Uniform Disciplinary Act (UDA). See, RCW

⁶⁰ RP 169, II 1-7

⁶¹ RP 170, II 21-25, RP 171, II 1

⁶² AR 1-139

⁶³ *Id.*

⁶⁴ AR 1182-1207

18.130.010. The UDA specifies that all adjudicative proceedings are governed by the Administrative Procedure Act (APA). See RCW 18.130.100. The APA delineates judicial review of administrative agency actions. See RCW 34.05.570(3)(a)-(i). For purposes of the issues presented in this case, this Court may grant relief from the Commission's order only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

...(d) The agency has erroneously interpreted or applied the law;

...(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or]

...(i) The order is arbitrary or capricious.

RCW 34.05.570(3). Review is based on the administrative record before the Commission, not on the superior court record. See City of Redmond v. Cent. Puget Sound Growth Management Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

⁶⁵ Clerk's Papers (CP 420-421)

2. The Presiding Officer cast a taint over the entire proceeding by failing to disqualify the hearing panel which held substantial prejudgment bias against Dr. Wodja.

On November 26, 2007, DQAC issued a Statement of Charges alleging unprofessional conduct by Dr. Wodja.⁶⁶ On November 29, 2007, DQAC issued a summary suspension of Dr. Wodja's license restricting him from practice.⁶⁷ The panel members issuing the suspension were: Dr. Russell Timms, Dr. Robert Achterberg, Dr. Abdul Alkesweeny and Dr. Fred Quarnstrom.⁶⁸ In issuing the summary suspension, the DQAC panel members considering the matter, reviewed conviction data relating to a 1999 criminal matter involving Dr. Wodja.⁶⁹ Specifically, the Commission reviewed and approved the Statement of Charges against Dr. Wodja which read:

Respondent [Dr. Wodja] has a history of assaultive behavior toward young women. On August 19, 1999, he pleaded guilty to assault and battery (misdemeanor) of a sixteen-year-old female in Boston, Suffolk County, Massachusetts. He served time in jail for that criminal offense and was placed on probation. The probationary requirements were transferred to Washington when he changed his residence in 2000.⁷⁰

⁶⁶ AR 1-139

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ AR 1-139

On January 7, 2008, the Presiding Officer issued an Order, responsive to Dr. Wodja's Motion to Strike Conviction information, striking criminal conviction information from consideration at hearing.⁷¹ The Presiding Officer ruled the conviction information could be used in considering appropriate sanctions.⁷²

In accordance with the Presiding Officer's ruling and to avoid a tainted hearing panel, Dr. Wodja moved to exclude any Commission members who had considered the summary suspension and, by extension, the prior criminal conviction.⁷³ Dr. Wodja requested, as per the authority provided in RCW 18.130.060, appointment of a pro tem panel to consider the charges against him. The Presiding Officer denied the Motion.⁷⁴ Accordingly, the Commission members considering the evidence against Dr. Wodja were aware of Dr. Wodja's prior criminal conviction and the inflammatory statements characterizing the conviction contained in the Statement of Charges.⁷⁵

Dr. Wodja's right to hearing before an unbiased panel implicates his due process rights and, as such, the Presiding Officer's decision to deny him an impartial tribunal should be reviewed *de novo*. Matthews v.

⁷¹ AR 679-683

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893 (1976) (right to hearing before an unbiased tribunal implicate Due Process); *cf.* Faghiih v. Department of Health, 148 Wn.App. 836, 841, 202 P.2d 962 (2009)(denial of motion to disqualify on “appearance of fairness” grounds reviewed on abuse of discretion standard). Claims of constitutional violations or erroneous conclusions of law by the Commission should be considered *de novo* by the reviewing court and, in addition, this court may substitute its judgment for that of the agency. RCW 34.05.570(3)(a),(d).

- a. **A balancing of interests between Dr. Wodja’s critical interest in his professional livelihood and the Commission’s interest in protecting the public mandated hearing before an unbiased tribunal.**

“Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” Nguyen v. Department of Health, Medical Quality Assurance Commission, 144 Wn.2d 516, 523, 29 P.3d 689 (2001). Here, the Presiding Officer’s determination to deny Dr. Wodja’s request for hearing before an unbiased panel is erroneous because, on balance, Dr. Wodja’s critical property interest in his license could have been

⁷⁵ *Id.*

afforded a hearing before an unbiased tribunal with very minimal burden upon the Commission.

Dentists have a constitutionally protected property interest in both their professional license and their reputation. Nguyen, supra at 522 (holding due process requires the prosecuting party to prove all allegations against physicians by a standard of “clear, cogent and convincing” evidence); *see also*, Ongom v. State, Dept. of Health, Office of Professional Standards, 159 Wn.2d 132, 142, 148 P.3d 1029 (2006)(applying the Nguyen rule to hold that disciplinary proceedings against all health care professionals require the prosecutor establish all allegations by “clear, cogent and convincing” evidence).

The precise procedural mechanisms which will satisfy due process are “flexible and calls for such procedural protections as the particular situation demands.” Matthews, supra at 334. However, as a cardinal rule, due process protections increase depending upon what is at stake in a legal proceeding. The more vital the interest, “the less tolerant we are as a civilized society that it be erroneously deprived.” Nguyen, supra at 524. The spectrum of interests spans from civil suits for damages between private parties at the low end, to criminal proceedings at the high end. Id.

Professional disciplinary proceedings are quasi-criminal in nature, putting them near the highest point of this constitutional spectrum. Id. at 525. When a medical professional's reputation and livelihood is on the line due process concerns are almost at their apex. Therefore, tolerance for procedural irregularity must be correspondingly low. Id.

Critical to the Due Process inquiry is whether the decision to deprive an individual of a property right is rendered by an impartial decision maker, as aptly stated by the United States Supreme Court:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 (1980).

Marshall went on to explain that, "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Id. Going further, the Washington Supreme Court has stated, "[n]ot only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the possibility of unfairness." Matter of Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983).

Note that the extreme deference afforded to an administrative body provides even greater reason to ensure that “the inexorable safeguard” of a “fair and open hearing is maintained in its integrity.” Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U.S. 292, 57 S.Ct. 724 (1937)(“there can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay when that minimal requirement [compliance with Due Process] has been neglected or ignored.”)

In Johnston, the Washington Supreme Court held that a “general predilection toward a given result which does not prevent the agency members from deciding the particular case fairly” is not a violation of due process. Id. at 475. There, the Medical Board exercised its authority to summarily suspend a licensee and then, thereafter, the same individuals heard evidence against him, ultimately determining to revoke his medical license. Id. at 473. During the suspension proceedings, one board member openly noted that Dr. Johnston’s care was “so unheard of in [his] opinion” and presented a “grave danger” to the public. Id. at 475. Dr. Johnston contended that this statement evidenced a prejudging of the facts and, therefore, violated his Due Process rights. Id. The Court rejected this contention holding that the member’s statements merely provided an

“elaboration on why” Dr. Johnston’s license had to be suspended and, as such, were in accord with the “public protection” duties the Board owed to the public at large. Id. at 477.

The facts of the current case are not controlled by the Johnston analysis. Here, the Commission had specific knowledge of inadmissible, inflammatory information regarding Dr. Wodja; this scenario was not at issue in Johnston. Furthermore, in considering the sanctions imposed on Dr. Wodja, it is apparent that the Commission did consider the inflammatory, editorialized version of Dr. Wodja’s prior conviction (“Dr. Wodja has a history of assaultive behavior towards women”) and thus was actually biased against Dr. Wodja before hearing any other evidence. The Commission found that Dr. Wodja did not sexually abuse Patient A yet, in ⁷⁶direct contrast to this determination, the Commission inexplicably ordered Dr. Wodja to engage in “sexual misconduct” counseling as a condition of returning to practice. As the Commission was, supposedly, only aware of an assault conviction at the time of imposing sanction (there was no statement of whether the assault was of sexual nature in evidence in this proceeding), the Commission necessarily was colored by their prior knowledge of the Department’s *ex parte*, inflammatory characterization of

⁷⁶ AR 1203

the conviction; information the Commission has supposedly entirely disregarded.⁷⁷

In Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 589 P.2d 198 (1979) the New Mexico Supreme Court held that the Board violated Reid's (an optometrist) Due Process rights by failing to disqualify one of its members prior to hearing. There, one of the Board members testified that, prior to hearing, he had stated his belief that Reid would be soon "losing his license". Id. at 415. The Board member testified that he "could render a fair and impartial decision". Id. The Supreme Court reversed for a new hearing holding that:

The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. at 416 *citing* Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1974).

The Court specifically rejected the contention that the member's statement that he could "be fair" was sufficient and held "the Board's failure to disqualify Dr. Zimmerman [the Board member] clearly violated Reid's constitutional right to procedural due process." Id.

⁷⁷ AR 1184

Analogous to, and more compelling than, Reid, the Commission's Findings, considered in tandem with the sanctions imposed, establish the Commission's clear and actual bias towards Dr. Wodja through their prior consideration of extremely prejudicial information.

In Vayiar v. Vic Tanny International, 114 Mich.App. 388, 319 N.W.2d 338 (1982), the court held that an analysis of Due Process in the administrative arena requires consideration of the potential cost to the State in providing a tribunal free from potential bias. There, an employer appealed a decision of the workers' compensation board, claiming that, as the majority of the panel consisted of "employer" interested parties, his Due Process rights were violated. Id. at 391. The court noted the failure to show "actual" bias, however, stated:

Where an alternative procedure posing a much smaller risk of prejudice by a decision-maker will impose no greater administrative burden on the state, it should not be necessary to prove that erroneous deprivations are likely under the present procedure, but only that the present procedure poses a substantial risk of bias in the decision-maker.

Id. at 393.

Vayiar is demonstrative of the fundamental unfairness inhering in the Presiding Officer's ruling. Akin to Vayiar, the Commission consists of fourteen members and, as such, providing a panel of individuals who had not considered the prior, inflammatory, inadmissible conviction, would

have imposed no burden upon the Commission. RCW 18.32.0351. Moreover, the rules governing the process specifically permit for appointment of a *pro tem* panel. RCW 18.130.060. At the time Dr. Wodja moved to disqualify the hearing panel he was suspended from practice and, accordingly, there was no potential danger to the public in a brief delay of hearing.

b. The “appearance of fairness” doctrine required disqualification of panel members who had considered Dr. Wodja’s prior conviction.

The appearance of fairness doctrine provides that members of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. The doctrine applies only “as far as practical” to ensure fair and objective decision making by administrative bodies. The practicality of the appearance of fairness will largely be determined by the procedures being applied.

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 313, 197 P.3d 1153 (2008)(Emphasis added.) Here, the procedures applied at hearing did not satisfy the appearance of fairness doctrine where the Presiding Officer could have, but chose not to, appoint a Commission panel who had not

considered inadmissible evidence to sit in judgment of Dr. Wodja at the hearing. RCW 18.130.060.

The proceeding under the UDA is exclusively governed by the APA which grants individuals facing license deprivations the opportunity to disqualify fact-finders for bias. RCW 34.05.425. The administrative rules promulgated for purposes of hearings under the UDA reiterate the fundamental right of an individual to request hearing before an unbiased tribunal. WAC 246-11-230. The APA and the rules promulgated there under are underpinned with the premise that, prior to a license deprivation, a licensee is entitled to a hearing in accordance with due process principles. *See, Nguyen supra.*

The Presiding Officer's decision to deny the motion for disqualification on "appearance of fairness" grounds is reviewed on an abuse of discretion standard. *Faghih, supra.* This standard turns on a determination of whether "discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *See, Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990) (trial court abused its discretion in denying motion for continuance); *see also, Saldivar v. Momah*, 145 Wn.App. 365, 394, 186 P.3d 1117 (2008)(reversing trial court's evidentiary rulings, finding the

rulings interfered with the plaintiff's ability to fully present her case, for abuse of discretion)

Here, the basic right to a hearing before an unbiased tribunal posed no burden upon the Commission and, in contrast, the implications of hearing by a biased tribunal, as indicated by the Commission's order, were extremely harsh for Dr. Wodja. On balance, the Presiding Officer's discretion was exercised on untenable grounds requiring reversal.

The appearance of fairness doctrine is as applicable to any administrative decision-maker and administrative proceeding as it is to a judicial officer or judicial proceeding. Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Washington St. Human Rights Commission, 87 Wn. 2d 802, 807, 557 P.2d 307 (1977). The appearance of fairness doctrine provides, "our system of jurisprudence...demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system." Id. at 808. That is, "justice must satisfy the appearance of justice." Id. Therefore, "[i]t is apparent that even a mere suspicion of irregularity, or an appearance of bias or prejudice is to be avoided by the judiciary in the discharge of its duties." Id. The Chicago court noted that evidence of

bias need not be “direct or obvious” instead “[a]ny interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. . . .” Id. at 807-808.

In Chicago, the Commission argued there was no evidence of actual harm or bias in the decision-making process. Id. at 810. The Chicago court rejected this contention finding that a “reasonably prudent and disinterested observer” would not conclude that a fair hearing was had regardless of whether prejudice existed and impacted the outcome. Id. at 811.

In Johnston, *supra*⁷⁸, the Supreme Court held the same panel members were permitted to hear both a summary suspension proceeding and the hearing on the statement of charges. The combination of investigatory, prosecutorial, and adjudicative functions in a single agency per se was not a due process violation. There, the physician challenged the procedural fairness of allowing the same body to serve both investigative and adjudicative roles. The challenge was based on the question of inherent fairness under those circumstances, not on an actual event leading to a question of bias and prejudice, as is the case here.

The Johnston court stated: “Under the appearance of fairness doctrine, proceedings before the quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” Id. at 478. After considering and accepting the propriety of the same panelists serving in dual roles, the court concluded, “We must presume the board members acted properly and legally performed their duties *until the contrary is shown.*” Id. at 479. (emphasis added). The Johnston court did not consider a situation where the impartiality of the panelists had been corrupted by consideration of inadmissible evidence. Rather, Johnston stands for the proposition that the procedural construction of adjudicative hearings does not of itself create bias, but the presumption of fairness is not absolute.

This Court most recently considered a challenge to the fairness of the Commission panel in Faghih v. Department of Health, 148 Wn.App. 836, 202 P.3d 962 (2009). There, a licensee challenged the fairness of one of the Commission members based upon her prior, adverse relationship with his counsel. Id. at 843-844. This Court held that the Presiding Officer had not abused his discretion in denying the motion to disqualify because

⁷⁸ Any reliance upon Johnston is suspect because, contrary to the Johnston ruling, the

there was no showing that the particular panel member held any bias toward the licensee. Id. The Court also noted that neither “logic” nor the “record” supported the licensee’s argument. Id. at 844.

Faghih and Johnston are not analogous to the scenario presented here. Unlike Faghih, the record here establishes that the Commission had actual knowledge of inadmissible evidence regarding the licensee they were sitting in judgment of. Moreover, the sanctions imposed by the Commission, requiring sexual misconduct counseling despite the fact that there was no finding of sexual misconduct, necessarily evidences the Commission’s prejudice against Dr. Wodja.

The case of Devous v. Wyoming State Bd. of Medical Examiners, 845 P.2d 408, 418 (Wyo.,1993) is on point with the facts of the current matter. In Devous, one of the panel members considering current charges against the licensee had previously participated in a hearing addressing that licensee’s guilt or innocence on a felony charge. Id. at 418. The court reversed noting that the physician’s statement that he could disregard this knowledge for purposes of the current proceeding did not “serve to eliminate the potential for bias.” Id.

Uniform Disciplinary Act now precludes the use of the same board members during both investigative and adjudicative stages. RCW 18.1030.050(9).

Here, the hearing panel considered Dr. Wodja's prior criminal misdemeanor conviction in determining whether to issue a summary suspension. The Presiding Officer ruled that the conviction was inadmissible at hearing; however, despite this correct ruling, permitted the same panel to sit in ultimate judgment of Dr. Wodja. As described above, the sanctions imposed by the Commission establish that the knowledge of the characterization of the prior conviction necessarily actually biased the Commission. This error contaminated the proceedings and requires reversal for a new hearing before an untainted panel.

- c. The Uniform Disciplinary Act does not contemplate permitting a panel to consider investigative facts, as were improperly considered here.**

The Uniform Disciplinary Act precludes the use of the same panel members during both investigative and adjudicative stages. RCW 18.130.050(9). The purpose underlying this statute is, at least in part, to ensure the hearing panel considers reasonably reliable evidence, rather than investigative facts which have not been subjected to any scrutiny by the Presiding Officer. Here, the panel members considering the summary suspension did not direct the investigation, however, they improperly

considered investigative facts, *i.e.*, Dr. Wodja's criminal conviction, in the course of their deliberation on the summary suspension.

In Clausing v. State, 90 Wn.App. 863, 876, 955 P.2d 394 (1998), a case factually distinguishable from the current case, the Court of Appeals determined that the same panel considering the summary suspension could also sit as a hearing panel. However, in Clausing, unlike here, there was no evidence the panel considering the summary suspension considered evidence found to be inadmissible at hearing. *See Clausing supra*.

Notably, the Clausing court considered and distinguished State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 456 P.2d 322 (1969), a case factually analogous to the current scenario. In Beam, a city employee was investigated, charged and tried before the same individuals. In reversing the employee's termination, the court reasoned that the hearing violated the appearance of fairness doctrine. *Id.* at 315-316. The Clausing court noted that, in Beam, unlike the case before it, the fact-finders "overlapped" in function and had prejudgment bias. Clausing, 76 Wn.2d at 876. Akin to Beam, the panel members considering the charges against Dr. Wodja impermissibly reviewed investigative facts (later appropriately determined by the Presiding Officer to be inadmissible) and, in addition, had already

indicated bias through summarily suspending Dr. Wodja's professional license.

d. The panel's consideration of Dr. Wodja's prior conviction is akin to permitting a jury to do so and is contrary to Washington law.

"Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." State v. Johnson, 90 Wn.App. 54, 62, 950 P.2d 981 (1998) (jury's consideration of prior conviction for rape required reversal of convictions). Here, the Commission panel members were not only aware of Dr. Wodja's prior conviction when they sat in judgment of him they had been subjected to the Department of Health's editorial comments regarding the conviction (*i.e.*, "Dr. Wodja has a history of assaultive behavior towards young women....") Accordingly, the Panel members were tainted and should have been disqualified.

In Faghih supra this Court determined that panel members are only like jurors to the extent they served as "finders of fact" and were appointed to "evaluate the evidence" against the licensee. Ultimately, this Court determined that panel members were subject to the same disqualification analysis as are judges. Id. at 845. Although not specifically addressed in Faghih, the administrative code explains the difference between commission panel members and judges. Unlike a judge in a bench trial, the

commission panel only evaluates the factual evidence and is assisted by the Presiding Officer in issuing the final order. WAC 246-11-480 (Presiding Officer evaluates the law)

Critically, Commission panel members, contrary to judges, are not presumed to know the law and act in accordance therewith. Moreover, Faghih did not address a circumstance, as is present here, where the panel members serving in their role as “juror”/finder of fact had specific knowledge of inadmissible evidence prior to considering the facts against the licensee. Moreover, Faghih does not undercut the argument that Washington law strongly disfavors permitting finders of fact who have been exposed to inadmissible evidence to render the ultimate decision.

3. The Presiding Officer erroneously denied Dr. Wodja the right of allocution prior to imposition of sanctions.

The Presiding Officer ruled that Dr. Wodja’s prior criminal conviction would not be admissible in the “fact finding” stage of the hearing; however, ruled that the Commission would be permitted to consider the conviction, for sanctions purposes, on the condition that the Department of Health presented the actual order on conviction, into evidence for purposes of “sanctions”.⁷⁹ To mitigate prejudice, Dr. Wodja

⁷⁹ RP 20, ll 9-25; RP 529, ll 14-19; RP 536, ll 1-6

requested a separate hearing on sanctions.⁸⁰ The Presiding Officer denied this request.⁸¹ At the close of the hearing, the Presiding Officer declined to submit Dr. Wodja's sanctioning brief, addressing mitigating factors surrounding the "conviction", to the Commission and, instead, *ex parte*, informed the Commission of the prior conviction.⁸² There is no showing, in the record, that the Department provided the order on conviction to the Presiding Officer and, if the Department did so, it did so without providing a copy of the order to Dr. Wodja. In short, the "Sanctions Only" findings, Findings 1.49-1.53 are not supported by any evidence in the record.

In Board of Dental Examiners v. King, 364 So.2d 319 (Al. 1978), the court held that the admission of prior disciplinary matters absent opportunity for dentist to be heard with regard to mitigating circumstances surrounding those disciplinary matters constituted a violation of dentist's Due Process rights. There, the Board considered the entire, substantial disciplinary file of the dentist during their deliberations but did not admit the file into evidence. Id. at 321. The Board did question the dentist about his prior disciplinary history, however, the questions did not cover the totality of the file. Id. As such, the court ruled that the deliberations thus

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² AR 1182-1207

failed to appear fair and, in any event, violated the dentist's right to fair hearing. Id.

Similarly, in Veksler v. Board of Registration in Dentistry, 429 Mass.650, 711 N.E.2d 562 (1999) the court reasoned that an administrative disciplinary panel violated a dentist's right to revoke a dentist's license, based upon a criminal conviction, prior to allowing the dentist to be heard on mitigating factors.

There, the dentist conceded her guilt of the criminal conduct, however, requested a hearing to present evidence of mitigating factors surrounding her conviction. Id. at 650. The Board declined this request reasoning that, by administrative rule, they were not required to hold a hearing where a hearing "would not advance the board's understanding of the issues involved or if disposition without a hearing would best serve the public interest." Id. at 652. The court rejected this argument and noted that, Maryland law, "provides the petitioner, like the criminal defendant at a disposition hearing, with a right of allocution, (the right to present mitigating factors prior to sentencing). Id.

The Presiding Officer's error in failing to allow Dr. Wodja hearing before an unbiased panel was compounded when he utterly failed to permit Dr. Wodja any opportunity to explain the circumstances surrounding his

criminal conviction. The Commission's governing rules require it to consider mitigating factors when imposing sanctions and, here, the order, on its face, states that it found "no mitigating factors". This Finding is not surprising given the fact that Dr. Wodja was deprived of the opportunity to present any mitigating factors.⁸³ Here, the Presiding Officer's actions deprived Dr. Wodja of an opportunity to be heard on the issue of sanctions and thus require reversal.

4. The Findings of Fact are not supported by substantial evidence in the record and do not support the Commission's legal conclusions.

Under RCW 34.05.570(3)(e), the agency's factual findings are reviewed under a substantial evidence standard. Conclusory statements of fact absent authority in the record do not meet the "substantial evidence" standard. Sunderland v. City of Pasco, 127 Wn.2d 782, 792, 903 P.2d 986 (1995). Here, facially, the Findings supporting the imposition of sanctions against Dr. Wodja fail to meet the "substantial evidence" test.

In Ames v. Dept. of Health, Medical Quality Assurance Comm., 208 P.3d 549, 552 (2009), the Washington Supreme Court ruled that the substantial evidence standard, in disciplinary proceedings, permits the reversal of Board decisions where the "evidence is simply too bare to form

⁸³ CP 332;

a credibly persuasive argument in favor of the Department's factual allegations". Id. at 552. There, Dr. Ames contended that "significant debate" existed regarding his use of nontraditional treatment for diagnosis and treatment of allergies. Id. at 553. However, the Department's experts testified to no such debate and, ultimately, the Commission rejected Dr. Ames' view in favor of the Department's expert's view. Id. The Court reasoned that, because of the competing testimony, there existed substantial evidence "on the record" to support the Commission's conclusions. Id.

Unlike Ames, the testimony at hearing undisputedly established that the prescription/administration of Triazolam, the primary basis for discipline⁸⁴ against Dr. Wodja, is an area subject to "controversy" within the dental profession. The Commission, throughout the Findings, repeatedly referenced the claim that the maximum dose for Triazolam is 0.5mg and relied upon this dosage to impose discipline on Dr. Wodja; this claimed maximum dosage is simply not reflected by the evidence at hearing. Notably, Dr. Johnson, the expert of the Department, testified, with regard to guidelines for Triazolam dosages, "it's going to be an ongoing investigation for probably several more years before we really have perfect

⁸⁴ Findings of Fact 1.9, 1.10, 1.11, 1.17, 1.20, 1.21, 1.22 and 1.29; AR 1188-1189.

guidelines.”⁸⁵ Dr. Isackson, expert for Dr. Wodja, testified that the maximum recommended dosage for Triazolam is 2.0 mg, not .5 mg.⁸⁶ Under the required analysis set forth in Ames, the testimony by Dr. Johnson coupled with that of Dr. Isackson simply provides no credible support for the premise that any dosage above 0.5mg is a violation of dental standards.

The testimony regarding controversy in the field pertaining to administration/prescription of medications renders the finding of “negligence” without force. RCW 18.130.180 specifically provides that treatment is not negligent merely because it is “non traditional”. “Non traditional” encompasses treatment that is not “customary” or “characteristic”. www.dictionary.com; Brenner v. Leake, 46 Wn.App. 852, 854-55, 732 P.2d 1031 (1987)(statutory terms should be given their dictionary definition).

Moreover, as noted by Ames, no evidence in the record will require reversal of agency action and, here, in several instances the Findings contain blatant factual errors. The Commission imposed sanctions on Dr. Wodja for his prescription of Clindamycin and Hydrocodone, however, the record undeniably establishes that Dr. Wodja never prescribed either of

⁸⁵ RP 467, ll 15-24.

⁸⁶ RP 268, 21-25, RP 269, ll 1-7

these medications to Patient A (the medications were prescribed by another practitioner).⁸⁷ Moreover, the Department of Health's expert, Dr. Bart Johnson (general practitioner), testified that Dr. Wodja's (advanced specialty general practitioner) prescription of six .25 tablets of Triazolam for Patient A was acceptable; yet, without any evidence to support it, the Commission claimed this prescription violated the standard of care.⁸⁸

Similarly, there is simply no evidence in the record to support the conclusory statement that an "inventory" of "stocked" drugs is required.⁸⁹ WAC 246-817-350 requires a practitioner to maintain an inventory control record for medications that are "stocked" by the dental office. The plain meaning of the term "stock" requires a showing that the drugs were "kept on hand." www.dictionary.com. The undisputed testimony at hearing established that Dr. Wodja did not "stock" medications for distribution to patients and, as such, the conclusion that Dr. Wodja "violated" the governing administrative code section is not meritorious.⁹⁰

⁸⁷ Findings of Fact 1.7, 1.8 and 1.34.

⁸⁸ RP 234, ll 6-9, RP 18-20; Finding of Fact 1.26

⁸⁹ Findings of Fact 1.12, 1.22, 1.23

⁹⁰ RP 384, ll 20-25

The Commission also held that a “conscious sedation permit” was required for administration of Triazolam.⁹¹ This Finding is not supported by either the law or the evidence presented at hearing. Note that, single agent administration of Triazolam does not require a permit. *See*, Former WAC 246-817-175. The Department’s own expert confirmed that no permit is required.⁹²

Findings of Fact 1.16 similarly indicates the Commission’s confusion regarding the record as it states that Stephanie and Janeel observed Patient A without clothing prior to 8:15pm. This Finding is incorrect. The testimony of Gaylene Davis establishes that Janeel first called her at 8:30pm, the time Patient A was discharged from the office.⁹³ The Commission’s finding, stating that Janeel called Gaylene between 8 and 8:15pm, does not comport with Gaylene’s testimony. Further, the undisputed testimony establishes that Dr. Wodja immediately told the Patient to dress when he became aware (at discharge) of her lack of clothing.⁹⁴

⁹¹ Finding of Fact 1.10.

⁹² RP 200, ll 2-4

⁹³ RP 353, ll 5-7

⁹⁴ RP 56, ll 14-22

The Findings⁹⁵ related to the chronology of events relying upon the testimony of Gary Reed fail to acknowledge that he took no notes during the time in which he was present for the interview of Dr. Wodja; instead, he wrote a report three days subsequent to the interview based solely upon memory.⁹⁶

Finding of Fact 1.18, addressing the amount of Triazolam ingested by Patient A, is not in keeping with the evidence. The Washington State Toxicology Report, admitted into evidence by the Department, detected no drugs in Patient A's blood.⁹⁷ Dr. Robert Julien, a pharmacologist, testified that the WST report's failure to identify drugs in blood was "surprising" to him and raised questions regarding whether the Patient had actually ingested 1-2mg of Triazolam.⁹⁸ Dr. Johnson, the Department's expert, does not have the expertise of Dr. Julien and confirmed that he would defer to the findings of a more experienced practitioner.⁹⁹

Finding of Fact 1.22, regarding the release of Patient A, is not supported by the evidence. Janeel Adams testified that Dr. Wodja provided written instructions to her.¹⁰⁰ Dr. Wodja also testified to

⁹⁵ Findings of Fact 1.27-1.28

⁹⁶ RP 170, ll 10-20

⁹⁷ AR 1289

⁹⁸ RP 450, ll 1-12

⁹⁹ RP 233, ll 18-20

¹⁰⁰ RP 96, ll 9-13

providing post operative instructions to Patient A.¹⁰¹ The Department's expert testified that it was appropriate to discharge a patient when the patient's vital signs were back to normal levels.¹⁰² He then made the brash conclusion that Patient A's vitals could not be at normal levels because of the administration of Triazolam.¹⁰³ However, the undisputed evidence establishes that Patient A's vital signs were at normal levels when she presented at Harborview shortly following treatment with Dr. Wodja.¹⁰⁴ Dr. Isackson confirmed that Dr. Wodja appropriately released the Patient.¹⁰⁵

Critically, as per the rule of Sunderland, conclusory findings will not be upheld. Finding of Fact 1.2 concludes, without any analysis, that Dr. Wodja violated the standard of care and placed Patient A at unreasonable risk of harm. This Finding cannot be sustained under Ames or Sunderland.

In Woodfield v. Board of Professional Discipline of the Idaho State Board of Medicine, 127 Idaho 738, 905 P.2d 1047 (1995)¹⁰⁶ the court held

¹⁰¹ RP 353, ll 5-6

¹⁰² RP 246, ll 7-8

¹⁰³ *Id.*

¹⁰⁴ RP 258, ll 15-24

¹⁰⁵ *Id.*

¹⁰⁶ In Idaho, the court follows the same standard for administrative review as Washington, *i.e.*, a court may only reverse an administrative decision if the findings are "clearly erroneous" and the court may not "substitute its judgment for that of the agency". Woodfield, supra at 744.

that the Board's failure to set forth specific factual findings supporting its legal conclusions required that the practitioner be afforded a new hearing. There, the Board brought charges against a practitioner for his treatment of twelve patients, the Board alleged sexual improprieties, poor charting, unnecessary surgeries and causing risk/unnecessary trauma to patients. Id. at 742. After hearing, the Board revoked the practitioner's license finding multiple violations of professional and ethical standards. Id. at 743.

The Woodfield court began its analysis with the central principle that the Board may appropriately use its "specialized knowledge" to evaluate the evidence before it; however, in its Final Order the Board must support any findings of violation of the standard of care by clearly articulating the "community standard" within the Order. Id. at 748. Without such standards, "the judicial [review] function is reduced to serving as a rubber-stamp for the Board's action." Id. Importantly, the court may not "speculate" that the Board relied upon its expertise to reach its findings absent articulation of each standard in the Final Order. Woodfield v. Board of Professional Discipline of the Idaho State Board of Medicine, 127 Idaho 738, 751, 905 P.2d 1047 (1995). Moreover, the Board's failure to acknowledge competing evidence cast aspersions upon its Findings. Id.

The analysis in Balian v. Board of Licensure in Medicine, 722 A.2d 364 (1999) also establishes the importance of identifying the basis for claimed standard of care violations. There, a licensee appealed from an order disciplining him for failing to release records to treating doctors after the patient made multiple requests. Id. at 365. The licensee did not dispute that he failed to produce the record. Id. The Board used its expertise to determine that the licensee violated the standard of care required of physicians, however, the standard applied by the Board was not set forth within the record. Id.

The Court reversed noting that Matthews, supra requires that findings be based upon the record to ensure: (1) notice and opportunity to rebut claimed standard; (2) lay members of the Board have an opportunity to fully review evidence; and (3) effective judicial review. Id.; see also, Smith v. Department of Registration and Education, 412 Ill. 332, 106 N.E.2d 722 (1952)(holding the order must be based upon evidence in record as the court “possesses neither medical learning nor powers of telepathy.”)

Like Woodfield and Balian, the Commission made Findings upon which it failed to define the standard upon which it was holding Dr. Wodja to. The Commission disciplined Dr. Wodja for “crushing tablets”;

however, there is no evidence in the record establishing that “crushing” is below the standard of care.¹⁰⁷ To the contrary, Dr. Wodja testified that he had been taught to “crush” tablets by a sedation dentist¹⁰⁸ and the Department’s expert testified merely that he had “not had occasion” to crush tablets.¹⁰⁹

The Commission also disciplined Dr. Wodja for treatment below the standard of care with regard to the “incision and drain”.¹¹⁰ The record is devoid of any evidence establishing what the standard of care for treatment of “severe decay” requires and, in addition, the Final Order fails to identify either the standard of care or the claimed amount of “education” required to perform an incision and drain.

On multiple occasions, the Findings are simply devoid of consideration of competing evidence, as required by Woodfield, *supra*. Critically, all Findings relating to charting¹¹¹ fail to acknowledge the testimony establishing that the mere failure to chart does not relate to the safety of the patient, it simply reflects recordkeeping.¹¹²

¹⁰⁷ Finding of Fact 1.17.

¹⁰⁸ RP 405-406

¹⁰⁹ RP 464, ll 2-10

¹¹⁰ Finding of Fact 1.19

¹¹¹ Findings of Fact 1.32-1.41

¹¹² RP 245, ll 4-15.

The Findings relating to Patient A's medical history¹¹³ similarly fail to acknowledge: (1) the admission by Patient A that she lied regarding her drug history; and (2) the fact that an outdated health history would not be helpful to the practitioner.¹¹⁴ Moreover, the Findings fail to note that undisputed testimony from the Patient established that Dr. Wodja's prescription of Acetaminophen 3 was for the purpose of stepping the Patient down from Hydrocodone; there is no evidence establishing that Dr. Wodja's prescription was inappropriate.¹¹⁵ Finding of Fact 1.13, regarding disposal of medications, fails to reflect that Dr. Wodja testified that he disposed of Patient A's remaining tablets of Triazolam because he did not want to allow Patient A, a recovering methamphetamine and Lorazepam/Triazolam addict, with additional drug.¹¹⁶

The Commission also erroneously determined that Dr. Wodja failed to "titrate to effect" yet, contrarily, relied upon the Department's expert testified that the appropriateness of medication dosages¹¹⁷ would depend upon the practitioner's observations of the patient.¹¹⁸ Dr. Wodja testified that Patient A was not evidencing "droopy eyes" or "slow speech"

¹¹³ Findings of Fact 1.5-1.6

¹¹⁴ RP 113, ll 10-13, RP 318, ll 1-15, RP 129, ll 10-25, RP 130, ll 1-8

¹¹⁵ Finding of Fact 1.8; RP 128, ll 5-16; AR 1208-1212

¹¹⁶ RP 356-358

¹¹⁷ Finding of Fact 1.15

¹¹⁸ RP 237, ll 12-19

when she arrived at his office thus justifying his administration of medication as appropriate under the titration standard.¹¹⁹

The reasoning of Paul v. Board of Professional Discipline, 134 Idaho 838, 11 P.3d 34 (2000) is also on point. There, the court reversed the Board's imposition of disciplinary sanctions upon a practitioner because the evidence failed to support the findings rendered. Id. In that case, doctors testified that methods used by the licensee were not a "good idea" and that other forms of treatment "probably would have been better"; the court reasoned that this speculative testimony was insufficient to support the findings. Id. at 37-38.

Like Paul, the Commission relied upon speculation to establish violations of the UDA. The Commission sanctioned Dr. Wodja for failing to have staff members on site during his treatment of Patient A and states that this is "below the standard of care".¹²⁰ There is simply no evidence to support this conclusion. The Department's expert testified that it is acceptable to treat a patient with a non-staff person present.¹²¹ He did testify, analogous to the experts in Paul, that having a friend

¹¹⁹ RP 378, ¶ 23-25; RP 379, ¶ 1-5

¹²⁰ Findings of Fact 1.10, 1.24, 1.30

¹²¹ RP 243, ¶ 22-25, RP 244, ¶ 1-15

present was not ideal because a friend could “support an allegation that was not true.”¹²²

It is impossible to quantify what impact the above errors and apparent confusion had on the Commission’s ultimate decision to impose sanctions. Where a practitioner’s livelihood is at stake, such cavalier error should not be tolerated.

5. The Commission’s determinations on non-clinical matters are not supported by substantial evidence and fail to support findings of legal violations.

a. The Commission’s sanctioning of Dr. Wodja for failing to report “patient injury”¹²³ is nonsensical as the Commission was aware of claimed “patient injury” prior to Dr. Wodja having knowledge of it.

Licenseses are required to report patient injury arising out of dental treatment within thirty days. WAC 246-817-320. The purpose underlying the administrative rule is to ensure that the Commission is aware of adverse dental outcomes in a timely manner to enable prompt investigation.

Here, the Commission found that Dr. Wodja knew of Patient A’s hospitalization yet failed to submit a report to the Commission. This

¹²² *Id.*

Finding is belied by the record which establishes: (1) that Harborview admitted Patient A for evaluation of possible sexual abuse; not for complications arising out of dental treatment¹²⁴; (2) no evidence that Dr. Wodja had knowledge of Patient A's hospitalization; and (3) the Commission was aware of Patient A's hospitalization well within thirty days.¹²⁵ This Finding is purely punitive and fails to serve the purposes of the UDA. RCW 18.130.160.

b. The Commission erroneously found that Dr. Wodja failed to cooperate where such finding infringes upon Dr. Wodja's right to maintain his silence in criminal proceedings.

The Uniform Disciplinary Act requires practitioners cooperate with the disciplining authority by providing, upon request, a written statement regarding the complaint. Findings of Fact 1.47-1.48, supporting this violation, simply do not reflect the testimony at hearing and, moreover, reflect a fundamental misunderstanding of the difficulties faced by practitioners who must address competing civil and administrative prosecutions. .

The testimony at hearing established that Dr. Wodja did not provide a written statement to the Department of Health because of a

¹²³ Findings of Fact 1.42-1.46

¹²⁴ AR 1265-1288

¹²⁵ RP 158

pending criminal matter involving Patient A.¹²⁶ King v. Olympic Pipeline, 104 Wn.App. 338, 354, 16 P.3d 45 (2000)(the pendency of criminal charges and/or investigation implicates the privilege to remain silent). Further, the Department of Health investigator confirmed that Dr. Wodja did not refuse to cooperate with his investigation.¹²⁷

The ultimate punishment of Dr. Wodja for complying with his counsel's advice is purely punitive and chills the ability of practitioners to maintain their licenses while facing allegations of criminal conduct. Spevack v. Klein, 385 US 511, 514 (1967)(holding that lawyer who asserted his Fifth Amendment privilege in disciplinary proceeding could not be disbarred for his failure to respond to request of disciplinary authority). The Commission's imposition of sanction on this ground was inappropriate and raises issues of constitutional magnitude.

6. The Commission's imposition of sanctions failed to comport with its enabling regulations.

Regulatory legislation attempting to control a lawful business must be *reasonably* adapted to promote the public health and general welfare in some particular manner, and must tend to prevent some existing or directly anticipated menace thereto. In re Flynn, 52 Wn.2d 589, 593, 328 P.2d 150 (1958). RCW 34.05.570(4)(c). Moreover, the Commission, as per its

¹²⁶ RP 175, ll 23-25; RP 176, ll 1-18

Sanctions Guidelines is required to consider mitigating factors in its imposition of sanctions and, as described above, the Commission failed in this duty. Montilla v. INS, 926 F.2d 162 (2nd Cir., 1991) (agency violations of its own rules requires reversal).¹²⁸ At minimum, the Commission's sanction imposing the requirement of "sexual misconduct" counseling must be vacated; there was no finding of sexual misconduct. *See, Aponte v. State, Dept. of Social and Health Services*, 92 Wn.App. 604, 621, 965 P.2d 626 (1998)(sexual misconduct evaluation unnecessary where the evidence failed to support a finding of sexual misconduct).

F. CONCLUSION

The disciplinary proceeding against Dr. Wodja failed to comport with fundamental principles of fairness. Ultimately, Dr. Wodja's constitutionally protected interest in his licensure and professional reputation was taken away under the guise of "public protection", based in emotional, passionate response, without careful consideration of the facts and circumstances. The law does not permit decisions to stand which bear their roots in a process imbued with prejudice. This Court should remand for hearing before an unbiased panel as permitted by the APA.

¹²⁷ RP 179, II 1-5

¹²⁸ CP 220

Respectfully submitted this 24th day of July, 2009.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

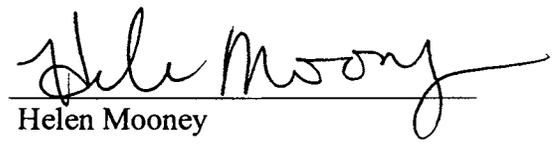
That on this day, I arranged for the service of this document to the Court of Appeals, Division One and counsel for the parties to this action as follows:

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Helen Mooney