

Docket # 68642-9-I

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

RANDALL KINCHELOE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF HEALTH
Respondent,

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. ASSIGNMENT OF ERRORS

A. The Department of Health's decision denying Mr. Kincheloe's application for a Nursing assistant license is based upon a reason erroneous as a matter of law and must be reversed.

1. Mr. Kincheloe correctly answered that he had no prior restrictions on his credential, because the 2001 Stipulation never used the term "restriction."
2. Mr. Kincheloe correctly answered that he did not have any prior restrictions on his credential, because under the statute, terms and conditions of a stipulation are not restrictions.
3. Mr. Kincheloe correctly answered that he did not have any prior restrictions on his credential, because 2001 Stipulation is an unambiguous contract.
4. Mr. Kincheloe correctly answered that he did not have any prior restrictions on his credential because the ordinary definition of "restriction" is not similar to the "supervision" terms and conditions in the Stipulation

B. There is no competent evidence of record to support the Department of Health's decision to deny Mr. Kincheloe's application for a nursing Assistant license, which was based

upon a finding that he “concealed” or “misrepresented” facts, and therefore the decision must be reversed.

- C. Appellant is entitled to attorneys fees and costs for this appeal because his license was denied for a substantially erroneous reason.

II STATEMENT OF CASE

NOTE RE: RECORD REFERENCES. The Administrative Record (AR) is transmitted to the Superior Court from the agency with a Bates Stamp number at the lower left of each page. The superior court has transmitted this record intact to the court of Appeals, and there is no additional assignment of clerks pages to this record. Documents in this brief from the Administrative Record are cited as AR, followed by the Bates-Stamped number. The verbatim report of proceedings is also referred to as “AR”, followed by its Bates Stamp number, and not by the ROP page number.

Mr. Kincheloe was notified that his application for a health care assistant credential was denied on October 7, 2010. AR 1. The basis for the decision was that Mr. Kincheloe answered “no” to 2 questions:

- 7. have you ever been found in any proceeding to have violated any state or federal law rule regulating the practice of a health care profession? If “yes”, please attach explanation and provide copies of all judgments,**

decisions, and agreements?

- 8. Have you ever had any license, certificate, registration, or other privilege to practice a health care profession denied, revoked, suspended or restricted by a state, federal or foreign authority.**

Id.

The credential was denied per RCW 18.130.180, unprofessional conduct,

“Misrepresentation or concealment of a material fact in obtaining a

license. . .” *Id.*

Mr. Kincheloe had entered into a Stipulation to informal Disposition in

2001. AR 36-42. Pertinent provisions of that stipulation include:

- 1.2 Respondent is informed and understands that the Commission has alleged that the conduct described above, if proven, would constitute a violation. .**
- 1.3 The parties wish to resolve this matter by means of a Stipulation to Informal Disposition pursuant to RCW 18.130.172.**
- 1.4 Respondent does not admit any of the allegations in the Statement of Allegations and Summary of Evidence or [sic]in paragraph 1.1 above. This Stipulation to Informal Disposition shall not be construed as a finding of unprofessional conduct or inability to practice.**
- 1.5 This Stipulation to Informal Discipline is not formal disciplinary action. . .**

AR 37.

1.7 Respondent agrees to be bound by the terms and conditions of the Stipulation of Informal Disposition.

1.8 The Commission agrees to forego further disciplinary proceedings concerning the allegations set forth in Section 1 above.

1.9 . . .

1.10 Respondent agrees to successfully complete the terms and conditions of this informal disposition.

1.11 . . .

1.12 The statement of charges served in this matter on January 22, 2001 shall be withdrawn upon the Commission's final acceptance of this Stipulation to Informal Disposition. . .

AR 38

2.1 That for a period of (1) year from the entry date of this Order, the Respondent shall be employed as a nurse in the State of Washington only upon compliance with the following terms and conditions:

AR 39

The "terms and conditions" included informing the Commission of future job descriptions, providing his job performance evaluations, providing a copy of the order to future employers, taking employment only with direct RN supervision and not floating from unit to unit. AR 40-41.

Mr. Kincheloe certified that he "fully understand and agree to all of it;" AR 41, and the Commission signed section 3: acceptance, stating in part, "All parties shall be bound by its terms and conditions." AR 42.

The Department of Health denied the application for credential because it deemed that the answer of “no” to questions 7 and 8 was a misrepresentation or concealment of the 2001 Stipulation to Informal Disposition. AR 79-80.

(There were other reasons advanced by the State regarding why the credential should be denied, but they were not upheld by the Department’s findings, and this is the sole set of facts that is relevant to this appeal. See AR 113.)

Mr. Kincheloe timely filed for a hearing on October 7, 2010. AR 4., and filed apparently a second request for a hearing, on October 25, 2010. AR 6. The hearing was held on April 4, 2011. AR 118.

Testimony at the hearing on April 4 regarding the issue of misrepresentation or concealment included:

(Mr. Kincheloe) And in reference to this restriction on the license, the license wasn’t actually restricted. I was still working as a nurse while I was complying with the State’s recommendations. I was still continuing to work as a licensed nurse.

AR 129.

Q. By the Attorney General) But you were, for a period of a year, under numerous restrictions that you had to follow, or would be unable to practice. Isn’t that right?

A.By Mr. Kincheloe) I didn’t have restrictions. As a matter of fact, what I had to do was write a thousand-

word essay. I had to attend two classes that they had to make up because they didn't have those classes. And in the completion of those classes, the stipulation was turned off.

Q. So –

A.Or turned away.

Q.—it's your testimony that these requirements—

A. Were fulfilled while I was working as a nurse.

Q. But – but these requirements do not constitute restrictions.

A. No. I didn't have any restrictions on my license that prevented me from currently working as an LPN, which I did all the way up until 2009, or 2007. I was working as a nurse without these restrictions. I didn't have to turn in any reports. I didn't do any – this – that's because there's none there.

AR 133-134.

(Q. By the Hearing Judge) Okay. But also in addition to that, I just am asking, is it that – when you made the application for the Nursing Assistant position credential, is it your testimony that your LPN license never had any restrictions on it?

(A.by Mr. Kincheloe) Did not have any restrictions

AR 144.

**(Q. by the Hearing Judge) What I'm getting at is the Department is asking – is saying these were conditions, so that when you apply for a job, for a credential, you – you did have a history of needing to –
(Start Tape Section 9:48)**

But you don't see it that way?

A.No, I didn't see it that way at all.

Q. So did you not –you didn't intentionally, um, deceive

–

A.No.

AR 145.

(Q. by Hearing Judge) I know that. What I'm trying to figure out is how it is that you felt that when you made an " Did you have any –" on number – No. 7 in –

A.Question 8.

Q. –question 8, how did you interpret those questions when you were reading them and answer the question?

A.If I had any restrictions. And no. I made the assumption that they weren't restrictions. I wasn't even thinking like that.

Q. When you entered into a – the 2001 stipulation, did you -- you never went to a hearing or anything; is that right? You just—

A. Correct.

Q. – informally. So is it your understanding that the stipulation was not a finding of having violated any statute or federal law. Is that correct?

A. Correct. They just mailed it to me and told me what to do, and I did what they told me to do.

Q. And then the other – the issue in terms of answering "no" to this other question, it – it's your testimony today that that question did not – does not ask whether

**or not you're under any contract or obligation with the
Nursing Care Quality Assurance commission with
respect to your license?**

A. Yes.

AR 146-7.

The Health Law Judge found as a fact that the Applicant did not reveal in his application that his expired Practical Nurse credential had been “restricted” as a result of the 2001 Stipulation. She further found that in Answering the personal data question No. 7 [sic no. 8] the Applicant “concealed” that his expired licensed practical nurse credential had been previously “restricted.” Inherent in and necessary to this finding is that the 2001 Stipulation constituted a restriction on Mr. Kincheloe’s Practical nursing credential. The concealment of a prior restriction on credential issued by the Department of Health a is a violation of RCW 18.130.180(2). And on this basis, the Health Law Judge ruled that the program properly denied Mr. Kincheloe’s application for credential. AR 112-113.

Mr. Kincheloe filed his Petition for Judicial review of this ruling on May 31, 2011. CP 1—2. The Superior court affirmed the decision of the Department of Health on March 23, 2012 CP 52—54 . Mr. Kincheloe then appealed to this court on April 19, 2012. CP 55-68.

STANDARD OF REVIEW

The review of an agency decision is on the agency record. *IAFF v. PERC*, 128 Wn. 2d 375, (1995).

For purposes of this appeal, the Court of Appeals is reviewing an agency decision, pursuant to RCW 34.05.570(3) (d), (the Administrative Procedure Act). The appellate court's inquiry is de novo, that is, it substitutes its judgment for that of the agency. *Discipline of Brown, D.D.S.* 94 WN. App 7 (1998) An agency's legal conclusions and statutory interpretations are reviewed de novo under the error of law standard; a court does not defer to an agency's determination regarding the scope of its own legislative authority. An agency is bound by its own rules. *Constanich v. Social and Health Services* 138 Wn. App 547 (2007)

RCW 34.05.570(3) provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

. . .

(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;

. . . .

(i) The order is arbitrary or capricious

A. The agency erred as a matter of law in concluding that Mr. Kincheloe had misrepresented or concealed a prior restriction on his license, because as a matter of law there had been no prior restriction.

The record is undisputed, and the parties agree, that Mr. Kincheloe never participated in any hearings in 2001 and thus was subject to no findings before any forum, thus his “no” answer to question # 7 was correct.

Mr. Kincheloe maintained during his testimony that the 2001 Stipulation was not a prior restriction against his license and therefore a “no” answer to question # 8 was also correct. There are several avenues of analysis for determining whether or not the Stipulation could be considered to be a “restriction” against the license. These methods include: (1) reviewing the language of the 2001 stipulation; (2) analyzing the language of the statute under which Mr. Kincheloe was certified that defines professional misconduct and using standard statutory interpretation techniques; (3) analyzing the 2001 stipulation based upon contract interpretation methods, and (4) reviewing the ordinary dictionary definition of the term.

(1)Mr. Kincheloe correctly answered that he had no prior restrictions on his credential, because the Stipulation signed in 2001 never used the term “restriction.”

(1)The 2001 Stipulation does not use the term “restriction.” Rather, the Stipulation refers only to “terms and conditions.” AR 39. None of the list of items to which Mr. Kincheloe agreed utilize the word “restriction.” The nature of the agreement is to require reporting and disclosure of the stipulation, require supervision by an RN, and require that he not float from unit to unit. They do not limit the type of work that he can do, nor limit the employers for whom he can work; rather they impose additional reporting and supervision.

Therefore, on the four corners of the document that Mr. Kincheloe agreed to and signed with the Department in 2001, there is no language that would give him notice that he is compelled to answer a question as to whether his credential was previously “restricted”, with a “yes.”

The language of the 2001 stipulation, instead, clarifies that it is not a finding or admission of misconduct, and that it is not discipline—and therefore those plain points of language would reasonably inform Mr. Kincheloe that he is not required to answer question 8 with a “yes.”

(2)Mr. Kincheloe correctly answered that he did not have any prior restrictions on his credential, because under the statute, terms and conditions under a stipulation are not restrictions.

(2) In defining professional misconduct and sanctions, the licensing

statute does not treat all sanctions as “restrictions” on a license. RCW 18.130.050 sets forth the authority of the Department of Health in denying or disciplining licensees; at paragraph 15, “to impose any sanction . . . provided by this chapter . . . in accordance with RCW 18.130.390; at paragraph 16, an enumerated power is “to restrict or place conditions on” the practice of licensees. As used in this statute, the term “restrict” is not used in the same sense as the term “place conditions on.” , since both terms are used in a list of alternatives. The term “sanction” includes many items, restrictions of which are just one of the options. Here, the stipulation in 2001 explicitly “placed conditions on” Mr. Kincheloe, but did not mention “restricting” him.

RCW 18.130.160 lists the alternative forms of sanctions. There are 12 alternatives, set forth as sub-points to the first paragraph of the statute to wit:

Upon a finding, after hearing, that a license holder has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority shall issue an order including sanctions adopted in accordance with the schedule adopted under RCW 18.130.390 giving proper consideration to any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any action taken by other in-state or out-of-state disciplining authorities. The order must provide for one

or any combination of the following, as directed by the schedule:

- (1) Revocation of the license;**
- (2) Suspension of the license for a fixed or indefinite term;**
- (3) Restriction or limitation of the practice;**
- (4) Requiring the satisfactory completion of a specific program of remedial education or treatment;**
- (5) The monitoring of the practice by a supervisor approved by the disciplining authority;**
- (6) Censure or reprimand;**
- (7) Compliance with conditions of probation for a designated period of time;**
- (8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation. Funds received shall be placed in the health professions account;**
- (9) Denial of the license request;**
- (10) Corrective action;**
- (11) Refund of fees billed to and collected from the consumer;**
- (12) A surrender of the practitioner's license in lieu of other sanctions, which must be reported to the federal data bank.**

Item (5), being monitored by an approved supervisor, and item (7), compliance with conditions, are most like the conditions and terms agreed upon with the Department in the Stipulation of 2001 in this case. Neither

of those items are a subset of a “restriction.” The court must not ignore unambiguous words, and interpret the statute as a whole, so that no part of it is rendered meaningless, and so that interpretation does not result in an absurdity. *State v. Delgado* 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Davis v. Dept. Licensing* 137 Wn 2d 957, 963, 977 P.2d 554 (1999), quoting *Whatcom County v. City of Bellingham*, 128 Wn. 2d 537, 546, 909 P.2d 1303. Because every word in a statute must be assumed to be purposeful, the listing of 12 different sanctions must be deemed to explicitly deem that conditions and terms imposed against Mr. Kincheloe in the 2001 order were not the same as a “restriction.” The fact that the legislature chose to list 12 categories on an equal footing with each other means that “restrictions” is just one distinct category of sanction, and that supervision and other conditions are additional distinct categories of sanctions. “Supervision” is therefore not a “restriction” and the terms and conditions of the 2001 order were therefore not “restrictions” on Mr. Kincheloe’s credential. Accordingly, as a matter of law, he had the right to answer “no” to the question of whether or not his credential had ever been “restricted.”

The language of the stipulation, moreover, is prescribed by statute per RCW 18.130.172, and especially pertinent is the language that the stipulation is not to be construed as a finding of either unprofessional

conduct or *inability to practice*, and “shall not” be considered formal disciplinary action. Since the stipulation is not to be construed as an inability to practice, it is reasonable for Mr. Kincheloe to believe that it is not to be construed as a restriction on his practice.

Statutory schemes should be interpreted as a whole, avoiding unreasonable and illogical consequences. *Seven Gables v. MGM/UA Entertainment* 106 Wn.2d 1, 721 P.2d 1 (1986). If a stipulation, which explicitly is not disciplinary and is not to be construed as an inability to practice is later deemed to be a prior “restriction” for purposes of obtaining a license, then, in effect, the stipulation is being treated as if it were discipline and a restriction. That question #8 of the application for a license lists only the first 3 of 12 sanction categories – revocation, suspension, and limitation, is logical, for only those 3 categories are discipline of record. It would be an illogical consequence for a person to agree to a non-disciplinary disposition and then to have the disposition nevertheless viewed as though it was as concerning as formal discipline in granting or denying a future license. (And in this case, the license was a different license from the one that was the subject of the 2001 stipulation.)

If two statutes conflict with each other, the more specific statute controls. *State v. Collins* 55 Wn.2d 469, 348 P.2d 214 (1960). In this case, the terms “supervision” and “conditions” are more specifically

accurate when describing the Stipulation from 2001. Thus, using this interpretation technique, again one must conclude that Mr. Kincheloe was not subject to a “restriction” in his license in 2001, because the specific terms of “supervision” and “conditions” would rule over the more general term of “restriction.”

Another approach to the same issue is to investigate the import when statutes utilize two different terms. If the legislature uses different language to deal with related matters within the same statute, it is presumed that the legislature intended such words to have different meanings. *Simpson Inv. Co. v. Revenue* 141 Wn.2d 139, 3 P.3d 741 (2000); *Silver Firs v. Water District* 103 Wn.App 411, 12 P.3d 1022 (2002); *Jung Pil Choi v. The City of Fife* 60 Wn. App 458 803 P 2d 1330(1991). The department used unambiguous statutory language in its application for licenses, and the term “restriction” did not include “terms and conditions”, “supervision” or any other words in the statute or in the stipulation signed by Mr. Kincheloe. Thus, in this licensing scheme, Mr. Kincheloe did not have any past restrictions against his credential.

(3) Using Contract interpretation methods, the stipulation cannot be construed to mean that it placed any restrictions against Mr. Kincheloe’s certification.

If the 2001 Stipulation is viewed as a contract between Mr. Kincheloe and the State, as it was given that each party agreed to act or to forego an

act, AR 36—41, and that the commission ordered that “both parties shall be bound by its terms and conditions”, AR 42, then the law regarding contract interpretation is relevant.

The stipulation cites to RCW 18.130.180, and RCW 18.130.172, and must be presumed to have incorporated the same meanings as those therein. Further, this being a Department Stipulation, any ambiguity must be resolved in favor of Mr. Kincheloe and against the Department drafter. *Brown v. Prime Construction Company* 102 Wn. 2d 235, 684 P.2d 73 (1984). It is not necessary for the Court to reach this last resort for contract interpretation, since the stipulation is internally consistent, and there is ample evidence of the intent of the parties—both considerations to be reached prior to construing ambiguity to the drafter. *Universal/Land Construction v. Spokane* 49 Wn. App 634, 745 P.2d 53 (1987). In this case, the intent of the parties is clear on the face of the document—Mr. Kincheloe did not admit any wrongdoing but avoided having to prove it, and the department avoided having to prove that he had acted unethically. AR 36-42, If Mr. Kincheloe’s intent was consistent with the Stipulation that he signed, then he would naturally not have expected that he was receiving a discipline or restriction, since he signed the stipulation to guarantee that he would not receive exactly that.

All of the statutory and contract construction criteria in case law

consistently compel an analysis that Mr. Kincheloe had the right to answer “no” to question #8 because he had not been subject to a restriction of his credential in the 2001 agreement. The decision below that ruled that he wrongfully withheld disclosure of the 2001 disposition in response to question #8 is erroneous as a matter of law and must be reversed.

(4) Mr. Kincheloe correctly answered that he did not have any prior restrictions on his credential, because the ordinary definition of “restriction” is not similar to or the same as the “supervision” terms and conditions of the 2001 Stipulation.

3. The ordinary definition of the term “restrictions” also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black’s Law Dictionary, fifth edition,(1979) defines “restriction” as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put.

The term “restrict” is also cross referenced with the term “restrain.”

Restrain is defined as;

To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on ; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms “supervise” and “supervisor” are defined as;

To have general oversight over, to superintend or to inspect. See Supervisor.

A surveyor or overseer. . .
In a broad sense, one having authority over others, to
superintend and direct.

The term “supervisor” means an individual having
authority, in the interest of the employer, to hire, transfer,
suspend, lay off, recall, promote, discharge, assign, reward,
or discipline other employees, or responsibility to direct
them, or to adjust their grievances, or effectively to
recommend such action, if in connection with the foregoing
the exercise of such authority is not of a merely routine or
clerical nature, but required the use of independent
judgment.

Comparing the above definitions, it is clear that the definition of
“restriction” is very different from the definition of “supervision”—very
few of the same words are used to explain or define the different terms. In
his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision
conditions, but he did not agree to restrict his license.

**B. The findings do not contain adequate evidence to support the
conclusions of law that Mr. Kincheloe misrepresented or
concealed any fact.**

If the court rules in Mr. Kincheloe’s favor based upon the arguments
and points of law in part A above, it need not reach this argument.
However, even if the court rejects the arguments in A. above, the denial of
Mr. Kincheloe’s credential must still be reversed because no evidence of
record shows that Mr. Kincheloe had actual or constructive notice that his

license had been restricted and that he purposefully concealed that fact.

Although it is clear as a matter of law and statutory interpretation that the license of Mr. Kincheloe was never restricted, it is also clear that in order for Mr. Kincheloe to “conceal or misrepresent” his status, he would have to reasonably have notice that he was falsely representing the facts in responding to the application questions.

Mr. Kincheloe’s testimony is consistent in explaining that he did not believe that he had to answer “yes” to question #8. He was not thinking of the process in that way, because he had voluntarily accepted a set of tasks to do in order to retain his license. In the stipulation, he agreed that if he violated the terms of the Stipulation, the violation would constitute grounds for discipline and the imposition of sanctions under RCW 18.130.160-180. AR 38. The stipulation was not discipline and therefore he did not reasonably think that he was required to answer “yes.” He had resolved the matter short of a hearing and short of a departmental finding and imposition of any discipline or sanction.

The Attorney general presented no evidence to the contrary. There were no witnesses who testified that Mr. Kincheloe had made any statements or taken any actions that indicated that he planned to hide his history. There were no facts to suggest that he would have considered that the 2001 Stipulation would affect issuance of his certification as a Nursing

Assistant, since he had been practicing as an LPN for the intervening years while the Stipulation was on his record, and since his LPN credential had never been denied or not renewed. Certainly, in this case, the state is not claiming that the 2001 stipulation is a basis upon which to deny the license. There is simply no evidence in the record that Mr. Kincheloe intended to conceal the fact of the 2001 Stipulation. That the department nevertheless knew of the stipulation is evidence that it compares the names of all applicants against its disciplinary and non-disciplinary records, and there is no claim that the department was misled since the initial determination denied the license based upon the allegedly inconsistent statement and not upon any difficulty of the Department in learning about Mr. Kincheloe's history.

Thus, not only does all of the evidence of record support only one conclusion—that Mr. Kincheloe intended to be accurate and correct in filling out the application for the new certification—but also the Department has not presented any evidence that his answer could have misled it regarding his licensing history.

It would appear that the State intends to argue, however, that Mr. Kincheloe intended to “conceal” or “misrepresent” the matter.

Two Washington court cases have interpreted the terms regarding “concealment” or “misrepresentation” under RCW 18.130.180, which is

the statute that applies to this case.

In *Johnson v. Washington State Dept. of Health* 133 Wn. App 403 136 P.3d 760 (Div. I, 2006), a person recently licensed as a counselor wrote a letter implying that she was certified as a chemical dependency counselor, on behalf of her son, to a court. The letter was the basis of discipline on the basis of misrepresentation, which was explained as “it was intended to convince the judge that client A was in compliance with court-ordered services. . . when in fact Johnson was neither qualified nor licensed to do so.” Thus, this case treats the term “misrepresentation” as a factual question, and as an issue of intent. Even if the court rejects the argument that Mr. Kincheloe was as a matter of law entitled to answer “no” to question #8, the attorney general had to submit at least some evidence supporting that Mr. Kincheloe intentionally presented a false fact on his application. It is clear that his answer is not false, since he took a good faith position in his testimony that he did not understand the stipulation to be a “restriction.” Nothing in the evidence presented by the State contests Mr. Kincheloe’s factual testimony.

In *Heinmiller v. Dept. of Health* 127 Wn.2d 595, 903 P.2d 433 (Wash. 1995) the same language was interpreted. In that case, the counselor, who commenced a personal relationship with a former client prior to adoption of the formal rules prohibiting such relationships, argued that at the time

she answered “no” to a question asking if she had engaged in any conduct prohibited by the professional disciplinary standards set forth in the statute, she did not have actual notice that she had violated the standards, and therefore could not have intended a misrepresentation in her answer. The court upheld a ruling that she had notice of the standard because a reasonable counselor would have avoided a personal relationship with a former client for at least 2 years based upon the standard of practice, and therefore she had “constructive” knowledge of her violation.

That case is not like this, the Kincheloe, case. Here, the issue is not based upon a standard of practice that changed from being a well-known and established practice to being a formal rule of ethics. The issue is not similar to that issue because it is not based upon any technical change in the status of a rule or in how that rule is expressed. There is no evidence of record that Mr. Kincheloe had “constructive knowledge” about any rule that he purportedly failed to follow. The narrow exception to the need to show actual misrepresentation, defined in *Heinmiller*, does not apply to this case. The department failed to introduce any evidentiary fact contrary to Mr. Kincheloe’s testimony that he did not intend to mislead or conceal the fact of his 2001 stipulation. Therefore, the decision of the department must be reversed as unsupported by competent evidence of record.

C. ATTORNEYS FEES.

Appellant is entitled to attorneys fees and costs for this appeal because his license was revoked for a substantially erroneous reason.

RCW 4.84.350 provides that a court “shall” award a party that prevails in a judicial review of an agency action fees and other expenses, unless the court finds that the agency was substantially justified. In this case, the agency wrongfully denied a license needed by Mr. Kincheloe for his employment, which was substantially prejudicial to him.

The purpose of this fee shifting statute, also called the Equal Access to justice Act, is to allow for the recoupment of attorneys fees so that individuals may challenge actions of the State when otherwise it may not be feasible to do so.

This statute is mandatory, and shall be awarded; the agency has the burden of proof to show that its action is “substantially justified” in order to escape payment of fees and costs. *Construction Industry Training Council v. Washington state Apprentice and Training Council* 96 WN. App 59 (1999).

Accordingly, if appellant prevails on any of his assignments of error, he is entitled to his reasonable attorneys fees and costs for both the Superior Court and Appellate court appeals, and should be permitted to present a

cost bill to the court within 10 days of the court's favorable ruling.

CONCLUSION

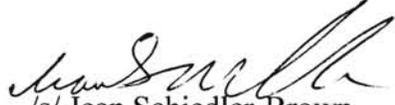
Based upon the Stipulation, which was an express contract to which Mr. Kincheloe and the Department of Health agreed in 2001, there was no agreement to the restriction of his license. The purpose and intent of the agreement was to avoid any discipline. The statute defines many "sanctions" that are not "restrictions", specifically supervision and other conditions. The statutory scheme would be illogical if the stipulations, which as a matter of law are not disciplinary, would be treated as if they are prior discipline for purposes of answering licensing application questions. Further, many terms of the statute would be only so much excess baggage if the specific terms were all intended to be "restrictions," violating the principle that no part of a statute should be read to be superfluous, but that every part of a statute must be presumed to have meaning. Numerous statutory presumptions—that the legislature means what it says in its pronouncements and that when it uses different terms they mean something different, would have to be ignored in order to uphold the Department's rejection of Mr. Kincheloe's certification. Moreover, none of the terms used in the Stipulation to express the agreement of the parties, such as reporting and supervision, have the same or a similar meaning as "restriction." There is no basis under the law to

draw the conclusion that Mr. Kincheloe's license had been restricted.

Finally, even if the court rules that the 2001 agreement could have constituted a restriction on Mr. Kincheloe's credential, there is no evidence of record that he had actual or constructive notice that he should have disclosed it and therefore he did not conceal or misrepresent a fact on his application.

The court should reverse the decision of the Department of Health and award reasonable attorneys fees to Mr. Kincheloe.

DATED this 18th day of June, 2012.


_____/s/ Jean Schiedler-Brown_____
Jean Schiedler-Brown
WSBA #7753, for Appellant