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NO. 69662-9  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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THOMAS J. OGDEN,

Appellant

Vs.

WASHINGTON STATE CRIMINAL  
JUSTICE TRAINING COMMISSION,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
No. 12-2-02512-6 KNT

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

The Washington State Criminal Justice Training Commission (“the Commission”) found Thomas Ogden to be in default and revoked his Peace Officer Certification despite legal authority requiring the dismissal of Mr. Ogden’s case. Mr. Ogden voluntarily surrendered his Certification, however, and thus deprived the Commission of the authority to render a decision in this matter. The Commission incorrectly argues that it has the power to reject Mr. Ogden’s voluntary surrender when no statute grants it such power, and that it could maintain jurisdiction even after the surrender of the certificate made any relief it granted meaningless. Further, rather than “knowingly” failing to appear at the first day of his hearing, Mr. Ogden was absent because of the mistaken information provided by his counsel. He was fully prepared to appear at the second day when he was set to testify and be cross examined. Nonetheless, Mr. Ogden’s case was never decided on its merits.

This Court should correct the Commission’s error and find that the Commission lacked jurisdiction, or alternatively, find that it was error for the Commission to hold Mr. Ogden in default and remand this case for a full hearing.

## II. STATEMENT OF THE CASE ON REPLY

Mr. Ogden has never had adverse disciplinary history with the Tacoma Police Department or with either of the two law enforcement agencies that had previously employed him. CP 58. In fact, his prior history includes multiple commendations. CP 202-204. On August 26, 2011, Mr. Ogden voluntarily surrendered his peace officer certification. CP 185. Despite no evidence that the Commission discussed Mr. Ogden's surrender, or even if the Commission has authority to reject such a surrender, it was rejected. CP 276-79. Mr. Ogden then appealed this rejection to the Superior Court. CP 259. The court denied Mr. Ogden's appeal, finding in part that it was premature. CP 68-69.

Chief Robert Torgensen, the Presiding Member of the Commission panel set to hear the allegations of misconduct against Mr. Ogden, purported solely to move the hearing date to December 15-16, 2011 from the prior date of December 19-20, 2011. CP 285; 512. Again, there is no evidence that the entire panel met to discuss scheduling the hearing. Unfortunately, Mr. Ogden was erroneously advised by counsel that the hearing date had been reset, but to December 19-20, 2011, rather than the correct dates of December 15-16, 2011. CP 287. Relying on this advice, Mr. Ogden unknowingly moved a business trip from the incorrect hearing date of December 19, 2011 to the actual hearing date of December 15,

2011. *Id.* By the time Mr. Ogden learned of the mistake, he was unable to make further changes to his travel plans. *Id.*

Mr. Ogden filed an affidavit explaining the circumstances precluding his appearance at the first day of the of a two-day hearing, as well as a waiver of his presence at the first day. CP 400-01. The full Hearing Panel finally met on December 15, 2011, and nonetheless orally ruled that Mr. Ogden was not entitled to a continuance. CP 515-26. Further, it erroneously found him in default despite the fact that his attorney was fully ready to proceed with the hearing and that Mr. Ogden would be present the next day. *Id.* The Commission subsequently revoked Mr. Ogden's peace officer certification, ignoring Mr. Ogden's prior surrender of his certificate. CP 332-39.

### III. ARGUMENT

**a. Mr. Ogden is not estopped from challenging personal jurisdiction on appeal.**

As an initial matter, the Commission argues that principles of collateral estoppel prevent Mr. Ogden from arguing issued of personal jurisdiction when a prior court has ruled on the matter. This is incorrect. Lack of personal jurisdiction can be challenged so long as it has not been waived. CR 12(h)(1) *see In re Marriage of Maddix*, 41 Wn.App. 248, 703 P.2d 1062 (1985). This is true even in circumstances where a judge or an

administrative officer has previously rendered a decision on the matter. *Subcontractors and Suppliers Collection Services v. McConnache*, 106 Wn. App. 738, 744, 24 P.3d 1112 (2001).

The Commission relies on *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002) to argue that Mr. Ogden should be estopped from arguing personal jurisdiction, but in that case, the court was confronted with an issue of whether Snohomish County was bound by the immunities promised in an agreement the defendant made when making statements to King County. The court reasoned that Snohomish County should be able to prove that it had a separate source of information from the statements, and so collateral estoppel did not apply. *Id.* at 99-100. This concept is entirely separate from whether a court has jurisdiction to hear a matter at all, particularly when the Superior court on appeal included in its opinion the fact that it considered Mr. Ogden's appeal premature. CP 68-69.

Under *Subcontractors v. McConnache*, Mr. Ogden was not required to appeal the superior court's ruling to maintain this argument. *Subcontractors*, 106 Wn.App. at 744. There, both a judge and an arbitrator had ruled on the issue of personal jurisdiction, finding that it did not exist. *Id.* *Subcontractors* argued that this collaterally estopped McConnache from raising the argument on appeal. *Id.* at 740. The court disagreed,

holding that unless a party has waived his jurisdictional challenge, it may be raised even if another judge previously ruled on the issue. *Id.* at 744.

Similarly, a case that is moot continues to be moot if a court cannot provide effective relief. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) (citing *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994)). The issue of mootness here is hand-in-hand with the Commission's lack of personal jurisdiction over Mr. Ogden. Mr. Ogden has never waived his challenge to the Commission's jurisdiction over him once he surrendered his certificate. To the contrary, he has continually maintained in his pleadings that no proper personal jurisdiction existed permitting the Commission to hear this matter. He has further maintained that once he was no longer certified, the Commission could provide no relief for any party.

Mr. Ogden was erroneously precluded from presenting his case on its merits, so he has suffered injustice. As discussed below, but for the mistake of his counsel, he was fully prepared to argue the meritorious defenses of his case. Collateral estoppel therefore does not bar Mr. Ogden from raising these issues before this court.

**b. The Commission lacked jurisdiction over Mr. Ogden because he had surrendered his Certification**

The Commission argues that nothing in the statutes or regulations permits a peace officer from surrendering his or her certification. This ignores the inverse of this argument--nothing in the statutes or regulations permits an agency to reject a voluntary surrender. Fundamentally, state agencies are creatures of statute and can only perform tasks assigned to them by the legislature. The Commission has been statutorily granted the power to grant, deny or revoke certification of an officer. The Commission does not have the power to reject surrenders.

Indeed, if this Court accepts the Commission's contention, then it would in effect be ruling that the Office of Superintendent of Public Instruction similarly lacks the jurisdiction to accept the voluntary surrenders of teaching certificates. This would call into questions thousands of such surrenders and create virtual turmoil for OSPI. This is particularly true since the grant of jurisdiction to OSPI and the Commission are very similar. Moreover, as a constitutional matter, state agencies cannot compel a person to maintain their certification. Indeed, the statutes anticipate that some officers might choose to undertake different careers and the statutes discuss what happens when a peace officer's certification lapses. RCW 43.101.125. In such situations the

Commission has the power to reinstate upon the peace officer meeting certain conditions. *Id.*

It is no different when an officer voluntarily surrenders his certification. Should Mr. Ogden attempt to reinstate his certification, the Commission would again assume jurisdiction and could address the issues set forth in the charges. However, nothing in the statutes states that the Commission can reject surrender. In this case, the Commission nonetheless entered a default judgment against Mr. Ogden despite the fact that he had surrendered his certification.

The Commission's statutory authority regarding peace officers is to "[g]rant, deny, or revoke certification of peace officers," RCW 43.101.085(6), in addition to establishing requirements for maintaining peace officer certification. RCW 43.101.095(3). Nothing in the statute allows the Commission to revoke a surrendered certification, or in fact to refuse to accept the surrender of a certification. Mr. Ogden cannot become re-certified without applying to the Commission, which then has the jurisdiction to assess his application and deny it for any of the reasons set forth in the statement of charges. The Commission is not deprived of future jurisdiction to review applications on the basis of a voluntary surrender, and none of Mr. Ogden's actions prevent the Commission from comparing any future or intervening conduct to that in the Statement of

Charges. Mr. Ogden's voluntary surrender of his certification thus has no impact on the Commission's power to decide reinstatements.

Finally, the hearing was moot because Mr. Ogden did not have a Peace Officer Certification at the time the hearing to revoke his certification occurred. The issue of mootness "is directed at the jurisdiction of the court." *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). The Commission sought no relief beyond the revocation of Mr. Ogden's certification. It also lacked the power to take any action beyond such a revocation. See RCW 43.101.115 and RCW 43.101.125. As discussed above, the Commission did not properly have personal jurisdiction over Mr. Ogden once he surrendered his certification. The Commission therefore could not grant any type of "effective relief," rendering the hearing moot. See *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

**c. The Commission did not follow proper rules when establishing the hearing date.**

The Presiding Member of the Commission did not have sole power to establish a hearing date different from the one established by the Commission as a whole. WAC 139.06.090 and WAC 139.06.060 both describe the duties of the presiding member, including conducting a

prehearing conference and delegating responsibility for signing documents on behalf of the panel. Neither statute discusses what process is necessary to schedule a hearing.

Despite the Commission's assertions, WAC 139.06.070 provides that the panel is responsible for scheduling hearing dates, not the Presiding Officer. A statute or ordinance must be interpreted to effect the legislature's intent. *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110, 676 P.2d 466 (1984). Every provision must be read in relation to every other provision so as to harmonize the ordinance's construction. *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986). In this case, "parties" is not defined in the statutes cited by the Commission as the term relates to setting a hearing. WAC 136.06.070 does, however, define who is able to set a hearing date: the panel. It was thus improper for the Presiding Member to set the date alone.

**d. Mr. Ogden has demonstrated that good cause exists for this court to vacate the default judgment.**

Mr. Ogden relied on his counsel's mistaken representation when he became unable to appear for the hearing date, preventing him from presenting his case on its merits. It has long been the policy of this Court to liberally set aside defaults and have controversies determined on their

merits. *Morton v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2008) (citations omitted). Here, there is sufficient evidence in the record to enable Mr. Ogden to prevail on the charges against him. *See Sacotte Construction, Inc. v. National Fire & Marine Insurance Co.*, 143 Wn.App. 410, 418, 177 P.3d 1147 (Div. I, 2008). Further, it was the mistake of Mr. Ogden's counsel that placed him in the position of being unable to attend the hearing. This current matter before the court is the result of Mr. Ogden diligently attempting to resolve that default. The Commission is also unable to show that substantial hardship would result to it if the default were set aside, because the hearing could still take place and it could still render a decision.

As noted by the Commission, the meaning of an administrative rule is to be provided by its plain language. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). In this case, the plain language of WAC 139.06.100(1) requires a peace officer to appear "in person" at the hearing. Nothing in the regulation's language requires the officer to be present for the entire duration of the hearing. If a hearing is but a single proceeding set over several days, then the respondent's presence at some point during those days satisfies the wording of the regulation. *See RCW 34.05 et seq.* Mr. Ogden was present through his attorney on the first day of the hearing, and was going to be present himself on the second day

when he was actually set to testify and be cross-examined. The “in person” requirement would therefore have been met, and no detriment would have been imposed on the process of the hearing.

Regardless, the Commission asks that its own ruling, that Mr. Ogden cannot rely on counsel for his appearance under the regulation, to sway this Court to conclude that it was Mr. Ogden personally who made the mistake of incorrectly calendaring the hearing dates.

The Commission cites a number of cases to support the contention that mistake of counsel is attributable to the client. However, the court in *Barr v. MacGugan* addressed these cases, noting that “these cases all addressed allegations of negligent handling of cases resolved on the merits. The law favors resolution of cases on their merits.” *Barr*, 119 Wn.App. 43, 47, 78 P.3d 660 (2003). In overturning the default, the *Barr* court relied upon the fact that the merits of Barr’s case had never been addressed. *Id.* Mr. Ogden has similarly never had the opportunity to have his case heard on its merits.

Conversely in *Graves v. v. Dep’t of Employment Security*, the claimant did not rely on statements of counsel, but instead put the incorrect date on a personal calendar. *Graves*, 144 Wn.App. 302, 306, 182 P.3d 1004 (2008). No attorney appeared as a representative of Graves, prepared to go forward as Mr. Ogden’s attorney did here. Instead, no one

simply showed up. The *Graves* court further stated that Graves should have “contact[ed] the agency and request a postponement of the hearing if he was unable to appear.” *Id.* at n.11. Here, Mr. Ogden filed a waiver of his presence and a motion to continue the hearing. Both were denied by the Commission. Mr. Ogden made extensive efforts to resolve the issue once it became clear he was unable to appear. It was error for the Commission to find that good cause did not exist in regard to Mr. Ogden’s absence from the first day of the hearing.

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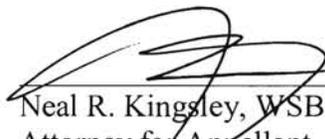
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#### IV. CONCLUSION

It was error for the Commission to find Mr. Ogden to be in default when it no longer had jurisdiction over him after he surrendered his certification. At that point, the hearing became moot because the Commission could take no other action. It was also error for the commission to enter a default judgment on the basis of Mr. Ogden following the incorrect advice of his attorney. Finally, the Commission erroneously interpreted its regulations to prohibit Mr. Ogden's attorney to appear for him in representative capacity when Mr. Ogden was unable to personally attend. This court should reverse these erroneous findings and either dismiss this case or remand it for the full hearing on the merits it deserves.

DATED this 8<sup>th</sup> Day of July, 2013.

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Attorney for Appellant

**CERTIFICATE OF TRANSMITTAL**

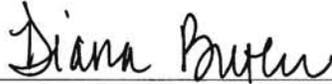
I hereby certify that the foregoing Appellant's Opening Brief was electronically sent (per prior agreement) to the following counsel:

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