69662-9

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NO. 69662-9-I

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

THOMAS J. OGDEN,

Appellant,

v.

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION,

Respondent.

# BRIEF OF RESPONDENT


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## I. INTRODUCTION

In April 2011, the Criminal Justice Training Commission (Commission) issued a statement of charges alleging that Appellant, Thomas Ogden, was discharged from his position as a peace officer for misconduct which disqualified him from maintaining his Peace Officer Certification (Certification). Specifically, Mr. Ogden made false or misleading statements to his employer in an internal investigation of Mr. Ogden after he accessed the WACIC/NCIC records system to look up a barista at his local Starbucks. In the charges, the Commission sought revocation of Mr. Ogden's Certification. During the revocation proceedings, Mr. Ogden attempted to force the Commission to accept his voluntary surrender of his Certification. However, state law provides no process for a certified peace officer to surrender his peace officer certification after being discharged from a law enforcement agency and the Commission did not accept Mr. Ogden's surrender on that basis. Mr. Ogden then knowingly failed to appear at his scheduled hearing, resulting in the Commission issuing a default order revoking his Certification. The Commission then denied Mr. Ogden's motion for reconsideration of the default order.

Mr. Ogden now challenges Commission's default order and order denying reconsideration, arguing that: 1) he evaded the Commission's

jurisdiction by surrendering his Certification after the statement of charges was issued; 2) the hearing dates, set with the full participation and consent of Mr. Ogden's attorney, were in violation of the Commission's rules; and, 3) Mr. Ogden's failure to appear at his hearing, which he was aware of and capable of attending, is good cause for vacating the default order.

Mr. Ogden's arguments ignore applicable statutes and case law. The Commission has jurisdiction over revocation proceedings for Mr. Ogden's Certification under RCW 43.101 and WAC 139-06. The hearing dates were chosen in accordance with the Commission's rules and Mr. Ogden acknowledged notice of the dates. Mr. Ogden knowingly failed to attend the hearing in violation of the Commission's rule requiring attendance. As such, this Court should affirm the Commission's Default Order and Order Denying Reconsideration.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Under RCW 43.101, may Mr. Ogden circumvent the Commission's jurisdiction by purporting to "surrender" his Certification in violation of the Commission's statute and rules and after a statement of charges has been issued?

2. Is Mr. Ogden estopped from raising the "surrender" issue here on appeal when he previously sought and was denied a writ of prohibition in superior court on the issue, a decision which he did not appeal?

3. RCW 43.101.155 permits a revocation hearing date to be extended outside the one hundred eighty-day period by mutual agreement of the parties. Did the Commission properly set the revocation hearing

outside of the one hundred eighty-day period where both parties agreed to the extension of time?

4. WAC 139-06-060 gives the presiding Commission panel member the authority to conduct prehearing conferences and determine procedural issues. Did the presiding Commission panel member properly conduct all such prehearing conferences and re-set hearing dates when he had the full participation and agreement of both parties?

5. WAC 139-06-100 requires the certified peace officer's attendance at the revocation hearing. Did the Commission properly issue a default order revoking his Certification when Mr. Ogden knowingly failed to appear for the hearing with no good cause for such absence?

## III. COUNTERSTATEMENT OF THE CASE

### A. Commission Proceedings Generally

The Legislature established the Commission to "provide programs and standards for the training of criminal justice personnel." RCW 43.101.020. A "peace officer" is defined as "any law enforcement personnel subject to the basic law enforcement training requirement of RCW 43.101.200 and any other requirements of that section". RCW 43.101.010(11). All persons who are employed as peace officers in Washington must obtain certification from the Commission to hold those positions. RCW 43.101.095. Commission certification is based upon the peace officer successfully passing basic law enforcement training requirements, a background investigation, a psychological examination, and a polygraph test. *Id.* The Commission has the authority to grant, deny or revoke a certification. RCW 43.101.095; RCW 43.101.105.

If a peace officer is terminated by their employer, the employer is required to notify the Commission within fifteen days of the termination date, regardless of the reason for termination. RCW 43.101.135. The Commission then reviews the reasons for such termination. Upon finding probable cause to believe a peace officer's certification should be denied or revoked under RCW 43.101.105, the Commission issues a statement of charges stating the grounds for denial or revocation of the peace officer's certification. RCW 43.101.155. The peace officer may challenge the denial or revocation by requesting an administrative hearing pursuant to the Washington Administrative Procedure Act (APA, RCW 34.05). RCW 43.101.105; RCW 43.101.380; Chapter 139-06 WAC.

If a hearing is requested, the Commission selects a hearing panel to conduct an administrative hearing to determine whether the alleged reason for termination warrants revocation. RCW 43.101.380(2); WAC 139-06-060. The hearing panel selects a presiding member to perform procedural matters for the panel, such as sign documents on behalf of the panel, and to conduct the prehearing conference and any other hearings that may be necessary. WAC 139-06-060(3). The rules permit either the peace officer or his/her attorney to attend the prehearing conference. WAC 139-06-090. However, the rules require the peace officer to appear in person at the

hearing. WAC 139-06-100(1). Failure to attend requires a default order to be issued pursuant to RCW 34.05.440. *Id.*

A peace officer whose certification is denied or revoked may reapply for certification after a length of time set by statute or rule based upon the reason for denial or revocation. RCW 43.101.115. For instance, the law provides that a peace officer whose certification is revoked based upon a felony conviction is not eligible to reapply for certification at any time, while a peace officer whose certification was revoked based upon discharge for disqualifying misconduct may petition the Commission for reinstatement after five years. *Id.* The Commission shall hold a hearing upon a petition for reinstatement and impose probation terms upon a reinstated certification. RCW 43.101.115; WAC 139-06-140; WAC 139-06-150.

**B. Commission Proceedings Against Mr. Ogden**

Mr. Ogden was hired as a Tacoma Police Officer in December 2007. CP 119.[1] The City of Tacoma Police Department terminated Mr. Ogden from his position on March 23, 2010. CP 117. His termination followed an internal investigation into his alleged misuse of

[1] As indicated in the Index to Clerk's Papers, the administrative record in this matter was submitted to this Court under separate cover. *See* CP 112-692.

WACIC/NCIC[2] records system, unbecoming conduct, unsatisfactory performance, and untruthfulness. CP 117-121. The Commission's review determined that Mr. Ogden had accessed the WACIC/NCIC records system to look up the license of a barista at a local Starbucks for personal reasons. CP 119-121. During the investigative process with his employer, Mr. Ogden was untruthful about the purpose of his use of the records system. *Id.*

On April 7, 2011, the Commission issued a Statement of Charges alleging that Mr. Ogden was discharged for disqualifying misconduct that would constitute a crime of dishonesty or false statement which, if true, would be grounds for revocation of Mr. Ogden's Certification. CP 122-124. Mr. Odgen timely requested a hearing to contest the charges. CP 124. On June 30, 2011, Mr. Ogden, through his counsel, waived his right to a hearing within 180 days by agreeing to extend time for the hearing to November 4, 2011. CP 136, 572-73. Based upon this extension of time, the Commission set the first hearing date on October 19, 2011. CP 131-34; 573-75.

Mr. Ogden then created a notarized form, and on August 6, 2011, Mr. Ogden attempted to "surrender" his Certification by submitting the

[2] The National Crime Information Center (NCIC) and Washington Crime Information Center (WACIC) are computerized information systems established as a service to all criminal justice agencies to provide criminal justice information. *See* RCW 43.43.500.

form to the Commission. CP 298-300. Within the form, Mr. Ogden did not provide reasons for the voluntary surrender or stipulate to the Statement of Charges, but instead offered "to provide the [Commission] with an affidavit describing in full the reasons for my voluntary surrender of the Certification listed above" when he applied for reinstatement. *Id.* Neither the statutes nor Commission rules have a process for allowing a peace officer to surrender a certification in lieu of revocation. The Commission rejected Mr. Ogden's attempts to do so. CP 392-95, 589-91. Mr. Ogden then filed a motion to dismiss the charges against him based on his purported surrender, arguing that the surrender deprived the Commission of jurisdiction and rendered the matter moot. CP 283-94. On September 28, 2011, the Commission denied Mr. Ogden's Motion to Dismiss. CP 392-95, 580-91.

Also on September 28, 2011, the Commission continued its original hearing date of October 19, 2011 pending the outcome of superior court proceedings, which Mr. Ogden's counsel represented, would be filed shortly. CP 396, 591-92. On October 3, 2011, Mr. Ogden filed an action in superior court seeking a Writ of Prohibition against the Commission from proceeding on his revocation hearing. He alleged that his "surrender" deprived the Commission of jurisdiction and rendered the matter moot. CP 365-91.

On October 20, 2011, the superior court denied Mr. Ogden's writ request, finding "Plaintiff's Writ of Prohibition is denied on the grounds that Plaintiff failed to establish that the Commission clearly and inarguably lacks jurisdiction in the administrative matter." CP 68-69. That same day, counsel for both parties appeared before the Commission's presiding panel member and three of the other four panel members via a telephonic prehearing conference. CP 621-31. At that time, Mr. Ogden, through his counsel, agreed to further extend the 180-day hearing period through December 31, 2011. CP 397, 406, 628. The parties agreed to a hearing date of December 19–20, 2011. CP 397, 626. Later that day, the parties contacted Commission staff and suggested the hearing be held instead on December 15-16 because Mr. Ogden's former employer - whom both parties had named as a witness - was unavailable on the December 19-20 hearing date. CP 281-82, 345-46, 397-98, 435, 545. Mr. Ogden, through his counsel, both requested and agreed to the December 15-16 hearing date. *Id.*

On November 9, 2011, Commission staff served Mr. Ogden, through his counsel, with the Prehearing Order and Notice of Change of Hearing Date both electronically and by U.S. Mail. CP 397-98, 460. The Prehearing Order indicated that the dates of hearing would be December 15-16, 2011, and stated: **"Per WAC 139-06-100(1), the peace officer**

**shall appear in person at the hearing. Failure to Appear in person shall constitute default and the hearing panel shall enter an order under RCW 35.04.440."** CP 398 (bold in the original).

The day before the December hearing, Mr. Ogden filed a document purporting to waive his "right" to be present on the first day of hearing and offering to be present only on the second day of the hearing. CP 401-04. The hearing convened the next day and Mr. Ogden did not appear in-person, although his counsel was present. CP 453, 632-43. Mr. Ogden's counsel affirmed that Mr. Ogden was aware of the hearing date, but that he had initially been given an incorrect date by his own counsel and had made conflicting travel plans. CP 399-404; 632-41.[3] Mr. Ogden's counsel also argued that the "waiver" signed by Mr. Ogden was sufficient to excuse him from appearing at his hearing. *Id.* At no time during the December 15 hearing did Mr. Ogden's counsel request a continuance of the hearing. *Id.* The panel deliberated for approximately thirty minutes and then ruled that Mr. Ogden was in default for his failure to appear. CP 642-43.

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[3] *See* statements by Mr. Ogden's counsel at hearing: "Only that this is not Mr. Ogden's fault. It's our fault. It's our law firm's fault, and he will be here tomorrow." and "I just want to re-enforce what [the Assistant Attorney General] said, is that [Mr. Ogden's counsel] knew about this. We've admitted that it's our office's fault." CP 628, 641.

On December 24, 2011, the Commission issued its Findings of Fact and Conclusions of Law Regarding Order of Default and Final Order on Peace Officer Certification, which revoked Mr. Ogden's Certification. CP 449-56. On December 29, 2011, the Commission entered an Amended Findings of Fact and Conclusions of Law Regarding Order of Default and Final Order on Peace Officer Certification to make clerical corrections. CP 459-64.

On January 20, 2012, Mr. Ogden moved to vacate the default order, arguing that the hearing dates were not established by the entire panel, the hearing was not held within 180 days of the issuance of the statement of charges, Mr. Ogden could waive his presence at hearing, and good cause existed to vacate the default. CP 512-25. The Commission denied Mr. Ogden's motion on February 9, 2012. CP 562-63. Thereafter, Mr. Ogden filed a petition for judicial review in King County Superior Court, which affirmed the Commission's Final Order on November 7, 2012. CP 79-93. Mr. Ogden timely appealed. CP 94-111.

## IV. STANDARD OF REVIEW

Judicial review of an agency order is governed by the APA. RCW 34.05.570. The party asserting the invalidity of the agency's action has the burden of demonstrating such invalidity based on the grounds outlined in RCW 34.05.570 (3). *See* RCW 34.05.570 (1)(a); *Lawrence v.*

*Dep't of Health*, 133 Wn. App. 665, 672, 138 P.3d 124 (2006). When reviewing an agency's decision, an appellate court sits in the same position as the superior court and applies the standards of review directly to the agency record. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Notwithstanding the *de novo* standard of review for questions of law, courts grant substantial weight to an agency's interpretation of the statutes it administers. *Pub. Utility No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Here, the Commission is charged with, and has expertise in administering peace officer certifications and the court should accord substantial weight to the Commission's application of that law. RCW 43.101.020; RCW 43.101.095.

An agency acts in an arbitrary and capricious manner when its action is willful and unreasoning, and when the action is taken without consideration and in disregard of facts or circumstances. *Lawrence*, 133 Wn. App. at 672. If there is room for two opinions and the agency acted honestly and upon due consideration, the action is not arbitrary and

capricious even if a reviewing court might reach the opposite conclusion. *Id.*

## V. ARGUMENT

The Commission had jurisdiction over Mr. Odgen when it issued a final order revoking his peace officer Certification. By way of a prior superior court action, which was not appealed, Mr. Ogden already received a final determination on the issue of the Commission's jurisdiction over his Certification and is estopped from now raising the issue here on appeal. Even if Mr. Ogden were permitted to reargue jurisdiction, his attempt to voluntarily surrender his Certification in the face of a pending revocation proceeding—a surrender the Commission had no authority to accept—did not divest the Commission of jurisdiction. Mr. Odgen's hearing dates were set in accordance with Commission procedure, and Mr. Ogden knowingly failed to appear for the hearing he requested. Mr. Ogden has failed to establish the Commission abused its discretion in entering a default order, and the Commission's final order should be affirmed.

### A. The Commission Has Statutorily-Authorized Jurisdiction To Grant, Deny, Or Revoke Peace Officer Certifications

The Commission had jurisdiction to issue a decision in this matter. Mr. Ogden already received a final determination on the issue of

jurisdiction from superior court when it denied Mr. Ogden's writ of prohibition, and Mr. Ogden is now estopped from raising this issue for the third time. Neither Chapter 43.101 RCW nor Chapter 139-06 WAC authorizes the Commission to accept a "voluntary" surrender on the peace officer's terms, and the Commission did not accept any such surrender. Finally, the Commission has continuing jurisdiction as this matter mirrors *Nims v. State Bd. of Registration*, 113 Wn. App. 499, 507, 53 P.3d 52 (2002), as the Commission issued a statement of charges prior to Mr. Ogden's offer to surrender Certification and therefore has continuing jurisdiction over the revocation proceeding.

**1. Mr. Ogden is estopped from arguing that his attempted voluntary surrender deprived the Commission of jurisdiction and rendered the action moot**

The issues of the Commission's jurisdiction and/or mootness associated with Mr. Ogden's attempt to voluntarily surrender his Certification were determined in prior litigation, and Mr. Ogden is estopped from asking this court to decide them again. Collateral estoppel precludes a party from re-litigating an issue when four factors are met:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of doctrine must not work an injustice.

*State v. Bryant*, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002).

Each factor is met in this case. First, Mr. Ogden's jurisdictional challenge to the Commission's authority to determine whether revocation should occur was fully presented to and finally decided by another court. Shortly before the first date set for hearing, Mr. Ogden created a form for a voluntary surrender of his Certification in an effort to avoid revocation. CP 392-95. After the Commission rejected Mr. Ogden's attempt to voluntarily surrender his Certification, Mr. Ogden initiated a separate action in superior court in an attempt to obtain a writ of prohibition, Cause No. 11-2-34310-3 KNT. CP 68-69, 373-91. There, Mr. Ogden argued that his voluntary surrender deprived the Commission of jurisdiction. CP 31-53. The superior court rejected his argument and found that Mr. Ogden "failed to establish that the Commission clearly and inarguably lacks jurisdiction in the administrative matter." CP 68-69. Mr. Ogden did not appeal the superior court's decision and as such, the superior court's determination regarding jurisdiction is final. *Id.*

This issue is the same issue Mr. Ogden now raises here. Aplt's Br. at 8-14. Mr. Ogden did not appeal the first superior court decision, so that unappealed decision is final. *Marley v. Dep't of Labor & Indus. of State*, 125 Wn. 2d 533, 537, 886 P.2d 189, 192 (1994) (Unappealed decision of a trial court operates as final judgment on the merits). As such, the first and

second factors for collateral estoppel are satisfied. Mr. Ogden was the plaintiff in the writ proceeding and is the Appellant here, thus satisfying the third factor for estoppel. The fourth factor is satisfied because precluding Mr. Ogden from re-litigating the issue now will not work an injustice. He had a full and fair opportunity to fully argue his position before the superior court and to seek an appeal if he so desired. His choice not to do so in his prior case should not overcome estoppel here. Because all four *Bryant* factors are satisfied, Mr. Ogden should be estopped from attempting to collaterally attack the Commission's jurisdiction again.

### 2. State law does not provide certification "surrender" authority to the Commission

RCW 43.101 does not authorize the Commission to accept a peace officer's voluntary surrender of a certification as a means to avoid an investigation and hearing. The Commission is specifically limited in its authority to "*grant, deny, or revoke* [the] certification of peace officers." RCW 43.101.085(6) (emphasis added). The Commission must allow a peace officer to retain his certification status so long as the peace officer meets the requirements of RCW 43.101. RCW 43.101.095(4). However, once the Commission has probable cause to believe that a peace officer has been discharged for disqualifying misconduct, the Commission must issue a statement of charges to revoke certification. RCW 43.101.155.

Nothing in either RCW 43.101 or the Commission's implementing rules contemplates a process for a peace officer to surrender his or her certification. The statutory revocation process contemplates that a peace officer may decide to accept the statement of charges as issued or request a hearing to contest the statement of charges; however, the peace officer may not unilaterally evade charges.

The Commission's inability to accept voluntary surrenders such as the one submitted by Mr. Ogden is also reflected in the regulations that determine the circumstances under which a peace officer who has been denied or revoked certification may apply for reinstatement. *See* RCW 43.101.115 (authorizing the Commission to establish standards for reinstatement and certification). The Commission addresses a petition for reinstatement by looking at the findings in the original denial or revocation order. RCW 43.101.105(1); RCW 43.101.115; WAC 139-06-130. Without any findings, the Commission would be unable to assess when a peace officer is qualified for reinstatement of his certification.

Mr. Ogden's citations to the enabling statutes for other professions to support his argument that the Commission may accept a voluntary surrender are inapplicable here. Aplt's Br. at 8-10, 12-16 (*citing* specifically to Professional Educator Standards Board's rules, WAC 181-86-013(1), and the Chiropractic Quality Assurance Commission's rules,

WAC 246-11-090(1)). Unlike the broader statutory authority of the boards and commissions cited by Mr. Ogden,[4] the Commission's statutory authority is limited to the ability to "grant, deny or revoke" certification. RCW 43.101.085(6). The statute does not authorize voluntary surrender, and the Board has not adopted any rule regarding voluntary surrender.

The Commission did not accept Mr. Ogden's attempt to voluntarily surrender his license because neither its enabling statutes nor its rules authorize it to do so. CP 392-95. When explaining its refusal to accept the surrender, the Commission explained that there was "no provision in Chapter 43.101 RCW or the Washington Administrative Code for voluntary surrender of peace officer certification." CP 393. The Commission further explained that the way Mr. Ogden attempted to surrender his license was especially problematic because the form he created did not include the "particular findings" that are necessary to include in a revocation order for purposes of later reinstatement. *Id.* Mr. Ogden cites no relevant authority suggesting that the Commission *can* accept a voluntary surrender of a certification—let alone that the

[4] For example, the Professional Educator Standards Board has the authority to "establish, publish, and enforce rules determining eligibility for and certification of personnel employed in the common schools of this state". RCW 28A.410.010(1)(a). Similarly, the Chiropractic Quality Assurance Commission's purpose is "to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensing, consistent standards of practice, continuing competency mechanisms, and discipline. Rules, policies, and procedures developed by the commission must promote the delivery of quality health care to the residents of the state." RCW 18.25.002.

Commission *must* accept a unilateral surrender by an officer attempting to avoid discipline. Mr. Ogden had the option to accept the Statement of Charges as issued if he wished to avoid a revocation hearing. The Commission properly refused to accept Mr. Ogden's "voluntary" surrender and had jurisdiction over the revocation hearing.

**3. The Commission retains jurisdiction over the proceeding once a statement of charges is issued**

Moreover, once the Commission properly established jurisdiction over Mr. Ogden, his unilateral attempt to surrender his Certification does not subsequently defeat jurisdiction. The Commission retained jurisdiction to proceed with a revocation once it issued the statement of charges. "Once a professional disciplinary tribunal lawfully acquires jurisdiction over a proceeding, its jurisdiction continues until the proceeding is concluded." *Nims v. State Bd. of Registration*, 113 Wn. App. 499, 507, 53 P.3d 52 (2002). In *Nims,* the Board of Professional Engineers issued charges against an engineer with an active license. *Id.* The licensee chose not to renew his license after the charges were issued. *Id.* This Court held that the Board's jurisdiction did not terminate merely because the licensee no longer held an active license. *Id.*

The facts of this matter mirror those in *Nims*. Here, the Commission is a professional licensing tribunal that issued a statement of

charges against Mr. Ogden while he undisputedly held a current Certification. Like Mr. Nims, Mr. Ogden attempted to relinquish his Certification after the issuance of a statement of charges in order to avoid the pending disciplinary action. Nevertheless, Mr. Ogden argues that *Nims* should not be applied to the present matter by claiming that 1) a certification is not a license; 2) the Commission is not a professional licensing board under the Business and Professions Act; 3) the peace officer certification statute does not provide for continuing jurisdiction as it is not worded as broadly as the Business and Licensing Act; 4) *Nims* is inapplicable as it relies on the quasi-criminal character of disciplinary proceedings against professional licenses; and 5) the matter is moot because Mr. Ogden has attempted to surrender his Certification. Aplt's Br. at 15-16. These arguments are not supported by statute or case law.

First, the definition of license and certification are indistinguishable in this context, as both are issued by the state and required for employment in a particular field. RCW 18.235.010. The Business and Professions Act referenced by Mr. Ogden includes certification within the definition of license, as it defines "license" as "equivalent to the terms "license," "licensing," "licensure," "certificate," "*certification*," and "registration"". RCW 18.235.010(6) (emphasis added). Additionally, the APA definition of license includes certification

– a license is: "a franchise, permit, *certification*, approval, registration, charter, or similar form of authorization required by law". RCW 34.05.010 (9)(a) (emphasis added). Moreover, the *Nims* court also used the terms "certificate" and "license" interchangeably. The *Nims* court discussed Mr. Nim's license to practice as a registered engineer. *Nims*, 113 Wn. App. at 501. But the court also recognized that the statute it analyzed—RCW 18.43.110—refers to an engineer's "certificate of registration." *Id* at 506. Mr. Ogden cites no authority for his position that a certification should be treated differently than a license in this context.

Furthermore, the *Nims* court did not base its analysis on the Business and Professions Act (Act), or even reference the language of the Act in its opinion. *Nims,* 113 Wn. App. at 506-07. Moreover, that court did not distinguish between the various professional[5] tribunals that might gain jurisdiction through issuing a statement of charges. *Id.* Instead, the *Nims* court's analysis was based on the language of RCW 18.43.110, which gave the Board of Professional Engineers the "power to discipline the registrant and sanction the certificate of registration of any individual." The court noted that the Board had jurisdiction over Mr. Nims when it

[5] The intent of the Business and Professions Act (Act) is only to "consolidate disciplinary procedures for the licensed businesses and professions under the department of licensing". RCW 18.235.005. Businesses regulated by the Act include such professions as barbers, professional boxing, real estate appraisers, white water rafting outfitters and security guards. RCW 18.235.020.

issued charges against him because he met the definition of a registrant: "any person holding a certificate of registration issued by this board." *Nims,* 113 Wn. App. at 506. The court concluded that the Board retained jurisdiction over Mr. Nims despite the lapse in his license after noting that "courts generally have held that a disciplinary board may complete a proceeding that it commenced while the licensee held his or her license." *Id.* at 507, n. 17.

In this matter, RCW 43.101 is even less restrictive in its language than the statute analyzed in *Nims*, in that it confers jurisdiction over *all* "peace officers," and is not restricted to only current holders of a peace officer certification like that in *Nims*. RCW 43.101.095(1); RCW 43.101.105(1)(d); WAC 196-27A-010(2). Unlike the professional engineer's statute where a "registrant" is the current holder of a certificate or license, a "peace officer" is "any law enforcement personnel" subject to the requirements of RCW 43.101.200. RCW 43.101.010(11); WAC 196-27A-010(2). Mr. Ogden was indisputably a peace officer under the Commission's jurisdiction when the Commission issued a statement of charges against him—he was "law enforcement personnel subject to the basic law enforcement training requirement of RCW 43.101.200 and any other requirements of that section." RCW 43.101.010(11). And, pursuant to RCW 43.101.155, the Commission must issue a statement of charges to

revoke certification if there is probable cause to believe the peace officer "has been discharged for disqualifying misconduct". Therefore, under *Nims*, regardless of whether Mr. Ogden surrendered his Certification, the Commission retained jurisdiction once it issued the April 7, 2011 Statement of Charges.

Regarding Mr. Ogden's claim that *Nim's* reliance on criminal procedure is misplaced because this matter involves a certification, not a license, this argument must fail. Aplt's Br. at 15-6. In general, a quasi-criminal proceeding will afford the licensee more due process protections, not less. *Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn. 2d 1, 9, 256 P.3d 339, 344 (2011). As stated above, a license is equivalent to a certification, and any additional protections afforded by treating the matter as a quasi-criminal proceeding work to Mr. Ogden's advantage.

Similarly, Mr. Ogden's argument that the revocation hearing became "moot" at the time he "surrendered" his Certification must also fail. Aplt's Br. at 16. The pending findings and conclusions of the Commission regarding Mr. Ogden's alleged misconduct would control Mr. Ogden's ability to become certified again in the future. Therefore, the revocation hearing had ripe issues to determine and was not moot. The Commission indisputably had jurisdiction when it issued the Statement of Charges because Mr. Ogden was a peace officer and had not yet attempted

to surrender his certificate. Once the Commission obtained jurisdiction, Mr. Ogden could not evade it by "surrendering" his certification.

### B. The Revocation Hearing Dates Were Properly Set In Accordance With The Commission's Rules And With Mr. Ogden's Consent

#### 1. The presiding member is authorized to set the hearing date

WAC 139-06-060 provides for the appointment of hearing panels in peace officer decertification proceedings and specifically grants the presiding member of the hearing panel the authority to rule on procedural matters:

> Each hearing panel shall select a presiding member who shall be responsible for signing documents on behalf of the panel, and for conducting prehearing conferences and any other hearings that may be necessary. If a panel hears more than one hearing, a new presiding member may, but need not, be selected for each hearing.

WAC 139-06-060(3). In addition, WAC 139-06-090 explicitly provides prehearing conferences "may be conducted by the presiding member." As such, the presiding member is given the authority to make procedural decisions, and may act for the panel in these procedural matters.

Mr. Ogden argues that the presiding member "unlawfully established" the December 15-16, 2011 hearing date because WAC 139-06-070(1) requires the entire panel to set hearing dates. Aplt's Br. at 19. Mr. Ogden's argument ignores the delegation of authority from the hearing

panel to the presiding member. WAC 139-06-060. Pursuant to that delegation, the presiding member conducted the prehearing conference and issued the prehearing order setting the agreed upon hearing dates. CP 397-98. The hearing panel properly set the hearing dates through its presiding member in accordance with the Commission's procedural rules. *Id.*; WAC 139-06-060; WAC 139-06-070.

**2. Mr. Ogden, through his counsel, agreed to an extension of time for the decertification hearing as permitted by RCW 43.101.155**

The parties to a peace officer decertification proceeding may mutually agree to extend the statutory time limits for a hearing. RCW 43.101.155(2). The parties may enter into this agreement through their respective counsel with or without the in-person participation of either party. RCW 34.05.428(2)[6]; RCW 43.101.155(2); WAC 139-06-090. On October 20, 2011, Mr. Ogden's attorney orally agreed to extend the time for hearing through December 31, 2011, and later, on December 15, 2011, Mr. Ogden's attorney signed the Agreement to Extend Time for Hearing Date through December 31, 2011. CP 397-98, 406, 628. Mr. Ogden waived his right to a hearing within the statutory 180 days

[6] The Commission follows the procedures governing adjudicative proceedings before agencies under RCW 34.05, except as otherwise provided in RCW 43.101. RCW 43.101.380(1).

through his counsel; as such, the December 15-16, 2011 hearing date was lawful.

Now, Mr. Ogden argues that his waiver was ineffective because it was made through his attorney rather than directly through him. Aplt's Br. at 21. However, an attorney's procedural acts accomplished in the regular conduct of the client's case are ordinarily considered to be the act of the client and binding on the client. *Russell v. Maas*, 166 Wn. App. 885, 891, 272 P.3d 273 (2012), *review denied,* 174 Wn.2d 1016 (2012). The agreement to the continuance by Mr. Ogden's attorney is imputed to Mr. Ogden, and Mr. Ogden cannot now argue that his attorney did not have the authority to act for him. The Commission did not commit an error of law in accepting the agreement of Mr. Ogden's attorney to the continuance.

### C. Mr. Ogden's Presence At The Decertification Hearing Is Mandatory; Mr. Ogden Has Failed To Provide Good Cause To Overturn The Default Order

#### 1. The plain language of WAC 139-06-100 requires Mr. Ogden's attendance at hearing

WAC 139-06-100(1) unambiguously states that the peace officer "shall appear in person at the hearing. Failure to appear in person shall constitute default and the hearing panel shall enter [a default] order under RCW 34.05.440." In contrast, Mr. Ogden argues that WAC 139-06-100

should be interpreted such that a peace officer may only appear at some unspecified time of the peace officer's choosing during the hearing. Aplt's Br. at 27-28. His argument fails.

If an administrative rule is clear on its face, its meaning is to be derived from the plain language of the rule. *Dep't. of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). A court or tribunal will not add to or subtract language from a rule unless it is imperatively required to make the rule rational. *Id.* at 57. In this case, WAC 139-06-100 unambiguously refers to a hearing in the singular. While a hearing may be set for one or several days, it is but a single proceeding. RCW 34.05.434; RCW 34.05.449; RCW 34.05.461. And, WAC 139-06-100 clearly requires attendance at the "hearing," not some portion of it.

When Mr. Ogden failed to appear at the hearing set for December 15-16, the Commission deliberated for approximately one half hour and then entered an order of default. CP 643-44. The Commission articulated the following reasons for its default order:

> 1) Mr. Ogden knew of the hearing date at least one day prior to the hearing;
> 2) Mr. Ogden had not yet started his trip when the misunderstanding of hearing dates was discovered; and
> 3) the prehearing order language clearly stated that Mr. Ogden's presence at the hearing was required.

CP at 641-43. The Commission considered the facts before it, and made a decision in good faith after due consideration to issue the default order based on its clear rule and notice to Mr. Ogden.

### 2. The Commission's rules permit attorney representation in lieu of the peace officer's attendance at preliminary proceedings only

Alternatively, Mr. Ogden argues that it is illogical to allow Mr. Ogden's attorney to appear for him at the prehearing conferences, but not at the hearing. Aplt's Br. at 27-28. This argument must also fail. The Commission's rules plainly authorize an attorney to appear on behalf of a peace officer during preliminary proceedings, but require the peace officer to attend the hearing in person. WAC 139-06-090; WAC 139-06-100. The Commission stated its reason for WAC 139-06-100 and requiring Mr. Ogden's presence at the hearing: "It gives the panel an opportunity to observe the respondent for a certain period of time, and it also provides the respondent with the opportunity to hear the testimony from all of the witnesses in this proceeding regarding his certification." CP 640. There is no legal obligation that the Commission's rules be uniform in their attendance requirements between preliminary proceedings and hearings. As the Commission's rule plainly requires Mr. Ogden's attendance, and the Commission stated its reasons for holding Mr. Ogden to the plain language of the rule, the Commission did not abuse its discretion or act in

an arbitrary and capricious manner in issuing its default order. The Commission's default order should be affirmed.

### 3. The Commission did not abuse its discretion in affirming the Default Order

Upon a petition for reconsideration, the decision to reverse a default order is discretionary. *Graves v. Dep't of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008); RCW 34.05.470; WAC 10-08-215. An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* In *Graves*, a party's mismarking of a hearing date on their personal calendar was held not to be good cause requiring vacation of an order of default because Mr. Graves did not demonstrate excusable neglect and due diligence. *Id.*

Here, upon receiving Mr. Ogden's petition for reconsideration, the Commission received briefing from the parties, heard argument from counsel, and asked questions of counsel. CP 653-90. The Commission deliberated for approximately twenty minutes before denying Mr. Ogden's motion for reconsideration. CP 690-91. Having considered the arguments, briefing, and the law, the Commission did not abuse its discretion when it denied Mr. Ogden's petition for reconsideration. CP 562-63, 690-91.

### 4. The Commission's Default Order was properly entered and should be affirmed

Mr. Ogden asks this Court to apply the four prong test for vacating default judgments as set forth in *Sacotte Const., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 418, 177 P.3d 1147 (2008):

> (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default judgment was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside

Aplt's Br. at 24. Mr. Ogden fails to establish the first or second prongs and as such, his argument should be rejected. Under the first prong, there is no evidence to support a *prima facie* defense on the merits for Mr. Ogden as he never offered such evidence; instead, he has made every effort to keep the Commission from reaching the merits. Under the second prong, Mr. Ogden's failure to timely appear was occasioned by his personal choice not to appear, as identified above, not mistake or excusable neglect. Even if the Court should apply the *Sacotte* test, Mr. Ogden fails to meet its requirements.

Mr. Ogden further argues that it is "manifestly unjust" to not vacate the default order because the mistake was Mr. Ogden's counsel's fault, not Mr. Ogden's, that Mr. Ogden made conflicting travel plans.

Aplt's Br. at 23-24. In support of this argument, Mr. Ogden cites to *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003). Aplt's Br. at 25. In *Barr*, an attorney's failure to respond to discovery requests or to inform the plaintiff about the requests led to plaintiff's lawsuit being dismissed. *Barr*, 119 Wn. App. at 45. While the court vacated the judgment in that case, it did so solely based on the "extraordinary" circumstance of plaintiff's counsel suffering from "severe clinical depression." The *Barr* court acknowledged and reaffirmed long-standing Washington case law holding that an attorney's negligence or incompetence is attributable to the client and is insufficient grounds to justify relief from judgment. *Barr*, 119 Wn. App. at 46; *see also Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996); *M.A. Mortenson Co. v. Timberlake Software Corp.*, 93 Wn. App. 819, 838, 970 P.2d 803 (1999).

Unlike *Barr*, there are no extraordinary circumstances that prevented Mr. Ogden from appearing at the hearing, and Mr. Ogden was fully aware of his attorney's mistake at least one day prior to the hearing. CP 641-43. Even after discovering the mistake, Mr. Ogden could still have attended the hearing because he had not yet left on his trip. CP 401-04. Mr. Ogden, however, chose to travel instead of attending the hearing. Mr. Ogden has not demonstrated that the Commission abused its

discretion by entering a default order upon Mr. Ogden's failure to attend his hearing, despite his availability.

## VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court affirm the Commission's Default Order and Order Denying Reconsideration.

RESPECTFULLY SUBMITTED this 8 day of August, 2013.

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