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STATE OF WASHINGTON
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No. 71516-0

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

JONATHAN V. WRIGHT, M.D., Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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I. REPLY

Judicial deference to MQAC's discretion has limits. Our State's jurisprudence in *Seymour*¹, *Yoshinaka*² and *Carlson*³ establish limits for MQAC's warrantless search and seizure procedures, rather than deferring to whatever MQAC wants. The APA and Due Process require MQAC to prove what it charges, and to do so with actual evidence. That means something other than deferring to whatever MQAC does. The First Amendment's prohibition against coerced speech and the "unconstitutional conditions" doctrine mean something other than deferring to whatever MQAC says. And judicial deference must have its limit when MQAC abuses its discretion, and misrepresents the legality of its investigation, as well as the evidence on appeal, as MQAC has done here.

¹ *Seymour v. Dept. of Health & Dental Quality Assur. Com'n*, 152 Wn.App. 156 (2009).

² *Client A v. Yoshinaka*, 128 Wn.App. 833 (2005).

³ *Carlson v. WA Dept. of Health*, 2008 WL 5068654 (W. D. Wash., 2008).

A. **MQAC has not been truthful about its determination of merit.**

MQAC lied to Dr. Wright about its determination of merit. Furthermore, MQAC falsely implied to this Court that MQAC disclosed its determination of merit to Dr. Wright in timely fashion at the onset of MQAC's investigation. Please consider the facts, as well as the importance of the chronology.

MQAC issued a determination of merit for the investigation of Dr. Wright in April 2009.⁴ MQAC requested information from Dr. Wright soon thereafter.⁵ In response to MQAC's request for information, Dr. Wright's attorney asked in May 2009 whether MQAC had issued a determination of merit⁶. MQAC represented that no determination of merit had been issued. See AR 2934, wherein MQAC's representative wrote to Dr. Wright's

⁴ AR 2925-2927.

⁵ AR 2929-2930.

⁶ See AR 2932. The reason Dr. Wright asked about the determination of merit is obvious: before disclosing proprietary, personal and/or patient health care information, a physician is duty-bound to know that MQAC's investigation is legally authorized.

attorney stating, “there is no determination of merit.” That was not true, as MQAC was compelled to admit much later.

MQAC’s deception led Dr. Wright into a belief that MQAC’s investigation had not been authorized. This deception led Dr. Wright to legitimately question the basis for MQAC’s investigation. That is, after 15-months of Dr. Wright’s cooperation, concomitant with his repeated requests for an explanation of the investigation, Dr. Wright resisted carte blanche production of patients’ statutorily protected personal health information.⁷ Dr. Wright’s reward for maintaining responsibility to his patients’ privacy, and being duped by MQAC’s lie about the determination of merit, was to receive a Statement of Charges for non-cooperation.

We fast forward to the parties’ briefing to this Court now. At page 22 of MQAC’s current Response Brief, MQAC represents that it disclosed its determination of merit to Dr. Wright, and that this disclosure should have

⁷ After finally learning that there was a determination of merit, Dr. Wright produced records.

compelled his cooperation starting in May 2009 and beyond. What MQAC fails to tell this Court is that MQAC produced that determination of merit only after MQAC had filed the non-cooperation charges, only after the adjudicatory proceeding was underway, and only after Dr Wright was forced to compel MQAC to prove that a determination of merit ever existed. Specifically, the Presiding Officer wrote in his written Order ruling on Dr. Wright's Motion to Compel as follows (See AR 336-343):

[Dr. Wright's] RFP-2 is a request for the documents related to the determination of merit in his case... this is a legitimate request. [MQAC's] response of "see response to RFP no.1" leaves unanswered the question of whether the determination of merit was included in the investigative file . . . [the determination of merit documents] should be provided to [Dr. Wright].

See last ¶ on AR 340 to AR 341.

The Presiding Office issued that Order in September 2011, more than two years after Dr. Wright asked about the determination of merit in May 2009, and six months after

MQAC charged Dr. Wright with non-cooperation. See AR 336-343.

MQAC's non-cooperation charges are founded on a deliberate effort to misrepresent the legitimacy of its investigation. MQAC misled Dr. Wright into believing there was no authorized investigation, and he responded accordingly. Now, in an effort to justify its conduct to this Court, MQAC implies that it disclosed its determination of merit to Dr. Wright from the beginning.

It is a tangled web that MQAC has woven here, and its charge against Dr. Wright for non-cooperation cannot stand for this reason alone, independent of the fact that MQAC's warrantless search and seizure also violate the 4th Amendment requirements articulated by *Seymour* and related cases.

B. The Licensing Essay is Unconstitutional.

MQAC's sanctions against Dr. Wright include probation that will last until March 15, 2016.⁸ AR 2346 at

⁸ MQAC's May 15, 2013 order levied a 90-day suspension that started on June 15, 2013, followed by 30 months (2.5 years) of probation that started on September 15, 2013.

¶¶ 3.1 and 3.2. However, the probation does not automatically end. Dr. Wright must apply to MQAC to have the probation lifted. Id. at ¶3.3. MQAC can hold Dr. Wright in violation of the conditions at any time. AR 2347 at ¶3.6.

Dr. Wright will be improperly leashed, muzzled and chilled if MQAC is authorized by this Court to insist upon the unconstitutional condition of a licensing essay as part of its sanction scheme. The weight of the case law, attendant with First Amendment principles, compels a categorical rejection of the “licensing paper” exercise that serves no compelling state interest.

C. MQAC prosecuted an uncharged offense and did so without evidence.

Dr. Wright has submitted that the Presiding Officer’s Prehearing Order no. 19⁹ narrowed the issues, and implied the existence of an uncharged offense. See Wright Opening Brief at pp. 14-15. To reiterate specifically, the Presiding Officer ruled on Dr. Wright’s motion to dismiss by holding that MQAC could not prove “knowledge” required of an

⁹ AR 2086-2098.

aiding and abetting charge, but that a “material fact question” existed about whether there was “a common practice in the profession . . . concerning having out-of-state physicians practicing in a respondent’s clinic or office.” AR 207 at ¶2.10. This material fact question was an uncharged offense, considering that MQAC’s Statement of Charges for aiding and abetting was based exclusively on allegations that Dr. Wright knew about Mitchell’s Texas status.

In briefing to this Court, MQAC claims that the Presiding Officer “simply” denied Dr. Wright’s Motion, and that his simple denial was of no import to the outcome of the hearing. See MQAC Response at p. 28.

The Presiding Officer’s Prehearing Order no. 19 was not a simple denial. Prehearing Order no. 19 changed the charges. In addition, the Order required evidence of a “common practice” that MQAC never offered at the hearing.

MQAC does not deny this. Rather, MQAC offers a generic excuse that Dr. Wright waived objections to these

problems. However, Dr. Wright did not waive his objections. His hearing counsel moved for a directed verdict at the close of MQAC's case. See AR 2742, et. seq. In response to that motion for directed verdict, the Presiding Officer deferred entirely to the MQAC panel members¹⁰ and allowed MQAC to pursue its new charge without evidence.

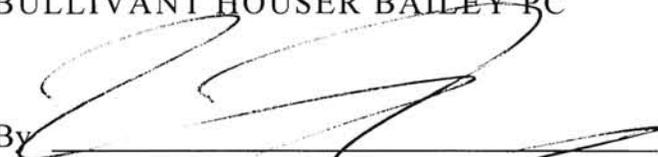
The Presiding Officer's deference to MQAC allowed MQAC (i) to pursue its uncharged offense; (ii) to do so without any evidence about "common practice;" and (iii) to establish without precedent a new rule for "common practice." MQAC then completed its predetermined objective by applying that rule retroactively against Dr. Wright.

The law does not defer to the process MQAC used here, nor to the result MQAC had preordained.

¹⁰ See AR 2747 line 18 to 2748, line 22.

DATED: June 30, 2014

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By 

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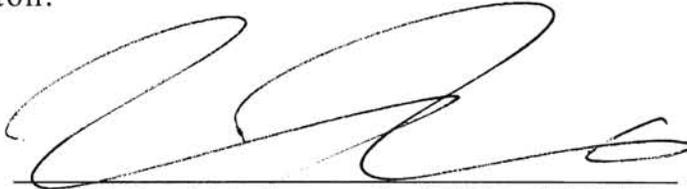
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 30th day of
June, 2014, I caused the foregoing to be served on:

Kim O'Neal	<input type="checkbox"/>	via hand delivery
Assistant Attorney General	<input checked="" type="checkbox"/>	via first class mail
Office of the Attorney General	<input type="checkbox"/>	via facsimile
P.O. Box 40100	<input checked="" type="checkbox"/>	via email
Olympia, WA 98504-0100		

I declare under penalty of perjury debunder the laws
of the state of Washington this 30th day of June, 2014, at
Seattle, Washington.



Michael McCormack, WSBA #15006