

NO. 71516-0-1

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

JONATHAN V. WRIGHT, M.D.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, MEDICAL
QUALITY ASSURANCE COMMISSION,

Respondent.

RESPONDENTS' BRIEF

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

The Medical Quality Assurance Commission (Commission) found that Dr. Jonathan V. Wright violated the Uniform Disciplinary Act, RCW 18.130, by aiding and abetting an unlicensed physician to treat patients in his Washington clinic for more than 18 months and by refusing to produce patient records requested during a lawfully authorized Commission investigation.

The Commission carefully considered extensive testimony and documentary evidence in finding these violations and in concluding that Dr. Wright's actions put patients and the public significantly at risk. The Commission properly rejected Dr. Wright's assertion that an exemption to the licensure requirement in RCW 18.71.030(6) applied because it applies only to physicians residing outside Washington who do not regularly see and take calls from patients within this state. Dr. Roby Mitchell, the unlicensed physician Dr. Wright permitted to treat patients in his clinic for 18 months, both resided here and regularly saw patients in that clinic, making RCW 18.71.030(6) inapplicable. The Commission's Order was based in part upon its determination that Dr. Wright was not credible in his testimony at the hearing. The Commission imposed reasonable sanctions that were within its statutory

authority and discretion and also were closely related to the violations the Commission found.

In this appeal, Dr. Wright fails to meet his heavy burden in challenging the Commission's Order, and he has failed to establish any basis for overturning the Commission's decision. The Commission respectfully requests that its Final Order be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Did the Commission Correctly Conclude Dr. Wright Aided And Abetted Unlicensed Practice In Violation Of RCW 18.130.180(10), And Is Its Conclusion Supported By Substantial Evidence In The Record?**
- B. Did The Commission Correctly Conclude Dr. Wright Violated RCW 18.130.180(8) By Failing To Produce Patient Records, And Is Its Conclusion Supported By Substantial Evidence In The Record?**
- C. Did The Commission Provide Due Process To Dr. Wright In Conducting Its Adjudicative Proceeding And Were The Sanctions It Imposed Legally And Constitutionally Appropriate?**

III. COUNTERSTATEMENT OF THE CASE

The Commission's investigation of Dr. Wright began with a complaint that alleged Dr. Wright was permitting an unlicensed physician (Dr. Roby Mitchell) to treat patients in his clinic and to bill patients for those services. AR 2913-15 (Hearing Exhibit D-1).¹ The Commission

¹ The citations in this Statement of Facts are to the Administrative Record (AR) and to the Clerk's Papers (CP).

authorized an investigation into that complaint under its statutory authority to conduct such investigations. RCW 18.130.080; AR 2926 (Hearing Exhibit D-4).

As part of that investigation, the Commission investigator and staff attorney repeatedly asked Dr. Wright to provide copies of the medical records for the patients that Dr. Mitchell treated during the 18 months he worked at Dr. Wright's clinic. See AR 2931-94 (Hearing Exhibits D-6, 7, 8, 9, 11, 12, 13, 14, 17, 19, 20, 21, 23, and 25). Dr. Wright never produced the patient records the Commission requested. AR 2338. Instead, he provided three purported patient records with everything on each page blocked out except for his own initials. AR 2971-82 (Exhibit D-22).

After the charges were issued and during discovery, Dr. Wright's counsel agreed to provide five patient records that he selected. This action was neither a timely nor a satisfactory response to the Commission's repeated requests for records during the investigation, and the Commission agreed only to accept the five records and not to request additional patient records without judicial order. There was no agreement that the failure to cooperate charge would be dismissed. The patient records produced are at AR 3017-3169 (Exhibits 31-35).

In its Amended Statement of Charges, the Commission charged Dr. Wright with two violations under the Uniform Disciplinary Act, RCW 18.130. AR 567-69, Appendix 1, page 1. The Commission originally charged Dr. Wright with failing to cooperate with its investigation in an attempt to obtain the requested patient records. The Amended Statement of Charges filed June 26, 2012, added the charge of aiding and abetting the unlicensed practice of medicine. AR 2-7.

The Commission alleged that Dr. Wright aided and abetted Dr. Roby Mitchell in the unlicensed practice of medicine in Washington by permitting him to treat patients in Dr. Wright's clinic in Renton, Washington for over 18 months without a valid medical license. *Id.* At the hearing, Dr. Wright admitted that Dr. Mitchell never had a license to practice medicine in Washington, and that he saw patients regularly at Dr. Wright's clinic under his supervision from September, 2007 through March, 2009. AR 2336, 2766, 2772.

The Commission also alleged that Dr. Wright refused to produce patient records evidencing the nature and extent of Dr. Mitchell's practice in Washington when the Commission officially directed him to produce those records during the Commission's investigation. *Id.* The Commission held a hearing to consider the charges on March 19, 2013, and it concluded that each of the charges had been proven by clear and

convincing evidence. AR 2330. The Commission issued a detailed final order explaining its findings, the evidence upon which it relied, and imposed sanctions based upon the violations found. AR 2330-49 Appendix 1.

Dr. Wright petitioned for judicial review of the Commission's Final Order, and also moved for a stay of the Commission's Order. CP 1-23, 24-358. The superior court denied his motion for a stay. CP 385. After reviewing the full administrative record and hearing oral argument from counsel, the superior court affirmed the Commission's Order in full. CP 584-85.

Dr. Wright has attached four appendices to his Brief which contain documents not in evidence at the hearing and never made a part of the administrative record in this case. Brief, Appendices A through D. Dr. Wright has not obtained leave of either the superior court or this Court to supplement the record, and those appendices should not be considered. RAP 9.11, RCW 34.05.558; 562

IV. ARGUMENT

A. The Standard Of Review Is Very Deferential To The Commission's Decision, And Dr. Wright Bears A Heavy Burden In Seeking To Overturn It.

While Dr. Wright challenges the Commission's order in various ways, the standard of review for each of his challenges accords substantial

deference to the decision of the Commission. A party challenging an administrative order bears the burden of establishing that it is invalid under the Administrative Procedure Act. RCW 34.05.570. Any findings of fact not assigned as error are considered to be verities on review. *Brown v State Dep't of Health Dental Disciplinary Board*, 94 Wn. App. 7, 972 P.2d 101,105 (1999). Here, Dr. Wright has not assigned error to specific findings the Commission made, thus all the Commission findings should be considered verities on review. *Id.*

Even if they were not verities, the court reviews the Commission's factual determinations for "substantial evidence." *Nationscapital Mortg. Corp. v. State Dep't of Financial Institutions*, 133 Wn. App. 723, 737-38, 137 P.3d 78 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). The substantial evidence test is highly deferential to the administrative fact finder, and the same deference is afforded to the Commission's factual findings as an appellate court would afford to a superior court's factual findings. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005). The Commission's credibility findings are accorded even greater deference. *Nationscapital*, 133 Wn. App. at 87; RCW 34.05.461. In this

case, the Commission based its Order upon a specific finding that they did not believe Dr. Wright was a credible witness. AR 2343-44.

The arbitrary and capricious standard is similarly deferential to the Commission's order. Action taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, is not arbitrary or capricious. *Washington Med. Disciplinary Board v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983). Instead, arbitrary and capricious action is "willful or unreasoning, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious even though one may believe an erroneous conclusion has been reached. *Heinmiller*, 127 Wn.2d at 609-10. The court may not substitute its judgment for that of the Commission, even if the court sees the evidence differently from the Commission. *Johnston*, 99 Wn.2d at 483.

Finally, a challenge to the appropriateness of the Commission's sanction is subject to the highest standard of review, and its sanction decision is accorded the most deference of any administrative determination. *Brown*, 94 Wn. App. at 17. The imposition of sanction is a matter uniquely within the Commission's expertise and discretion. *Id.* An agency's determination of sanction is accorded considerable judicial deference because "it is peculiarly a matter of administrative competence."

Id. The perceived harshness of that penalty is not a basis for reversing the order. *Id.* As long as the agency is within its statutory authority, the choice of a penalty is a matter of discretion that the court will not disturb unless the agency has abused its discretion. *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992); *Arnett v. Seattle General Hospital*, 65 Wn.2d 22, 27-29, 395 P.2d 503 (1964). For the court to reverse a discretionary agency decision under review, it must find the decision manifestly unreasonable, exercised on untenable grounds or for untenable reasons. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 837 P.2d 647 (1992).

B. Dr. Wright Aided And Abetted Dr. Mitchell's Unlicensed Practice Of Medicine By Employing Him To Regularly See Patients At Wright's Washington Clinic For 18 Months Without A Washington License.

1. Substantial evidence supports the Commission's finding that Dr. Wright did aid and abet Dr. Mitchell's unlicensed practice.

After considering the record and listening to testimony, the Commission concluded Dr. Wright had aided and abetted Dr. Mitchell's unlicensed practice. AR 2342. The Commission's decision was fully supported by substantial evidence in the administrative record, which established that Dr. Wright knew Dr. Mitchell had no license to practice

medicine in Washington (AR 2762, 2766) and still permitted Dr. Mitchell to see patients in his clinic for approximately 18 months. *Id.*

Dr. Wright admitted he knew Dr. Mitchell had no Washington license to practice medicine for the entire 18 months he let Dr. Mitchell see patients in his clinic. AR 2762, 2766. Dr. Wright knew that Dr. Mitchell was residing in Washington during the time he was seeing patients in the clinic. AR 2817-18. Dr. Wright also knew Dr. Mitchell was seeing patients in Dr. Wright's clinic and supervised his practice. AR 2766, 2773. That is all the knowledge and all the evidence required to sustain the charge of aiding and abetting unlicensed practice.

Whether Dr. Mitchell was an "independent contractor" rather than an employee of the clinic makes no difference in the context of aiding and abetting unlicensed practice. Br. at 7. While Dr. Wright never produced evidence of a contract or other agreement with Dr. Mitchell, his employment status has no legal significance. Under the Uniform Disciplinary Act, the violation of aiding and abetting another to practice without a license does not require actual employment of the unlicensed person. RCW 18.130.180(10). Dr. Wright permitted Dr. Mitchell to regularly see patients in his Renton clinic for 18 months knowing he had no license to practice medicine in Washington. AR 2762,

2766. That conduct constitutes aiding and abetting the unlicensed practice of medicine whether he employed Dr. Mitchell or contracted with him.

2. The commission correctly construed RCW 18.71.030(6), which provided no defense to Dr. Wright.

The statutory exemption from Washington licensure in RCW 18.71.030(6), applies only in specific and limited circumstances, which did not exist in this case. Br. at 22-23, AR 2780. By its own terms, however, RCW 18.71.030(6) applies only to physicians “licensed by another state **in which he or she resides provided that such practitioner shall not open an office or appoint a place of meeting patients or receiving calls within this state.**” (Emphasis added).

The exemption to licensure provided by RCW 18.71.030(6) was never applicable to Dr. Mitchell, regardless of whether he had a license in Texas. It could not have authorized Dr. Mitchell to practice in Washington without a license because he resided here, he saw patients and took their calls at one specific office location for 18 months, and he was not licensed by any other state. In fact, Dr. Mitchell resided in Washington the entire time he regularly saw patients at Dr. Wright’s clinic. AR 2785-86. Dr. Mitchell saw patients at Dr. Wright’s clinic four days a week for nearly the entire 18 months he practiced there. AR 2785-86. Patients came to the clinic specifically to see Dr. Mitchell,

some of them having learned of his presence in the clinic from the clinic website, which provided telephone numbers for patients to call Dr. Mitchell. AR 2795. The exemption provided by RCW 18.71.030(6) did not apply to Dr. Mitchell's conduct in Washington, and it provides no defense to Dr. Wright.

In fact, as shown by the plain language of RCW 18.71.030(6), Dr. Wright's entire discussion of Dr. Mitchell's Texas license revocation is irrelevant. Br. at 19, 23. Regardless of whether he had a Texas license, RCW 18.71.030(6) could not have applied to excuse Dr. Mitchell's unlicensed practice in Washington as he did not meet the criteria.

Dr. Wright's argument that the Commission tried an uncharged allegation and found he violated RCW 18.71.030(6) is a misrepresentation of the administrative record. *See* Br. at 20-22. The Commission charged Dr. Wright with aiding and abetting unlicensed practice in violation of RCW 18.130.180(10), and both the Final Order and the Amended Statement of Charges evidence that charge. AR 2330, 566-579. The Commission originally charged only failure to cooperate in an attempt to obtain the requested patient records. AR 2-7. After receiving the five patient records produced during discovery and when the aiding and abetting allegations were being litigated as part of the explanation for requesting the records, the Commission added that charge. AR 2330.

Contrary to Dr. Wright's claim, the status of Dr. Mitchell's Texas license made no factual or legal difference to the aiding and abetting charge.

There is no reference to RCW 18.71.030(6) in the charging document or in the statute making aiding and abetting unprofessional conduct because that statute is neither an element of the offense, nor an alternative means of committing it. RCW 18.71.030(10). The Commission's charging document gave Dr. Wright full notice of the aiding and abetting charge, which he fully adjudicated and defended at the hearing.

Dr. Wright raised the exemption in RCW 18.71.030(6) as a legal justification for his having allowed a physician he knew had no Washington license to practice at his clinic. AR 2339, 2780. The Commission considered that claim and the evidence surrounding it and correctly concluded it was not applicable. AR 2339-42. The Commission further found that Dr. Wright's testimony regarding his claimed defense lacked credibility. AR 2341-42. Nothing about the Commission's consideration of RCW 18.71.030(6) constituted an uncharged allegation or a conclusion that he had committed the violation by an uncharged alternate means. Rather, the Commission properly considered and evaluated Dr. Wright's claimed defense under RCW 18.71.030(6) and rejected it.

The Commission did not create an inappropriate or uncharged legal standard in finding Dr. Wright should have inquired into Dr. Mitchell's qualifications before permitting him to practice in Dr. Wright's clinic. Br. at 27-28. The Commission did not charge Dr. Wright with having violated RCW 18.71.030(6), and did not find him in violation for failing to inquire into Dr. Mitchell's credentials AR 2341-45. The Commission necessarily considered and evaluated Dr. Wright's claim in defense that he relied upon RCW 18.71.030(6) to determine that the statute authorized Dr. Mitchell to practice without a license. In considering that defense, the Commission found that, because Dr. Wright was the clinic medical director and because he testified he had brought Dr. Mitchell here and that he supervised Dr. Mitchell's unlicensed practice here, Dr. Wright should have done something to verify Dr. Mitchell's credentials if he was really relying on that statutory exemption. AR 2340-41.

Dr. Wright argues that he should be excused from having aided and abetted Dr. Mitchell's unlicensed practice because the Commission's licensing staff knew Dr. Mitchell's Texas license had been revoked and did not tell Dr. Wright about it. Br. at 8-9, 19. As the Commission correctly concluded, it was the Commission's Licensing staff who had this knowledge, and they had no reason to realize that Dr. Mitchell was

working at Dr. Wright's clinic or that the Commission's Enforcement staff was investigating a complaint involving Dr. Mitchell. AR 2343. Neither Dr. Wright nor his staff asked anyone at the Commission about Dr. Mitchell's Texas license; they inquired only about whether his application for a Washington license was open. Because the Commission Licensing staff had no knowledge Dr. Mitchell was working at Dr. Wright's clinic, they had no way to know that the status of Dr. Mitchell's Texas license would be of interest to Dr. Wright.

The status of Dr. Mitchell's Texas license is entirely immaterial unless the exemption in RCW 18.71.030(6) can be applicable. The exemption is not applicable, regardless of the status of the Texas license, because under the terms of RCW 18.71.030(6), no practitioner who resides in Washington and regularly sees patients and takes their calls at a designated place in Washington, can escape the requirement of *Washington* licensure. Dr. Mitchell was required to be licensed, and RCW 18.71.030(6) could not have been applicable to him even if he had possessed an active license in Texas.

The Commission did not find an uncharged violation by concluding Dr. Wright aided and abetted Dr. Mitchell's practice regardless of whether he knew about the revocation of Dr. Mitchell's Texas license. Br. at 21. This is another argument that is based upon the false assertion

that, if Dr. Mitchell's Texas license had been active, RCW 18.71.030(6) would have excused him from having a Washington license. That is incorrect, and the Commission did not base its finding that Dr. Wright aided and abetted Dr. Mitchell's unlicensed practice on that basis. The Commission determined Dr. Wright aided and abetted unlicensed practice because he let Dr. Mitchell see patients in his clinic for 18 months when he knew Dr. Mitchell had no Washington license to practice medicine.

The Commission did not find an uncharged violation in concluding Dr. Wright had a duty to check Dr. Mitchell's credentials before permitting him to see patients in Dr. Wright's clinic. Br. at 20. Deciding Dr. Wright should have checked Dr. Mitchell's credentials was not a separate charge or the basis for finding a violation. The Commission discussed Dr. Wright's own duty to check Dr. Mitchell's credentials in the context of considering the credibility of his claim that he relied upon RCW 18.71.030(6) in permitting Dr. Mitchell to see patients in his clinic. The Commission said that, if Dr. Wright really relied upon that statutory exemption, it would have been reasonable to expect him to make sure it was applicable by checking Dr. Mitchell's credentials. The Commission also said that, as medical director of the clinic, if Dr. Wright intended to employ a practitioner to see patients in his clinic, he should be expected to check that practitioner's credentials. AR 2789-90.

There was evidence in the record that checking Dr. Mitchell's credentials could have been done quickly and easily. Dr. Wright testified he knew about Washington's website where practitioner's licensure status could be reviewed. AR 2791. There was also evidence in the record that a simple check of the Texas Medical Board website would have provided the information Dr. Mitchell's Texas license had been revoked for several years. AR 3007-13 (Hearing Exhibit D-29). Since Dr. Wright's whole legal claim under RCW 18.71.030(6) was dependent upon Dr. Mitchell having a license in some other state, it was not unreasonable for the Commission to find that, if Dr. Wright was relying upon that statute, he should have done something to verify Dr. Mitchell's out-of-state license before permitting him to treat patients in Dr. Wright's clinic. AR 2342.

3. The Commission did not retroactively adopt a rule or conduct rulemaking by adjudication.

The Commission was not required to adopt regulations stating its interpretation of RCW 18.71.030(6) prior to issuing its order in this case. There is no legal authority to support that claim because it is incorrect. The Commission did nothing more than apply the plain language of RCW 18.71.030(6) to Dr. Wright's conduct. The Commission did not add to or adopt a novel interpretation of RCW 18.71.030(6). Neither of these actions requires rulemaking.

The Commission correctly ruled that RCW 18.71.030(6) limits the amount of time an unlicensed physician can practice in Washington. Br. at 23. The statute states a specific exemption to the otherwise universal mandate to possess a Washington license before practicing medicine in Washington. Dr. Wright's argument seems to be that the Commission ruled for the first time in his case that temporary practice permits are not available to physicians or that such permits are limited in duration. Br. at 23-24. He incorrectly cites WAC 246-12 and the fact that other health care professions have rules permitting applicants to obtain temporary practice permits trying to argue that it is the ruling in his case that prevents such permits from being issued to physicians. *Id.* To the contrary, WAC 246-12 has no application here because physicians are not eligible for such permits. There is nothing in this record or in WAC 246-12 that relates those regulations to physicians because there is no provision for temporary practice permits for physicians. Perhaps most importantly, there is nothing in the record to show that either Dr. Wright or Dr. Mitchell ever made any attempt to even inquire whether a temporary practice permit was a possibility, let alone acquire one for Dr. Mitchell.

The Commission correctly concluded that Dr. Wright aided and abetted Dr. Mitchell's unlicensed practice of medicine in Washington. None of Dr. Wright's arguments change the fact that he knew Dr. Mitchell

had no Washington license, and Dr. Wright continued to allow Dr. Mitchell to see patients daily in his clinic for 18 months. There is substantial evidence in the record to support the Commission's conclusion that Dr. Wright violated RCW 18.130.180(10).

C. Dr. Wright Failed To Cooperate With The Commission's Investigation Because He Never Produced The Patient Records The Commission Repeatedly Requested.

- 1. Substantial evidence in the record confirms that Dr. Wright failed to cooperate by failing to produce the patient records requested during the Commission's investigation in violation of RCW 18.130.180(8).**

The Commission correctly concluded that Dr. Wright failed to cooperate with its investigation by repeatedly refusing to produce patient records. AR 2342. In the administrative hearing, Dr. Wright did not claim to have produced the patient records. His "defense" to the charge was that he always "responded" to the Commission's requests and never communicated a refusal to produce the records. Br. at 3, 10-13, 43. In fact, he seeks to excuse his repeated failure to produce the records by stating that, since his responses included questions or legal arguments, he cannot be found to have failed to cooperate. Br at 3, 10-14. However, when Dr. Wright and his counsel asked questions and requested information from the Commission, their requests were repeatedly answered. See AR 2931-94 (Hearing Exhibits D-6 through D-25).

Dr. Wright's "defense" was neither legally nor factually supportable, and the Commission properly found Dr. Wright failed to cooperate with its investigation.

Dr. Wright also argues his failure to produce records was justified because he asked for evidence the Commission's investigation was lawfully authorized, and it was never provided to him until discovery after charges were filed. Brief at 3, 14. His claim, however, is refuted by the evidence in the record. The Commission's investigation was lawfully authorized on April 22, 2009. AR 2926 (Hearing Exhibit 4).

Dr. Wright's counsel first asked whether the Commission had issued what he called "a determination of merit," on May 14, 2009. Exhibit 6, AR 2932. Neither the Commission nor the Commission staff use that term, which is a misconstruction of statutory language authorizing the Commission to investigate a complaint it determines "merits investigation." RCW 18.130.080. As a result of this mistaken wording, Commission Investigator Joy Johnson responded on May 21, 2009, that the Commission had not and need not issue a "determination of merit," which she understood to refer to an unrelated statutory determination to be reached by a plaintiff before filing a malpractice lawsuit. AR 2934 (Hearing Exhibit 7). Because Dr. Wright's case did not involve violations

of the standard of care in his treatment of patients, she understood there to be no need for the determination that Dr. Wright's counsel referred to. *Id.*

Commission Staff Attorney Michael Bahn referred to the issue in an email to Dr. Wright's counsel on December 17, 2009, in which he invited counsel to call him to discuss the "determination of merit." AR 2937 (Hearing Exhibit 8). Dr. Wright's counsel responded by answering earlier questions from Mr. Bahn stating that Dr. Wright supervised the work of Dr. Mitchell, including diagnosis and treatment decisions. AR 2942-43 (Hearing Exhibit 10). Staff Attorney Bahn responded asking how Dr. Wright's supervision was accomplished and requested patient records demonstrating that oversight, with patient names redacted if necessary. AR 2947 (Hearing Exhibit 12). Dr. Wright's counsel responded on March 25, 2010, refusing to provide patient records because of HIPPA² concerns. AR 2952 (Hearing Exhibit 14). He responded again on April 16, 2010, raising both HIPPA concerns and the issue of the "determination of merit" and Joy's letter. AR 2957 (Hearing Exhibit 16). On April 23, 2010, Staff Attorney Bahn immediately responded explaining Joy's confusion about the designation

² This federal statute, the Health Information Protection and Privacy Act, controls how patient health care information can be shared and transmitted. It has an explicit exemption permitting state licensing authorities to request and receive patient records needed for disciplinary actions without patient authorization that complements RCW 70.02.050.

“determination of merit,” and confirmed that the Commission members lawfully authorized the investigation, including the requests for patient records. Exhibit 17, AR 2960-61. Mr. Bahn also responded twice to Dr. Wright’s HIPAA concerns. *Id.*

As of April 23, 2010, both the issue of the “determination of merit” had been explained, and the Commission’s lawful authorization of the investigation had been confirmed to Dr. Wright’s counsel. Dr. Wright’s refusals to provide patient records continued regardless of these assurances. In fact, Dr. Wright was asked repeatedly during the Commission’s investigation to produce patient records showing the kind of treatment Dr. Mitchell provided during his practice at Dr. Wright’s clinic. See AR 2931-94 (Hearing Exhibits D-6, 7, 8, 9, 11, 12, 13, 14, 17, 19, 20, 21, 23, and 25). Dr. Wright was initially asked for a representative sample of Dr. Mitchell’s patient records, and the Commission’s staff attorney even agreed that the patients’ names could be redacted if that would result in Dr. Wright producing the patient records requested. AR 2949-50 (Hearing Exhibit D-13). That attempt to work reasonably with Dr. Wright resulted in his producing three patient records with every single word on every page redacted except for Dr. Wright’s initials. AR 2971-82 (Hearing exhibit D-22).

When Dr. Wright refused to produce any of the records requested, the Commission made two final requests for all patient records reflecting Dr. Mitchell's patient treatment during his time at Dr. Wright's clinic. AR 2984-85 and AR 2989-91 (Hearing exhibit D-23 and D-25). Those requests were stated in official terms citing the Commission's legal authority to make the request and explaining the consequences of failing to produce the requested records. *Id.* Dr. Wright again failed to produce any patient records at all in response to those requests, and the Commission authorized and filed charges against him for failing to cooperate with its investigation in violation of RCW 18.130.180(8).

2. The Commission lawfully authorized the investigation of the complaint against Dr. Wright in compliance with the *Yoshinaka* and *Seymour* requirements.

The Commission staff provided proof to Dr. Wright that the Commission had legally authorized the investigation prior to most of the requests for patient records. AR 2925-27 (Hearing Exhibit D-4, establishing that at least three Commission members authorized the investigation in compliance with RCW 18.130.080). *See also, Client A v. Yoshinaka*, 128 Wn. App 833, 116 P.3d 1081 (2005) and *Seymour v. Commission*, 152 Wn. App 156, 216 P.3d 1039 (2009). Dr. Wright is incorrect in arguing he did not know about the authorization until discovery. (Br. at 10) The *Yoshinaka* and *Seymour* courts recognized

that it could be considered a warrantless or unconstitutional search if a Commission (the Dental Commission in those cases) requested patient records without first authorizing an investigation into a complaint and determining patient records were required for the investigation. *Yoshinaka*, 128 Wn. App. 843-45; *Seymour*, 152 Wn. App. 168-69. The Commission here did exactly as these cases require when it first authorized the investigation and then requested the patients' records from Dr. Wright.

In fact nothing about Dr. Wright's case is similar to the *Seymour* or *Yoshinaka* cases, and those cases provide no support for Dr. Wright's arguments that the investigation in his case was unlawfully authorized, or that the request for patient records was an unreasonable search. In both cases, the respective disciplining authority had not itself authorized an investigation into the complaints against the licensed dentists; rather the investigations had been authorized by staff working with the Dental Commission. *Yoshinaka*, 128 Wn. App. 834; *Seymour*, 152 Wn. App. 168-69. Because the staff and not the disciplining authority had authorized the investigation, both courts found violations of RCW 18.130.080, which provides the legal authority and mechanism for authorizing an investigation. *Yoshinaka*, 128 Wn. App. 844-45; *Seymour*, 152 Wn. App. 171. Because the authorizing statute had not been

followed, the *Yoshinaka* and *Seymour* courts concluded that the request for patient records was not legally authorized and could have been a violation of the Fourth Amendment prohibition against warrantless or unreasonable searches and seizures, especially under the more protective language of Article 1, § 7 of the Washington State Constitution. *Id.*

Here, the Commission legally authorized investigation into Dr. Mitchell's unlicensed practice and Dr. Wright's involvement in aiding that unlicensed practice in full compliance with RCW 18.130.080. AR 2925-26 (Exhibit D-4). Because the Commission and staff fully complied with RCW 18.130.080, neither the Fourth Amendment concerns nor the possibility of an illegal search are present in this case. Dr. Wright has no legal basis to refuse to produce the patient records based upon the Fourth Amendment, the *Yoshinaka*, or the *Seymour* cases.

Further, Dr. Wright's arguments (Br. at 32-35) are not supported by the *Yoshinaka* or *Seymour* courts' analyses. While the courts said that rulemaking might be able to provide legal authority for Commission members to delegate to staff the decision to authorize investigations, (*Yoshinaka*, 128 Wn. App. 844) the Commission chose not to take that alternative but to retain the authority in itself to authorize such investigations, as RCW 18.130.080 contemplates. Nothing about the analysis in those decisions mandated rulemaking unless the disciplinary

authority chose to delegate the authority to initiate investigations to its staff. To the contrary, the decisions suggest that the Commission should make the investigation decision itself. This is exactly what the Commission did in this case. As long as the Commission itself authorizes the investigation, both RCW 18.130.080 and the requirements of *Yoshinaka* and *Seymour* are fully satisfied.³

3. The Commission's regulation WAC 236-919-820 is constitutionally valid and protects licensees' rights to due process

The Commission's regulation, WAC 236-919-820, in which it specifies how refusals to provide records will be handled does not violate Dr. Wright's rights. Br. at 32. Specifically, Dr. Wright argues the regulation imposes a strict liability standard requiring that in every case of a refusal to provide records, a statement of charges must be filed. While there would be no constitutional defect in such a requirement, Dr. Wright's interpretation of the regulation is simply not correct.

Only the Commission can authorize charges to be filed. RCW 18.130.090. No charging decision is automatic. *Id.* WAC 236-919-820 simply lays out the due process protections a licensee

³ Dr. Wright refers to Clark County Superior Court Judge Wulle's comments from the bench in a completely unrelated case that never resulted in an order or final judgment. Brief at 36-37 and Appendix A. Nothing about the *Hughes* case is applicable here; it is not and cannot be part of this record, and it should not be considered by this court. Considering this material would violate both this Court's rules and the Administrative Procedure Act. RCW 34.05.554, .558, and .562. RAP 9.11.

receives in cases where investigative demands are made. The regulation explains that in every case where an investigative demand is made, the recipient must be given at least two written notices of that demand with specified time periods for response. WAC 236-919-820. Only if two mandatory notices have been issued (and often additional notices are issued as occurred in Dr. Wright's case), can charges be brought. In this case, both the 14-day and 3-day notices were provided to Dr. Wright. AR 2984-85 (Hearing Exhibit D-23), and AR 2989-91 (Hearing Exhibit D-25). The regulation is protective of a licensee's rights, and Dr. Wright has shown no constitutional defect.

4. The Commission's statutory authority to request and obtain patient records is provided in RCW 18.130.080 and RCW 70.02.050.

The Commission's legal authority to request patient records during an investigation is not found in RCW 70.02.060. Br at 40-43. RCW 70.02.060 provides third parties in specific types of litigation with the means of requesting patient records through notice to and consent of the patient. That statute, however, has no application to Commission disciplinary cases, where the law requires records be produced regardless of the patient's consent. As the Commission's various requests to Dr. Wright clearly state, RCW 70.02.050(2)(a) authorizes the disciplining

authority, in this case the Commission, to request the production of patient records in an investigation.

RCW 70.02.050 authorizes the Commission to request and obtain patient records needed for its investigations and disciplinary actions regardless of patient authorization.

A health care provider shall disclose health care information about a patient without the patient's authorization if the disclosure is: . . . needed to determine compliance with state or federal licensure, certification or registration rules or laws; . . .

RCW 70.02.050(2)(a). The separate authorization in RCW 70.02.060 to disclose patient records after notice to the patient applies to discovery requests or other legal proceedings, and it does not control or limit the Commission's authority to receive patient records in the course of its investigations.

D. Dr. Wright's Due Process Rights Were Fully Protected During The Conduct Of His Hearing Before The Commission, And The Sanctions Imposed Were Legally And Constitutionally Valid.

1. The Presiding Officer's prehearing rulings on Dr. Wright's summary judgment motions did not narrow or specify the legal or factual issues for the hearing; the rulings simply denied summary judgment.

The Presiding Officer's prehearing rulings on Dr. Wright's summary judgment did not narrow or change the charges to be tried at the hearing. Br. at 19-20. Dr. Wright claims that the Presiding Officer and

hearing panel failed to comply with prehearing rulings in violation of his right to due process. *Id.* Nothing in the administrative record or his conduct at hearing supports those claims.

In Prehearing Order #19, Judge Lockhart denied Dr. Wright's motion for summary judgment on both the aiding and abetting charge and the failure to produce patient records charges. AR 2086-98. Finding that there remained material issues of fact to be tried as to both charges, he simply denied the motion. AR 2086, 2094, 2096-98.

At the beginning of the administrative hearing, Judge Lockhart explained the procedure and dealt with prehearing matters. AR 2530-45. Dr. Wright's counsel made no reference to any prehearing rulings on the issues to be tried. Judge Lockhart correctly observed that nearly all of the prehearing issues were collateral to the issues before the Commission, and he identified the issues before the Commission to be whether Dr. Wright aided and abetted the unlicensed practice of medicine and/or failed to cooperate with the Commission's investigation. AR 2544-45. Neither Dr. Wright nor his counsel argued that the issues at the hearing had been narrowed or changed from the Commission's charging document. Further, neither Judge Lockhart nor the Commission disobeyed or disregarded any prehearing rulings narrowing or changing the issues to be tried because there were none.

2. The Commission did not violate its sanction rules in imposing sanctions against Dr. Wright.

The Commission has regulations to which it refers when imposing sanctions for unprofessional conduct. WAC 246-16. Within those regulations, there are several schedules of appropriate sanctions for commonly adjudicated types of unprofessional conduct. WAC 246-16-810 through -860. As stated in the Commission's order in this case, there are no specific schedules recommending sanctions for the violations found against Dr. Wright. *Id.* The Commission determined appropriate sanctions under RCW 18.130.160 by using its statutory discretion, given the found violations. Everything the Commission did in imposing sanctions in this case, as well the sanctions themselves, complied with the Commission's sanctions regulations.

In arguing the Commission's sanctions were improper, Dr. Wright includes a discussion of several other physician discipline cases along with a chart showing the sanctions imposed. Br. at 46-48. He includes the orders from those cases as Appendix D to his brief. As argued above, none of this information is properly before the Court because it is not part of the administrative record and he did not properly obtain leave to supplement the record. Even if the Court considers this argument,

Dr. Wright has not established that the Commission's sanction of him is unlawful or inappropriate.

None of the other physician discipline cases are in any way similar to Dr. Wright's case. They do not involve the same violations or the same conduct. The Commission is not required to impose identical sanctions even against licensees who violated the same statutory section, let alone those found to have committed very different kinds of unprofessional conduct. *Brown*, 94 Wn. App. at 17. The choice of and imposition of an appropriate sanction is a matter of Commission discretion, and Dr. Wright has not shown any abuse of discretion because the Commission imposed different sanctions upon different physicians who committed different violations.

3. Requiring Dr. Wright to submit a paper explaining the purpose and necessity for physician licensing is a constitutionally appropriate sanction within the Commission's statutory authority.

Dr. Wright was found to have aided and abetted the unlicensed practice of medicine in Washington. AR 2336. As part of the sanction for that violation, the Commission directed Dr. Wright to produce a written office policy regarding the verification of employee credentials and to write a paper "describing the importance of licensure and the elements of proper licensure." AR 2344. That sanction was obviously related to

Dr. Wright's violation and the risk the Commission found. It also serves to assure that those who take patients' lives into their hands first demonstrate they are qualified before they practice in Washington. Having found that Dr. Wright failed to act in a responsible manner to protect either the patients in his clinic or the public health and safety of the citizens of Washington, it is an appropriate exercise of the Commission's statutory authority to require him to state in a paper his understanding of his duty as a physician under Washington law so that the Commission can be assured that in the future, Dr. Wright will carry out his responsibilities. This sanction is well within the Commission's legal authority in RCW 18.130.160.

The license requirement for physicians is a valid exercise of Washington's police power, and it is a requirement in every one of the fifty states as well as most other countries. RCW 18.71.002, .021. Nevertheless, Dr. Wright purports to state either a political or religious objection to licensure for the first time in all this lengthy administrative record. CP 420. He makes no attempt to explain his supposed religious or political objection. *See* Appendix B. And none of the First Amendment cases Dr. Wright cites support his argument that the Commission exceeded its statutory authority in imposing this sanction or in any way affected his rights under the First Amendment.

All of the federal cases that Dr. Wright cites in his brief are broad prohibitions of categories of political or other highly protected speech imposed generally on the public in criminal statutes or ordinances. Br. at 44-45. The only case that discusses licensure simply states that requiring charitable fundraising solicitors to first be licensed before they can begin fundraising is a violation if there is no time limit or other provision making licensure available within a reasonable time. *See Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). None of those cases support Dr. Wright's claim that the Commission's requirement that he write a paper on the importance of licensure violates his First Amendment rights.

The Commission's paper requirement does not require Dr. Wright to make a political or religious statement. Dr. Wright has criticized the Commission in the past, and he may criticize it in the future. Br. at 6. Nothing about this sanction limits his right to state his views of the Commission in any way. Nothing about this sanction requires him to either endorse the Commission or change his stated views about the Commission's actions. The sanction simply requires him to state that he understands the importance of the license requirement, and agrees to abide by Washington laws and regulations that apply to his practice of medicine

as a licensed physician in this state and explain how he will carry them out in the future to prevent violations and threats to public health and safety.

Dr. Wright has not shown that the Commission's sanction requiring him to write a paper on the importance of licensure and a plan for how he will verify staff license status in the future violates his First Amendment rights.

Dr. Wright's argument that the rule of lenity prohibits the Commission's sanctions against him is incorrect because the statutes on which the aiding and abetting charge are neither ambiguous nor overly broad. Br. at 48-50. As argued extensively above, Dr. Wright knew Dr. Mitchell had no Washington license throughout the 18-month period Dr. Wright let him see patients daily in his Washington clinic. Neither RCW 18.130.180(10), which prohibits aiding and abetting unlicensed practice, nor RCW 18.71.030(6), which excuses Washington licensure only for out-of-state physicians who do not appoint a regular place to see patients in Washington, are ambiguous or overly broad.

There is nothing about the sanctions the Commission imposed that are penal. The sanctions are remedial in that each is closely tailored to the violations found and designed both to correct the misconduct and prevent risks to the public. Contrary to Dr. Wright's argument, the Commission found the public was significantly at risk, and its sanctions are

appropriately designed to prevent that risk in the future. AR 2345. The Commission's sanctions are remedial, and not penal. Because neither of the legal requirements for the rule of lenity to apply are present in this case, this argument must fail.

4. Dr. Wright fails to support his claim that the result of the hearing was predetermined or to support his claim of retaliation.

In his statement of facts, Dr. Wright refers to his earlier dealings with the Commission. Br. at 6-8. He refers to a copy of part of his blog post regarding the Commission and to a prior case in which Dr. Wright sought judicial intervention into his refusal to produce patient records to the Commission. *Id.* Dr. Wright suggests that these references to his earlier cases or his previous dealings with the Commission demonstrate that the decision in this case constitutes retaliation against him. Nothing in this record supports Dr. Wright's claims, and he cites to no evidence of retaliation. The Commission did not retaliate against Dr. Wright in finding the violations in this case based upon substantial evidence demonstrated in the administrative record.

First, the citation in Dr. Wright's brief to his blog post is to the extensive attachments to one of his many prehearing motions. Br. at 6; AR 922-23. While that document is in the administrative record, it was not an exhibit at hearing, and it was not before the Commission. There

was no opportunity for it to have influence on the Commission's decision here.

Next, his reference to an earlier case in which Dr. Wright sought judicial intervention in a Commission request for patient records is again a part of the administrative record that was not a hearing exhibit. Br. at 6, AR 826-36. Those documents are in the record, but they were not before the hearing panel. Nothing about that earlier case affected the Commission's decision here, and Dr. Wright provides no evidence that it had any influence. Instead, Dr. Wright makes obscure, glancing references to documents or other proceedings that were not before the Commission, and he in no way establishes any claim of bias or retaliation on the part of the Commission or the hearing panel. All such claims should be rejected by this Court.

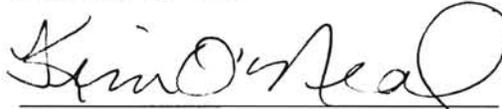
IV. CONCLUSION

The evidence in the administrative record fully supports the Commission's Final Order, which includes detailed findings to support the violations it found and the sanctions imposed. Dr. Wright has shown neither a factual nor a legal basis for this Court to overturn the

Commission's decision or sanctions. The Commission's Final Order should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Kim O'Neal", written over a horizontal line.

KIM O'NEAL, WSBA #12939
Senior Counsel
Attorney for Respondent

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COURT OF APPEALS, DIV. 1
STATE OF WASHINGTON
2014 MAY 29 PM 1:19

NO. 71516-0-1

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

JONATHAN V. WRIGHT, M.D.,

Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF HEALTH,
MEDICAL QUALITY ASSURANCE
COMMISSION,

Respondent.

DECLARATION OF
SERVICE

I, Jeanne Roth, make the following declaration:

1. I am over the age of 18, a resident of Pierce County, and not a party to the above action.

2. On May 28, 2014, I caused to be served a true and correct copy of the Respondent's Brief and this Declaration of Service via U.S.

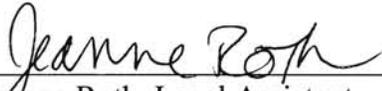
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.



Jeanne Roth, Legal Assistant