

72162-3

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No. 72162-3

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

LISA CUMMINGS dba MOD INVESTIGATIONS
Appellant – Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING
Respondent

APPELLANT’S FIRST AMENDED OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
CLERK OF COURT

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I. INTRODUCTION

This is an appeal of a final order issued by the Department of Licensing. An administrative hearing was conducted on March 26 through March 28, 2013, and an initial order was issued on June 26, 2013. That order found Appellant guilty of all allegations and suspended her license for a period of eight years. The final order upheld the initial order. This matter was then appealed to the King County Superior Court, where Judge Bradshaw upheld the findings below on July 3, 2014.

Appellant was charged with unprofessional conduct pursuant to RCW 18.165.160 for placing a tracking device on a car allegedly at a client's behest while acting as a private investigator, accessing the GPS device, and relating information to the purported client while aware he was the subject of a no-contact-domestic-violence order. Those allegations are not true. Accordingly, Respondent was not able to support those elements with substantial evidence. The remaining charges of negligence and unprofessional conduct, as contained in RCW 18.235.130, hinge on whether Appellant was acting as a private investigator at the time, knew about the protective orders, and what steps she took or should have taken to remove the GPS device once she did know about the protective orders.

The charges by Respondent are not supported by substantial evidence. No evidence was adduced that Appellant was working as an

investigator, was assisting a client, was asked by the client to trace the person for whose benefit the protective order had been obtained, or passed on any information to the purported client. In fact, Appellant was administered a polygraph test by the Kirkland Police Department that supported her defense to those allegations. Respondent also produced insufficient evidence to sustain its allegations that Appellant knew that the purported client was subject to a protective order, the terms of the protective order, or that she was negligent by not removing the GPS device once she discovered the existence of the protective order.

Respondent misapplied the law in imposing its sanction. The governing statute requires that, when imposing a sanction, Respondent consider public safety, health and welfare and after that, the rehabilitation of the licensee. In the present case, there was no demonstrable risk to the public, only to one particular person. Respondent should have only considered rehabilitative measures, but specifically and improperly declined to do that.

The punishment imposed was arbitrary and capricious in that Respondent did not consider all of the facts in reaching its determination. First, it did not take into account Appellant's complete lack of experience. At the time the incident occurred, Appellant had just received her license, had never worked before as a private investigator, and was actively

employed as a life coach. Second, Appellant was motivated to place the GPS device on the car Ms. Peddle was driving out of concern that Ms. Peddle would attempt to take her and Mr. Duncan's child out of state, which Ms. Peddle had done before without Mr. Duncan's consent and in violation of the custody agreement. Third, no harm came from the placement of the GPS device. Last, Respondent could not articulate a meaningful basis for the punitive sanction it did impose.

II. ASSIGNMENT OF ERROR

1. Respondent failed to provide substantial evidence to support the elements of its case that Appellant violated RCW 18.165.160(11) and RCW 18.235.130(1), (4), (8) and (10).
2. Respondent misapplied the law when it sanctioned Appellant.
3. Respondent acted in an arbitrary and capricious manner in sanctioning Appellant.

III. STATEMENT OF THE CASE.

Respondent accused Appellant of violating RCW 18.165.160(11) and RCW 18.235.130(1), (4), (8) and (10) by placing a concealed GPS tracking device on a vehicle operated by Christine Peddle at the behest of her client, Shaun Duncan. Appellant then allegedly accessed the GPS device and relating part or all of the information to Mr. Duncan, known to be the subject of a no-contact domestic violence protection order regarding Ms.

Peddle. Appellant is also accused of leaving the GPS device on the vehicle Ms. Peddle was driving after she discovered the existence of the protection orders. CP4A Certified Administrative Record (hereinafter “CABR”) at 775.

a. Nature of Relationship.

There is no dispute that Appellant was introduced to Mr. Duncan, (hereinafter “Duncan”), the alleged client, as a life coach by a mutual friend. Duncan supported that account. CP4A Transcript of Administrative Hearing (hereinafter “TAH”) at 550. That friend, Ms. Hotix, confirmed that in her testimony, *Id.* at 510, as did James Clarkson, the investigator for Respondent (hereinafter “Clarkson”). *Id.* at 321.

Clarkson did not find any evidence to support the allegation that Duncan hired Appellant. *Id.* at 327. Appellant denied that she was working for Duncan, but rather placed the GPS device because of her unsolicited determination to protect Duncan’s child. *Id.* at 396. Substantial testimony confirmed that motive. Duncan testified that he did not retain Appellant to assist him and was shocked when he found out about the GPS. *Id.* at 551-52. Nevertheless, Respondent concluded that Appellant was working as a private investigator on behalf of Duncan because she performed the duties of a private investigator by placing a GPS device. CP4A CABR at 763; *see also* testimony of Clarkson, CP4A

TAH at 339; *see also* testimony of Defendant’s representative Mary Haglund, *Id.* at 463. Respondent agreed that Appellant did not relay any information gleaned from the GPS device to Duncan. King County Superior Court Hearing Transcript (Hereinafter “RP”) at 28.

b. Appellant placed a GPS device on the car Ms. Peddle was driving.

Appellant admitted that she placed a GPS device on the car Ms. Peddle (hereinafter “Peddle”) was driving. She stated she did so as a private individual and not on behalf of a client. CP4A TAH at 296. Duncan repeatedly testified that Appellant did not place the GPS device at his request. *See, e.g., Id.* at 551-52. The Kirkland Police Department also conducted a criminal investigation of the allegations and found that Appellant did not place the GPS device on the car Peddle was driving at Duncan’s behest. *Id.* at 374. That investigation included Appellant voluntarily submitting to a polygraph analysis. *Id.*

c. There was a no-contact order.

Duncan denied that Appellant knew of the no-contact order. *Id.* at 563-565. Video recordings showed that Appellant was not present at hearings when the orders were issued or discussed. CP4A CABR at 1084 & 1091. Clarkson admitted that there were only inferential conclusions that Appellant knew about the protection orders. CP4A TAH at 328.

Respondent's only witness directly linking Appellant to the no-contact orders was Peddle. Serious questions regarding Peddle's credibility were raised amidst a very contentious custody dispute. *See Id.* at 323, 351-53, 161.

- d. Appellant left the GPS device on the car after she knew of the no-contact order.

Appellant admits that she left the GPS device on the car Peddle was driving after she learned of the no-contact order. *Id.* at 375-76. The vehicle was parked where she could not access it. She continued to access the GPS device to see if the vehicle was moved, but it never was. *Id.* at 381. She therefore could not remove the GPS device.

IV. ARGUMENT

- a. Standard on Appeal.

The standards for review of agency orders in adjudicative proceedings are set forth in RCW 34.05.570(3), which provides that relief from an agency order in an adjudicative proceeding can only be granted if the court determines that one of a list of enumerated errors have occurred. Within that list are that the agency has interpreted and applied the law erroneously, the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law, the order is not supported

by evidence that is substantial when viewed in light of the whole record before the court, and the order is arbitrary and capricious.

This Court reviews the Commissioner's findings of fact for substantial evidence in the administrative record to support them. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32, 226 P.3d 263 (Div. 2 2010). A reviewing court looks for a quantity of evidence that is "substantial when viewed in light of the record as a whole." RCW 34.05.570(3)(e). The judicial definition of "substantial evidence" is evidence sufficient to persuade a fair minded, rational person of the truth of the declared premise. RCW 34.05.461(4); see e.g., *Thurston County v. Cooper Pt. Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002); *Plum Creek Timber Co. v. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 993 P.2d 287 (Div. 1 2000).

Courts review legal issues de novo, including whether a decision is arbitrary and capricious. *Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). A decision is arbitrary and capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (Div. 3 2009). Although the "harshness of the sanctions imposed," alone, is not the test to determine if an action is arbitrary or capricious, *Id.* at 421,

imposition of a sanction without honest and due consideration of mitigating factors may show that an agency action did not consider relevant facts and circumstances. *See Medical Disc. Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (Div. 1 2000) (“If there is room for two opinions, a decision is not arbitrary and capricious if it is made honestly and upon due consideration ...”); *Brown v. State of Washington, Dep’t of Dental Health*, 94 Wn. App. 7, 17, 972 P.2d 101 (Div. 3 1998) (An agency must consider the facts prior to imposing a sanction).

Agencies also do not have unlimited power to impose sanctions. An agency’s mandate to impose sanctions is strictly limited to the mandate of its statute. *See, e.g., In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 60, 60 P.3d 53 (2002); *Wash. Fed’n of State Emps. v. Bd. of Trs. Of Cent. Wash. Univ.*, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980); *Cole v. Washington Util. & Transp. Comm’n*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971).

b. Allegations depend on Appellant working as a private investigator for Duncan.

Appellant has been charged with violating RCW 18.165.160(11) and RCW 18.235.130(1), (4), (8) and (10). Those charges center on the allegations of “unprofessional conduct.” as enshrined in RCW

18.165.160(11). The remaining charges, contained in RCW 18.235.130, are dependent upon the Respondent proving that Appellant was acting as a private investigator when she placed the GPS device. Respondent acknowledged that all the charges hinge on whether Appellant was acting as a private investigator for Duncan and knew, or should have known, about the protective orders. *See* CP4A TAH at 345. Respondent pled the same set of facts for all the charges. CP4A CABR 762-780.

c. Respondent did not support its charges under the Private Investigator statute with substantial evidence.

The charges made by the Respondent under RCW 18.165.160(11) only apply where each of five factors is met. Specifically, that statute requires that (1) if the Respondent had been working as an investigator, (2) had been assisting a client, (3) had known that the client was subject to a protective order, (4) knew the terms of the protective order, and (5) had been asked by the client to locate or trace the person on whose benefit the protective order had been obtained. The Department did not support any of these five factors with substantial evidence when viewing the record as a whole.

Respondent held that the parties' testimony conflicted on whether there was a private investigator-client relationship between Appellant and Duncan, which included the communication of investigative information from the

Appellant to Duncan. Respondent found its testimony to be more credible, largely because Appellant placed a GPS device on the car Peddle was driving, something it believed she did not do as a life coach. CP4A CABR at 769-70. Appellant's "services went beyond that of a Clarity coach by installing a GPS device on Ms. Peddle's car and tracking her location on a regular basis." *Id.* at 776. Respondent further found that Appellant was directed by Duncan to place the GPS device and also passed on information to him regarding what was gleaned from that device. *Id.* at 776. Appellant was found to have done those activities while knowing about a no-contact order. *Id.*

- i. Appellant did not work as an investigator or assist a client.

Respondent held that Appellant had an investigator-client relationship with Duncan because Appellant performed work that went beyond that of a life coach for Duncan, with whom she had a relationship. CP4A CABR 770.

Appellant was neither working for nor assisting Duncan as an investigator. Appellant was introduced to Duncan as a life coach by a mutual friend, Ms. Hoxit. Ms. Hoxit testified that she introduced Appellant to Duncan as a life coach and asked her as a personal favor to

see Duncan in that capacity. CP4A TAH at 510. Respondent's investigator Clarkson confirmed this:

Q. And also Ms. Hoxit informed you in the course of your investigation that when she introduced Lisa Cummings to Mr. Duncan, she introduced her as a Clarity Coach, not as a P.I., isn't that true?

A. Yes.

Id. at 321.

Appellant denied acting in the capacity of private investigator for Duncan or anyone else at that time.

Q. And were you at this point in May of 2011 working as a Clarity coach as well?

A. Yes, I was.

Q. All right. So, you got a license in May of 2011, as you testified. At that time were you looking for clients for your P.I. business?

A. No.

Q. Did you approach anybody for P.I. business?

A. No.

Q. Did you have any client at that time?

A. No.

Q. When was the first time you got any client of yours you're acting as a P.I./client relationship?

A. September of 2012.

Q. Ok. Were you ever hired by Mr. Duncan as a P.I.?

A. No.

Q. Did he ever pay you a dime for your services as a P.I.?

A. No.

CP4A TAH at 396.

Duncan, the alleged "client," testified that he did not retain Appellant to assist him.

Q. And did you ever hire Ms. Cummings as a private investigator?

A. No.

Q. Did you ever give Ms. Cummings an assignment as a private investigator?

A. No.

Q. Do you have any contractual relationship whatsoever in writing as a P.I./client relationship?

A. No.

Q. Have you ever paid any compensation to Ms. Cummings as a P.I.?

A. No.

Id. at 551-52. Furthermore, as discussed elsewhere, there was no evidence that Appellant passed information relating to the GPS device on to Duncan, something she surely would have done had he been a client.

In contrast, Respondent presented little evidence to support its assertion that Appellant was working as an investigator or assisting Mr. Duncan as a client. Clarkson, when asked whether he found “any evidence of any kind which indicates that Shaun Duncan hired Lisa Cummings as a P.I. and paid any amount of money for her services?” responded: “No. I did not find any evidence of Shaun Duncan paying her.”

Id. at 327. Clarkson testified that Appellant and Duncan did not have a client/investigator relationship in the “conventional way.” *Id.* at 302.

Q. Thank you. And, Mr. Clarkson, you have no evidence to verify that Lisa Cummings was retained by Shaun Duncan as a P.I., isn't that true?

A. In a conventional way what I would normally expect is that there would be a contract, or receipts, or anything like that. I do not have any of that kind of documentation showing a contractual relationship...

In a conventional way, there is no evidence, sir.¹

Id. at 302. Clarkson stated that the “relationship between Mr. Duncan and Lisa Cummings was complex. It was not – it was – it had several aspects to it that I don’t pretend to understand.” *Id.* at 310. Clarkson stated the following in response to Administrative Law Judge Birnbaum’s questioning:

Q. Mr. Clarkson, during your direct examination you characterized the relationship between the respondent and Mr. Duncan as unconventional, is that correct?

A. I believe I used the word complex, your honor.

Q. Okay, a complex relationship is that the way you would describe the relationship between Mr. Duncan and the Respondent?

A. From my understanding, yes.

Q. And why do you say that?

A. Because normally when I deal with complaints, I’m going in and I’m investigating a licensee and there would be certain things there that were not there. In other words, I would expect contracts, files, things that I could inspect. A lot of my job normally is involved in file inspection, determining if proper records are maintained, etc. That’s probably - - and so that I could consider a conventional situation for a licensee and a client, and yet in this case I detected things that I believe represented friendship, whatever this - - I don’t know exactly what to call it because to this day I don’t totally understand what Clarity coaching is, so I don’t know that there isn’t a counselor/client relationship, in other words someone being given counseling the way a psychologist would. I don’t know if this is social, if it’s psychological, or what it is exactly, and, then, at the same time, the reason that I’m going as far as I am is because there are issues related to the installation of the GPS unit, which is something that would to me clearly suggest

¹ DOL representative Mary Haglund testified that a private investigator-client relationship was generally marked by the payment of a retainer, creation of a client file, progress reports, and other documentation, but that none of that was present here. *Id.* at 453.

the type of activity according to the definitions of what a private investigator would do for somebody if they were hired to locate or trace people. So, in other words, I felt like I was being - - I was seeing all of these things at the same time and not seeing certain things that i would normally; so, I characterized it as complex.

CP4A TAH at 339. Clarkson's later testimony offered nothing more to explain his determination that Appellant was working as a private investigator on behalf of a client.

Q. So, Mr. Clarkson, when you don't have these pieces which you usually look for to show a relationship between P.I. and client, isn't the simple interpretation is that there is no relationship rather than calling it a complex relationship?

A. Given the circumstances that I was given, I could not say that there was no relationship.

Id. at 347. Respondent's insinuations aside, nothing supports the claim that a relationship of investigator-client existed. Indeed, Clarkson's testimony acknowledges the lack of typical markers of such a relationship.

Despite the apparent ambiguity of the relationship, Clarkson concluded that Appellant was working as a private investigator because she performed the duties of a private investigator by placing a GPS device.

Id. at 339; *see also* testimony of Mary Haglund, *Id.* at P. 463 ("....I mean using a GPS and attaching a GPS to the car, these are all things that a private investigator does. So, it's separate from the life coach, what she

did, the actions she spoke of. She was doing private investigator work.”). Those conclusions are the only support for Respondent’s allegations.²

Respondent recognized the weakness in its case. It is self-evident that placing a GPS device on a car or otherwise tracking a person does not make someone a private investigator. If it did, many non-sensical results could occur. For example, a news reporter might be charged with acting as an unlicensed private investigator by following a subject of interest in a news story. Respondent therefore elsewhere argued that Appellant was acting as a “volunteer” and not in any professional capacity within the meaning of RCW §§26.44.020 and 26.44.030. Arguing that Appellant was acting merely as a “volunteer,” and not within any professional capacity, is inconsistent with the unsubstantiated claim, made elsewhere, that that Mr. Duncan was Appellant’s “client.” *Id.* at 347.

ii. The “client” did not ask Appellant to track Peddle.

The purported “client,” Duncan, did not ask Appellant to track Peddle. Duncan repeatedly testified that Appellant did not act on his behalf.

Q. And did you ever ask Ms. Cummings to use a GPS?

A. No.

Q. Did you ever ask her to buy a GPS device?

² Christian Martin, Ms. Peddle’s private investigator, testified that he “interrogated” Appellant and came to the conclusion that Appellant acted on her own in order to prevent the abduction of Mr. Duncan’s child and did not know about the protection orders. CP4A TAH at 610, 611.

A. No.

Q. Did you ever buy a GPS device?

A. No.

Q. Did you ever ask Ms. Cummings to track Ms. Peddle in any way?

A. No.

CP4A TAH at 552. Appellant also denied tracking Peddle at Duncan's request.

In reaching its conclusion that Appellant had tracked Peddle at Duncan's request, Respondent failed to take into account its own evidence that Duncan had no knowledge of the GPS device. Detective Hass of the Kirkland Police Department conducted a criminal investigation of the allegations. After a thorough investigation, he discussed his findings with the court appointed parent evaluator in the Duncan-Peddle custody dispute, Melanie English, PhD, MSW. Ms. English described the Detective's findings and conclusions that resulted in the dismissal of the complaint against Appellant. Detective Hass found Appellant's voluntary statements to him credible. He also conducted a Computer Voice Stress Analysis ("CVSA") polygraph test, which Appellant passed:

Detective Hass, Kirkland Police Department. Detective Hass investigated the GPS unit placed on the mother's car and reported it was placed independently by a woman named Lisa Cummings, a private investigator, who was acquainted with the father professionally and personally. Detective Hass reported that Ms. Cummings voluntarily agreed to complete a polygraph and passed, purporting that the father had no knowledge of its existence. Detective

Hass stated nothing could be proved otherwise and that this case was now technically closed.

Id. at 374. In conclusion, Respondent failed to produce even a scintilla of evidence that Duncan had asked Appellant to track Peddle.

iii. Appellant neither knew of the no-contact order or its contents.

The parties' testimony conflicted on whether Appellant knew about the no-contact orders preventing Mr. Duncan from contacting Peddle prior to her putting the GPS device on the car Peddle drove. Respondent found its testimony to be more credible. CP4A CABR 49 at 763.

Appellant did not know about the no-contact order relating to Duncan. The principal testimony relating to this allegation came from Duncan. He testified that:

Q. And let's talk about those dates. In the criminal court in Kirkland where the domestic violence order was – domestic violence matter was pending, did you see Ms. Cummings present during the hearing whenever domestic violence order was discussed?

A. No.

A. And did she go to this court hearing sometime in Kirkland with you at some point?

A. - - If I could elaborate a little bit on this answer, if I may, I don't recall Lisa ever in a courtroom, and there were times in a parking lot that we met before I went in and the time was so horrific with this case that I don't think Lisa was ever in a courtroom in Kirkland or Seattle.

Q. Okay. Now, thank you, and I'm going to ask a specific question about June 10, 2011. Now we have moved to the King County Superior Court on Third and James. Did you ever see Lisa Cummings sitting in the courtroom when the hearing of this matter was called, which means Mr. Duncan and Ms. Peddle's issue?

A. No I don't.

Q. Let's move on to June 24, 2011. During the time the hearing was called of Ms. Peddle and relating to you before Commissioner Jeske, did you see Ms. Cummings sitting for any part of that hearing?

A. I did not.

Q. And did you at any time, anywhere, in any court, whether it's in Arizona or in Washington, whenever a protection order was discussed did you see Ms. Cummings present at that time?

A. I did not.

Q. Did you ever ask Lisa Cummings to violate any order at any time?

A. Never.

Id. at 563-565

Respondent acknowledged that it could not prove that Appellant knew about the protection orders. At deposition, Clarkson testified that:

Q. And Ms. Cummings admitted to being at one of these – at the court hearing?

A. She admitted to being at the hearing. She did not admit that she was there for the order being issued.

Id. at 278.

Q. Did Ms. Cummings ever admit to you knowing about the protection orders?

A. No.

Id. at 291.

Clarkson also acknowledged that the videotapes of the court hearings at which he surmised Appellant were present at did not support that conclusion:

Q. And, Mr. Clarkson, about this video...you have watched the whole video?

A. Yes, sir.

Q. And nowhere in that video have you identified my client, Ms. Lisa, in any of that video?

A. That is correct.

Id. at 300. Clarkson repeated that testimony regarding the other court hearings that were videotaped. *Id.* at 301-302; *see also* videotapes at CP4A CABR 1084 & 1091.

Clarkson admitted that there were only inferential conclusions that Appellant knew about the protection orders:

Q. Do you have any direct, you know, evidence, which I may be missing here, that Lisa Cummings was, you know, she was told about this order, she knew about this order or somebody discussed this protection order with her, and if she did, you know, violated that, having known this order?...

A. Ok. If you're asking for my opinion based upon everything that I learned from this investigation, I would freely admit that the argument is constructive.

CP4A TAH at 330.

Respondent's sole witness linking Appellant to the no-contact orders was Peddle. She stated that she saw Appellant at the court hearings where the orders were issued or discussed. *Id.* at 117. Peddle states that she was present at some of these hearings with her attorney and family

members. *Id.* at 128. None of those parties were contacted by Respondent to corroborate Peddle's story. Superior Court Judge Downing also raised serious questions regarding Peddle's credibility amidst a very contentious custody dispute. CP4A TAH 323, 351-53, 161.³

In conclusion, the findings that Appellant was acting as a private investigator for a client, knew of the no-contact orders and their contents, and passed information on to him is not supported by substantial evidence. Those conclusions are necessary to uphold the present charges.

- d. Respondent failed to support its allegation of unprofessional conduct under the Uniform Regulation of Business Professionals Act with substantial evidence.

Appellant is also charged with unprofessional conduct pursuant to RCW 18.235.130. Subsection (1) holds that "any act involving moral turpitude, dishonesty, or corruption" constitutes unprofessional conduct, whether the act constitutes a crime or not.

Respondent argued that "moral turpitude" is "conduct indicating unfitness to practice the profession," citing *Nghiem v. State*, 73 Wn. App. 405, 4011, 869 P.2d 1086 (div. 2 1994). *Id.* at 778. Respondent cites *Haley* in support of its contention that Appellant was unfit to practice in the

³ Q: Ms. Peddle, isn't it true Judge Downing made a finding January 29th this year that you testified, you gave false testimony under oath, is that true? A: I believe that there was something along those lines about a specific item."

profession. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 734, 735, 818 P.2d 1062 (1991). In *Haley* the Washington Supreme Court found that a physician's sexual relationship with a former juvenile patient involved moral turpitude and cited a California Case involving tax evasion as moral turpitude, as well as a New York case involving a conviction of an individual conspiring to influence a judge. *Id.*, citing *Windham v. Board of Med. Quality Assur.*, 104 Cal. App. 3d 461, 163 Cal. Rptr, 566(1980), *Erdman v. Bd. of Regents of Univ. of N.Y.*, 24 A.D.2d 698, 261 N.Y.S.2d 634 (1965).

Respondent held that Appellant had committed an act of moral turpitude by placing a GPS device on the car Peddle was driving while acting in an investigator – client relationship with Duncan. Appellant did so while knowing that Peddle had a no-contact order against Duncan. CP4A CABR at 777-78. Mary Haglund testified at length about Respondent's theory that Appellant was guilty of unprofessional conduct as a private investigator by leaving the GPS device on the car after she was made aware of the no-contact order, thereby continuing to place Peddle at risk.

Q. The statement of charges also charges unprofessional conduct for moral turpitude or dishonesty. Does the Department assert that she violated this professional conduct standard?

A. Yes.

Q. How?

A. The fact that she kept – if she – if Lisa Cummings admits that for almost seven weeks from the point that she said, "Oh, no, I found out that there is a no contact order" and left the tracking device on there and continued to check the location of the vehicle, she had an

opportunity to be honest, to tell somebody, to tell Shaun's attorney, to tell her attorney, to tell Christine, tell the police so that we could remove the element of the risk that this person is being traced, she's being tracked, she is under a protection order.

Q. And were Ms. Cummings' actions related to her profession?

A. Yes.

Q. In what way?

A. A licensed private investigator, the duties that Lisa was doing, fit underneath what describes the definition of a private investigator by statute. She is tracking, she's locating, checking into on maybe a daily or weekly basis the location of the vehicle, she's running background checks.

CP4A TAH at 465. Respondent's allegations rest on Appellant having acted as a private investigator, leaving a GPS device on the car Peddle was driving after she came to know of the no-contact order, and thereby placing Peddle at risk.

Respondent has erred in its interpretation of the law. Moral turpitude involves reprehensible conduct performed in the practice of a profession. First, the definition of moral turpitude does not encompass merely technical and unwitting violations. *In re Farina*, 94 Wn. App. 441, 460, 972 P.2d 531, (Div. 3 1999). It is an act of "baseness, vileness, or the depravity in private and social duties which man owes to his fellow man[.]" *Id.* It is to be "distinguished from statutory mala prohibita." *Id.*, citing Black's Law Dictionary 1008 (6th ed.1990). Court decisions have reserved "moral turpitude" for such egregious conduct as sexual misconduct with patients or clients. *E.g., Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d

433, 909 P.2d 1294 (1995) (social worker's sex with patient), cert. denied, 518 U.S. 1006, 116 S.Ct. 2526, 135 L.Ed.2d 1051 (1996); *Haley*, 117 Wn.2d 720, 818 P.2d 1062 (physician's sex with teenage former patient in his office including plying her with alcohol).

Second, Courts have consistently demanded that the charge of unprofessional conduct be limited to untoward conduct in the practice of their profession. For example, in *McDonnell v. Commission on Med. Discipline*, a physician allegedly made intimidating phone calls to two witnesses in a malpractice case against him. 301 Md. 426, 483 A.2d 76 (1984). Applying a statute defining unprofessional conduct as “[i]mmoral conduct of a physician in his practice as a physician,” the court held the phones calls were not unprofessional conduct because they were not related to his actual practice of medicine. *Id.* Again, in *Brown v. Dep’t of Health*, the court found unprofessional conduct where respondent practiced chiropractic medicine without a license, represented to his clients that he was a licensed chiropractor, and failed to exercise reasonable care when performing a chiropractic manipulation. 110 Wn. App. 778,784, 42 P.3d 976 (Div. 1 2002). That, and many other cases, demand that the practice of the profession be involved. *See e.g., Seymour v. Washington State Dep’t of Health*, 152 Wn. App. 156 (Div. 1 2009) (unprofessional conduct composed of fraudulent billing practices for

treatment and substandard care); *Heinmiller v. Dep't of Health*, 127 Wn.2d 595 (unprofessional conduct composed of a practitioner having sexual relationship with her client).

The acts alleged in the present case were not performed in the course of the practice of Appellant's profession. Appellant was not acting as a private investigator and Duncan was not her client. Duncan did not ask her to place the GPS device and Appellant did not tell him about anything discovered as a result of the placement of the GPS device. Accordingly, she cannot be found to have engaged in unprofessional conduct.

The allegations in the present case are not sufficiently appalling to rise to the level of moral turpitude. Appellant, who had already been exonerated of any criminal wrongdoing by the Kirkland Police Department, was motivated by a desire to protect a child from illegal removal from Washington. That selfless motive may have been misguided, but it could hardly be said to constitute moral turpitude on par with the molestation of an underage patient while plying her with alcohol.

Appellant did testify that she had placed the GPS, but was unable to remove it after she discovered the no-contact order.

Q. So, you admit to learning about the protection orders in late July?

A. Yes.

Q. After you learned about the protection orders did you remove the GPS device?

A. I tried.

Q. Did you access the GPS information after you knew about the protection order?

A. After I found out there was a protection order in place at the end of July, I made attempts to remove it only from the standpoint of viewing the tracking records to see where the vehicle was to see if I could get it off.

Q. So, you accessed the GPS record to locate the vehicle?

A. Yes.

Q. And how many times did you try and remove the device?

A. I never did.

Q. Why not?

A. Because the car stopped - - She was no longer driving it.

Q. Did you do anything else to try and remove the device?

A. There's nothing else I can do.

CP4A TAH at 375-76. She continued to access the GPS device to see if it was moved, *Id.* at 381, but it never was. She therefore could not remove it.

Q. And when you learned that there is a protection order and knowing that you have planted a GPS, what steps did you take to remedy the situation?

A. The only steps that I could take was to immediately try to find the car, the vehicle, and remove it. It had only been on - - At that point, it had been on for three weeks, and I remember the dates specifically when I found - - when I knew - - when I found out about the protection order because I was leaving for Arizona the following week, and I was going to be gone from April 3rd to the 10th, and I was frantic to get that GPS unit off before I left, and like I've stated, and you can view on the tracking reports, that she stopped driving the car.

Id. at 404-05.

Clarkson testified that Appellant maintained a consistent story with him:

Q. Ms. Cummings admitted to you knowing about the protection order in late July; is that right?

A. Yes.

Q. After she found out about the - - or after she admits to knowing about the protection order did she try and remove the GPS?

A. She told me that she had intended to.

Q. Did she tell you if she actually did remove it?

A. She told me that she didn't. She couldn't locate, couldn't get access to the vehicle.

Id. at 345.

Last, no one was put at risk by Appellant's conduct. Peddle suffered no harm at the hands of her alleged abuser, Duncan, before or after the protective orders had been issued. Duncan was also found "not guilty" of the domestic violence charge. Respondent also admitted that Appellant did not pass on any information gleaned from the GPS device to Duncan:

The Court: Do you agree then there's no evidence that Ms. Cummings did relate information?

Ms. Padilla-Huddleston: There was no finding about whether she related information to Mr. Duncan.

RP at 28. If Duncan did not know, then Peddle was never placed at risk.

It is noteworthy that Mr. Martin, the private investigator hired by Peddle who found the GPS device, testified that he did not believe that Peddle was in fear for her safety or that Appellant was a risk to the public.

Q. Mr. Martin, could you tell if Ms. Peddle took any other precautions or actions which were to show that she was - - really she believed that she was in fear for her life, not what she said, but what she did?

A. Not that I'm aware of.

Q. Do you know if she at any time told you that, "Look, I have to relocate to Arizona in an emergency situation. My life is in Danger", did she say that to you?

A. She did not say that. She – I think from the time that I found the tracker, to date – I’m not going to have the exact date, but the latter part of September, and she didn’t relocate until I think November 2nd maybe was the day she actually vacated the residence, I was called out to do an assessment of the residence when she left, and, so, it was five plus weeks that she remained at the residence. And I had also offered her, you know, call me 24 hours a day. Obviously if someone is kicking the door in, she needed to call 911. But I had told her that she call me at any time day or night if she felt like she just needed a little extra presence, you know, outside to watch, or if she thought that someone was violating the curtilage on the house, and I never received any phone calls from her requesting that.

Q. So, Mr. Martin, based on your experience, and knowledge, and also interaction with Ms. Cummings, do you believe that this Ms. Cummings should not be on the streets, she poses a threat to anybody?

A. No, I don’t believe that. Actually, I’ve had occasion to work with Ms. Cummings on a couple of other protection details since that time and I have personally found her to be very ethical and capable as far as her processes and procedures in investigating.

Id. at 618.

In conclusion, Respondent failed to show that Appellant’s alleged conduct was sufficiently egregious to constitute moral turpitude. Appellant is accused of having placed a GPS device on a vehicle in order to prevent the illegal removal of a child from the state. Respondent also failed to show that Appellant was acting in the capacity of private investigator at the time, could have removed the GPS device in a more timely fashion, or put anyone at risk by her conduct.

e. Respondent failed to show Appellant was negligent.

Subsection (4) of RCW 18.235.130 holds that “incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another” is unprofessional conduct. The plain reading of that statute is clearly that there must be incompetence, negligence, or malpractice and that must result in harm to another or creates an unreasonable risk of harm to another.

Conduct that falls below a legal standard established for the protection of others against unreasonable risk amounts to negligence. *Hicketheir v. Washington State Dep’t of Licensing*, 159 Wn. App. 203, 213, 244 P.3d 1010 (Div. 3 2011) (citing with approval *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)). For example, in *Hicketheir*, the plaintiff failed to maintain a statutory standard by authorizing an unlicensed party to act as his rental agent. The agent prepared contracts, procured renters, and collected rents for Ms. Hicketheir’s rental properties. That court held that the plaintiff was negligent in permitting the agent to act in that role: “His actions are substantial evidence of an unreasonable risk of harm to the public given the complete absence of state authority to act as a rental agent.” *Id.* at 216.

Respondent found that Appellant was guilty of unprofessional conduct by exercising poor judgment rising to the level of negligence when she inserted herself into the Peddle-Duncan dispute without ensuring that

there was not a protection order in place. CP4A CABR at 779-80. By those actions, she “created an unreasonable risk of harm or damage to another,” and “jeopardized the protection of the mater and child that were put into place by the judicial system.” *Id.* Mary Haglund put Respondent’s case as follows:

Q. And the other charge the Department alleges is incompetence, negligence, or malpractice. Does the Department allege that she violated that professional conduct standard?

A. Yes. The Department feels that because the law – I mean our code of unprofessional conduct is not that long and one of the items contained within our code of conduct for private investigators is that you cannot assist somebody in locating them if there is a no contact order for your client. Even if this – even if the licensee, the private investigator, had – was oblivious to the fact that there was a no contact order or order of protection, there still was enough evidence within the case file that showed that she had to be aware of a contentious divorce, and that because our statute says you shall not do this she has an obligation to check with the courts. She could have checked with the courts online, Washington courts. The document would have shown. So, she had the tools and ability to do that. She was obliged before she even considered using a GPS because the obvious trail where that would lead to is, if you’re going to take a GPS and get involved in and insert yourself into a situation where there’s a custody battle, a separation, The Department just really felt that she overlooked and was negligent in that manner.

She also put Christine Peddle at risk, exposing her to further or potential domestic violence. She put Shaun at risk where documents within the investigation file showed that a commissioned or a judge in court pretty much stated very clearly within the file that part of the reason why she was allowing Shaun’s son to leave the state was partially connected to the fact that the GPS was found on the car. So, there’s a lot of victims here. Christine is a victim, Shaun, and it had the potential to be a lot more serious. So, for these, reasons, these findings, the Department decided to include malpractice, negligence, and incompetence.

Q. The private investigator statute makes clear that you can't help trace someone when there's a protection order in place.

A. Yes.

Q. So, is it the Department's position that Ms. Cummings should have ensured that there was no protection order before she placed the GPS?

A. Yes, it is.

Q. And are P.I.'s obligated not to violate the P.I. law?

A. Yes they are.

Q. Was it reasonable to expect Cummings to find out that there was a no contact order before placing the GPS device?

A. Yes, there was.

Q. What about her failure to remove the device or inform Peddle of it before it was discovered, is that unprofessional conduct?

A. Unprofessional conduct, yes.

Id. at 467-68. In other words, Appellant was guilty of unprofessional conduct because she acted negligently by placing a GPS device on a vehicle without ensuring that a no-contact order was in place. Appellant thereby injured Peddle and Duncan.

Despite the hyperbole, Respondent fails to support this allegation with evidence. First, no one was injured or put at unreasonable risk of harm. Duncan was found "not guilty" of domestic violence, and in any case, Appellant never passed on information gleaned from the GPS device to him. RP at 28. Since Duncan did not know of its existence, Peddle was not put at even theoretical risk of harm. Second, there was no evidence submitted to support Ms. Haglund's assertion that Appellant could have checked with the Washington Courts online system and seen the no-contact order. In fact, the no-contact order was placed under the name

“Peddle-Cornish,” and thus even were a search to be made, nothing would have been found.

Last, is the question of negligence. Appellant was not acting as a private investigator and thus it is erroneous to use statutes relating to that profession to establish a duty of care. She was acting as a private citizen. No duty of care was presented by Appellant other than that enshrined by statute controlling private investigators. Accordingly, Respondent failed to provide substantial evidence that such a duty was breached.

f. Respondent failed to support its other allegations.

Respondent asserts that Appellant violated subsection (10) of RCW 18.235.130, which holds that the “practice or operation of a business or profession beyond the scope of practice or operation as defined by law or rule” is “unprofessional conduct.” Again, Respondents allege the same set of facts to support those charges. CP4A CABR at 780. For the same reasons discussed above, those charges are not supported by substantial evidence. Respondent also alleged that Appellant violated subsection (8), which holds that “violating any of the provisions of this chapter” constitutes unprofessional conduct. Those charges likewise fail for the same reason as the other charges.

g. Respondent misapplied the law.

Respondent asserted that it is entirely up to its discretion to determine the proper remedy for unprofessional conduct. “This Tribunal should not second-guess the remedy chosen by the Department, upon whom discretion is conferred by the Legislature.” CP4A TAH at 347; *see also* RP at 31 (“It is within the Department’s discretion to determine what an appropriate disciplinary measure is here.”).

Respondent misstated the law in support of its contention that its authority to impose sanctions is not reviewable. Respondent claims two cases support that position. Respondent stated that *Wash. Fed’n of State Emps. v. Bd. of Trs. Of Cent. Wash. Univ.*, stands for the proposition that, “[b]ecause the HEPB is the legislatively designated agency to enforce the unfair labor practice provisions of the Higher Education Personnel Law, its determination as to remedies should be accorded considerable judicial deference.” 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980). However, the full holding of that court was that “[n]evertheless, the board’s remedy is limited by the mandate of its statute.” *Id.* at 69. In other words, the power of the agency to impose sanctions is limited. Further, the Supreme Court held that HEPB still needed to provide specific reasons for the imposition of its remedy based on the specific facts on hand. *Id.* at 69-71. The court went on to reverse the decision, holding that HEPB in fact had not

considered all the relevant facts, and remand for further proceedings consistent with their decision.

Respondent also points to *Pasco Housing Auth. v. PERC*, to support of its assertion of unlimited authority. 98 Wn. App. 809, 991 P.2d 1177 (Div. 3 2000). However, there, the court of appeals found that “PERC’s orders will be upheld so long as they are consistent with the purposes of the Act and are not otherwise unlawful. The court determined this based on the Act, which gives PERC extraordinary discretion...” *Id.* at 814. Respondent does not have the same level of discretion accorded to it by statute.

In the present case, the governing statute holds that Respondent is to consider public safety and then rehabilitation of the licensee. “In determining what action is appropriate, the disciplinary authority must first consider what sanctions are necessary to protect the public health, safety, or welfare. Only after these provisions have been made may the disciplinary authority consider and include in the order requirements designed to rehabilitate the license holder or applicant.” RCW 18.235.110 (3); *see also* RCW 18.165.220.

Respondent failed to show that Appellant posed any danger to public health, safety or welfare. “If a statute’s meaning is plain on its face, then we must give effect to that plain meaning as an expression of legislative

intent.” *Nationscapital Mortg. Corp. v. State DFI*, 133 Wn. App. 723, 736, 137 P.3d 78 (Div. 2 2006); accord *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). The phrase “public health, safety or welfare” has a common sense reading. First, the risk must be to the public, and not a theoretical possibility of risk under certain circumstances to a particular person. Further, risk must be to the public’s health, safety or welfare.

Respondent erroneously considered Appellant a public risk and imposed a sanction without considering mitigating factors. Mary Haglund, testified:

Because of the risk and the actions of Lisa Cummings that were so close to the point of something that could have turned into a more violent situation or the potential of death, I mean it’s very clear that to protect the public this private investigator should not be allowed to practice.

CP4A TAH at 456. Ms. Haglund goes on to testify:

.... We are prosecuting because the actions that she took were very serious in nature and the Department contends to say that it was of the public protection risk that could have resulted in death.

Id. at 464. Ms. Haglund further testified that “there’s a lot of victims here,” pointing to the potential harm to Peddle and Duncan.

She also put Christine Peddle at risk, exposing her to further or potential domestic violence. She put Shaun at risk where documents within the investigation file showed that a commissioned or a judge in court pretty much stated very clearly within the file that part of the reason why she was allowing

Shaun's son to leave the state was partially connected to the fact that the GPS was found on the car. So, there's a lot of victims here. Christine is a victim, Shaun, and it had the potential to be a lot more serious. So, for these, reasons, these findings, the Department decided to include malpractice, negligence, and incompetence.

Id. at 467.

The allegations do not involve a risk to the public. The allegations involve placing a GPS device on a car involving one discrete individual in one particular instance.

As discussed above, no one was put at risk by Appellant's conduct. Peddle suffered no harm at the hands of her alleged abuser, Duncan, before or after the protective orders had been issued. Duncan was also found "not guilty" of the domestic violence charge. Respondent admitted that Appellant did not pass on any information gleaned from the GPS device to Duncan. RP at 28. If Duncan did not know, then Peddle was never placed at risk. It is noteworthy that Mr. Martin, the private investigator hired by Peddle who found the GPS, testified that he did not believe that Peddle was in fear for her safety or that Appellant was a risk to the public. *Id.* at 618. No particular person was placed at risk, let alone the public. Accordingly, Respondent was required to consider rehabilitating Appellant, but pointedly declined to do so.

- h. Respondent acted in an arbitrary and capricious matter in imposing the sanction.

Respondents did not consider all of the facts in determining the sanction to impose. Respondent admitted that it was their responsibility to thoroughly examine a case before imposing a penalty. Mary Haglund stated:

- A. It relies on a lot of discussion, a lot of allowing each case to be based on its own individual merits. Everything is discussed, and everything is rediscussed....
- Q. Does the Department consider the nature of the violation?
- A. Yes.
- Q. What about the severity of the harm?
- A. Yes.
- Q. What about the risk that the conduct poses to the public?
- A. Yes.

CP4A TAH at 469. Yet, Respondents only considered the risk and not any mitigating factors.

There were substantial mitigating factors. Judge Bradshaw noted that Respondent did not adequately consider Appellant's "lack of experience" and "relative intent" in reaching its conclusion. CP28A. Appellant received her license one month before the incident and had never yet acted as a private investigator. CP4A TAH at 396. Her actions were undertaken strictly out of concern for the child involved. Appellant testified:

Q. Oh. "I made the decision to dedicate my time and energy to life coaching and private investigation. I want to be able to facilitate the recovery of missing children through my investigative services by providing parents with information regarding the State resources available to them, thus minimizing the risk of their child running away, and, second, if their child is already gone, provide my services to find their child...my primary focus is on helping parents, teens, runaways that are missing.

Id. at 357. No testimony contradicted this motive. For example, Duncan similarly testified:

Q. What is your understanding why Ms. Cummings installed a GPS on the vehicle owned by you but being driven by Ms. Peddle?

A. As time went on and I learned more about Ms. Cummings it was to hope that my son was not - - our son was not removed from the state again.

Q. To the reasonableness of her concern, okay, I want to address the issue, do you think her concern for the removal of the child, Senna, was reasonable?

A. I do.

Q. And what is the basis of your belief that Ms. Cummings' concern for the removal of the child, Senna was reasonable, what basis?

A. Senna had been removed illegally twice before from the state with no - - I had no idea of his whereabouts.

Id. at 561.

Respondent's investigator, Clarkson, also testified that Appellant's motive was the safety of a particular child:

Q. ...Did she tell you why she put the GPS - - did Ms. Cummings tell you why she put the GPS device on the car?

A. Yes she did.

Q. What did she say?

A. She said that she was afraid that the child Senna was going to be transported out of state to Arizona by Christine Peddle and that there would be no warning of this.

Id. at 296.

Respondent acknowledged to the King County Superior Court that it *only* considered exacerbating factors in determining the sanction:

The Court: Okay. Did Ms. Haglund or the Department, did they take into consideration that the motivation for the unprofessional conduct was magnanimous?

Ms. Padilla-Huddleston: There was no testimony regarding whether or not they took Ms. Cummings' motivation into account. However, her motivation in engaging in unprofessional conduct isn't the standard for whether she engaged in unprofessional conduct.

.....

The Court: What about inexperience? That she had been licensed for about a month or so?

Ms. Padilla-Huddleston: I don't believe - - I think the testimony here and I couldn't point to the page in the transcripts, but my recollection from the transcripts is that the Department was obviously well aware that Ms. Cummings had not been licensed for very long. But given the seriousness of the violation, and the obviousness of the violation, it did not feel that was entitled to any mitigating circumstance.

RP at 34-35; *see also* CP28A.

Appellant showed that the determination of the length of the sentence lacked a meaningful basis. Clarkson testified that there was no guideline for sanctions:

Q. And isn't it true that you testified that Ms. Haglund is the person who makes, you know, the decision making process?

A. Primarily, yes.

Q. And you indicated that there are no guidelines or written materials available to the Department to consult and make determinations about sanctions and prosecution, so there is a parity, p-a-r-i-t-y, of everybody's being treated equally.

A. I don't believe there is...

CP4A TAH at 332. Respondent admitted that the determination was arbitrary.

The Court: But why? I don't understand how they got to the eight years still?

Ms. Padilla-Huddleston: I think her testimony - -

The Court: Why not 20?

Ms. Padilla-Huddleston: The Department has a ten-year revocation period. Doesn't ever really go above 10 years for reasons that were not elicited in testimony, so they're not part of the record.

The Court: Good. That's helpful. So we know it's confined.

Ms. Padilla-Huddleston: Yes.

The Court: There's some sort of standard range, so to speak? So why not six? Why not one?

Ms. Padilla-Huddleston: Because based on comparing it to the seriousness of the allegations, the threat to Ms. Peddle, the threat to the public, and the continued threat of allowing Ms. Cummings to practice, the Department exercised its discretion in determining eight years.

The Court: Ok. So I'm hearing that there's no calculus that went into it?

Ms. Padilla-Huddleston: No. There's no grid, there's no index, there's no, you know, sentencing guideline. It is a effort within the program to determine on a case-by-case basis in comparison to all the cases they handle what is appropriate.

RP at 33-34. Respondent considered erroneous facts in reaching its decision, as there was no risk to the public and arguably no risk to Peddle. Appellant had also, by that time, practiced for three years as a private investigator without incident, belying the argument that she represented a continued threat. Nowhere did Respondent consider any mitigating factors.

Respondent also failed to conduct a complete investigation. Respondent did not interview Duncan, a person who in many ways was central to this case. They did not do so because they did not feel that he would give them honest answers, CP4A TAH at 311-312, although Clarkson also admitted that it was his job to collect all the evidence. *Id.* at 314.

Q. Your job is to collect all the evidence, whether exculpatory to the respondent or defendant, or helpful to the prosecution of the Department, is that true?

A. Yes, sir.

Q. And as a honest, truthful, hardworking investigator, the goal is to obtain justice, that is your training, is that true?

A. Yes, sir.

Q. And the only way to obtain justice and truth is through the collecting of information, not exclude it, is that true?

A. Yes.

Q. And here you declined to even talk to Mr. Duncan with the understanding that he is going to - - with the understanding his relationship is complex, is that true?

A. Well, there's more to it than that.

Q. But is that true based on one reason that it was a complex relationship?

A. It's very complex, yes, sir.

CP4A TAH at 314-15.

Mary Haglund had no explanation why Duncan was not interviewed.

Q. And you did not interview Duncan, Mr. Duncan?

A. I did not.

Q. And you never inquired that if Mr. Duncan requested the installation of GPS, you never tried to inquire that?

A. I did not.

Q. And nobody from the Department tried to inquire from Mr. Duncan that if he requested installation of GPS from Ms. Cummings?

A. Yes.

Q. Is that true?

A. Yes.

Q. And that would have been very easy to establish, to ask the person, as the saying goes, from the horse's mouth, that would have been very easy to establish for you or Mr. Clarkson to call, or any other investigator to call, and ask Mr. Duncan, it would be very easy?

A. That could be a good assumption.

Id. at 496. Duncan could have provided information regarding whether Appellant was representing him, whether he asked her to place the GPS device, and whether she was in court or knew of the content of the protective orders. It is hard to see how Respondent could assess culpability, let alone impose sanctions, without interviewing Duncan. The failure to do so left Respondent with a very incomplete picture.

Respondent wields significant power to impose sanctions. As such, it must consider all of the facts in reaching its sanctioning decision, particularly one as harsh as this. Having failed to do so, the sanction is arbitrary and capricious.

V. CONCLUSION

For the foregoing reasons, Appellant requests that this court reverse the order of Judge Bradshaw dated July 14, 2014.

DATED THIS October 6, 2014

The Rosenberg Law Group, PLLC

A handwritten signature in black ink, appearing to read 'Seth Rosenberg', written over a horizontal line.

Seth Rosenberg, WSBA #41660

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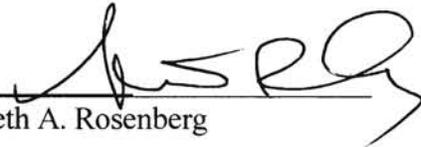
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DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on October 6, 2014, I mailed a copy of the foregoing motion via electronic mail to the following parties:

Dionne Padilla-Huddleston
Licensing and Administrative Law Division
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DATED: October 6, 2014


Seth A. Rosenberg