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SUPREME COURT OF THE STATE OF WASHINGTON

GEOFFREY S. AMES, M.D.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION,

Respondent.

**RESPONDENT WASHINGTON STATE DEPARTMENT OF
HEALTH MEDICAL QUALITY ASSURANCE COMMISSION'S
ANSWER TO AMICUS BRIEF OF WASHINGTON CITIZENS
FOR HEALTH OPTIONS, INTEGRITY, AND CLINICAL
EXCELLENCE**

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ORIGINAL

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I. INTRODUCTION

The amicus curiae brief filed by the Washington Citizens for Health Options, Integrity, and Clinical Excellence (“WaCHOICE”) broadly criticizes “establishment,” “mainstream medicine,” and the Commission as hostile toward alternative medicine. Amicus Br. at 1. WaCHOICE asserts without citation to the record or evidence that review is warranted because the actions of the Commission and the Court of Appeals are “a severe threat to alternative health care.” Amicus Br. at 5. Despite generalized concerns, WaCHOICE does not assert a conflict or significant constitutional question. WaCHOICE has not shown any of the grounds for review in RAP 13.4(b), and Dr. Ames’ petition for review should be denied.

II. ARGUMENT

The Commission held a five-day adjudicative proceeding and issued a final order on May 30, 2004, concluding that Dr. Ames had been negligent under RCW 18.130.180(4) and had promoted an inefficacious device for personal gain under RCW 18.130.180(16). AR 1850-68. The Benton County Superior Court affirmed the Commission’s order. The Court of Appeals affirmed the Commission’s order and denied Dr. Ames’ motion for reconsideration.

A. The WaCHOICE Brief Provides No Basis To Grant Review Under RAP 13.4(b).

A petition for discretionary review should be granted only if one of the grounds for review in RAP 13.4(b) has been shown. WaCHOICE has not shown any of those grounds. The WaCHOICE brief does not conform to RAP 10.3(e) because it simply repeats the issues raised in Dr. Ames' petition without providing any additional analysis or assistance for the Court.

WaCHOICE offers only a bald, unsupported claim that the Commission's order affects alternative health care and a similarly unsupported claim that every act of the Commission and the Court of Appeals below constitutes an issue of substantial public interest under RAP 13.4(b). WaCHOICE offers neither argument nor factual basis for its broad claims, and does not establish any issue appropriate for review by this Court.

B. WaCHOICE Failed To Show That Its Interest Is Affected By The Commission's Conclusion That Dr. Ames' Use Of A Specific Device To Diagnose And Treat A Patient Fell Below The Standard Of Care.

WaCHOICE asserts an interest in Dr. Ames' case based solely upon its categorization of Dr. Ames' practice as alternative medicine. WaCHOICE does not explain how its members' interests will be affected. It has shown no reason to believe that any other similar case is before the

Commission or is contemplated which the decision in Dr. Ames' case would impact.

WaCHOICE asserts without citation to the administrative record that the Commission's action rejects legislative acceptance of Asian or homeopathic medicine. *See* Amicus Br. at 3. Nothing in the Commission's final order supports this proposition. It simply concludes that Dr. Ames' use of a specific device to diagnose and treat an allergy in one patient fell below the standard of care based upon evidence cited in the administrative record. The Commission made no findings regarding Asian medicine or homeopathic practice and specifically found that Dr. Ames' practice did not constitute alternative medicine based upon Dr. Ames' own testimony. Administrative Record (AR) 1862, 2077.

The statutes WaCHOICE cites as evidence of legislative support of alternative medicine have no application to this case and do not support its argument. *See* Amicus Br. at 2. RCW 18.06.010(1) defines acupuncture. RCW 18.36A.040 defines naturopathy. Those statutes are part of a statutory requirement that practitioners must be licensed. Neither acupuncture nor naturopathy were at issue in Dr. Ames' case, and the Commission made no finding regarding these disciplines.

The record here fails to support WaCHOICE's assertion that the Commission or the hearing panel had any hostility or bias towards

alternative practitioners or alternative medicine, including the unsupported allegation that “every one of the Commission’s professional members has evinced hostility toward alternative medicine.” *See* Amicus Br. at 1. Nothing in the Commission’s order shows any such hostility or bias.

The case against Dr. Ames arose because Patient One complained about the treatment he received from Dr. Ames. AR 1983. The case was handled just as any other patient complaint would be handled, and the record before this Court does not support any allegation that Dr. Ames was treated differently or that any other alternative practitioner would be treated differently. The Commission applied RCW 18.130.180(4) to the facts of Dr. Ames’ case and concluded that his treatment of Patient A was below the standard of care. That is the same legal standard applied to any practitioner. WaCHOICE’s claim that a different procedure applies to alternative practitioners is wholly without support in the record before this Court. *See* Amicus Br. at 6-7, 10.

WaCHOICE argues, again without factual or legal support, that other practitioners or alternative medicine practices will be affected by the outcome of Dr. Ames’ case. *See* Amicus Br. at 4. Nothing in the record supports that allegation. The Commission applied settled law to the specific facts concerning Dr. Ames’ treatment of Patient One with the LISTEN device. Only Dr. Ames is affected by the decision the

Commission reached and the sanctions imposed upon him, and WaCHOICE has not shown any broader impact.

C. Washington Statutes And Case Law Fully Support The Use Of Expertise By Administrative Decision-Makers Like The Medical Commission.

WaChoice reiterates Dr. Ames' claim that foreign case law does not support the use of expertise by administrative decision-making bodies such as the Medical Commission. Amicus Br. at 7-8. However, both statute and case law in Washington fully authorize the use of expertise by administrative decision-makers to analyze, interpret, and draw inferences from the evidence produced at hearing. RCW 34.05.461(5).

WaCHOICE merely reiterates Dr. Ames' argument regarding decision-makers' use of expertise without adding any additional legal authority. See Commission's Answer to Dr. Ames' Petition (Commission's Answer) at 7-9. RCW 34.05.461(5) authorizes the use of expertise by administrative decision-makers. This principle has been affirmed by the appellate courts. *Brown v. Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 13-14, 972 P.2d 101 (1999) (An administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence when finding unprofessional conduct.); *Wash. State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 482, 663 P.2d 457 (1983) (RCW 34.04.100(4) permits

agencies to utilize the specialized knowledge of their members in evaluating evidence presented to them and it is logical and proper for them to draw their own conclusions as to acceptable standards.); *Davidson v. Dep't of Licensing*, 33 Wn. App. 783, 786, 657 P.2d 810 (1983) (The Board was entitled to rely on its own specialized knowledge in its evaluation of the evidence and can draw inferences from the evidence.). Washington law fully supports the use of expertise by all administrative decision-makers, not just professional members of agency decision-making bodies.

Contrary to WaCHOICE's argument, the use of expertise by administrative decision-makers is settled and not an issue of first impression. Amicus Br. at 6. See *Brown, Johnston, Davidson supra*. WaCHOICE has not shown either a constitutional issue or an issue of substantial public interest in the Commission's use of its own expertise to evaluate and draw inferences from the administrative record in Dr. Ames' case. RAP 13.4(b).

D. Substantial Evidence Supported The Commission's Finding That Dr. Ames Violated The Standard Of Care.

The record before the Court shows substantial evidence to support its Order. See Commission's Answer at 3-6, 13-15. WaCHOICE's attempt to challenge the sufficiency of the evidence is not supported by the

record. The Commission correctly found that Dr. Ames' use of the LISTEN device with Patient One did not meet the required standard of care. The hearing panel correctly applied RCW 18.130.180(4) to the facts of the case, and substantial evidence supports their findings and conclusions. WaCHOICE argues without any citation to the record that the Commission found the use of a biofeedback device to provide some evidence of a possible egg allergy was a violation of law. Amicus Br. at 3. This argument misstates both the factual record and the legal standard applied. The hearing panel found that Dr. Ames' claimed use of the device to diagnose and treat an egg allergy violated the standard of care because he had no clinical evidence of any allergy and no support for his claim that using the device could treat it. AR 1861-62. The expert witness who testified for Dr. Ames stated that the blood test result Dr. Ames obtained was not evidence of an egg allergy and not a basis for providing any treatment. AR 2993. The device's creator testified the LISTEN device had no ability to diagnose or treat any condition. AR 2893, 2906-07.

WaCHOICE similarly misstates the record as to Patient One's description of Dr. Ames' treatment. WaCHOICE claims that Patient One testified Dr. Ames' diagnosis was based upon the blood test. Amicus Br. at 3. To the contrary, Patient One testified Dr. Ames told him he had a

machine that could be used to find out what was going on with his body. AR 2209. Patient One testified that Dr. Ames told him the device helped him make a diagnosis and that he could cure the allergy. AR 2208, 2214. Patient One understood after the treatment with the device that he had been diagnosed and cured of an egg allergy. AR 2211-13, 2215, 2223, 2255, 2268.

E. Both Substantial Evidence And The Plain Language Of The Statute Support the Commission's Conclusion That Dr. Ames Promoted The LISTEN Device For Gain.

WaCHOICE offers no legal authority or analysis to support its claim that the Commission's interpretation of RCW 18.130.180(16) was erroneous or not supported by the record. Amicus Br. at 10. WaCHOICE claims that the statute requires not only evidence to show promotion for gain but also negligent practice. The statute contains nothing to support an argument that a finding of negligence is required. The Legislature knew how to include such a requirement as it did in RCW 18.130.180(4). If it had wanted to include negligence in RCW 18.130.180(16), it is presumed to know how to do so. Since it did not, there is no basis for an argument that proof of negligence is required to support a finding under RCW 18.130.180(16). *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 964, 967, 977 P.2d 554 (1999).

Similarly, there is no legal support for WaCHOICE's argument that RCW 18.130.180(16) applies only to "entrepreneurial" actions. Amicus Br. at 10. No such language appears in RCW 18.130.180(16), and WaCHOICE has shown no legal basis for construing the statute to apply only to entrepreneurial actions.

III. CONCLUSION

Arguments made by WaCHOICE do not show any issue under RAP 13.4(b) justifying review by this Court. WaCHOICE has pointed to no evidence that any other practitioner or case that will be affected by the Commission's Order against Dr. Ames. WaCHOICE has failed to show that review is appropriate under RAP 13.4(b). The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 18th day of January, 2008.

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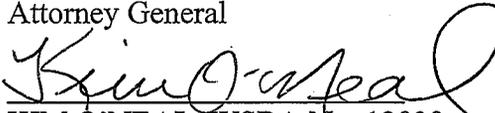
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