

FILED

SEP 07 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

SUPREME COURT OF
STATE OF WASHINGTON

80644-6

GEOFFREY S. AMES, M.D.,

Petitioner,

vs.

**WASHINGTON STATE HEALTH
DEPARTMENT MEDICAL QUALITY
HEALTH ASSURANCE COMMN.,**

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 SEP -4 PM 4:58

FILED
SEP 19 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON
am

PETITION FOR REVIEW

William R. Bishin P.S.
1404 East Lynn
Seattle, WA 98112
(206) 323-7175
By: William R. Bishin No. 8386

Certificate of Service
The undersigned served this
Petition on Respondent on this date
by placing it in the U.S. MAIL
addressed as follows:

Kim O'Neal, Esq.
P.O. Box 40100
Olympia, WA 98504

September 4, 2007



TABLE OF CONTENTS

Identity of Petitioner	1
Opinion of the Court of Appeals	1
Issues Presented	1
Statement of the Case	5
The Expert Testimony and Failure-to-Charge Issues Raised by the Foregoing Proceedings	8
<i>The Efficacy Finding</i>	8
<i>The Finding of Failure to Take Necessary Safety Measures</i>	10
The Failure to Charge Basic Facts Found by the Panel	11
Argument	12
The Constitutional and Public Policy Importance of Expert Testimony in Medical and Other Professional Board Proceedings	12
The Failure to Charge the Essential Facts	19
The Meaning of RCW 18.130.180(16)	19
Conclusion	20

TABLE OF AUTHORITIES

Arthurs v. Board, 383 Mass. 299, 418 N.E.2d 1236 (1981):	13
Baltimore and Ohio R. Co. v. Aberdeen & Rockfish R. Co., 393 U.S. 87, 92, 89 S.Ct. 280 (1968)	13
Brown v. Dental Board, 94 Wn.App. 7, 972 P.2d 101 (Div. 3, 1998)	8, 10, 13, 18
Burlington Truck Lines v. United States, 371 U.S. 156, 83. S.Ct. 239 (1962)	13
Davidson v. Dept. of Licensing, 33 Wn.App. 783, 657 P.2d 810 (1983)	8, 15, 16, 18
Drew v. Psychiatric Sec. Rev. Bd., 322 Or. 491, 909 P.2d 1211 (1996)	13
ICC v. Louisville R. Co., 227 U.S. 88, 33 S.Ct. 185 (1913)	13
In re Mintz, 233 Or. 441, 378 P.2d 945 (1963)	13
Jaffe v. State Dept. of Health, 135 Conn. 339, 64 A.2d 330 (1949)	8, 13, 16, 17
Johnston v. Medical Board, 99 Wn.2d 466, 663 P.2d 457 (1983)	8, 10, 13, 16, 18
Martin v. Sizemore, 78 S.W. 249, 271 (Tenn. Ct.App. 2001)	13, 15, 17
McKay v. State Bd. of Med. Exmnr., 103 Colo. 305, 86 P.2d 232 (1936).	14
Ohio Bell Telephone Co., 301 U.S. 292, 57 S.Ct. 724,(1937)	13

Painter v. Abels, 998 P.2d 931 (Wyo. 2000)	3
Smith v. Dept. of Registration, 412 Ill. 332, 106 N.E.2d 722 (Ill. 1952)	18
State Bd. of Medical Examiners v. McCroskey, 880 P.2d 1188 (Colo. 1984):	14

IDENTITY OF PETITIONER

The Petitioner is Geoffrey Ames, M.D., the petitioner below.

OPINION OF THE COURT OF APPEALS

The unpublished opinion of the Court of Appeals in this matter, Ames v. Medical Board, No. 24897-III was filed by the Court on May 17, 2007.

After Petitioner's timely motion for reconsideration, the Court entered an order denying the motion for reconsideration on August 2, 2007. The opinion and order are attached. See Appendix.

ISSUES PRESENTED

The specific issues of constitutional, administrative, professional disciplinary and other statutory law that this case raises are set out below. But there are issues that deal with the broader supervisory role of this Court in insuring that every person receive due process and that the outcome of every case comports with the Rule of Law. The appellate issues raised by this case arise out of the most brazen, lawless administrative action that counsel for Petitioner has encountered in over forty years of practice and teaching – including the teaching of administrative law – in jurisdictions throughout this country. The case is a frivolous, malicious prosecution, brought to coerce a settlement. It was prosecuted without evidence, yielding a decision based on a series of patent speculations and ad hoc factual theories created during and after the evidentiary hearing in this case.

Respectfully, and with a vivid awareness of and concern about the

emotional resistance of judges to criticisms of their friends and colleagues on other courts, it must also be said that the agency's lawlessness in this case has been aided, abetted and implemented by the most striking abdication of judicial responsibility that counsel has encountered in the State of Washington, after almost thirty years of practicing here.

In short, the Court of Appeals refused to grant Petitioner the judicial review of agency error to which he was entitled under the Administrative Procedure Act and the due process and equal protection clauses. As this and other courts have held, because of the needs of the administrative state, judicial review is the only protection against agencies with peculiar opportunities to engage in uncontrolled abuse, because they have been delegated and can combine in abusive ways the legislative, administrative, investigative, prosecutorial and adjudicative powers.

Not only does the Court of Appeals opinion in this case – and the oral argument which preceded it – suggest that it did not seriously review the evidentiary record, the findings, or Petitioner's brief; not only does that court fail in all but one minor instance to cite even one place in the record which supports its affirmance of agency findings that Petitioner vigorously challenged; but the Court of Appeals (borrowing not from the record, but from the agency brief) actually creates facts out of whole cloth and shifts the burden of proof to the Petitioner. It not only misstates the facts, but it bases its justification of the agency's conduct on findings that were never made and

facts that do not exist. Like the respondent's brief, which it apparently viewed as the only document it need pay any serious attention to, that court also justifies the agency decision, not by defending the reasoning of the agency, but by creating a new, after-the-fact theory. The result is that the statement of charges proceeded on one factual theory, the panel's Order on another, and the Court of Appeals's on yet another. Compare the allegations in the amended statement with ¶¶ 1.25-1.29 of the challenged Order with pages 10-14 of the Court of Appeals opinion, all of which appear in the appendix. See Opening Brief ("OB") Appendix and this Appendix.

The outrageous decision of the agency was not surprising, because similar agencies throughout the country have done similar – although not quite as brazen – things in similar cases. But in those other jurisdictions, the Courts would not stand for it, and found a way to thwart the abuse of legislative power. See, especially, *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), where a medical board attempted to prevent an alternative physician from using a device like the one in this case by attacking her mental health and when that failed by claiming negligence without being able to offer any expert testimony to support the claim. It is more than ironic that in Washington, where public policy is clearly opposed to the substantive objective which motivated the agency's action, the courts simply deferred to the agency's abuse and then defended it in disingenuous opinions.

There follow some of the specific issues this appeal raises.

1. Was the Medical Commission (“MQAC”) panel that issued the Order on appeal correct in ruling that under existing Washington law no expert evidence on the record was necessary to establish the medical, scientific, or technical facts on which its decision rests, and if the panel was correct, should those decisions, as to that issue, be overruled or limited on due process or other legal grounds?

2. Under WAC 246-11-250, WAC 246-11-260 and WAC 246-11-520, which requires that a statement of charges must contain a “clear and concise statement of the . . . factual basis” of the charges, must the statement set forth the specific facts – including the specific conduct of the respondent – found to constitute unprofessional conduct or is notice pleading sufficient?

3. Did MQAC’s failure to specify in the statement of charges facts that it found essential to its conclusion that Petitioner had engaged in unprofessional conduct – including the specific conduct of the respondent which allegedly constitutes such conduct – violate his “due process right to be notified of clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present” his defense. *In re Romero*, 152 Wash.2d 124, 94 P.3d 939 (2004)?

4. May a physician be found to have engaged in “negligence” under RCW 18.130.180(4) because of a good faith mistake in judgment on one occasion without explicit evidence on the record that the mistake violated a standard of care which makes such a mistake negligence?

5. Under RCW 18.130.180(16) which makes “promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service” “unprofessional conduct,”

(a) is evidence and/or a finding that a device failed to function successfully on one occasion sufficient by itself to support a finding or a conclusion that the device is “inefficacious” within the statute’s meaning?

(b) is the use in his practice of an alternative assessment device for which the respondent does not charge and which was not shown to increase his income, “promotion for personal gain” of that device within the meaning of the statute, taken as a whole and considering the consequences?

6. Were the proceedings below taken as a whole so outrageous and inconsistent with due process and the Administrative Procedure Act as to require this Court to lay down specific guidelines for the initiation and conduct of medical commission hearings, at least in cases involving alternative physicians and alternative medical modalities?

7. Did the Court of Appeals and the Superior Court accord the Petitioner meaningful judicial review of the panel decision in this case – *e.g.*, of his right to a determination of the sufficiency of the evidence under the Administrative Procedure Act and the due process clause?

STATEMENT OF THE CASE

This case arises out of the use by a holistic physician of an assessment device which was found to be inefficacious and its use therefore a violation

of the uniform disciplinary act's proscription of negligence and "promotion for personal gain" of an "inefficacious" device. The hearing was held before and the Order on appeal was issued by a panel of two MQAC members and a pro tem physician's assistant. Only one member of the panel was a physician. Because of page limitations, the Petitioner, Geoffrey Ames, M.D. must rely on his opening and reply briefs and his motion for reconsideration to inform the Court of all of the enormities that occurred in this case. This Statement of the Case will focus on a few of the panel's findings that raise the major substantive issues in this Petition. The Court should be aware, however, from the outset that in neither of the two statements of charges filed in this case, nor at any time or in any place thereafter has there ever been a contention, let alone evidence, that this device was dangerous in any respect or that it has caused harm to anyone. In addition, the Court is also warned that – although the Court of Appeals did not address them – some of the assertions of fact on which the Order relies heavily (especially in ¶¶ 1.25-1.29) are wholly without support and inconsistencies between ¶¶1.1 - 1.24 and ¶¶1.25-1.29 that the Court may wonder about are really there.

Initially, the Court is requested to note the following testimony from the patient ("P1") with whom Dr. Ames was claimed to be unprofessional.

Q. [Y]ou're not claiming, are you, that Doctor Ames caused you any injury, are you?

A. No.

Q. He didn't hurt you in any way, did he?

A. No.

- Q. Particularly with respect to this device, you don't know of any injury this device caused you: isn't that correct?
- A. No.
- Q. You don't know of any injury the muscle testing caused you; isn't that correct?
- A. Yes.
- Q. So basically your problem with Dr. Ames is that he sounded – what word did you use – a little obsessed with alternative medicine: is that right?
- A. That's fair.
-
- Q. As I understand your testimony at the deposition, when you wrote to the medical commission you didn't really consider yourself as complaining about Dr. Ames: isn't that correct?
- A. Yes.
-
- Q. Now, you didn't think that Dr. Ames was trying to fool you or mislead you, did you?
- A. No.
- Q. You just felt he was overboard in his enthusiasm – or might be – for some of these modalities; isn't that right?
- A. Yes. had questions in my own mind about how the whole thing played out. [CR 2227-2228]

At the hearing, no expert or layperson testified that Dr. Ames's device was inefficacious. No studies, tests, evaluations or demonstrations were introduced reporting or purporting to establish that. No expert or layperson testified that it was dangerous in any way. No person testified that the device was of a type that required any safety measures, nor that any safety precautions or investigations were necessary, or what such precautions might be. No expert or layperson testified that Dr. Ames had not sufficiently investigated the safety of the device. No person other than Dr. Ames and his expert witness Dr. Martin testified about allergies. No expert or layperson – including P1 – testified that P1 did not have an egg allergy. Although P1 had

been tested and treated for hay fever twenty-five years earlier, he did not testify and there was no other evidence that he had ever been tested for food allergies and no other evidence was introduced to the effect that he did not have an egg or any other food allergy. Nor did P1 testify that he had not been cured by Dr. Ames's treatment. No expert or layperson testified that Dr. Ames had violated any standard of care or created any risk of harm – reasonable or unreasonable – to P1. No one testified that P1 had been deceived or exploited. P1 did not testify that he had been billed for the use of the device with him or for the treatment he allegedly had.

In an analysis at the beginning of its Order the panel anticipated the objection that none of its findings regarding negligence and inefficacy were based on expert testimony. It said that under *Johnston v. Medical Board*, 99 Wn.2d 466, 663 P.2d 457 (1983) and *Brown v. Dental Board*, 94 Wn.App. 7, 972 P.2d 101 (Div. 3, 1998) such testimony was not necessary because MQAC had sufficient expertise to resolve expert factual issues. It might also have cited *Davidson v. Dept. of Licensing*, 33 Wn.App. 783, 657 P.2d 810 (1983), the primary basis of the *Brown* decision's language regarding expert testimony. *Davidson* in turn drew its ideas and language almost word for word from portions of a 1949 Connecticut case, *Jaffe v. State Dept. of Health*, 135 Conn. 339, 64 A.2d 330 (1949).

**THE EXPERT TESTIMONY AND FAILURE-TO-CHARGE
ISSUES RAISED BY THE FOREGOING PROCEEDINGS**

The Efficacy Finding. As noted, the finding of inefficacy, which

appears in ¶1.25, and therefore of negligence (¶1.28), is not based on expert testimony, or other scientific or medical evidence. It is based entirely on a tortured, speculative inference from P1's answers to questions by Ms. Paxton, the pro tem physician assistant, to the effect that no one had ever told him that he had an allergy to eggs and that he had no reaction (apparently of the sort that he had to blowing dust) that he knew of to them. CR 2268-2270. There was no expert testimony or other medical evidence that he had had no reactions to eggs – obviously, people are not aware of all reactions their bodies have to allergens: that is why there are allergy tests – nor that he did not have such an allergy, nor that the fatigue and other symptoms of which P1 complained (see ¶1.13) were not symptoms that could be caused by an egg allergy. Yet his answers to Ms. Paxton's questions became the keystone of the panel's entire decision. On that basis alone, the panel found that P1 did not have an egg allergy and *therefore* the LISTEN was inefficacious and *therefore* Dr. Ames was negligent for using it, etc. See Petitioner's fuller analysis of the egg allergy finding in OB 32-37.

Surely, this cannot be the kind of evidence our Supreme Court allows to be used by the medical and other boards to visit severe injuries to career and reputation, and to create a life time stain on a professional's record. For the effects of this discipline on Petitioner see Reply Br. 3-4. We contend that this case would probably never have been filed and certainly the lower courts would not have upheld the panel's decision if MQAC had been required to

prove medical, scientific and technical facts through qualified expert witnesses. That is a central reason why the language on expert testimony in Johnston and Brown is harmful and, in part, why it is in error.

The Finding of Failure to Take Necessary Safety Measures. This Finding in ¶1.28 is, if possible, even more speculative than the inferences of no egg allergy and of inefficacy. See discussion of the wholly unsupported assumptions on which it is based in OB 39-42. As discussed *infra* and below, it was never charged and the evidence on which it was based did not exist until at the hearing Dr. Ames testified that he did not know the physics behind the device, that he was not sure of the exact voltage and that the device had no labeling and came only with a manual. The Finding claims that Dr. Ames did not take allegedly necessary safety measures, but there was no testimony as to what such measures were or that the nature of the device required special safety measures. Such testimony would have had to be provided by an expert on such devices, but the expert who testified on the subject was not asked these questions by anyone and only testified that the type of device was safe. *Ibid.*

The finding assumes that Dr. Ames's consultations with his colleagues and the vendor were not sufficient, but there is no testimony as to why this would be so, just as there was no testimony adverse to Dr. Ames as to what happened in those consultations. The panel simply assumed that he didn't learn everything he needed to know in those consultations. For some

of Dr. Ames's testimony about his assurances from these sources and his own investigation of safety, including testing it on himself, e.g., CR 3063-3065, 3120, 3157-3158. The Finding also assumed that he did not receive any personal training on the device during any of those consultations and that the nature of the device requires personal training, rather than simply reading a manual. None of these assumptions were justified by expert or other testimony. Again, it is difficult to see how such a finding could have been made or upheld if it must be based on expert testimony on the record.¹

THE FAILURE TO CHARGE BASIC FACTS FOUND BY THE PANEL

Despite the language of WAC 246-11-250 and the due process doctrine requiring specific, clear charges sufficient to allow preparation of a meaningful defense, *In re Romero*, 152 Wash.2d 124, 94 P.3d 939 (2004), neither lower court took seriously MQAC's failures to charge most of the facts on which it based its decision – such facts as that Dr. Ames treated P1, that he did so with the LISTEN, that he told P1 that he had been cured, that he failed to take necessary safety measures and what those measures were. These courts did not address the language of the regulation or this Court's applicable due process language and indeed never stated that the “factual basis” had been set forth in the charges or that they were clear and specific. The reason these facts were not charged was that they were not part of MQAC's case until testimony was taken. They are not mentioned in

¹ Space does not permit further discussion of other instances in which expert testimony should have been required – e.g., as to the nature of any risk that Dr. Ames created.

MQAC's pre-hearing statement nor in MQAC's opening. See OB 38-42.

Had Dr. Ames known, for example, that whether P1 had an egg allergy and Dr. Ames had taken necessary safety measures were issues, he could have arranged for independent expert witnesses to testify about these matters. He could have deposed MQAC experts on the subject, if MQAC had named such experts – as it probably would have had to if it had chosen to make such charges – and he would have deposed P1 differently.

ARGUMENT

Petitioner contends that the description of what MQAC and the lower courts did below self-evidently raises fundamental constitutional and statutory issues. This Argument will be devoted to showing primarily that Petitioner has a strong argument that the Johnston-Davidson-Brown language on which MQAC relied was incorrect (and unnecessary in the circumstances of those cases) and therefore should be disapproved or at least strictly limited. Brief remarks on two of the other issues are provided to show that there are substantial considerations justifying finding for Petitioner on those as well.

1. THE CONSTITUTIONAL AND PUBLIC POLICY IMPORTANCE OF EXPERT TESTIMONY IN MEDICAL AND OTHER PROFESSIONAL BOARD PROCEEDINGS

Over the years, and especially in the years after World War II, many medical and other professional boards argued that as to medical, scientific and technical facts on which a charge of unprofessional conduct is based, the boards *acting as prosecutors* need not introduce expert evidence of such facts at the hearing, because the boards *acting as adjudicators* are themselves

experts and do not “need” the testimony. For that reason, they claimed, they can consider such facts in their decision even though no one testified to them.

The majority of courts confronted with this contention – a contention that flies in the face of principles set down by several well-known United States Supreme Court cases² – have resoundingly rejected it. California, Oregon, Idaho, Illinois, Texas, Minnesota, Wisconsin, Massachusetts, and New Jersey are among the states that have done so.³ See, e.g., *Arthurs v.*

Board, 383 Mass. 299, 309-310, 418 N.E.2d 1236 (1981):

The board, however, argues that since most of the members of the board are experts, the board can use its expertise without the evidentiary basis of that expertise appearing in the record. “*This startling theory, if recognized, would not only render absolute a finding opposed to uncontradicted testimony but would render the right of appeal completely inefficacious as well.*” A board of experts, sitting in a quasi-judicial capacity, cannot be silent witnesses as well as judges.” [citing authority] The board may put its expertise to use in evaluating the complexities of technical evidence. However, the board may not use its expertise as a substitute for evidence in the record. “The requirement for administrative decisions based on substantial evidence and reasoned findings which alone make effective judicial review possible would become lost in the haze of so-called expertise (if material facts known to the agency did not appear in the record). Administrative expertise would then be on its way to becoming ‘a monster which rules with no practical limits on its discretion.’” *Baltimore & Ohio R. R. v. Aberdeen & Rockfish R. R.*, 393 U.S. 87, 92, 89 S.Ct. 280, 283, 21 L.Ed.2d 219 (1968), quoting from *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962)

See also, *Drew v. Psychiatric Sec. Rev. Bd.*, 322 Or. 491, 498-499, 909 P.2d 1211, 1214-1215 (1996):

² E.g., *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92, 89 S.Ct. 280 (1968); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962); *Ohio Bell Telephone Co.*, 301 U.S. 292, 304, 57 S.Ct. 724, 730 (1937) (Cardozo, J.); *ICC v. Louisville R. Co.*, 227 U.S. 88, 33 S.Ct. 185 (1913)

³ See generally *Martin v. Sizemore*, 78 S.W. 249, 271 (Tenn. Ct.App. 2001).

A somewhat less flattering, but equally accurate, summary of this last argument is as follows: "There's enough evidence but, even if it doesn't seem like enough to you--trust us. We have expertise beyond that of the average person in these cases, and we're satisfied." Seen in this light, it should come as no surprise that we reject the argument.

"It is one thing * * * to say that an agency may employ its experience and expertise to evaluate and understand evidence and quite another to allow it to use its special knowledge as a substitute for evidence presented at a hearing. A fundamental premise of administrative law is that the quality and efficiency of the regulatory process will be enhanced by delegating authority to experienced, expert administrators. Just as fundamental, however, is the principle that factfinding in contested cases is governed exclusively by the record of the hearing.

' * * * [E]xclusiveness of the record is at the core of the right to a fair hearing. Without that principle the hearing itself can be but a sham. * * * Only if the agency is limited to the record of the hearing can the private party have assurance that he not only has a full opportunity to present his case but, more important, opportunity to confront and rebut the entire case against him. [citing authority] We agree with that statement and adopt it as our own.

The substantial evidence rule loses its meaning if it is interpreted as leaving to the internal "expertise" of agency personnel, rather than to the external scrutiny of appellate courts, the critical question whether the facts of the case permit the administrative choice involved.

See also *State Bd. of Medical Examiners v. McCroskey*, 880 P.2d 1188, 1194-1195 n.7 (Colo. 1984):

The Board does not have the authority to set the standard of care from its own knowledge *when that standard has not been presented and tested in the hearing process*. *McKay v. State Bd. of Med. Exmnr*s, 103 Colo. 305, 312-313, 86 P.2d 232, 236 (1936).

It is important to recognize that the majority view is not that expert testimony is always required when there are medical, scientific or technical facts to be established. Where the reviewing court can tell from the record

that the board's conclusion is clearly right or where the board properly takes official notice of facts notorious to experts, such testimony – especially testimony regarding the standard of care – is not required. *See e.g., Martin v. Sizemore, supra; In re Mintz*, 233 Or. 441, 378 P.2d 945 (1963) A review of the *Johnston*, *Davidson* and *Brown* cases shows that they fall into this category and it was unnecessary to use the language on which MQAC relied here. In *Davidson* no expert testimony was necessary because the chiropractor in that case had clearly abused his patients sexually and a layperson could tell this was unprofessional (what could be more unprofessional?). In *Johnston* and *Brown* – unlike this one – there was ample expert testimony – indeed testimony that explicitly and implicitly stated the standard of care and addressed all other relevant medical and dental facts. With that testimony no reviewing judge could have had a problem applying the substantial evidence rule and no respondent could reasonably claim that he had no opportunity to cross-examine and rebut the evidence against him.

As noted above, the Johnston-Davidson-Brown language derives from portions of a 1949 Connecticut case, *Jaffe v. State Dept. of Health*, 135 Conn. 339, 64 A.2d 330 (1949); see, especially, 135 Conn. at 350-351. The minority of cases that adopted the language and reasoning of *Jaffe* apparently did not notice that even though it did not require expert testimony before the board, under the Connecticut procedure of that time, the respondent had in effect a right to a *de novo* judicial review in a proceeding that would

inevitably require the board to call expert witnesses to defend against the respondent's court challenge. See *id* at 354-355. Thus in Connecticut, Jaffe's holding would not have had the adverse effects that led to its rejection by the majority of courts in this country.

Be that as it may, the Jaffe ruling – although it is phrased in language which sounds logical – is subject to serious logical criticism.⁴ Jaffe in essence said that expert testimony was not necessary, because the board consisted entirely of physicians and must be presumed to know the standard of care and because the board had the right to disregard expert testimony: *i.e.*, it wasn't necessary. As to the presumption of omniscience, in 1949, when medicine was much simpler and there were fewer specialties, the difficulty might not have been apparent. But now we know that a generalist or specialist sitting on such a board may have no knowledge of the standard of care for a different specialty - *e.g.*, of a neurosurgeon, a pediatric cardiologist, a radiation oncologist or, for that matter, a specialist in food allergies or holistic medicine. Although in some familiar cases, the entire panel may know exactly what the standard of care is, in many others all or most will not.

In addition, today virtually every board has members who are not

4

Davidson is expressly based on Jaffe and one of its followers and Jaffe was cited in the briefing in Johnston. But no brief informed either the Johnston or the Davidson court that even at that time Jaffe was a minority case: indeed, none of the briefs for the respondents even addressed Jaffe and attempted to show its logical weaknesses. This was no doubt because the expert testimony issue in Johnston was a minor one and in Davidson the evidence of wrongdoing was clear without any expert testimony. Thus, there was little incentive for a full-dress discussion. The briefs are in the University of Washington and the State Supreme Court libraries under docket numbers 48104-1 and 5414-1..

members of the profession in question. The Court of Appeals sloughed this off, but Petitioner contends that by itself this lack of expertise is a decisive answer to the Jaffe doctrine and Washington's adoption of its language, especially where, as here, a majority of the panel are not members of the profession. In that situation the very foundation of the Jaffe rationale disappears. See e.g., Martin v Sizemore, 78 S.W. 249, 270-271 (Tenn. Ct.App. 2001):

it is quite possible that . . . a majority of the Board will lack sufficient expertise to have a personal understanding of the applicable standards of professional practice for a particular professional. In this circumstance, expert testimony regarding the applicable standards of professional conduct is necessary to enable the board members who are unfamiliar with the applicable standard of practice to discharge their adjudicatory responsibilities. Without this evidence, the non-expert board members will be faced with the choice of either basing their decision on their own uninformed notions about the applicable professional standards or deferring to board members who possess the necessary expertise.

Public members are supposed to be independent from the medical professionals. This they cannot be if they are dependent upon them for expert information. As for a physician's assistant, especially a pro tem, there is simply no basis for presuming that she has knowledge of a physician's – especially a specialist's – standard of care or of many other medical facts that even a general practitioner would know.

Space permits no further discussion of many other logical objections to Jaffe, particularly in Washington, where RCW 34.05.461(3), by adding requirements regarding agency orders that did not exist at the time of

Johnston and Davidson establishes the State's powerful commitment to strict and meaningful judicial review and RCW 18.130.180(4)'s concern about medical board bias against alternative physicians. See OB 26, 29-30.

Finally, it does not seem an unreasonable burden that an agency be required to present its case through expert testimony to the extent that the case is based on medical, scientific and technical facts. As courts have pointed out, if the facts are as the agency contends them to be, it should be a relatively simple matter to find experts who will so testify. See Smith v. Dept. of Registration, 412 Ill. 332, 106 N.E.2d 722 (Ill. 1952), at 730 ("if the 'Koch Treatment' is without value, it was a simple matter for the Department to have produced such proof"). Note that in Johnston and Brown, several physicians did testify for the board and implicitly – and sometimes explicitly – stated that what the licensee had done fell below the standard of care.

In this case, if the Commission had evidence establishing that the device was inefficacious it should have been able to present a physician and/or a biomedical engineer to so testify and to state the medical or scientific reasons for his or her opinion. If there were any notorious facts on which the view was based, they could have been officially noticed after giving Petitioner an opportunity to contest them.

The failure to present expert testimony in a case like this one suggests that MQAC cannot find an expert who can testify to the facts the agency alleges to constitute a violation of the law, as does the fact that the board did

not initially charge that the device was inefficacious or that Petitioner was negligent and that these new allegations were based on the very same investigative file that the first statement of charges was based on. Most impressively, when the hearing was held MQAC did present experts, an expert on biofeedback machines and an FDA employee from Maryland – not the easiest experts to find – but none could or did testify to the efficacy of the device or to Dr. Ames’s negligence.

THE FAILURE TO CHARGE THE ESSENTIAL FACTS

It is both a constitutional matter and an issue of critical public interest that the Court make it clear that WAC 246- 11-250 will be followed, and that the specific conduct claimed to constitute unprofessional conduct be stated in the charges. This is a matter of fundamental due process and not only the panel, but both lower courts simply refused to address either the regulation or the due process language that this Court has used to assure adequate notice of the factual theory of a quasi-criminal disciplinary proceeding. To require adherence to this authority prevents what happened here and imposes no significant burden on health care boards conducting quasi criminal proceedings. The WACs give these boards unfettered discretion to amend any time and any number of times. See WAC 246-11-260.

THE MEANING OF RCW 18.130.180(16)

The panel and the Court of Appeals interpreted this statute for the first time and, Dr. Ames contends, interpreted it in a way that cannot withstand

scrutiny. That interpretation creates a major threat to alternative medicine when it is realized that medical board panels are necessarily comprised of conventional physicians and those who are likely to be influenced by them. See discussion of this statute's meaning in OB 42-48.

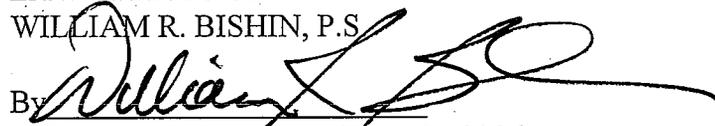
CONCLUSION

The Court should grant the Petition and correct the aberrations below.

Respectfully submitted,

LAW OFFICES OF
WILLIAM R. BISHIN, P.S.

By



William R. Bishin WSBA No. 8386

FILED

AUG -2 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

GEOFFREY S. AMES, M.D.,	)	No. 24897-6-III
)	
Petitioner,)	
	)	ORDER DENYING
v.	)	MOTION FOR
	)	RECONSIDERATION;
WASHINGTON STATE HEALTH	)	ORDER DENYING
DEPARTMENT MEDICAL QUALITY	)	MOTION TO MODIFY
HEALTH ASSURANCE COMMISSION,	)	CLERK'S RULING
)	
Respondent.)	

THE COURT has considered petitioner's motion for reconsideration of this Court's decision of May 17, 2007, and the answer thereto, and is of the opinion the motion should be denied.

THE COURT has further considered the petitioner's objection to the Clerk's Letter of July 9, 2007, and is also of the opinion the objection should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 17, 2007 is hereby denied.

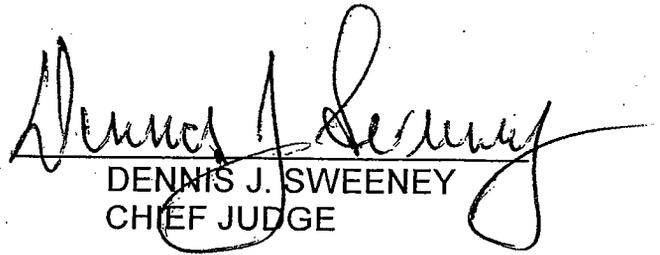
No. 24897-6-III

Ames v. Washington St. Health Dep't

IT IS FURTHER ORDERED, the objection to the Clerk's Letter of July 9,
2007 is also denied.

DATED: August 2, 2007

FOR THE COURT:



DENNIS J. SWEENEY
CHIEF JUDGE

FILED

MAY 17 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEOFFREY S. AMES, M.D.,	)	No. 24897-6-III
)	
Petitioner,)	
)	
v.	)	Division Three
)	
WASHINGTON STATE HEALTH)	
DEPARTMENT MEDICAL QUALITY)	
HEALTH ASSURANCE COMMISSION,)	
)	
Respondent.	)	UNPUBLISHED OPINION

KATO, J.*—The Washington State Department of Health, Medical Quality Assurance Commission (Commission), found Dr. Geoffrey Ames had committed unprofessional conduct by using an alternative medical device. The Commission determined his conduct fell below the standard of care and suspended his license for five years. But it stayed the suspension provided that Dr. Ames comply with several conditions that included not using the device, paying a fine, and submitting his records for periodic evaluations. Dr. Ames appealed to superior court, which upheld the Commission's ruling. We affirm.

* Judge Kenneth H. Kato is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

Dr. Ames, a licensed physician, is board certified in holistic medicine. In 1995, he began practicing in Richland, Washington, specializing in chronic fatigue and allergies. One of the methods used by Dr. Ames was acupressure.

Another method used by Dr. Ames employed a device called the Life Information System Tens device (LISTEN). It is a galvanic skin response machine that measures changes in resistance. James Clark developed it and submitted information to the Food and Drug Administration (FDA). LISTEN was described as having electrodermal screening techniques, alternative medicine techniques, and bioenergetics techniques. The FDA did not clear the device for these uses. Mr. Clark also developed other galvanic skin response devices that were cleared, but not approved, by the FDA.

Dr. Ames learned about LISTEN from colleagues. He understood the device functioned like a biofeedback machine. In 1997, he purchased it and learned how to operate it from colleagues. His nurse attended a course on the use of the device for electrodermal screening (EDS), but he did not find her training useful for his purposes. He used LISTEN when treating his patients, but did not specifically bill them for it.

Dr. Ames saw Patient One on June 6, 2001, and July 10, 2001. The patient complained of fatigue, sluggishness, weak and tired joints and muscles, infrequent joint and muscle pain, and severe mood swings. During the first visit,

No. 24897-6-III

Ames v. Dep't of Health

Dr. Ames discussed metal toxicity, metal poisoning, and his alternative medicine practice. He ordered blood tests and a urine test.

On July 10, Dr. Ames reviewed the lab results with Patient One and told him he had a mineral imbalance, mineral deficiencies, and a low testosterone level. Dr. Ames thought Patient One might have some metal poisoning that contributed to his tiredness. He told him he should undergo treatment for metal poisoning and he might be allergic to eggs and mustard, allergies that could be weakening his body.

Dr. Ames then told Patient One about LISTEN and how it could be used to find out what was going on with his body. Dr. Ames said he would place a probe connected to LISTEN in the patient's hand. This would enable the doctor to make a diagnosis and possibly cure any allergies.

Prior to using LISTEN, Dr. Ames assessed Patient One's strength. While lying on his back, the patient raised his right arm and Dr. Ames asked him to resist while he tried to pull his arm down. This test revealed Patient One had a strong resistance. Dr. Ames then had the patient raise his arm as before. The doctor typed the word "eggs" into LISTEN and asked the patient to resist when he pulled on his arm. Dr. Ames was able to easily pull the patient's arm down, indicating he had been compromised due to his egg allergy. Next, the doctor had Patient One roll over onto his stomach and he thumped his back with an

acupressure device. Dr. Ames again did the resistance test with LISTEN, but this time he was not able to pull the patient's arm down. Dr. Ames told him his allergy was gone.

Dr. Ames advised Patient One not to eat any eggs for the next 24-48 hours or the treatment would not take. The patient believed any egg allergy he had was cured. He had never before been diagnosed as having an egg allergy. Dr. Ames told Patient One he would have to return to cure his other allergies because only one allergy at a time could be cured.

Dr. Ames disputed Patient One's account of the second visit, claiming he simulated the process he would use to treat the allergy through muscle testing but did not actually use LISTEN. He was merely informing Patient One about what might happen if he elected treatment.

Several weeks after his last visit, Patient One contacted the Department of Health (Department) because he was concerned about Dr. Ames's views of mercury, lead poisoning, and chelation. He also indicated concern with the doctor's obsession with alternative modalities.

After an investigation, the Department filed on July 10, 2002, a Statement of Charges against Dr. Ames, alleging he treated Patient One with LISTEN in violation of federal food and drug acts and state law. On February 5, 2003, the Department amended its charges against Dr. Ames to claim he was not acting

within the required standard of care, his actions constituted moral turpitude, and he promoted an inefficacious device for personal gain. The Commission determined Dr. Ames violated (a) RCW 18.130.180(4) by being negligent in creating a risk the patient could be harmed and (b) RCW 18.130.180(16) by promoting an inefficacious device for personal gain. The Commission, however, did not find Dr. Ames had violated the standard of care or committed an act of moral turpitude. Based upon its findings, the Commission suspended his license. But the suspension was stayed provided Dr. Ames not use LISTEN in his practice, permit the Commission to conduct quarterly record reviews of his patients, submit a declaration he was complying with the order each quarter, and pay a \$5,000 fine. Dr. Ames appealed this decision to the Benton County Superior Court, which upheld the Commission's ruling. This appeal follows.

The Department charged Dr. Ames with violating several provisions of the Uniform Disciplinary Act, chapter 18.130 RCW. This Act establishes the licensure and disciplinary procedure for health care professions. *Nguyen v. Dep't of Health, Med. Quality Assur. Comm'n*, 144 Wn.2d 516, 520, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002). RCW 18.130.100 provides that all disciplinary proceedings are governed by the Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW.

“In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.” *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433, 909 P.2d 1294 (1995) (quoting *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)), *cert. denied*, 518 U.S. 1006 (1996). Because this is a medical quasi-criminal proceeding, findings of fact must be proved by a clear preponderance of the evidence. *Nguyen*, 144 Wn.2d at 529, 534. Unchallenged findings are verities on appeal. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991). Conclusions of law are reviewed under the “error of law” standard. *Id.* In applying this standard, courts accord substantial weight to the agency’s interpretation of the law, even though we may substitute our judgment for that of the agency. *Id.*

Dr. Ames claims the Commission erred by using its own expertise instead of taking expert testimony. But an administrative tribunal comprised of medical practitioners is competent to determine the propriety of medical conduct without expert testimony. *In re Discipline of Brown*, 94 Wn. App. 7, 14, 972 P.2d 101 (1998), *review denied*, 138 Wn.2d 1010 (1999). Here, the Commission was comprised of two medical professionals and an attorney. It heard testimony from Dr. Ames as well as another doctor. The Commission was not required to take any additional expert testimony. *Id.*; see also RCW 34.05.461(5).

The Department alleged Dr. Ames violated RCW 18.130.180(4). RCW 18.130.180 defines what acts constitute unprofessional conduct for a health care provider. Specifically, RCW 18.130.180(4) states “[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed” constitutes unprofessional conduct. The section further states “[t]he use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed.” *Id.* The Commission concluded the Department proved by clear, cogent, and convincing evidence that Dr. Ames had violated this section by using LISTEN with Patient One. The doctor assigns error to this conclusion of law, as well as several of the Commission’s findings.

Dr. Ames assigns error to the first sentence of finding 1.7, which stated he did not know the physics behind the device or the voltage or amperage it used. In response to questions regarding the electricity sent to the body by LISTEN, Dr. Ames testified, “I believe the LISTEN device sends a current of five ohms, but I’m not the inventor of the machine, so I can’t really give you a reliable answer on that.” Board Record (BR) at 2097-98. He later testified, “I don’t know the physics behind it.” BR at 2156. This finding is supported by clear and convincing evidence.

He also assigns error to the last two sentences of finding 1.12, which indicate he used the device in assessing patients. Dr. Ames testified he used the device to help him assess the allergies of his patients and he did use it. He testified he used LISTEN on about 50 percent of his patients. The device helped him to speed up his assessment of patients. The finding is supported by clear and convincing evidence.

Dr. Ames also assigns error to a sentence in finding 1.13 indicating Patient One described his symptoms on the date of his initial visit; a sentence in finding 1.15 that he told Patient One eggs and mustard could be weakening his body; and a sentence in finding 1.16 stating he told Patient One he could cure his egg allergy. These findings, however, are all supported by the testimony of Patient One.

Dr. Ames assigns error to findings 1.17-1.23 to the extent an allergy other than hay fever was implied. These findings indicate Dr. Ames treated Patient One for an egg allergy. They are supported by the patient's testimony. The doctor also assigned error to the first sentence of finding 1.24, which states he told Patient One he could only treat one allergy at a time and the patient would have to come back for additional treatments to treat each allergy. Again, this finding is supported by the patient's testimony.

Dr. Ames further assigns error to findings 1.25-1.29, which state Dr. Ames used LISTEN to treat Patient One for his allergy to eggs, but the device could not provide such treatment. The findings question the diagnosis of egg allergy and indicate Dr. Ames used the device for his own personal gain and failed to ensure it was not harmful to his patients. The findings indicated Dr. Ames's use of the device precluded him from making a proper diagnosis and treatment, thus subjecting Patient One to an unreasonable risk of harm. Patient One's testimony supports these findings with regard to his visits and treatment with Dr. Ames, who admitted using LISTEN with his patients and that it improved his efficiency in treating patients. Other patients testified as to what Dr. Ames told them about LISTEN and how he used it in their treatments. Dr. Ames testified it was possible to cure an allergy in one visit. From this testimony, the challenged findings were supported by clear and convincing evidence.¹

Based on its findings, the Commission concluded Dr. Ames violated RCW 18.130.180(4). It believed the doctor violated this section because his actions created an unreasonable risk that Patient One could be harmed.

¹ Whether LISTEN had FDA clearance or approval was argued by both parties. The Commission found the FDA had not cleared or approved the device. (findings 1.3-1.6, CP at 16-17). Dr. Ames did not challenge these findings and therefore they are verities. *Haley*, 117 Wn.2d at 728. Furthermore, these findings were supported by the testimony of the device's creator and the FDA. In any event, FDA clearance, or lack of it, was not of great import in the Commission's ruling.

Dr. Ames contends the determination of negligence under this section was predicated on finding that LISTEN was an inefficacious device because it could not be used to make an appropriate diagnosis and/or provide effective treatment. The Commission, however, determined Dr. Ames used LISTEN to erroneously diagnosis and treat an egg allergy and consequently created an unreasonable risk Patient One would be harmed. Its conclusion was based on the following facts.

Dr. Ames testified about allergies and tests used to diagnose allergies. He testified kinesiology, the arm muscle testing process described by Patient One, can indicate an allergy. He also discussed blood tests and skin tests used by allergists. Dr. Ames did use a blood test, but did not do a skin test on Patient One. He used LISTEN to assist him in diagnosing allergies, but he did not have any evidence LISTEN was efficacious for diagnosing allergies. He had only heard from colleagues that a device similar to it was efficacious. Dr. Ames admitted he did not understand the physics behind the device and was unsure what voltage it produced. He did not receive any claims, warnings or labeling with the device. He received no personal training on LISTEN. Patient One testified that in his second visit, Dr. Ames used LISTEN to diagnose and treat an allergy to eggs. Based on these facts, the Commission did not err by concluding Dr. Ames created an unreasonable risk of harm to Patient One by using LISTEN

to diagnose and treat allergies without any evidence the device was effective for that purpose. Furthermore, he created an unreasonable risk of harm to Patient One by using LISTEN without understanding how it worked. Dr. Ames failed to establish he had any evidence from which he based his conclusion the device was appropriate to use in the diagnosis and treatment of allergies.

Dr. Ames claims this conclusion is flawed for two reasons. First, he asserts any error he made was a one-time error in judgment and did not constitute negligence. But the Commission was not asked to determine if the device was inefficacious for every possible use. The Statement of Charges indicated Dr. Ames's use of the device with Patient One constituted negligence. The charge and the underlying statute is specific to a patient. See RCW 18.130.180(4). The evidence clearly and cogently established Dr. Ames's use of the device with Patient One created an unreasonable risk of harm, thus establishing a violation of RCW 18.130.180(4). The Commission was not required to conclude the device was inefficacious in all circumstances.

Dr. Ames also claims the blood tests established Patient One had an egg allergy. Accordingly, the Commission erred by concluding Dr. Ames's treatment of Patient One for an egg allergy was based on LISTEN and by concluding Patient One did not have an egg allergy. There was evidence that Dr. Ames did a blood test on Patient One who testified Dr. Ames told him his blood test

detected an allergy to eggs. But Dr. David Martin, Dr. Ames's own expert, testified that a blood test result alone was not a basis for treatment. Patient One testified he did not like eggs, but he had no symptoms indicating an allergy to eggs and had never been diagnosed with an egg allergy prior to Dr. Ames's diagnosis.

The Commission's ruling, however, was not based on Dr. Ames's diagnosis that Patient One had an egg allergy. It found Dr. Ames created an unreasonable risk of harm to Patient One by using LISTEN to treat his egg allergy. This risk was amplified because Dr. Ames did not understand the mechanics behind the device. A blood test suggested the possibility of an egg allergy, but it did not change the fact that Dr. Ames treated this allergy with a device he did not understand and for which he had no training. This created an unreasonable risk of harm.

Dr. Ames further claims his supposed negligent use of LISTEN based on these facts was not charged and thus cannot support the Commission's conclusion. Specifically, he claims he was not prepared to defend against a claim that Patient One did not have an egg allergy. But the Statement of Charges clearly provides that his treatment of Patient One was at issue. It did not specifically charge him with misdiagnosing an egg allergy, but the Commission's decision was not based on a finding that Patient One had no egg

allergy. The decision was based on the finding that Dr. Ames did not properly treat the allergy and used a device without proper investigation. The Statement of Charges put Dr. Ames on notice about his use of the device. The prehearing brief filed by the Department also put Dr. Ames on notice of its position. In these circumstances, Dr. Ames cannot claim he was unaware of the facts used by the Department to support its charges.

He claims the conclusion of negligence based on a failure to investigate was also unsupported and improper because it was not charged. The charges against Dr. Ames involved improper use of LISTEN. Contrary to his assertion, the Department did argue that its case was based upon Dr. Ames's use of the device and that it was not proper in his medical practice. It was Dr. Ames's own testimony that provided support for the finding he did not understand the device, the physics behind it, or how it worked. His testimony also indicated he did not receive any training or literature on the device. The finding that Dr. Ames did not properly investigate LISTEN prior to using it on his own patients was supported by the record.

Dr. Ames argues that because he practices alternative medicine, the Commission impermissibly discriminated against him. He does not cite any supporting facts in the record. Moreover, nothing in the record suggests the Commission members were biased against Dr. Ames or alternative medicine.

A medical provider violates RCW 18.130.180(4) if he acts in a manner that creates an unreasonable risk of harm to a patient. Dr. Ames treated Patient One with LISTEN for an egg allergy. He knew very little about the device. The evidence was clear, cogent, and convincing that Dr. Ames's use of the device created an unreasonable risk of harm. The Commission did not err.

Dr. Ames also claims the Commission erred by determining LISTEN was inefficacious and he promoted it for his own personal gain. RCW 18.130.180 states that it is unprofessional conduct for any licensed health care provider to promote for personal gain an unnecessary or inefficacious drug, device, treatment procedure, or service. The statute does not define "inefficacious." Webster's defines "inefficacious" as lacking the power to produce the desired effect. WEBSTER'S THIRD NEW WORLD DICTIONARY, 1156 (1993). There was no evidence the device was capable of curing allergies. The findings support the conclusion that the device was inefficacious for this situation.

Dr. Ames appears to argue that in order for a device to be inefficacious, it must create an unreasonable risk of harm. He urges RCW 18.130.180(4) to be read in conjunction with RCW 18.130.180(16). An appellate court reviews questions of statutory construction de novo. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 612, 146 P.3d 914 (2006).

The examination begins with the language of the statute and related statutes to determine whether plain statutory language shows the intended meaning of the statute in question. If this examination leads to a plain meaning, that is the end of the inquiry. If the statute is amenable to more than one reasonable interpretation, a court may then resort to legislative history, principles of statutory construction, and relevant case law to resolve the ambiguity and ascertain the meaning of the statute.

Id. (internal citations omitted).

RCW 18.130.180 begins by stating “[t]he following conduct, acts, or conditions, constitute unprofessional conduct for any license holder or applicant under the jurisdiction or chapter.” The statute then lists 25 subsections that detail different conduct, acts, or conditions. Each numbered subsection is separate and distinct from the others and alone is unprofessional conduct. There is no basis for finding that portions or requirements of one subsection must be read into a different subsection. Thus, RCW 18.130.180(16) does not require that a device must demonstrate an unreasonable risk of harm in order to be inefficacious.

Dr. Ames further claims that even if the device was inefficacious, there was no evidence he used it to promote his own personal gain. The statute does not define “promote.” “Promote” is defined as “to contribute to the growth, enlargement or prosperity of.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1815 (1993). The evidence established Dr. Ames used the device

with about 50 percent of his patients. He stated his use of the device helped him speed up his assessment of patients. Three patients testified Dr. Ames used the device on them. All reported he told them the cure for their allergies was provided, or at least substantially provided, by LISTEN. He also told them he could only cure one allergy at a time.

The Commission entered several findings detailing Dr. Ames's use of LISTEN in his practice. Those findings were supported by clear and convincing evidence. The findings in turn support the conclusion that Dr. Ames used the device to promote his own personal gain. The evidence also showed clearly and convincingly that the device was inefficacious and could not produce the desired effect. The Commission did not err by finding Dr. Ames had violated RCW 18.130.180(16).

Dr. Ames argues the sanctions imposed were a manifest abuse of discretion because the evidence did not support a finding that he violated RCW 18.130.180(4) and .180(16). RCW 18.130.160 authorizes the imposition of sanctions based upon findings of unprofessional conduct. The Commission's findings of unprofessional conduct were proper. The sanctions imposed were permitted by RCW 18.130.160.

Affirmed.

No. 24897-6-III
Ames v. Dep't of Health

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato JPT

Kato, J. Pro Tem.

WE CONCUR:

Sweeney, C.J.

Sweeney, C.J.

Kulik, J.

Kulik, J.

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON
NO. 248976

GEOFFREY S. AMES, M.D.,

Petitioner,

vs.

WASHINGTON STATE HEALTH
DEPARTMENT MEDICAL QUALITY
HEALTH ASSURANCE COMMN.,

Respondent.

FILED
SEP 19 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

CLERK

RONALD R. CARPENTER

07/SEP - 7 AM 7:59

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENT TO APPENDIX

PETITION FOR REVIEW

1. Statement of Charges
2. First Amended Statement of Charges
3. Findings of Fact, Conclusions of Law and Final Order
4. Department of Health Regulations
 - WAC 246-11-250
 - WAC 246-11-260
 - WAC 246-11-520
5. RCW 18.130.180
6. Administrative Procedure Act (Excerpts)
 - RCW 34.05.452
 - RCW 34.05.461
 - RCW 34.05.
7. RCW 18.120.010

ORIGINAL

APPENDIX 1

Statement of Charges

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION**

In the Matter of the License to Practice)
As a Physician and Surgeon of:)

GEOFFREY S. AMES, MD)
License No. MD00026961)

Respondent.)
_____)

Docket No. 02-06-A-1012MD

STATEMENT OF CHARGES

FILED

JUL 10 2002

Adjudicative Clerk
Office

The Program Manager of the Medical Quality Assurance Commission, (Commission), on designation by the Commission, makes the allegations below, which are supported by evidence contained in program case file 2001-08-0007MD. Any patients referred to in this Statement of Charges are identified in an attached Confidential Schedule.

Section 1: ALLEGED FACTS

1.1 Geoffrey S. Ames, MD, Respondent, was issued a license to practice as a physician by the state of Washington in December 1989.

1.2 On or about July 10, 2001, Respondent tested Patient One for food allergies using an electro-diagnostic device called the Life Information System Ten device (LISTEN device). Respondent later admitted to a Department of Health representative that he uses the LISTEN device to detect food allergies in patients.

1.3 The LISTEN device uses low voltage to measure galvanic skin resistance.

1.4 The LISTEN device is a medical device under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(h). A medical device may not be marketed until there is either an approved application for premarket approval, pursuant to 21 U.S.C. § 360e, or an approved application for an investigational device exemption, pursuant to 21 U.S.C. § 360j(g). There is no approved application for premarket approval or investigational device exemption for the LISTEN device.

1.5 A manufacturer is exempt from the requirements in the above paragraph if it files a pre-market notification under section 21 U.S.C. § 360(k), and the Food and Drug Administration (FDA) rules the device is "substantially equivalent" to a device already on the market. This is known as receiving "510(k) approval."

1.6 In 1996, the FDA granted "510(k) approval" for the Digital Conductance Meter to be used for relaxation training in the biofeedback process.

1.7 The FDA has not granted "510(k) approval" for the LISTEN device.

1.8 Although a component of the LISTEN device is a digital conductance meter, the LISTEN is different in several significant respects, including using different software, and is, therefore, a new device, which must meet the requirements listed in paragraph 1.4, above.

1.9 Commercial distribution of a device prior to obtaining an approved application for premarket approval or an investigational device exemption, or receiving "510(k) approval" results in the device being adulterated under 21 U.S.C. § 351(f)(1)(B).

1.10 By receiving an adulterated device in interstate commerce, Respondent has violated 21 U.S.C. § 331(c).

1.11 Even if the "510(k) approval" for the digital conductance meter applied to the LISTEN device, Respondent did not use the digital conductance meter for its approved purpose.

1.12 The LISTEN device is a medical device under RCW 69.04.010. The use of an adulterated or misbranded device is prohibited under RCW 69.04.040(1) and (3).

Section 2: ALLEGED VIOLATIONS

2.1 The violations alleged in this section constitute grounds for disciplinary action, pursuant to RCW 18.130.180 and the imposition of sanctions under 18.130.160.

2.2 The facts alleged in paragraphs 1.2 through 1.12 constitute unprofessional conduct in violation of RCW 18.130.180(7), which provides in part:

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice.

//

//

//

//

//

//

APPENDIX 2

First Amended Statement of Charges

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

FILED
FEB 05 2003
Adjudicative Clerk Office

In the Matter of the License to Practice)
As a Physician and Surgeon of:) Docket No. 02-06-A-1012MD
)
GEOFFREY S. AMES, MD) FIRST AMENDED STATEMENT
License No. MD00026961) OF CHARGES
)
Respondent.)
_____)

The Program Manager of the Medical Quality Assurance Commission, (Commission), on designation by the Commission, makes the allegations below, which are supported by evidence contained in program case file 2001-08-0007MD. Any patients referred to in this First Amended Statement of Charges are identified in an attached Confidential Schedule.

Section 1: ALLEGED FACTS

1.1 Geoffrey S. Ames, MD, Respondent, was issued a license to practice as a physician by the state of Washington in December 1989.

1.2 On or about July 10, 2001, Respondent tested Patient One for food allergies using an electro-diagnostic device called the Life Information System Ten device (LISTEN device). Respondent later admitted to a Department of Health representative that he uses the LISTEN device to detect food allergies in patients.

1.3 The LISTEN device uses low voltage to measure galvanic skin resistance.

1.4 The LISTEN device is a medical device under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(h). A medical device may not be marketed until there is either an approved application for premarket approval, pursuant to 21 U.S.C. § 360e, or an approved application for an investigational device exemption, pursuant to 21 U.S.C. § 360j(g). There is no approved application for premarket approval or investigational device exemption for the LISTEN device.

1.5 A manufacturer is exempt from the requirements in the above paragraph if it files a pre-market notification under section 21 U.S.C. § 360(k), and the Food and Drug Administration (FDA) rules the device is "substantially equivalent" to a device already on the market. This is known as receiving "510(k) approval."

000060

ORIGINAL

ATT. 3

1.6 In 1996, the FDA granted "510(k) approval" for the Digital Conductance Meter to be used for relaxation training in the biofeedback process.

1.7 The FDA has not granted "510(k) approval" for the LISTEN device.

1.8 Although a component of the LISTEN device is a digital conductance meter, the LISTEN is different in several significant respects, including using different software, and is, therefore, a new device, which must meet the requirements listed in paragraph 1.4, above.

1.9 Commercial distribution of a device prior to obtaining an approved application for premarket approval or an investigational device exemption, or receiving "510(k) approval" results in the device being adulterated under 21 U.S.C. § 351(f)(1)(B).

1.10 By receiving an adulterated device in interstate commerce, Respondent has violated 21 U.S.C. § 331(c).

1.11 Even if the "510(k) approval" for the digital conductance meter applied to the LISTEN device, Respondent did not use the digital conductance meter for its approved purpose.

1.12 The LISTEN device is a medical device under RCW 69.04.010. The use of an adulterated or misbranded device is prohibited under RCW 69.04.040(1) and (3).

1.13 On or about June 6, 2001, Respondent saw Patient One complaining of chronic fatigue. Respondent ordered urine and blood tests and hair analysis.

1.14 On or about July 10, 2001, Patient One returned to see Respondent to discuss the test results. Respondent told Patient One that the blood tests showed a number of food allergies. Respondent then used the LISTEN device on Patient One. Respondent had Patient One lie down on a table and hold his left arm straight up in the air. Respondent then asked Patient One to try to resist when Respondent attempted to push his arm down. Respondent pushed on Patient One's arm but did not push it down. Respondent then had Patient One hold a brass rod in his hand, which was connected to the LISTEN device, and typed in "eggs" into the device. Respondent asked Patient One to hold his left arm up in the air and to try to resist when Respondent attempted to push his arm down. Respondent then pushed Patient One's arm down and told Patient One that this showed he was allergic to eggs. Respondent repeated the test, but placed a piece of paper over the brass rod. When Patient One asked Respondent why he placed a piece of paper over the brass rod, Respondent told him he could emit the EMF frequency for eggs and many other foods through telepathy, so he hardly needed the device anymore.

Section 2: ALLEGED VIOLATIONS

2.1 The violations alleged in this section constitute grounds for disciplinary action, pursuant to RCW 18.130.180 and the imposition of sanctions under 18.130.160.

2.2 The facts alleged in paragraphs 1.2 through 1.14 constitute unprofessional conduct in violation of RCW 18.130.180(1), (7), and (16) which provides in part:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not.

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed.

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice.

The statutes Respondent violated are 21 U.S.C. § 331(c) and RCW 69.04.040(1) and (3), which provide as follows:

Sec. 331. - Prohibited acts

The following acts and the causing thereof are prohibited:

...

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

RCW 69.04.040 Prohibited acts:

The following acts and the causing thereof are hereby prohibited:

(1) The sale in intrastate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(2) The adulteration or misbranding of any food, drug, device, or cosmetic in intrastate commerce.

(3) The receipt in intrastate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the sale thereof in such commerce for pay or otherwise.

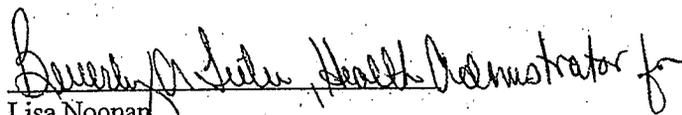
(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure or service.

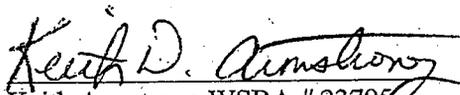
Section 3: NOTICE TO RESPONDENT

The charges in this document affect the public health, safety and welfare. The Program Manager of the Commission directs that a notice be issued and served on Respondent as provided by law, giving Respondent the opportunity to defend against these charges. If Respondent fails to defend against these charges, Respondent shall be subject to discipline, pursuant to RCW 18.130.180 and the imposition of sanctions under 18.130.160.

DATED this 5th day of February, 2003.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION


Lisa Noonan
Disciplinary Manager


Keith Armstrong WSBA # 23795
Assistant Attorney General Prosecutor

FOR INTERNAL USE ONLY. INTERNAL TRACKING NUMBERS: Program No. 2001-08-0007MD

APPENDIX 3

Findings of Fact, Conclusions of Law and Final Order

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

In the Matter of the License to Practice)
as a Physician and Surgeon of:)

GEOFFREY S. AMES, M.D.)
License No. MD00026961,)

Respondent.)

Docket No. 02-06-A-1012MD

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

APPEARANCES:

Respondent, Geoffrey S. Ames, M.D.
William Bishin, Attorney at Law

Department of Health, by
The Office of Attorney General, per
Keith D. Armstrong, Assistant Attorney General

COMMISSION PANEL: Cabell Tennis, J.D., Public Member, Panel Chair
Jan Paxton, PA-C, Pro Tem
Sunanda Uberoi, M.D.

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

The Medical Quality Assurance Commission (the Commission) convened a hearing on January 13-16, 2004 and February 10, 2004. The Department's post-hearing brief was submitted to the Commission on February 25, 2004. The Commission deliberated on March 10, 2004.

The Department of Health issued First Amended Statement of Charges alleging that the Respondent had violated the Uniform Disciplinary Act. License Suspended. Stayed.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 1 of 20

Docket No. 02-06-A-1012MD

001850

ATT. 1

ISSUES

Whether the Respondent engaged in unprofessional conduct within the meaning of RCW 18.130.180(1), (4), (7) and (16).

If the Department proves unprofessional conduct, what are the appropriate sanctions under RCW 18.130.160?

SUMMARY OF EVIDENCE

In consideration of this matter, the Commission heard over thirty-three hours of testimony and oral argument. The Department presented testimony of the following witnesses: Geoffrey Ames, M.D. (the Respondent); Patient One; Richard Sherman, Ph.D.; and Neil Odgen. The Respondent testified on his behalf and presented testimony of the following witnesses: Donald Volkman; Joan McVey; James Clark; and David Martin, M.D. The Department's had two exhibits admitted, which were numbered as Department's Exhibit No. 2 and Department's Exhibit No. 3. The Respondent had eight exhibits admitted, Respondent's Exhibits Nos. 1-8.

ANALYSIS

The Uniform Disciplinary Act (the UDA) defines what conduct, acts, or conditions constitute unprofessional conduct. RCW 18.130.180. In this case, the Department alleged that the Respondent committed four violations under the UDA, specifically RCW 18.130.180(1), (4), (7) and (16).

First, the Department alleged the Respondent's conduct was unprofessional under RCW 18.130.180(1), unprofessional conduct is defined in part as:

The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 2 of 20

Docket No. 02-06-A-1012MD

001851

act constitutes a crime or not.

RCW 18.130.180(1). During the hearing, the Commission granted the Respondent's motion to dismiss the alleged violation under RCW 18.130.180(1).

Second, the Department alleged the Respondent's conduct was unprofessional under RCW 18.130.180(4), which is defined as:

Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

RCW 18.130.180(4).

Expert testimony is helpful, but not essential to the Department's case, nor would the lack of such testimony either support or require dismissal of the charges against Respondent. *Johnston v. Washington State Medical Disciplinary Board*, 99 Wn.2d 466, 663 P.2d 457 (1983); *Brown v. State Department of Health, Dental Disciplinary Board*, 94 Wn. App. 7, 972 P.2d 101 (1998). Based on the *Johnston* and *Brown* cases, the Commission can use its own expertise to evaluate the standard of care regarding the Respondent's actions with Patient One. No additional expert is necessary to resolve this case. RCW 34.05.461(5).

Third, the Department alleged the Respondent's conduct was unprofessional under RCW 18.130.180(7), which is defined as:

Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

RCW 18.130.180(7). Specifically, the Department charged the Respondent for violating a federal code, 21 U.S.C. § 331(c), which provides as follows:

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Sec. 331. – Prohibited acts

The following acts and the causing thereof are hereby prohibited:

.....
(c) The receipt in intrastate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

The Department also charged the Respondent for violating a state statute, RCW 69.04.040(1) and (3), which provides as follows:

The following acts and the causing thereof are hereby prohibited:

(1) The sale in intrastate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

.....
(3) The receipt in intrastate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the sale thereof in such commerce for pay or otherwise.

This statute is similar to the above federal code, 21 U.S.C. § 331(c). The facts that would apply to the federal code would apply as well to the allegations under RCW 69.04.040, regarding the LISTEN device being adulterated or misbranded.

In this case, Mr. Ogden did not know about the LISTEN device that was purchased by the Respondent. Likewise, Dr. Sherman not only did not know about the LISTEN device, but also had not seen or evaluated it. In addition, there was no evidence that the manufacturer or the Respondent made significant changes to the LISTEN device that it thereby became adulterated. There was no evidence that the Respondent mislabeled the LISTEN device; thus, there was no evidence that it was misbranded. Finally, the Department failed to offer evidence that the Respondent delivered or offered it for delivery to someone else for pay. During the hearing, the Commission granted the Respondent's motion to dismiss the allegation of unprofessional conduct under RCW 18.130.180(7)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Fourth, the Department alleged the Respondent's conduct was unprofessional under RCW 18.130.180(16), which is defined as:

Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

RCW 18.130.180(16).

During the hearing, the Commission heard and observed the testimony of Patient One and the Respondent. The Commission finds Patient One credible when he testified about his visits with and treatment by the Respondent on June 6, 2001 and July 11, 2001. The Commission did not find the Respondent credible when he testified about his treatment of Patient One on these dates. RCW 34.05.461.

I. FINDINGS OF FACT

1.1 Geoffrey S. Ames, M.D., the Respondent, was issued by the state of Washington in December 1989, a license to practice as a physician and surgeon. The Respondent completed a pathology residency. He completed a year of internal medicine training. He started a family practice in Gardnerville, Nevada. The Respondent is board-certified in holistic medicine. The Respondent took an acupuncture course at UCLA, San Francisco. Since 1995, he has been practicing as a physician in Richland, Washington. The Respondent's practice includes the following specialties: NAET¹ allergy therapy, JMT allergy therapy, neuromodulation technique allergy therapy, acupuncture, acupressure and dermatology.

¹ NAET stands for Nambudripad Allergy Elimination Technique. Devi S. Nambudripad developed the NAET, which is a technique that treats allergies using acupressure.

1.2 The Life Information System Tens device (the LISTEN device) is a galvanic skin response machine. The LISTEN device consists of a keyboard, monitor, a computer with hardware, foot mouse, black box used to create the circuit so an ohmmeter will work. The black box has a wire to a metal probe that is held by the patient in his/her hand. The LISTEN device is an electronic skin response device and it measures changes in resistance, which is the impediment of a flow of electrical current. The LISTEN device uses low voltage, a current of five ohms, to measure galvanic skin resistance.

1.3 James Clark developed the LISTEN device. On January 7, 1992, he submitted information on a LISTEN device to the United States Food and Drug Administration (FDA). The LISTEN system was described as having electrodermal screening techniques, alternative medicine techniques and bioenergetic techniques. The device was not cleared with that labeling. It did not receive pre-market approval since it was not substantially equivalent to predicate devices studied by the FDA.

1.4 In August 1992, James Clark made a submission for the Digital Conductance Meter (DCM) to clear the ohmmeter and the capability for the Listen System without the acupuncture claims and to market the LISTEN device. The FDA cleared the DCM as a biofeedback device for relaxation training. The DCM had been submitted for other uses, but those were removed from the FDA file.

1.5 James Clark has a number of upgraded models that are galvanic skin response devices. They are called the Orion, the Pegasus and the Mira. These upgraded devices have the same hardware as the LISTEN device; they both have the

ohmmeter, computer software and the signal generator. The only difference between the LISTEN device and the later devices was that the LISTEN device was a DOS-operated system while these upgraded devices were a WINDOWS based system.

1.6 In 1996, James Clark obtained clearance from the FDA for the Orion, the Pegasus and the Mira. In 1996, the FDA notified him that his devices (the Orion, the Pegasus and the Mira) were substantially equivalent to a predicate device, which permitted him to proceed to market the devices. James Clark received a pre-market "clearance," not a pre-market "approval." Nevertheless, he could not market the devices as being cleared, because the public might think that the FDA had approved them.

1.7 The Respondent does not know the physics behind the LISTEN device, nor did he know the voltage or amperage that the LISTEN device produces. The Respondent understands the LISTEN device functions like a biofeedback machine, but it is used in different ways. He used it in combination with kinesiology. Kinesiology is based on the theory that an imbalance in acupuncture meridians will make muscles weak. The Respondent learned kinesiology from a NAET course.

1.8 The Respondent heard about the LISTEN device from colleagues, from vendors and from attending conferences of the American Academy of Environmental Medicine. The Respondent has owned the LISTEN device since 1997, when he bought it from the company owned by James Clark. The LISTEN device was made in Utah.

1.9 The Respondent learned to operate the LISTEN device from his colleagues and from the manual, which told him how to operate it. The manual did not

make any claims on its use and provided basic instructions on how to turn it on and off. The LISTEN device had no labeling on it.

1.10 He also sent his office nurse to a course to learn about the LISTEN device. The nurse learned how to use it for Electrodermal Screening (EDS). On one hand, this was not helpful because he does not do EDS. On the other hand, it was helpful because it increased his understanding and knowledge about the device. The Respondent obtained information about the LISTEN device from others colleagues, including Dr. Nambudripad, who uses a machine similar to it, but who purchased it from a different manufacturer.

1.11 Before the Respondent purchased the LISTEN device, he talked with James Clark who informed him that it was registered with the FDA. The Respondent purchased a device that could be sold to him by the manufacturer. The Respondent purchased the LISTEN device in good faith.

1.12 Although the Respondent does not charge his patients specifically for its use, the Respondent bills his patients for visits that include the LISTEN device's use. The device helps in his assessment and speeds up his patient visits. When he sees a patient, the LISTEN device is part of the whole picture of assessment and treatment.

1.13 The Respondent saw Patient One on two occasions: June 6, 2001 and July 10, 2001. At the initial visit, Patient One informed the Respondent that he had been tired. Just before the initial visit, Patient One filled out a health history provided by the Respondent. Patient One described the symptoms that he felt the day of the initial visit. Patient One felt fatigue and experienced sluggishness and that these symptoms

were severe. Patient One frequently tired easily and felt weak. He experienced apathy and lethargy and the symptoms were severe.

1.14 At the initial visit, the Respondent discussed metal toxicity and metal poisoning with Patient One. The Respondent talked about his alternative medicine practice and informed Patient One that he would send him to the Tri-Cities laboratory for blood and urine testing. The Respondent took a hair sample. The first visit lasted about 30 to 45 minutes.

1.15 During the second visit on July 10, 2001, the Respondent reviewed Patient One's laboratory tests results. The Respondent reported to Patient One that he had a mineral imbalance, mineral deficiencies, and that his testosterone level should be higher. He reported that Patient One might have some metal poisoning which would contribute to the tiredness. He informed Patient One that he should undergo treatment for the metal poisoning. The Respondent also informed Patient One that foods like eggs and mustard could be weakening his body.

1.16 The Respondent informed Patient One that he had a machine that could be used to find out what was going on with his body. The machine that the Respondent was referring to was the LISTEN device. The Respondent informed Patient One that he would place a probe in his hand and the probe was connected to the LISTEN device. The Respondent informed Patient One that the LISTEN device helped him make a diagnosis. The Respondent informed Patient One that he could cure the egg allergy and that eggs would not bother him again.

1.17 Before using the LISTEN device, the Respondent assessed the strength of Patient One's deltoid muscle to obtain a baseline. The Respondent had Patient One lie on his back. The Respondent put the probe in Patient One's right hand and raised Patient One's right arm to a 90 degree point from his body. Patient One had a ring on his left-hand and on his right wrist he wore a watch. The Respondent asked Patient One to resist as hard as he could while the Respondent tried to pull his arm down next to Patient One's body. During this test, Patient One resisted pretty well and Patient One's resistance was strong.

1.18 The Respondent used the LISTEN device when he conducted the next muscle assessment. While Patient One was still lying on his back, the Respondent put the probe in Patient One's right hand and raised Patient One's right arm to a 90 degree point from his body. This time the Respondent had the LISTEN device operating and, using the keyboard, he typed in the word "eggs." The Respondent again asked Patient One to resist as hard as he could while the Respondent tried to pull Patient One's arm down. This time the Respondent was then able to easily pull Patient One's arm down. When this occurred, the Respondent informed Patient One that he could pull his arm down, because his body had been compromised due to the egg allergy.

1.19 Next, for the treatment, the Respondent had Patient One roll over on his stomach and the Respondent thumped Patient One on his back with an acupressure device. The device had rubber tips on it like a plunger. While the Respondent thumped Patient One on his back, he mentioned acupressure.

1.20 After the acupressure treatment, the Respondent assessed whether it affected the muscles. The Respondent had Patient One roll over on his back again and the Respondent gave Patient One the probe that was connected to the LISTEN device. The Respondent had Patient One raised his arm to a 90 degree position and the procedure was repeated. The Respondent could not pull Patient One's arm down. The Respondent then said "See, it's gone."

1.21 After the Respondent used the LISTEN device, the Respondent performed an final assessment. The Respondent wrapped the probe in tissue paper and then had Patient One hold the probe with the tissue paper wrapped around it. Patient One asked him why he did this. The Respondent answered that he has done this so long, that he could do what the machine could do, and that he did not need the machine anymore.

1.22 After this series of assessments and treatment, the Respondent advised Patient One that he should not eat any eggs for 24 hours or perhaps 48 hours or the treatment would not take. Patient One understood that the Respondent had diagnosed that he was allergic to eggs, that the Respondent provided treatment, and that the Respondent cured him of his egg allergy. Patient One understood that he would be able to eat eggs and would have no allergic reaction.

1.23 In 1976-80, Patient One had been diagnosed by another health care practitioner that he was allergic to blowing dust and pollens for which Patient One took shots to help relieve the symptoms. He had also been diagnosed with hay fever, with

resulting symptoms of respiratory difficulties, feeling plugged-up, sinus drainage, and itching of eyes.

1.24 At the end of the second visit, the Respondent informed Patient One that he could only treat one allergy at a time and that he would need to come in for additional visits to treat each allergy. The Respondent wrote out some prescriptions and suggested that the Respondent sign up for additional treatments. The Respondent prescribed testosterone, DHEA, multi-mineral vitamins and a low glycemic index diet to be followed by a Metabolic typing diet.

1.25 As a physician, the Respondent used the LISTEN device to treat Patient One for an egg allergy. The LISTEN device was inefficacious and did not cure an egg allergy. The LISTEN device did not provide any manner of treatment or assessment. Before the Respondent's assessment and treatment for an egg allergy, Patient One had not been diagnosed to be allergic to eggs or mustard or any food allergies. There was no clinical evidence to support the Respondent's assessment and treatment that Patient One had an egg allergy. Before his visit with the Respondent, Patient One had not been advised that he was allergic to eggs and had no reaction to eating eggs, except that he does not like to eat them.

1.26 The Respondent promoted the use of the LISTEN device in his practice and for his own personal gain. He informed Patient One that he uses it for treatment. He billed Patient One for his treatment, which included using the LISTEN device. The Respondent was able to speed up his assessment and treatment by using it. He

suggested to Patient One to return for additional treatments so he can treat each individual allergy.

1.27 As a physician, the Respondent failed to take the necessary safety measures to ensure that the LISTEN device would not be harmful to his patients. The Respondent obtained no literature or had no labeling on the LISTEN device, and he did not receive any personal training on its use. The Respondent only listened to his colleagues and to a salesperson. The Respondent did not know the voltage or amperage that the LISTEN device produces.

1.28 The Respondent's use of the LISTEN device, an inefficacious device, precluded him from making as a physician an appropriate diagnosis and treatment. By using his credentials as physician, the Respondent took advantage of Patient One to use an inefficacious device to allegedly assess, treat and cure an egg allergy. By using the LISTEN device in his assessment and treatment of Patient One on July 10, 2001 for an egg allergy, the Respondent was negligent in his practice as a physician. The Respondent's use of the LISTEN device was not nontraditional treatment.

1.29 Making a false medical diagnosis through the use of an inefficacious device, providing an ineffective treatment, and misinforming Patient One that he had been cured, the Respondent subjected him to unreasonable risk of harm. The Respondent's reliance on the LISTEN device, an inefficacious device, created an unreasonable risk of harm to Patient One.

//////////

//////////

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

II. CONCLUSIONS OF LAW

2.1 The Commission has jurisdiction over the Respondent's license and over the subject matter of this proceeding. RCW 18.71; RCW 18.130.

2.2 The Washington Supreme Court has held that the standard of proof in disciplinary proceedings against physicians before the Washington State Medical Quality Assurance Commission is proof by clear and convincing evidence. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534, cert. denied, 535 U.S. 904 (2002).

2.3 Based upon Findings of Fact, Paragraphs 1.1, 1.2 and Paragraphs 1.7 through 1.30 above, along with the above Analysis, the Commission concludes that the Department proved by clear and convincing evidence that Respondent violated RCW 18.130.180(4) and (16).

2.4 Based upon Findings of Fact, Paragraphs 1.1 through 1.6 above, along with the above Analysis, the Commission concludes that the Department failed to prove by clear and convincing evidence that Respondent violated RCW 18.130.180(7). This charge under RCW 18.130.180(7) shall be dismissed.

2.5 Based upon Findings of Fact, along with the above Analysis, the Commission concludes that the Department failed to prove by clear and convincing evidence that Respondent violated RCW 18.130.180(1). The Respondent purchased the LISTEN device in good faith. The decision to use an inefficacious device, even though its use resulted in unprofessional conduct, did not constitute an act of moral turpitude, dishonesty, or corruption. This charge under RCW 18.130.180(1) should be dismissed.

2.6 As a result of the unprofessional conduct found under RCW 18.130.180(4) and (16), the Commission may impose sanctions. The first consideration is the protection of the public. RCW 18.130.160.

2.7 Based upon the above Findings of Fact, Analysis and Conclusions of Law, the Commission concludes that the Respondent's license should be suspended, but the suspension should be stayed provided that he complies with the conditions ordered below. The Respondent should not be permitted to use the LISTEN device with patients. The Respondent should pay a fine for his conduct and he should be monitored during this period of stayed suspension, including a regular review of his patient records. The Commission concludes that these conditions are necessary to ensure that sufficient safeguards are in place to protect the public.

III. ORDER

Based on the foregoing, the Commission hereby issues in this case the following ORDERS:

3.1 Stayed Suspension. The license to practice as a physician and surgeon in the state of Washington held by the Respondent, Geoffrey S. Ames, M.D., is SUSPENDED for a period of at least five (5) years from the date of service of this Order. The suspension of the Respondent's license is hereby STAYED, PROVIDED that the Respondent complies with the following terms and conditions in this Order.

3.2. Limitation on Practice. The Respondent shall not use the LISTEN device to assess for or to treat allergies. Further, the Respondent shall not have the LISTEN device in his medical office(s) where he sees and/or treats patients.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 15 of 20

Docket No. 02-06-A-1012MD

001864

3.3 Record Reviews. Within thirty (30) days from the effective date of this Order, or as soon thereafter as deemed by the Commission or its designee, the Department shall conduct a review of 10 to 15 patient records, randomly selected, on a quarterly basis. After a compliance hearing in review of this condition, the Commission at its discretion may order the record reviews to continue this quarterly review of the Respondent's records for an additional period as long as the Commission deems it necessary.

3.4 Quarterly Declaration. The Respondent shall submit a quarterly declaration under penalty of perjury stating whether there has been compliance with all conditions of the Order. The quarterly declarations shall be submitted to the Commission on the first day of the following months: September, December, March and June, unless ordered otherwise by the Commission.

3.5 Compliance with Laws and Rules. The Respondent shall obey all federal, state, and local laws and all rules governing the practice of medicine and surgery in the state of Washington.

3.6 Fine. The Respondent shall pay an administrative fine to the Commission in the amount of \$5,000 (five thousand dollars) within 180 days of the entry of the effective date of this Order. The payment shall be made payable to the Washington State Treasurer and sent to the following address:

Medical Quality Assurance Commission
P.O. Box 1099
Olympia, WA 98507-1099

3.7 Appearance at Compliance Hearings. The Respondent shall appear before the Commission six months from the effective date of this Order, or as soon thereafter as the Commission's schedule permits, and shall present proof that he is complying with this Order. He shall continue to make such compliance appearances every six months, or as frequently as the Commission otherwise requires, until the period of stayed suspension, is terminated by the Commission. The Respondent shall be given notice of the compliance hearing, and if he fails to comply with this Order, the Commission may impose other sanctions as appropriate under RCW 18.130.160 to protect the public. Further, after a compliance hearing, the Commission may determine that the Respondent is in compliance and that he need not personally appear for a six-month compliance hearing.

3.8 Costs. The Respondent shall be responsible and shall pay for any and all costs involved in his compliance with any and all conditions in this Order.

3.9 Responsibility for Providing Current Address. The Respondent shall ensure that the Commission has his current practice and residence addresses and telephone numbers. The Respondent shall notify the Commission in writing of any address change within twenty (20) days after the change.

3.10 Placed on Notice. The Respondent is hereby placed on notice that it is his responsibility to ensure that all required reports are submitted to the Commission on time and in the manner specified in this Order.

3.11 Periods of Out of State Practice. In the event the Respondent should leave Washington State to practice or reside outside the state, the Respondent shall

notify the Commission, in writing, of the date of departure and return. Periods of residency or practice outside Washington State will not apply to the reduction of this five (5) year period of suspension.

3.12 Modification of Order. Except as provided above, the Respondent may petition the Commission for modification of this Order no sooner than five (5) years from the date this Order is signed. Upon notice duly given by the Commission, the Respondent shall appear personally before the Commission to present evidence in support of the petition. Evidence in opposition to the petition may also be presented for the Commission's consideration. The Commission has sole discretion to grant or deny the Respondent's petition for modification and has the authority to impose restrictions and/or conditions on the Respondent's license to practice as long as the Commission's jurisdiction over the Respondent, pursuant to this Order, continues.

3.13 Termination of this Order. After the Respondent completes the conditions of the stayed suspension and after five (5) years from the effective date of this Order, the Respondent may file a petition for termination of the stayed suspension and for a license to practice medicine and surgery in the state of Washington without restrictions and conditions. At a hearing on the petition, the Department may present evidence in opposition to be considered by the Commission. After considering the petition and the evidence presented, the Commission has the sole discretion to grant or deny the Respondent's petition and has the authority to remove or to impose restrictions and/or conditions on the Respondent's license to practice as long as the jurisdiction remains over the Respondent, pursuant to this Order.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 18 of 20

Docket No. 02-06-A-1012MD

001867

3.14 Violation of Order. If the Respondent violates any provision of this order, the Commission, after giving the Respondent notice and the opportunity to be heard, may set aside the stay order and impose the suspension, or may impose any sanction as it finds appropriate under RCW 18.130.160, or may take emergency action ordering summary suspension restriction or limitation of the Respondent's practice as authorized by RCW 18.130.150.

3.15 The charges in this matter that the Respondent's conduct violated RCW 18.130.180(1) and (7) are DISMISSED.

Dated this 30th day of May, 2004.

Medical Quality Assurance Commission



CABELL TENNIS, J.D.
Panel Chair

FOR INTERNAL USE ONLY: (Internal tracking numbers)
Program No. 2001-08-0007

CLERK'S SUMMARY

Charges	Action
RCW 18.130.180(1)	Dismissed
RCW 18.130.180(4)	Violated
RCW 18.130.180(7)	Dismissed
RCW 18.130.180(16)	Violated

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 19 of 20

Docket No. 02-06-A-1012MD

001868

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); RCW 34.05.470. The petition must be filed within 10 days of service of this Order with:

The Adjudicative Clerk Office
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Medical Quality Assurance Commission
PO Box 47866
Olympia, WA 98504-7866

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Clerk Office has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

Page 20 of 20

001869

Docket No. 02-06-A-1012MD

APPENDIX 4

Department of Health Regulations

WAC 246-11-250

WAC 246-11-260

WAC 246-11-520

(b) A subpoena may be served by any suitable person ten years of age or older by:

(1) Giving a copy to the person to whom the subpoena is directed;

(2) Leaving a copy at the residence of the person to whom the subpoena is addressed with a person of suitable age and discretion;

(3) Sending a copy by mail to the current address on file with the program if the person is licensed by the board or has applied for a license with the board; or

(4) Sending a copy by certified mail with proof of receipt if the person is neither licensed by nor has applied for a license with the board.

(c) Proof of service may be made by:

(1) Affidavit of personal service;

(2) Certification by the person mailing the subpoena to a holder or applicant; or

(3) Return or acknowledgment showing receipt by the subpoenaed or his/her representative. Any person receiving certified or registered mail at the last known address of the person subpoenaed shall be considered an authorized representative.

(d) The presiding officer, upon motion made promptly before the time specified for compliance in the subpoena,

may quash or modify the subpoena if the subpoena is unreasonable or requires evidence not relevant to any matter in issue.

(e) Condition denial of the motion upon just and reasonable conditions, including advancement of the reasonable costs by the person on whose behalf the subpoena is issued of producing the books, documents, or tangible things; or

(f) Issue a protective order under RCW 34.05.446.

(g) The board may seek enforcement of a subpoena pursuant to RCW 34.05.588(1) or proceed in default pursuant to RCW 34.05.11-280.

Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-230, filed 1/31/94, effective 3/3/94; Statutory Authority: RCW 18.130.050(1), 4.24.240, 4.24.250 and 4.24.260, 93-08-003 (Order 347), § 246-11-230, filed 3/24/93, effective 4/24/93.

WAC 246-11-230 Presiding officer and panel members

(1) The board may appoint one or more persons as presiding officer for brief adjudicative proceedings as provided in WAC 246-11-430(1).

(2) The board shall authorize one of the following to act as presiding officer for adjudicative proceedings:

(a) A board member; or

(b) An individual appointed pursuant to RCW 34.05(3); or

(c) An administrative law judge employed by the office conducting administrative hearings.

(3) The board may designate certain of its members to hear a matter as a hearing panel as provided by law.

(4) Any party may move to disqualify the presiding officer or a member of the board hearing the matter, as provided in RCW 34.05.425(3).

Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-230, filed 1/31/94, effective 3/3/94; Statutory Authority: RCW 18.130.050(1), 93-08-003 (Order 347), § 246-11-230, filed 3/24/93, effective 4/24/93.

SECTION II INITIATING ACTIONS

WAC 246-11-250 Form and content of initiating documents. (1) Initiating documents shall include a clear and concise statement of the:

(a) Identity and authority of the person issuing the document;

(b) Factual basis for the action or proposed action set forth in the document;

(c) Statutes and rules alleged to be at issue;

(d) Identity of the party against whom the action is taken or proposed to be taken;

(e) Action or proposed action or penalties, including the statutory or rule authority for those actions or penalties;

(f) Signature of the person issuing the document and the date signed; and

(g) Method by which an adjudicative proceeding may be requested.

(2) Initiating documents shall be accompanied by the following documents:

(a) Notice that the respondent may defend against the action or proposed action; and

(b) Form for requesting adjudicative proceeding.

(3) Initiating documents shall be served as described in WAC 246-11-080.

[Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-250, filed 1/31/94, effective 3/3/94; Statutory Authority: RCW 18.130.050(1) and 34.05.220, 93-08-003 (Order 347), § 246-11-250, filed 3/24/93, effective 4/24/93.]

WAC 246-11-260 Amendment of initiating documents. (1) Prior to the hearing date, initiating documents may be amended subject to the following conditions:

(a) Amended initiating documents shall meet the requirements of WAC 246-11-250(1);

(b) Amended initiating documents shall be accompanied by the documents described in WAC 246-11-250(2);

(c) Whenever amended initiating documents are issued, a new interval for response will begin, as described in WAC 246-11-270, unless the respondent requests the time periods set by the original initiating document; and

(d) Issuance of amended initiating documents ends all obligations of the parties under the prior initiating documents.

(2) On the hearing date, the initiating documents may be amended subject to the following conditions:

(a) The documents may be amended upon motion of the state;

(b) The documents may not be amended without the approval of the presiding officer; and

(c) Upon motion of a party or upon his/her own initiative, the presiding officer may grant a continuance on all or part of the matter if necessary to afford the respondent an opportunity to prepare a defense to the amended documents.

[Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-260, filed 1/31/94, effective 3/3/94; Statutory Authority: RCW 18.130.050(1) and 34.05.220, 93-08-003 (Order 347), § 246-11-260, filed 3/24/93, effective 4/24/93.]

presiding officer proposed findings of fact and conclusions of law and a proposed order.

[Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-500, filed 1/31/94, effective 3/3/94. Statutory Authority: RCW 18.130.050(1), 93-08-003 (Order 347), § 246-11-500, filed 3/24/93, effective 4/24/93.]

WAC 246-11-510 Issuance of final order. If the adjudicative proceeding is heard by the board or a panel of the board the presiding officer and board or panel of the board shall:

- (1) Issue a final order containing findings of fact and conclusions of law and an order; and
- (2) Cause the adjudicative clerk office to serve a copy of the order on each party and any designated representative of the party.

[Statutory Authority: RCW 18.155.040, 97-13-015, § 246-11-510, filed 6/6/97, effective 7/7/97. Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-510, filed 1/31/94, effective 3/3/94. Statutory Authority: RCW 18.130.050(1), 93-08-003 (Order 347), § 246-11-510, filed 3/24/93, effective 4/24/93.]

WAC 246-11-520 Standard of proof. The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria. In all other cases the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence.

[Statutory Authority: RCW 18.130.050(1), 93-08-003 (Order 347), § 246-11-520, filed 3/24/93, effective 4/24/93.]

WAC 246-11-530 Consolidated proceedings. (1) When two or more applications for adjudicative proceeding involve a similar issue, the applications may be consolidated by the presiding officer and the hearings conducted together. The presiding officer or hearings officer may consolidate on his/her own motion or upon the request of a party.

(2) A party scheduled for a consolidated proceeding may request to withdraw from the consolidated proceeding in favor of an individual proceeding. The presiding officer may grant a motion to withdraw from a consolidated proceeding at any time when good cause is shown.

(3) Each respondent in a consolidated proceeding shall retain the right to representation.

[Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-530, filed 1/31/94, effective 3/3/94. Statutory Authority: RCW 18.130.050(1) and 34.05.220, 93-08-003 (Order 347), § 246-11-530, filed 3/24/93, effective 4/24/93.]

WAC 246-11-540 Initial order. (1) If the adjudicative proceeding is not heard by the board or panel of the board the presiding officer shall:

- (a) Issue an initial order containing proposed findings of fact, conclusions of law, and a proposed order;
- (b) Cause the adjudicative clerk office to serve a copy of the initial order on each party and any designated representative of a party; and

(c) Forward the initial order and record of the adjudicative proceeding to the adjudicative clerk office.

(2) Initial orders on brief adjudicative proceedings shall become final orders as provided in WAC 246-11-540.

(3) Following receipt of initial orders in matters other than brief adjudicative proceedings, the board shall review the initial order and the record as provided in RCW 34.05.464, and issue a final order as provided in WAC 246-11-560.

[Statutory Authority: RCW 18.155.040, 97-13-015, § 246-11-540, filed 6/6/97, effective 7/7/97. Statutory Authority: RCW 18.130.050(1) and 18.130.060(3), 94-04-078, § 246-11-540, filed 1/31/94, effective 3/3/94. Statutory Authority: RCW 18.130.050(1), 93-08-003 (Order 347), § 246-11-540, filed 3/24/93, effective 4/24/93.]

SECTION VII POST HEARING PROCESS

WAC 246-11-550 Appeal from initial order. (1) Any party may file a written petition for administrative review of an initial order issued under WAC 246-11-430 or 246-11-540 stating the specific grounds upon which exception is taken and the relief requested.

(2) Petitions for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within twenty-one days of service of the initial order.

(3) The opposing party may file a response to a petition for administrative review as provided in this section. The response shall be filed at the place specified in subsection (2) of this section. The party filing the response shall serve a copy of the response upon the party requesting administrative review. If the initial order was entered pursuant to WAC 246-11-430, the response will be filed within ten days of service of the petition. In all other matters, the response will be filed within twenty days of service of the petition.

[Statutory Authority: RCW 18.155.040, 97-13-015, § 246-11-550, filed 6/6/97, effective 7/7/97. Statutory Authority: RCW 18.130.050 and 43.70.040, 96-21-027, § 246-11-550, filed 10/7/96, effective 11/7/96. Statutory Authority: RCW 18.130.050(1) and 34.05.464, 93-08-003 (Order 347), § 246-11-550, filed 3/24/93, effective 4/24/93.]

WAC 246-11-560 Final orders. (1) The form and content of final orders shall be as follows:

(a) Final orders shall contain findings of fact, conclusions of law, and an order. All final orders shall be signed by a member of the panel of board members who heard the matter.

(b) Final orders may adopt by reference the initial order in whole or in part.

(c) Final orders may modify or revise the initial order in whole or in part.

(2) Final orders shall be served upon the parties and their representatives as provided in WAC 246-11-080.

(3) Final orders shall be issued following:

- (a) A review of the record;
- (b) A review of the initial order, if any;
- (c) A review of any request for review of the initial order and any response thereto; and
- (d) Consideration of protection of the public health and welfare.

(4) Unless a later date is stated in the final order, final orders shall be effective when entered but a party shall not be

APPENDIX 5

RCW 18.130.180

RCW 18.130.180

➔18.130.180. Unprofessional conduct

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

- (a) Not furnishing any papers or documents;
- (b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;
- (c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or
- (d) Not providing reasonable and timely access for authorized representatives of the disciplining authority seeking to perform practice reviews at facilities utilized by the license holder;
- (9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;
- (10) Aiding or abetting an unlicensed person to practice when a license is required;
- (11) Violations of rules established by any health agency;
- (12) Practice beyond the scope of practice as defined by law or rule;
- (13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;
- (14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;
- (15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;
- (16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;**
- (17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;
- (18) The procuring, or aiding or abetting in procuring, a criminal abortion;
- (19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;
- (20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW;

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding;

(23) Current misuse of:

(a) Alcohol;

(b) Controlled substances; or

(c) Legend drugs;

(24) Abuse of a client or patient or sexual contact with a client or patient;

(25) Acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor of medical or health-related products or services intended for patients, in contemplation of a sale or for use in research publishable in professional journals, where a conflict of interest is presented, as defined by rules of the disciplining authority, in consultation with the department, based on recognized professional ethical standards.

APPENDIX 6

Administrative Procedure Act (Excerpts)

RCW 34.05.452

RCW 34.05.461

RCW 34.05.

RCW 34.05.452

➔34.05.452. Rules of evidence--Cross-examination

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

(3) All testimony of parties and witnesses shall be made under oath or affirmation.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

RCW 34.05.461

→34.05.461. Entry of orders

(1) Except as provided in subsection (2) of this section:

(a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;

(b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and

(c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

(8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown.

(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).

(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

APPENDIX 7

RCW 18.120.010

RCW 18.120.010

➔18.120.010. Purpose--Criteria *(Effective until January 1, 2006)*

(1) **The purpose of this chapter is to establish guidelines for the regulation of health professions not licensed or regulated prior to July 24, 1983, and those licensed or regulated health professions which seek to substantially increase their scope of practice: PROVIDED, That the provisions of this chapter are not intended and shall not be construed to: (a) Apply to any regulatory entity created prior to July 24, 1983, except as provided in this chapter; (b) affect the powers and responsibilities of the superintendent of public instruction or state board of education under RCW 28A.305.130 and 28A.410.010; (c) apply to or interfere in any way with the practice of religion or to any kind of treatment by prayer; and (d) apply to any remedial or technical amendments to any statutes which licensed or regulated activity before July 24, 1983. The legislature believes that all individuals should be permitted to enter into a health profession unless there is an overwhelming need for the state to protect the interests of the public by restricting entry into the profession. Where such a need is identified, the regulation adopted by the state should be set at the least restrictive level consistent with the public interest to be protected.**

(2) It is the intent of this chapter that no regulation shall, after July 24, 1983, be imposed upon any health profession except for the exclusive purpose of protecting the public interest. All bills introduced in the legislature to regulate a health profession for the first time should be reviewed according to the following criteria. **A health profession should be regulated by the state only when:**

(a) Unregulated practice can clearly harm or endanger the health, safety, or welfare of the public, and **the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;**

(b) The public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and

(c) The public cannot be effectively protected by other means in a more cost-beneficial manner.

(3) After evaluating the criteria in subsection (2) of this section and considering governmental and societal costs and benefits, if the legislature finds that it is necessary to regulate a health profession not previously regulated by law, the least restrictive alternative method of regulation should be implemented, consistent with the public interest and this section:

(a) Where existing common law and statutory civil actions and criminal prohibitions are not sufficient to eradicate existing harm, the regulation should provide for stricter civil actions and criminal prosecutions;

(b) Where a service is being performed for individuals involving a hazard to the public health, safety, or welfare, the regulation should impose inspection requirements and enable an appropriate state agency to enforce violations by injunctive relief in court, including, but not limited to, regulation of the business activity providing the service rather than the employees of the business;

(c) Where the threat to the public health, safety, or economic well-being is relatively small as a result of the operation of the health profession, the regulation should implement a system of registration;

(d) Where the consumer may have a substantial basis for relying on the services of a practitioner, the regulation should implement a system of certification; or

(e) Where apparent that adequate regulation cannot be achieved by means other than licensing, the regulation should implement a system of licensing.