

80644-6

NO. 24897-6

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

GEOFFREY AMES, MD,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF HEALTH, MEDICAL QUALITY
ASSURANCE COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, when considering the Commission's proper use of a) its own expertise to evaluate, assess, and draw inferences, b) the documentary evidence, and the testimony of witnesses, the Commission's findings and conclusions are supported by substantial evidence.¹
2. Whether the Commission's credibility determinations are entitled to a high degree of deference and should be affirmed.
3. Whether the charges issued against Ames met statutory and constitutional requirements for due process, provided adequate notice of the violations charged, and were filed in good faith.
4. Whether the legal standard for unprofessional conduct is the same for practitioners of traditional and non traditional treatments.
5. Whether the Commission properly found Ames promoted an inefficacious device for personal gain.
6. Whether the Commission properly exercised its discretion in assessing a sanction against Ames consistent with its statutory authority.

¹ Ames incorrectly presents the issue as whether a reasonable person could find by clear and convincing evidence a violation. This is not the proper standard of review on appeal, but rather the burden of proof at the hearing level.

II. SUMMARY OF THE CASE

The Medical Quality Assurance Commission (“Commission”) determined that Dr. Geoffrey S. Ames (“Ames”) committed unprofessional conduct in the diagnosis and treatment of Patient One when he used the inefficacious LISTEN device for personal gain and practiced below the standard of care in the state of Washington.

The Commission’s findings were based upon its consideration, evaluation and assessment of the totality of the evidence using its experience and expertise. It is entitled to draw inferences from the facts in the record and to determine what the appropriate standard of care is. The Commission determined that Ames did not meet that standard. The Commission members have professional training and experience as practitioners and those members also develop expertise on the Uniform Disciplinary Act (RCW 18.130 et seq.)(“UDA”), which regulates physicians, through their service on the Commission. The Commission is entitled to draw upon that experience in evaluating the evidence presented in hearings.

Nothing in the Commission’s order indicates that it used or considered facts or information from outside the administrative record. To the contrary, its findings were based upon facts, testimony, and evidence produced at the hearing. Sufficient evidence existed to

persuade a fair-minded person of the truthfulness of the Commission's findings. Based upon this record, a reasonable person would have found as the Commission did.

The Commission's detailed Final Order makes extensive findings that are fully supported by the administrative record. Its decision is well-reasoned and well within its statutory authority. The Commission's order should be affirmed.

III. COUNTER STATEMENT OF THE CASE

A. Procedural History

The Department of Health ("Department") charged Ames on July 9, 2002 with using the LISTEN device to diagnose and treat Patient One in violation of the federal food and drug acts and state law. Administrative Record ("AR") at 3-6.² On February 5, 2003, the Department issued an Amended Statement of Charges, which added allegations that Ames' treatment of Patient One violated the UDA. AR 60. Specifically, the Department charged that Ames was not acting within the required standard of care for his profession, that his actions constituted moral turpitude, and that he had promoted an inefficacious device for personal gain. AR 60-64.

² Any reference to the administrative record as certified to the court is hereafter referred to as "AR." Any reference to the Clerk's Papers in this matter will be referred to as "CP."

The Commission held a full adjudicative hearing on January 13-16, 2004, and February 10, 2004. AR 1850. The Commission heard more than 33 hours of testimony and oral argument and admitted 10 exhibits. AR 1850-51. On May 30, 2004, the Commission issued its 20-page Final Order concluding that Ames violated RCW 18.130.180(4) and (16). AR 1850-68.

Ames appealed this order to Benton County Superior Court. CP 148-56. Following briefing and oral argument, the Superior Court affirmed the Commission's order in its entirety. CP 31-35. Ames timely filed this appeal. CP 4-30.

B. Factual Statement

Patient One saw Ames on two occasions: June 6, 2001 and July 10, 2001. AR 1932-33. At the first visit, Patient One told Ames he felt fatigued and sluggish and that his symptoms were severe. AR 1857. During this initial visit, Ames discussed metal toxicity and metal poisoning with Patient One. AR 2191. Ames talked about his alternative medicine practice and told Patient One he wanted blood and urine tests done at a laboratory. AR 2191. Ames also took a hair sample from Patient One. AR 2191. This first visit lasted approximately 30 to 45 minutes. AR 1858 (¶ 1.14), 2191-92.

Patient One met with Ames a second time on July 10, 2001 and Ames reviewed the laboratory results with him. AR 2197. Ames told Patient One that he had a mineral imbalance, mineral deficiencies, and that his testosterone level should be higher. AR 2197-98. Ames told Patient One he might have metal poisoning, which would contribute to his tiredness, and that he should undergo treatment for metal poisoning. AR 2200-01. Ames also told Patient One that foods like eggs and mustard could be weakening his body. AR 1858, 2204.

Patient One testified that Ames told him that he had a machine that could be used to find out what was going on with his body.³ AR 2209. Ames explained how he would use the machine and that Patient One would hold a probe connected to the LISTEN device in his hand. AR 2209-11. Ames told Patient One that the LISTEN device helped him make a diagnosis. AR 2214. Ames also told Patient One that he could cure his egg allergy and that eggs would not bother him again. AR 1858, 2208.

The LISTEN device consists of a brass probe, an aluminum plate, a foot pedal, a computer tower, a monitor, and keyboard. AR 2841. According to its developer, James Clark, the FDA rejected his request to clear the LISTEN device in 1992 because he included claims

³ The machine Ames was referring to was the LISTEN device.

that the device was useful for acupuncture or “electrodermal screening.” AR 2870-71. No FDA clearance was ever obtained for the LISTEN device for any purpose. AR 2872.

Clark also stated that he is not a medical doctor, and that the LISTEN device does not have capabilities to provide a medical diagnosis for allergies or the capability to cure allergies. AR 2893. Clark considers the LISTEN device to be a biofeedback device. AR 2899. The LISTEN device as sold by Clark’s company cannot diagnose, cure, or prevent any disease. AR 2906-07. While Ames claimed that the software in the LISTEN device corresponds to various potential allergies such as foods, Clark stated that data is part of “electrodermal screening,” and the FDA has not cleared any of his devices for “electrodermal screening.” AR 2928.

Patient One then described how Ames used the LISTEN device during the second visit. AR 2209-11. Patient One laid on his back, held the probe attached to the LISTEN machine in his right hand, and held his right arm out at a 90-degree angle. AR 2209-10. Then Ames told Patient One to resist, and Ames tried to pull on Patient One’s arm. AR 2210. Ames was unable to pull Patient One’s arm down. AR 2210. Ames then typed the word “eggs” into the LISTEN device using the keyboard. AR 2210.

For a second time Ames asked Patient One to resist and tried to pull his arm down. AR 2214. This time Ames could pull Patient One's arm down. AR 2210. When this occurred, Ames diagnosed Patient One as suffering from an egg allergy that compromised his body. AR 1859 (¶¶ 1.17, 1.18).

Patient One then described that Ames treated him for the egg allergy by rolling him onto his stomach and thumping on his back with an acupressure device that had rubber tips on it. AR 2211. Ames mentioned acupressure to Patient One while using the device with rubber tips. AR 1859 (¶ 1.19), AR 2211.

After using the acupressure device, Ames rolled Patient One over onto his back again and used the probe and the LISTEN device again as he had before. AR 2211. This time Ames could not pull Patient One's arm down. AR 2211. Ames told Patient One, "See, it's gone." AR 1860 (¶ 1.20), 2211.

Ames performed a final assessment by wrapping the probe in tissue paper and having Patient One hold the probe attached to the LISTEN device. AR 2215-16. When Patient One asked why Ames was doing this, AR 2215. Ames answered that he had done this for so long that he could do what the machine could do, and that he did not need the machine anymore. AR 2215, 1860 (¶ 1.21).

After this series of treatments and assessments, Ames advised Patient One that he should not eat any eggs for 24 or perhaps 48 hours or the treatment would not take. AR 2211. Patient One understood that Ames had diagnosed that he was allergic to eggs, had provided treatment, and had cured him of his egg allergy. AR 2211-12, 2215, 2255, 2268. Patient One understood that he would be able to eat eggs and would have no allergic reaction. AR 1860 (¶ 1.22), 2205, 2211-13, 2220.

Prior to his visits with Ames, Patient One had been diagnosed by another health care practitioner as being allergic to blowing dust and pollens. AR 2204. Patient One took shots to help relieve the symptoms of these allergies. Patient One had also been diagnosed with hay fever, which produced symptoms of respiratory difficulties, sinus drainage, and itching of his eyes. AR 2204-05. Patient One had never been diagnosed as allergic to eggs, mustard, or any other food. AR 2204. Before his visit with Ames, Patient One had not been advised that he was allergic to eggs and had no reaction to eating eggs, except that he did not like to eat them. AR 1860-61 (¶¶ 1.23, 1.25), 2269.

At the end of the second visit, Ames told Patient One that he could only cure one allergy at a time and that he would need to return for additional visits to treat each allergy. AR 2212-13. Ames wrote some

prescriptions for Patient One and suggested that he sign up for additional treatments. AR 2213, 2219. Ames prescribed testosterone, DHEA, multi-mineral vitamins, and a low glycemic index diet to be followed by a Metabolic type diet. AR 1861 (¶ 1.24).

Both Patient One and Ames testified at the hearing. They were the only witnesses with personal knowledge of the interaction, diagnosis, and treatment at the visits between Ames and Patient One. AR 1854. Ames' accounts of the two visits Patient One made to see him varied significantly from those of Patient One. The Commission explicitly found that Patient One was credible as to his account of these two visits and that Ames was not. AR 1854. The Commission accepted Patient One's testimony as to what occurred during the two visits and rejected Ames' version when it conflicted with the testimony of Patient One. *Id.* The Commission made an explicit credibility finding in their Final Order based upon its observation of the witness testimony at the hearing. *Id.*

The Commission made the following determinations based on the hearing testimony: 1) Ames used the LISTEN device to treat Patient One for an egg allergy (AR 1861); 2) the LISTEN device was inefficacious and did not provide any manner of treatment or assessment and did not cure the egg allergy (AR 1862); and 3) no clinical evidence

supported Ames' assessment that Patient One had an egg allergy or his purported treatment of that allergy. AR 1861 (¶ 1.25).

The Commission also found that Ames promoted the use of the LISTEN device in his practice for his own personal gain. He purported to use the device in his diagnosis and treatment of Patient One and told Patient One the device was diagnosing and treating his egg allergy. AR 1861-62. Ames suggested to Patient One that he return for additional treatments to treat each of his other individual allergies. AR 2213; *see also* AR 1861-62 (¶ 1.26), 2213.

The Commission found that Ames failed to take necessary safety measures to ensure that the LISTEN device would not harm his patients. AR 1862 (¶ 1.27). Ames obtained no literature or labeling on the LISTEN device, and he did not receive any personal training on its use. AR 2156. Ames listened only to a few colleagues and to a salesperson. AR 2179. Ames did not know the voltage or amperage the LISTEN device produces. AR 2155-56.

The Commission found that Ames' use of the inefficacious device kept him from making an appropriate diagnosis and treatment. AR 1862 (¶ 1.28). Ames used his credentials as a physician to take advantage of Patient One by using an inefficacious device to purport to assess, treat, and cure an egg allergy. *Id.*

The Commission found that by using the device to make a false medical diagnosis and provide ineffective treatment and by misinforming Patient One that he had been cured, Ames subjected him to unreasonable harm and created an unreasonable risk of harm to Patient One.⁴ AR 1862 (¶ 1.29).

IV. STANDARD OF REVIEW

Ames' major focus on review is that the Commission's findings and conclusions are not supported by substantial evidence. The extensive administrative record does support the Commission's detailed findings and conclusions, and its order should be affirmed.

The party challenging an administrative order bears a heavy burden when challenging the agency's factual findings. *Nguyen v. State, Dep't of Health, Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 530, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904, 122 S. Ct. 1203, 152 L. Ed. 2d 141 (2002); *Pierce Cy. Sheriff v. Civil Serv. Comm'n of Pierce Cy.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Unchallenged factual findings are verities on review. *Brown v. State Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 972 P.2d 101, 105 (1998). Ames did not

⁴ In addressing the charge that Ames' use of the LISTEN device violated state and federal law regarding medical devices, because the device had not been cleared or approved by the Food and Drug Administration and that it was therefore adulterated within the definitions in the state and federal devices statutes (AR 60-62), the Commission concluded that these allegations were unproven. AR 1863 (¶¶ 2.3-2.4).

challenge all of the Commission's factual findings, and the ones he did not challenge are considered verities on this review. *Id.*

The party challenging an administrative order bears the burden of establishing that it is invalid under the Administrative Procedures Act ("APA"). RCW 34.05.570. Ames challenges the Commission's Order, arguing that portions of it lack substantial evidence in the record, and is arbitrary and capricious. *See* Brief of Appellant (Br. Appellant) at 2-6. The standard of review for either of those challenges accords substantial deference to the decision of the Commission.

The standard of review for factual determinations is the "substantial evidence" test. The substantial evidence test is highly deferential to the administrative fact-finder, and the same deference is afforded to the Commission's factual findings as an appellate court would afford to a superior court's factual findings. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005), citing *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000), and *Snohomish County v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

The arbitrary and capricious standard is similarly deferential to the Commission's decision. Action taken after giving a party ample opportunity to be heard, exercised honestly, and upon due consideration, is not arbitrary or capricious. *Wash. State Medical Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983). Arbitrary and capricious action is "willful or unreasoning, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious even though one may believe an erroneous conclusion has been reached." *Heinmiller*, 127 Wn.2d at 609-10, citing *Pierce Cy. Sheriff v. Civil Serv. Comm'n of Pierce Cy.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). A court may not substitute its judgment for that of the Commission, even if the court sees the evidence differently. *Johnston*, 99 Wn.2d at 483.

Ames also challenges the Commission's sanction which was based on its determination that Ames acted below the standard of care. A challenge to the appropriateness of the sanction the Commission chose is subject to the highest standard of review, and its sanction decision is accorded the most deference of any administrative determination. The imposition of a sanction is a matter uniquely within the Commission's expertise and discretion. An agency's determination regarding sanctions is accorded considerable judicial deference because "it is peculiarly a

matter of administrative competence.” *Brown v. State Dep’t of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 17, 972 P.2d 101 (1999). The perceived harshness of that penalty is not a basis for reversing the order. As long as the agency is within its statutory authority, the choice of a penalty is a matter of discretion that the court will not disturb unless the agency has abused its discretion. *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992); *Arnett v. Seattle Gen. Hosp.*, 65 Wn.2d 22, 27-29, 395 P.2d 503 (1964). For the court to reverse a discretionary agency decision under review, it must find the decision manifestly unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 837 P.2d 647 (1992). The court must find the agency’s discretion was exercised on untenable grounds or for untenable reasons. *Id.*

Finally, Ames takes issue throughout his brief with the Commission’s credibility determinations. It is incumbent on the finder of fact to make credibility determinations when testimony conflicts. The Commission’s credibility determinations are subject to a very high standard of review. The reviewing court must accord a very high degree of deference to the Commission’s credibility determination, and will not weigh the evidence or substitute its judgment for that of the administrative decision maker who observed the witnesses. *Peterson v. Dep’t of Labor*

and Indus., 22 Wn.2d 647, 157 P.2d 298 (1945); *Nationscapital Mortgage Corp. v. State Dep't of Fin. Institutions*, 137 P.3d 78, 87 (2006).

V. ARGUMENT

A. The Commission Is Authorized by the Administrative Procedure Act, by the Uniform Disciplinary Act and by Washington Case Law to Use Its Expertise to Evaluate, Assess, and Draw Inferences From the Facts in the Administrative Record.

Administrative agencies are authorized to use their expertise in adjudicating matters before them. RCW 34.05.461(5). This statutory authorization is not limited to the professional members of the health disciplinary boards and commissions, but is accorded to all administrative agencies to make use of their expertise. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 725-26, 696 P.2d 1222 (1985).

Washington case law supports the use of the Commission's expertise and states that separate expert testimony is not necessary when determining standard of care cases. *Brown*, 94 Wn. App. at 7; *Johnston*, 99 Wn.2d at 482; *Davidson v. State, Dep't of Licensing*, 33 Wn. App. 783, 657 P.2d 810 (1983). Contrary to Ames' arguments, nothing in Washington statute or case law suggests these cases or this legal principle

are not good law in Washington today. *See Nguyen*, 144 Wn.2d at 522-23. 528.

Ames contends the Commission's use of its own expertise or knowledge was violative of the law. *See Br. Appellant* at 23-26. He claims that existing case law is invalid and the Commission's reliance on it is a mask for insufficient evidence. *Id.* However, he offers no legal support whatsoever either in the order or in the record for his argument. The Commission's order recites that the panel members used their expertise to evaluate the evidence they heard. AR 18. The Commission did not suggest it made use of facts or information outside the administrative record. It simply used its professional expertise and experience to evaluate, assess, and draw inferences from the facts and evidence that are in the administrative record, a right to which it is entitled.

Ames next argues that if the Commission has authority to use its expertise, its use is restricted to the issue of the proper standard of care. *See Br. Appellant* at 18. Neither the APA nor case law supports such a restriction. Administrative decision makers are legally authorized to use their expertise to evaluate and draw inferences from all of the evidence in the record to make all of the decisions the hearing requires, and Ames cites nothing to support his argument for the limitation he alleges.

The Commission's order cites to the evidence in the administrative record and is fully compliant with the APA requirements for agency orders. Ames' arguments should be rejected.

B. The Commission's Explicit Credibility Findings Are Entitled to a High Degree of Deference and Should be Affirmed.

The Commission accepted the testifying patients' descriptions of their interactions with Ames as more credible than Ames. AR 1854. The Commission was entitled to give more weight to the testimony of the patients and to conclude that Ames promoted the LISTEN device to encourage patients to return for multiple visits to have their allergies diagnosed and cured. Ames' arguments throughout his brief are based on the assumption that his account of his interactions, diagnosis and treatment of Patient One should be accepted, instead of that of Patient One. See Br. Appellant at 6, 38, 52. The Commission specifically rejected Ames' testimony as not credible and adopted that of Patient One, finding that his testimony was more credible. AR 1854 (¶ 5). The Commission determined that Patient One was credible as to his interactions with Ames, and that Ames was not credible when his account of the interactions with Patient One were different.

Specifically, Ames takes exception to a number of findings based on his presumption. Each is identified below. Ames challenged the fourth sentence of Finding 1.13. That sentence states that Patient One described his symptoms on the day of the initial visit. Patient One did describe his symptoms. AR 2190-91. Ames testified that Patient One came in complaining of chronic fatigue. AR 3078-79. The health history questionnaire introduced as an exhibit also described Patient One's symptoms. AR 1945. Patient One testified that he filled the questionnaire out at the first visit and that he filled it out based upon how he felt that day. AR 2230-35. The record contains substantial evidence from multiple sources supporting the finding and corroborating Patient One's testimony.

Ames challenged the Commission's Finding 1.17, which describes his use of the LISTEN device with Patient One. The Commission found Patient One's account credible where Ames' testimony was not. AR 2209-10, 2270.

Ames challenged Finding 1.19, which is Patient One's description of part of the treatment Ames did for the egg allergy Ames diagnosed. Patient One described being asked to roll over onto his stomach and Dr. Ames thumping him on the back with a device with rubber tips and mentioning acupressure. AR 2210-11.

Ames challenged Finding 1.20, which stated that after the treatment Ames assessed Patient One's muscles again, using the probe attached to the LISTEN device. Ames again tried to pull Patient One's arm down, and was unable to do so. Patient One testified that Ames then said to him, "See, it's gone." AR 2211.

Ames challenged Finding of Fact 1.21, which states that he performed a final assessment after using the LISTEN device. Ames wrapped the probe in tissue paper and had Patient One hold the probe while it was covered with tissue paper. Patient One asked why he was doing this, and Ames responded that he had been doing it so long he no longer needed the machine and that he could do what the machine could do. This finding is based upon Patient One's testimony. AR 2215-16, 2271-72.

Ames challenged Finding 1.22, which states that after the series of assessments and treatments, he advised Patient One not to eat any eggs for 24 to 48 hours or the treatment would not take. Patient One understood that Ames had diagnosed that he was allergic to eggs, had provided treatment, and that Ames had cured him of his egg allergy. Patient One understood that he would be able to eat eggs and would have no allergic reaction. This finding is based upon Patient One's testimony. AR 2208-09, 2211, 2219-20, 2268-70.

Ames challenged Finding 1.23, which states that Patient One had been diagnosed in the past with hay fever and allergies to dust and pollen for which he had taken shots. This finding is based upon Patient One's testimony. AR 2204-05, 2269. Therefore, no argument based upon the Ames' testimony should be given weight where it conflicts with other witnesses' testimony.

C. The Charges Issued Against Ames Complied With Due Process Requirements, Provided Adequate Notice of the Violations Charged, and Were Filed in Good Faith.

The Statement of Charges issued in this case provided Ames with notice of the specific sections of the UDA and of the state law regulating his practice that the Department alleged he had violated. AR 3-6. The charges notified Ames that the violations occurred during his treatment of Patient One and identified the specific dates on which the two patient visits occurred. AR 3-4. Ames received fair notice of his conduct that amounted to violations and of the specific statutory sections allegedly violated. The legal standard for administrative pleadings was met.

The APA outlines the general notice requirements for administrative pleadings. RCW 34.05.434. The notice required is of the legal authority and jurisdiction under which the hearing will be held; a reference to the particular sections of the statutes and rules involved; and a short and plain statement of the matters asserted by the agency.

RCW 34.05.434(2)(f)-(h). The Statements of Charges in this case contained all three elements.

To provide fair notice and meet the requirement of due process, a charging document must give reasonable notice of what the charges are and provide a fair opportunity to prepare and present a defense. *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d 115, 119, 702 P.2d 469 (1985); *Inland Foundry Co., Inc. v. Dep't of Labor and Indus.*, 106 Wn. App. 333, 338-39, 24 P.3d 424 (2001). Administrative pleadings are to be liberally construed. *Inland Foundry*, at 338, citing *National Realty & Construction Co. Inc. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir 1973). "As Professor Davis has stated, 'The most important fact about pleadings in the administrative process is their unimportance'." *Id.*

Even where a statute requires that the administrative pleading describe a violation "with particularity," a stricter standard than the minimum required to provide due process, the pleading need only give the party notice of what was done wrong, in order to provide an understanding of the regulations violated and an adequate opportunity to prepare and present a defense. *Id.* at 336-38. Both the original Statement of Charges and the Amended Statement of Charges issued in this case meet the legal standard for administrative pleadings.

The initial charges alleged violations of the federal and state laws regulating medical devices, which also constitute a violation of RCW 18.130.180(7).⁵ The charges set forth the facts surrounding Ames' treatment of Patient One and identified the federal and state statutes the Department alleged he violated. AR 3-6. Similarly, the Amended Statement of Charges alleged conduct related to Ames' treatment of Patient One. AR 60-64. The Amended Charges merely added charges related to violations of additional subsections of the UDA, and again specified those subsections. *Id.*

Ames argues that the Amended Statement of Charges was filed "in response" to his discovery requests. *See* Br. Appellant at 14-15. Nothing in the record supports this argument, and it is not a persuasive or relevant basis to challenge the charging document even if there were evidence to support this claim.

Finally, Ames claims that, because the Commission dismissed charges that he violated the state and federal food and drug laws, the Department acted in bad faith issuing those charges. *See* Br. Appellant at 13 n.2. He fails to provide any authority to back this proposition. Simply because a charge is not sustained at hearing does not establish it was filed in bad faith. The Commission considered the evidence related

⁵ This provision of the UDA makes it unprofessional conduct to violate a statute or regulation relating to the practice of medicine.

to this charge and concluded that those charges had not been proven. AR 1863. Nothing about that decision supports a due process violation or bad faith.

The original Statement of Charges and the Amended Statement of Charges issued against Ames complied with the due process and legal requirements of administrative pleadings in Washington.

D. The Commission's Findings and Conclusions Are Supported By Substantial Evidence.

Ames asserts multiple challenges to the Commission's Findings of Fact and Order. However, as outlined below, each of the challenged findings are supported by evidence including direct testimony. As such, his contentions should be rejected.

1. Ames' Use of the LISTEN Device to Diagnose and Treat Patient One Was Inefficacious (Findings of Fact 1.25 and 1.28).

The Commission found that Ames' use of the LISTEN device with Patient One was inefficacious and that his promotion of the device violated RCW 18.130.180(16)⁶. The Commission's findings that support

⁶ RCW 18.130.180(16) Unprofessional Conduct states:

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

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

the conclusion that Ames' use of the device with Patient One was ineffective are found primarily in Findings of Fact 1.25 and 1.28.

Finding 1.25 provides:

As a physician, the Respondent used the LISTEN device to treat Patient One for an egg allergy. The LISTEN device was ineffective 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 other 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.

AR 1861. Ames used the LISTEN device to treat Patient One for an egg allergy. AR 2204, 2214, 2219-20, 2255, 2269-70.

Finding 1.25 is also based in part on testimony from Ames. He testified that he did not do skin testing with Patient One. AR 2171. He testified that kinesiology, the arm muscle testing process described by Patient One (AR 2210-12), is not conclusive evidence of an allergy but that if it indicates an allergy and the patient improves after he treats for it, he assumes there was an allergy. AR 2175. When questioned about what evidence demonstrated that the LISTEN device is efficacious for diagnosing allergies, Ames responded only that he had heard it from unnamed colleagues. AR 2179. Ames testified that he had only

anecdotal information to support his allergy testing and assessment rather than scientifically based information. AR 3167.

Ames tries to argue that, because the LISTEN device had Food and Drug Administration (“FDA”) clearance for use as a biofeedback device, he is entitled as a physician to use it for other purposes, such as the diagnosis and treatment of allergies. *See* Br. Appellant at 9. Under some circumstances, such “off label” use may be appropriate if the device is cleared for some use, and the practitioner has a sufficient basis supporting his use of it for a different purpose. *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 350, 121 S. Ct. 1012, 148 L. Ed. 2d. 854 (2001).

However, the FDA never cleared the LISTEN device for any purpose. AR 2872. Both James Clark, (“Clark”), the device’s creator, and Neil Ogden, FDA Branch Chief, testified that the LISTEN device had never been cleared by the FDA. AR 2872, 2395-97. The LISTEN device was submitted for clearance in 1992 and rejected because of Clark’s claims that it could be used for acupuncture. AR 2870, 2872. At the hearing, Clark admitted that the LISTEN device was never cleared for any purpose. AR 2872. Ogden confirmed that the LISTEN device was not cleared because it was not substantially equivalent to devices already being marketed and because its specifications claimed that it was

useful for acupuncture. AR 2395-96. Ogden confirmed that the LISTEN device was never resubmitted for FDA clearance. AR 2396-97.

Although the LISTEN device was never cleared by the FDA, Ames claims that a separate FDA clearance for a device called the Digital Conductance Meter ("DCM") also applied to the LISTEN device. AR 2871-72. He based that claim upon testimony from Clark, but Neil Ogden stated that the DCM clearance would not apply to the LISTEN device if any new components, new functions, or new specifications were added or if any changes other than minor changes had been made. AR 2397-98.

Because the LISTEN device had not been cleared by the FDA for any purpose, it is not permissible even for a physician to use it claiming an off-label use. *See Buckman*, 531 U.S. at 350. Contrary to Ames' argument, the Commission did not find that the LISTEN device could be legally marketed if it simply dismissed the charges against Ames relating to the state and federal food and drug acts. AR 1863 (¶ 2.4).

Even if a device was appropriate for a physician to use for an unapproved purpose, such as the diagnosis or treatment of allergies, the physician must still have some basis for deciding that it is appropriate

for the use he intends.⁷ Ames did very little investigation of the LISTEN device and admitted he lacked any such scientific or other support for his allergy treatment of Patient One using the LISTEN device. AR 3167. Because Ames could provide no evidence demonstrating that the LISTEN device had ever been approved or cleared for any use, his use was inappropriate.

The finding of inefficaciousness is also based upon Patient Three's testimony that she had been cured of an allergy to ham through Ames' use of the LISTEN device. Patient Three testified that Ames did muscle testing with her and just said the word "ham," rather than selecting the entry in the computer database for ham. AR 2736. Ames defended this procedure as also being effective treatment for allergies. AR 3120-23. Finally, Finding 1.25 is based upon the Commission's assessment and evaluation of the totality of the evidence heard and upon inferences drawn from that evidence.

Ames argues that it is improper for the Commission to conclude that the LISTEN device is inefficacious based upon one patient's experience. The Commission did not undertake to establish that the LISTEN device is inefficacious in every possible use. The charge was

⁷ Ames testified that if he were considering using a drug for an off-label use, he would investigate peer-reviewed scientific literature and medical tests and studies. AR 2120-21.

that Ames' use of the device with Patient One constituted the promotion for gain of an inefficacious device. AR 62. As outlined above, the record fully supports this finding. The Department is not required to prove the device is inefficacious in every possible situation to sustain a charge under this statute. Ames offers no evidence to show that the device as he used it with Patient One was ever efficacious, and there was substantial evidence in the record to support the Commission's findings that the charge under this subsection was proven. This determination should be affirmed.

2. Ames' Use of the LISTEN Device to Diagnose and Treat Allergies Created an Unreasonable Risk of Harm. (Findings of Fact 1.7-1.11, 1.27, 1.29)

The Commission had substantial evidence to support its finding that Ames created an unreasonable risk of harm to Patient One through his use of the LISTEN device purportedly to diagnose and treat allergies. In order to find a violation of RCW 18.130.180(4)⁸, the Commission must find that Ames' treatment of Patient One was outside the standard of care,

⁸ RCW 18.130.180(4) Unprofessional Conduct states:

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

(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.

and that it harmed the patient or created an unreasonable risk that the patient would be harmed. The Commission found that Ames' diagnosis and treatment of Patient One using the LISTEN device created an unreasonable risk of harm. Its determination is supported by substantial evidence in the administrative record, primarily by Findings 1.7 through 1.11, 1.27, and 1.29.

a. Findings of Fact 1.7-1.11

Other than the first sentence of Finding 1.7, Ames did not assign error to Findings 1.7 through 1.11, and they must be accepted as verities on review. The first sentence of Finding 1.7 states that Ames testified that he did not know the physics behind the LISTEN device and that he did not know the voltage or amperage the device produces. AR 2097-98, 2155-56. He testified that he did not know the voltage the device emits. He understood that the device sends a signal that weakens a patient's muscle and "affects the acupuncture meridians." AR 2155. However, he did not know if the signal was electrical energy and that he did not understand the physics behind it. AR 2155-56. He received nothing with the device as to claims, warnings, or capabilities. AR 2156.

b. Finding of Fact 1.27

Finding 1.27 states that Ames failed to take necessary safety measures to ensure the LISTEN device would not be harmful to his patients. AR 1862. Ames obtained no literature or labeling with the machine, and he did not receive any personal training on its use. AR 2156. He only listened to colleagues and to a salesperson. AR 2179. He did not know the voltage or amperage that the device produces. AR 2155-56.

Finding 1.27 is based upon earlier findings of fact which Ames did not challenge and which must be accepted as verities on review. AR 1856-57 (¶ 1.7-1.10). Additionally, Ames testified that he listened to vendors and colleagues and spoke briefly with Clark, who designed the device. AR 3063-64, 3140. Ames sent his nurse to a course about the device with the idea that she would train him on it, but the course involved electrodermal screening which he does not do so, he considered the course to have little value. AR 2179, 3140, 3169. He did not think the device had any warning labels and that he did not look for any warning labels. AR 2103-04. Finally, he believed the LISTEN device sends a 5-volt current back to the patient, but he did not know for certain. AR 2097-98.

c. Finding of Fact 1.29

Finding 1.29 states that, by making a false medical diagnosis, providing an ineffective treatment, and misinforming Patient One that he had been cured, Ames subjected Patient One to an unreasonable risk of harm. AR 1862. The Commission's evaluation and assessment of the record as a whole and of inferences it drew from the evidence and testimony before it formed the basis for the finding. Specifically, there was testimony that Ames took no action to find out about the machine or the amperage or voltage it put out or to obtain literature, labeling or other instructions about the use of the device before he used it with patients, including Patient One. AR 1856-57. Ames' use of the device, which he had inadequately investigated and knew next to nothing about, created an unreasonable risk to Patient One. AR 2177-78. Further, by purporting to diagnose, treat, and cure a non-existent egg allergy, he performed an ineffective treatment and misinformed Patient One that he had been cured. *See* AR 2208-09, 2211, 2219-20, 2268-70. Any physician who tells a patient he has been cured of an allergy without any basis for it puts the patient at risk because that patient will not seek out a legitimate diagnosis and treatment and may be harmed by relying on the false advice that he has been cured.

3. RCW 18.130.180(16) Does Not Require a Showing of an Unreasonable Risk of Harm.

Ames argues that RCW 18.130.180(16) requires the Department to demonstrate an unreasonable risk of harm in order to prevail. By doing so, he asks this Court to import from requirement of proof of an unreasonable risk of harm. This Court should resist such a reading because the plain language of the statute does not so require. There was no mention of subsection 16 when subsection 4 was amended in 1960. If the Legislature had intended to require a finding of unreasonable risk of harm in subsection 16, it could have included similar language. It did not do so. Ames offers no basis for arguing that the Commission must find an unreasonable risk of harm to the patient in order to find that the use of a device like the LISTEN is inefficacious or promoted for personal gain. Ames' argument that they are dependent upon each other should be rejected as lacking any legal basis.

Ames' reciprocal argument that a finding of negligence under requires a finding that the device used is inefficacious must fail for the same reason. If the Legislature had intended a requirement that a device must be inefficacious for the use of it to constitute negligence or malpractice under RCW 18.130.180(4), it would have specified that

requirement in the statute. It did not, and Ames' argument that such a requirement can be presumed must fail for lack of any legal support.

**4. Ames Failed to Properly Diagnose An Egg Allergy.
(Findings of Fact 1.15 – 1.16)**

In support of his diagnosis of an egg allergy, Ames asserts that Finding of Fact 1.15 to mention it fails to mention the RAST blood testing that he did.⁹ See Br. Appellant at 32-33. To the extent Ames argues that the RAST blood test shows Patient One had an egg allergy, his own expert, Dr. Martin, testified that the RAST test result by itself, without symptoms, would not justify any diagnosis or treatment. AR 2993. Ames also argues that the Commission failed to consider the RAST blood test result as clinical evidence that Patient One had food allergies, including an egg allergy. However, Dr. Martin also testified that the RAST blood test result was not evidence of anything or justification for any treatment, whether conventional or non-traditional. AR 2993.

Ames then challenges the last sentence of Finding 1.16, which states that he informed Patient One that he could cure the egg allergy

⁹ This is really not a substantial evidence challenge to the Commission's finding. There is no legal requirement that the Commission's findings include references to all of the evidence and testimony adduced at the hearing. *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 121 Wn. App. 850, 855, 90 P.3d 698 (2004), *aff'd* 155 Wn.2d 824, 123 P.3d 102 (2005); *State ex rel. Lige and Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

and that eggs would not bother him again. *See* Br. Appellant at 3. Patient One persuasively testified that Ames told him he could get rid of allergies and get them out of his body. AR 2205. Patient One testified that Ames told him he would be rid of the egg allergy when he walked out the door and that there was a machine involved as well as acupuncture. AR 2208. Patient One understood being “rid” of the allergy to equate to a cure. AR 2208. Finally, Patient One testified that Ames told him he had cured the egg allergy. AR 2268-69.

As outlined above, the testimony from the hearing provided sufficient credible evidence to support the Commission’s findings. Ames’ simple disagreement with the finding is insufficient to justify overturning the Commission’s decision.

5. Ames Promoted the LISTEN Device For His Personal Gain. (Findings of Fact 1.12, 1.24, 1.26)

Testimony at hearing supported the determination that Ames used the LISTEN device as part of his practice. The testimony of Patient One and the patients Ames called to testify thus promoting it for his personal gain established how prominently Ames presented the LISTEN device during their visits with him. AR 2207-10, 2698-99, 2744-47. The record shows that all patients who testified at the hearing were told that the benefits they were to receive from Ames’ treatments were

dependent upon his use of the LISTEN device, and that the “cure” for their allergies was being provided, or at least substantially produced, by the LISTEN device. AR 2212-13, 2219, 2698, 2706, 2739-40, 2744-45. Ames told Patient One and the other patients that he could “cure” one allergy at a time, and each of his diagnoses and treatments as described by the patients included his use of the LISTEN device. AR 2212-13, 2219, 2698, 2744-45, 2752, 2759. While Ames attempted then and now to minimize his use of the device, it clearly played a role in his treatments.

Ames challenged Finding 1.12, which states:

Although 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.

AR 1857.

Ames’ himself testified that he used the device to help him assess allergies. AR 2084-85. He used the device on the two patients he called as witnesses at the hearing. AR 2098. Ames also described how he used the device with other allergy patients. AR 2098-99, 2151-52, 2154-56. He used the device with approximately 50 percent of his allergy patients (AR 2100) to determine weaknesses in patients’ muscles. AR 2112,

2141-42. He claimed that the use of the device helps to speed up his assessment of patients. AR 2163.

Ames also challenged Finding 1.24, which states:

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 low glycemic index diet to be followed by a Metabolic typing diet.

AR 1861. In support of this finding, Patient One testified Ames told him he would need 20 to 30 additional treatments. AR 1932, 2212-13, 2219;

Ex. 2.

Finally, Ames challenged Finding 1.26, which states:

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.

AR 1861.

Patient One testified credibly that Ames told him he used the LISTEN device for treatment. AR 2208, 2212-13, 2215-16. Ames confirmed that he could cure an allergy in one visit. AR 3132. He

admittedly billed Patient One for visits during which he used the LISTEN device. AR 3084. Additionally, Patient Three, called to testify by Ames, testified that she had been cured of some allergies by Ames' use of the LISTEN device. AR 2731. She urged the Commission to not take the machine away from Ames because she relied on the machine, not upon any other form of treatment. AR 2740.

The patients' testimony demonstrates that they understood Ames' diagnosis and treatment of their allergies and were dependent upon his use of the LISTEN device. They described the device as a prominent part of his interactions with them, understood that the series of treatments Ames urged upon them to treat their multiple allergies would involve diagnosis and treatment using the device, and were encouraged by Ames to return for additional treatments. The patients' testimony, as well as portions of Ames' testimony, show that he was promoting his use of the device in encouraging patients to return for multiple treatment sessions.

Substantial evidence exists in the record to support the Commission's findings that Ames promoted the LISTEN device for personal gain, and as such, the Order should be affirmed.

E. Ames' Use of the LISTEN Device With Patient One Did Not Qualify As "Nontraditional Treatment" or Homeopathy.

RCW 18.130.180(4) authorizes the use of nontraditional treatment and provides that such use alone is insufficient to constitute unprofessional conduct unless the treatment also either harms a patient or creates an unreasonable risk of harm. The same legal standard for negligence or malpractice in conventional treatments also applies to nontraditional treatment. To establish negligence or malpractice under RCW 18.130.180(4), the treatment must fall below the standard of care and must either harm a patient or create an unreasonable risk of harm. Whether Ames' treatment was classified as "nontraditional" or conventional, the legal standard applicable to his practice is the same.

Ames argues that his use of the LISTEN device is appropriate under RCW 18.130.180(4). In doing so, he challenges the Commission's finding that his treatment of Patient One with the LISTEN device was not "nontraditional" treatment, Asian medicine, or homeopathy. Specifically, Ames challenged Finding 1.28, which states that his use of the LISTEN device was not "nontraditional treatment." *See Br. Appellant at 3; AR 1862.*

Finding 1.28 is based upon Ames' own characterization of his allergy treatment as conventional, AR 2077, and the testimony of Dr. Martin, who described his own alternative medicine practice. AR 2077, 2946-58. Dr. Martin treated patients using Asian medicine techniques,

including acupuncture. He testified extensively about Asian medicine theories and practices. *Id.* Dr. Martin's practice is very different from the treatment Ames used to treat Patient One. AR 2946-58, 2966, 2996.

Dr. Martin was unfamiliar with the LISTEN device and the kinesiology or muscle testing process that Ames used. He also did not use devices in his own practice. AR 2976, 2987, 2989-91, 2993, 2994. Dr. Martin testified that machines for diagnosis are not part of his practice, that he did not have experience with machines that purport to balance energy, and that he could not testify about them. AR 2995. Dr. Martin did not know physicians who practice NAET, a form of homeopathy that Ames testified was part of his practice with the LISTEN device. AR 2972. Dr. Martin testified that the only authority he was aware of about electrodermal devices and allergy diagnosis and treatment states that it is untested. AR 2985. Dr. Martin's testimony did not support Ames' claim that his use of the LISTEN device was "nontraditional treatment" or that it was an accepted part of Asian medicine.

Ames himself testified that Clark, the machine's manufacturer, told him the machine generates homeopathic signals and that he made up the signals. AR 2183. He also testified that Clark has no medical training and was not a physician. AR 2183. Ames did not claim that

Clark was a homeopathic practitioner. The record contains no evidence or testimony demonstrating that any homeopathic practitioner other than Ames believed the LISTEN device was part of homeopathic practice or was effective for homeopathic treatment. Ames testified that the basis for his claim that patients have been cured by his treatment was self-reports by an unspecified and unverifiable number of unnamed patients. AR 3099. This testimony was insufficient to persuade the Commission as to the legitimacy of this viewpoint.¹⁰

Ames further argues that the legislative history of RCW 18.130.180(4) illustrates that the Commission is biased against non traditional medicine. However, that legislative history reveals nothing to establish such bias, either when the statute was amended in ESHB 1960 or, more particularly, at the present time. Ames argues that the bill report states the Medical Disciplinary Board, predecessor to the Medical Quality Assurance Commission, was biased against alternative medicine. That report is not part of the record, before the Court. Even so, the text of the bill report does not support that claim. *See* Appendix A. The statutory amendment, clarified that an unreasonable risk of harm to the patient must be shown in order to establish care below the

¹⁰ To the extent that Ames argues that the Commission acted out of bias against non traditional treatment methods, he fails to provide any support for that proposition.

standard. That amendment does not provide the basis for showing bias concluding bias had been shown.¹¹

Finally, Ames argued bias on the part of current Commission members. There is nothing in the record or in the cases Ames cites to support his argument that the panel members who heard his case acted out of bias against non traditional treatment methods.

The Commission specifically found that Ames' use of the LISTEN device constituted an unreasonable risk of harm to Patient One. AR 1862. It did so based upon its questioning of Ames about the basis for his use of the device; based upon its examination of the treatment records of Patient One, which were in evidence as Department's Exhibit 2; and upon its finding that Ames knew next to nothing about the device he was using on patients. AR 1856-57 (¶¶ 1.7-1.11). These findings were not challenged by Ames and must be accepted as verities on review. The Commission fully complied with RCW 18.130.180(4), and Ames' claims of bias must be rejected as having no support in the record before this Court.

¹¹ Ames devotes much of his brief to discussing various unrelated out-of-state cases purporting to show some bias against non-traditional methods of treatment. He argues completely without legal or factual support in the record that there is bias against him because he uses non traditional treatments. His arguments are unsupported and should carry no weight.

Furthermore, because Ames failed to establish that his use of the LISTEN device was “nontraditional treatment” or that, as used by him, it was either an approved part of Asian medicine or homeopathy, the Commission’s finding is supported by substantial evidence in the record, should be affirmed.

F. The Commission’s Sanction Was Within Its Statutory Authorization.

The Commission is empowered to determine the appropriate sanction once it determines that a physician’s actions are outside the standard of care. RCW 18.130.160. Those sanctions include remedial education, probation, restriction or limitation of practice, fine, suspension or revocation. The Commission chose sanctions it believed were appropriate for the unprofessional conduct it found Ames had committed. AR 1864 (¶ 2.7). Each of the sanctions imposed on Ames are authorized by RCW 18.130.160. AR 1864. The Commission recognized that when imposing sanctions, its first consideration must be protection of the public. *Id.*

Contrary to Ames’ arguments, the Commission did not abuse its discretion with the chosen sanctions. The Commission suspended Ames license to practice, but stayed the suspension upon the condition that he comply with its order. AR 1864 (¶ 3.1) (authorized under

RCW 18.130.160(2) suspension). It required him to cease using the LISTEN device to assess for or to treat allergies and to cease having the device in his office when he saw patients. AR 1864 (§ 3.2) authorized under RCW 18.130.160(3) (limitation on practice). It required a review of a sample of Ames' patient records, which could be continued on a quarterly basis if the Commission determined it was necessary. AR 1865 (§ 3.3) (RCW 18.130.160(3)). The Commission also required a fine of \$5,000. AR 1865 (§ 3.6) (RCW 18.130.160(8)).

All of these sanctions are well within the Commission's statutory discretion. The sanctions are clearly related to the unprofessional conduct the Commission found. Ames showed no abuse of discretion and no legal basis to support his challenge to the sanctions ordered. The Commission's sanctions determinations should be affirmed.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that this Court affirm its Final Order. Ames' treatment of Patient fell below the standard of care and the sanction levied is appropriate.

RESPECTFULLY SUBMITTED this 30th day of August, 2006.

ROB MCKENNA
Attorney General

KIM O'NEAL, WSBA #12939
Assistant Attorney General

HOUSE BILL REPORT

ESHB 1960

As Passed Legislature

Title: An act relating to health professions regulation.

Brief Description: Redefining practice beyond the scope of practice for health professions.

Sponsor(s): By House Committee on Health Care (originally sponsored by Representatives Prentice, Paris, Day, Braddock, Cantwell, Edmondson, Franklin, Morris, Phillips, Pruitt, Basich, Leonard, Orr, Wood, R. Johnson, Heavey, Wineberry, May, D. Sommers, Beck and Dellwo).

Brief History:

Reported by House Committee on:
Health Care, March 4, 1991, DPS;
Passed House, March 19, 1991, 98-0;
Amended by Senate;
House concurred;
Passed Legislature, 83-0.

**HOUSE COMMITTEE ON
HEALTH CARE**

Majority Report: *That Substitute House Bill No. 1960 be substituted therefor, and the substitute bill do pass.*
Signed by 11 members: Representatives Braddock, Chair; Day, Vice Chair; Moyer, Ranking Minority Member; Casada, Assistant Ranking Minority Member; Cantwell; Edmondson; Franklin; Morris; Paris; Prentice; and Sprenkle.

Staff: Bill Hagens (786-7131).

Background: The Uniform Disciplinary Act provides standardized procedures and sanctions for specified acts of unprofessional conduct governing the regulated health practitioners in this state.

The commission of an act of incompetence, 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 shortage of health care professionals is receiving increased attention among policy makers, health care providers, employers of providers and consumers. There are

reports of widespread personnel vacancies at health care facilities and steady or falling enrollments at the state's health professional training programs. Many health care employers claim that health care careers have lost their appeal because of low pay, long working hours and the risk of disease.

Demographic forecasts for the next 20 years predict population increases in the number of elderly and children. Both age groups tend to be high utilizers of health care services, and an increase in the demand for health care is expected. At the same time, an overall shrinkage of the work force age population is predicted to result in a smaller number of people available to fill health care occupations.

Regarding a completely unrelated matter, the current system of law actually discourages veterinary specialists from locating in the state since there is no mechanism for licensing the specialty so it may be legally advertised.

Summary of Bill: 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.

The licensing authorities for the health professions are directed to issue temporary practice permits. This allows licensed individuals from other states to practice in Washington while their applications are being completed. Only persons whose licenses have been verified in good standing are eligible. The disciplining authorities for each of the regulated health care professions may participate in voluntary continued competency projects when selected by the Secretary of Health.

Community-based recruitment and retention projects are also authorized. Up to three projects may be established by the Department of Health to assist local communities to recruit and retain health care professionals. A statewide health personnel recruitment and retention clearinghouse is also authorized to inventory and identify successful existing health professional recruitment and retention activities in the state, identify needed programs and provide this information to the public.

The Statewide Health Personnel Resources Plan is created. Various health and education related agencies are directed to prepare the plan which is to be approved by the governor and submitted to the Legislature. The plan includes, but is not limited to, an assessment of future health care training needs including medical care, long-term care, mental health

and other specialties; analysis of the need of multi-skilled personnel, education articulation, and the use of telecommunications and other innovative technologies to provide education to placebound students. Institutional plans are required from colleges, universities and vocational technical institutions specifying how they will implement the elements identified in the statewide plan.

New professions seeking credentialing, or existing ones upgrading the level of regulation, are required to describe the need for, location and cost of any proposed educational requirements.

The state's three current health professional loan repayment and scholarship programs are combined into one program. The program will terminate in June 1992 and will be replaced by an expanded comprehensive Health Professional Loan Repayment and Scholarship Program. Beginning in 1992, the designation of health care professions eligible for the Loan Repayment and Scholarship Program and the designation of shortage areas will be made using a data-based analysis. Scholarship and loan repayments are to be awarded in three ways. One portion is to be made available for use by participants of the community-based health professional recruitment and retention projects. A second portion is to be made available for use by state-operated institutions, county public health and human service agencies, community health clinics and other health care settings providing services to charity and subsidized patients. The third portion is to be made available for general use for eligible providers serving in any shortage area. A trust fund is created to hold funds appropriate to the program.

Credentialing by endorsement is authorized for optometry, hearing aid fitters, midwives and dispensing opticians.

The Department of Health may issue a license to practice specialized veterinary medicine in a specialty area recognized by the Veterinary Board of Governors by rule. The license may be issued to a national veterinarian who: is currently certified by a national specialty board or college recognized by the board by rule in the specialty area; is not subject to disciplinary action regarding a license in the United States, its territories, or Canada; has successfully completed a state exam on this state's laws and rules regulating the practice of veterinary medicine; and provides supporting information. The secretary of health must establish a fee for such a license.

The bill contains a null and void clause for the health professional shortage parts of the bill.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The state Medical Disciplinary Board has discriminated against physicians who practice alternative health care, considered nontraditional medicine. Many patients who received no satisfaction with traditional medical care have gotten relief from physicians who practice under other theories, including holistic medicine. The board should not discriminate unreasonably against these physicians as long as no harm is being done. Their patients demand a freedom to choose the health care that they believe is best for them, and this freedom is adversely affected by discrimination and harassment from state disciplinary authorities.

Testimony Against: None on substitute.

Witnesses: Glenn Warner (pro); Robert Kimmel (pro); Joseph Hattersley (pro); Symma Winston (pro); Elizabeth Springer (pro); David Clumpner, Well Mind Association (pro); Dave Hamilton (pro); Beverly Haywood (pro); Bob Wheeler (pro); William Robertson, Washington State Medical Association (pro with amendment); Jan Polek, Medical Disciplinary Board (neutral); Jeff Larson, Washington Academy of Physicians Assistants (pro); and Steve Curry (pro).

NO. 24897-6

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

GEOFFREY S. AMES, M.D.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF HEALTH,
MEDICAL QUALITY ASSURANCE
COMMISSION,

Respondent.

DECLARATION OF
SERVICE

I, Vicki Glad, make the following declaration:

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

2. On August 30, 2006, I deposited via U.S. mail, postage prepaid, the original and one copy of the Brief of Respondent to:

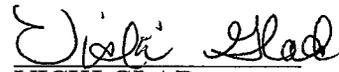
Patricia I. Crandall, Court Clerk
Court of Appeals, Division III
500 N. Cedar Street
PO Box 2159
Spokane, WA 99210-2159

3. On August 30, 2006, I deposited via U.S. mail, postage prepaid, a true and correct copy of the Brief of Respondent to:

William R. Bishin
1404 E. Lynn
Seattle, WA 98112
Attorney for Appellant

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

DATED this 30th day of August, 2006 at Olympia, Washington.


VICKI GLAD
Legal Assistant