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Docket # 68642-9-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RANDALL KINCHELOE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF HEALTH
Respondent,

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF SUPPLEMENTAL FACTS: On the same form that is the subject of this appeal, as to whether Mr. Kincheloe committed professional misconduct by failing to disclose information, AR 28—31, Mr. Kincheloe disclosed all of his historical certifications from the Department, including the first year issued and his certification numbers. AR at 31.

II. STANDARD OF REVIEW ARGUMENTS.

For purposes of this appeal, as to the errors of law, both parties agree that the appellate court's inquiry is de novo, that is, it substitutes its judgment for that of the agency.

The Respondent cites to authority that an agency's interpretation of its own rules is given latitude in a de novo review, but fails to frame its arguments in terms of any specific agency rule interpretation in this case. In fact, the Health Law Judge did not engage in any analysis of the meaning of "restriction" under the applicable statute or WAC, and therefore there is no departmental analysis to which the court should defer. We are presented with simply a ruling that Mr. Kincheloe failed to disclose a "restriction", without any reasoning regarding why the ALJ considered the 2001 agreement to be a "restriction," and without citing to any RCW or

WAC. Thus, this court has no duty to defer to any ALJ or Departmental “interpretation”, as there is no interpretation of record.

As to the second standard of review, the review as to factual issues, the parties also agree upon the standard to be applied by this court, that is, whether there is substantial evidence of record. A review of the record shows that there are no facts presented that show that his license was ever restricted. He did not admit it. No other witness testified to it. Nowhere on the fact of the 2001 stipulation is there the word “restriction.” Further, the Health Law Judge did not find Mr. Kincheloe to lack credibility. The only participant in the hearing who characterized the 2001 stipulation as a “restriction” was the Attorney General, in argument, without any legal citation. That argument does not constitute evidence. There is no evidence of record that Mr. Kincheloe’s right to practice was restricted by the 2001 agreement.

III. ERROR OF LAW ARGUMENT: A stipulation is not a restriction as a matter of law

A. RESPONDENT CITES NO AUTHORITY THAT HOLDS THAT A STIPULATION IS A RESTRICTION, AND ITS ARGUMENTS IN REFERENCE TO THE STATUTE ARE FLAWED.

Respondent has failed to contradict the discussion of the statutory scheme and the overt language of the 2001 stipulation, set forth in the opening brief. It is uncontested that the 2001 stipulation does not use

the term “restriction,” but rather the term “terms and conditions” to describe the supervision to which Mr. Kincheloe agreed in that stipulation. Neither does the State disagree with any of the cases that set forth the methodology for interpreting the applicable statutes. The State does not deny that the statute setting forth sanctions for licensing issues includes 12 distinct and equal—mutually exclusive—categories, and that only the first 3 include “Revocation, Suspension, or Restriction or limitation”. See RCW 18.130.160 (1)–(12), set forth pp 12-13 of the opening brief. The State does not deny that there are 9 categories of sanctions that are not revocations, are not suspensions, and are not restrictions or limitations. The State does not deny that most of the provisions of the 2001 stipulation fit under one or more of the remaining 9 categories of the statute. Without aid of any authority, however, the State urges the court to find that items E and F of the 2001 stipulation can only be viewed as “restrictions”, regardless of any [as the State terms it] “semantic” argument.

Query—are not all statutory interpretation and contract interpretation arguments “semantic?” That is, they are courses of reasoning that rely upon rules of construction in order to ascertain the intent and meaning of words. Calling an argument ‘semantic’ is really circular and does not contribute at all to the merits of the issue.

The merits of the issue are served by applying rules of interpretation to the substance of items E and F of the 2001 Stipulation. Item E shows that Mr. Kincheloe agreed to work for the next year with direct RN supervision. Item F. provided that Mr. Kincheloe agreed not to float from unit to unit. The State argues that these agreements can fit only under RCW 18.130.160(3), Restriction or limitation of the practice. This is not so. RCW 18.130.160 (5) states:

The monitoring of the practice by a supervisor approved by the disciplinary authority.

Item E specifically relates to the establishment of supervision. Item F is a necessary adjunct to the agreement to supervision, since if Mr. Kincheloe floated from unit to unit, the approved supervisor would lose his or her immediacy of supervision.

In short, the statute sets up a separate and distinct category from “restriction or limitation”, that is, “supervision.” The 2001 agreement uses the term “supervision”, not the term “restriction or limitation.” The state’s argument that the terms of the 2001 stipulation as a matter of law can only be restrictions or limitations must be rejected.

The State also argues that RCW 18.130.172(2) , by stating that the State “may” by agreement impose any of the 12 sanctions under RCW 18.130.160. , means that the 2001 stipulation is a ‘restriction.’ This is a fallacious argument, since the statutory provision is permissive, and since

any of the 12 subsections may be imposed by agreement, thus, any particular agreement may not include restrictions or limitations of the practice. Here, reviewing the actual agreement at issue, no “restrictions or limitations” are imposed, only terms and conditions that related to the other 9 categories under the statute. This flawed attempt at finding authority in the statute for concluding that the 2001 is necessarily a “restriction or limitation” must be rejected.

B. THE STATE’S “COMMON SENSE” OR “PUBLIC POLICY” REASONS FOR FINDING THAT MR. KINCHELOE WITHHELD INFORMATION ON THE 2001 STIPULATION ALSO FAIL.

Failing to find a specific statutory term of art that Mr. Kincheloe’s 2001 stipulation was a restriction or limitation on his credential, the state engages in several dead-end arguments.

First, the State argues essentially that any reasonable person would view the 2001 stipulation as a restriction or limitation because it in fact tells him that he cannot do certain things, such as supervise or float from unit to unit. Thus, the State reasons, if Mr. Kincheloe were ‘honest’, he would have naturally disclosed the 2001 stipulation when asked if his practice had ever been restricted or limited. However, the State ignores the very language of RCW 18.130.172 which provides that a stipulation is not to be construed as a finding of either unprofessional conduct or inability to practice, and “shall not” be considered formal discipline. This

language is mirrored and expanded upon in the language of the stipulation. AR 37, also set forth on page 3 of the opening brief. In fact, upon successful completion of the stipulation, the statement of charges is to be withdrawn. AR 38. When asked about what he understood regarding the 2001 agreement and whether or not he thought his license was restricted, Mr. Kincheloe stated, "I wasn't even thinking like that." AR 146. A reasonable person would, like Mr. Kincheloe, consider that he made an agreement, that he did not admit any wrongdoing, that he fulfilled the conditions agreed to, and that his license was never restricted.

Second, The State makes an argument that because of the strong public policy to protect the public, persons applying for licenses must be able to be relied upon to answer candidly, or they are violating the spirit of RCW 18.130.180(2) (that misrepresenting or concealing a material fact is unprofessional conduct). Thus, the state is alleging that regardless of the statutory definitions, Mr. Kincheloe should reasonably have known that the 2001 stipulation was a "material fact" to be disclosed even if not directly asked for. The fallacy here is that the state never presented any evidence that it had any difficulty in learning about the 2001 stipulation. In fact, on page 4 of its application, Mr. Kincheloe fully responded and identified all of his prior certifications and identified them by file number. AR 31. The state obviously had no difficulty accessing its own records

and, ultimately denying Mr. Kincheloe's license for allegedly "failing to disclose". The irony is that he did disclose everything in his files by disclosing the file numbers—that is how the state got the information in order to deny the license for failing to disclose! If the State also wanted a "yes" answer to question number 8, then it should have asked if the licensee had ever entered into any stipulations, whether disciplinary or non-disciplinary. This is an issue with how the state asked the question, and not with whether Mr. Kincheloe withheld a material fact. He did not.

The State makes a related argument that disclosure of the stipulation is paramount to public policy because it means that at one time he was not qualified for a license. This argument has even more levels of fallacy. First, the stipulation was 10 years old, and in reference to a different type of certification. Second, the 2001 stipulation specifically provides that there is no finding of non-qualification, no admission of non-qualification, and thus one cannot conclude that it could be used to prove any facts of being non-qualified for the certification application at present. Finally, the State found Mr. Kincheloe qualified for the Medical Assistant certificate for which he applied; the application was not denied because of any conduct connected to the 2001 stipulation, only because he allegedly "failed to disclose" it. The argument that the stipulation is material

because it proves his lack of qualification for the new certification has no merit.

IV. ERROR OF FACT ARGUMENTS: THERE IS NO SUBSTANTIAL EVIDENCE OF RECORD THAT MR. KINCHELOE CONCEALED OR MISREPRESENTED OF 2001 STIPULATION

The State is asking this court to find that the mere fact that Mr. Kincheloe did not specifically note the existence of the 2001 stipulation on his application, whether or not actually requested, was unprofessional conduct and a basis for denial of his credential as concealment of a fact. In so doing, the State asks this court to expand current case law of “exceptions” into a new rule.

In the one case, a dentist was liable for hiring a non-licensed dentist. While he was not factually aware of that circumstance, he had the power to investigate whether or not his employee was properly licensed and would be expected to be liable for his employee under other applicable law. So, while his act was not defined as “unprofessional” in the licensing statutes, as an employer he was subject to the age-old common law liability of *respondiat superior*, i.e., a well-known legal duty. Additionally, as between himself and the public, he could with a simple telephone call ascertain whether or not his employee was licensed, whereas his patients would have the right to assume that he would hire

only licensed personnel to work on their bodies. Thus, the dentist “should have known” and “should have adequately investigated”, and thus, should have been subject to sanctions for unprofessional conduct. Mr. Kincheloe, on the other hand, disclosed all of his licensing file history to the state which had the power and in fact did review those files. He was not the only party with the knowledge of his past—the state had also been a party to those stipulations and presumably had the entire files. Further, the files did not contain evidence of his lack of qualification to serve the public. This case does not fit within the exception of the case of *In re Flynn*,⁵² Wn.2d 589, 328 P.2d 150 (1958)

Likewise, Heinmiller failed to disclose her sexual relationship with a patient. The court found that although technically it was not “unprofessional conduct” as defined by the current rules at the time the acts were committed, there was already a general standard of the profession that it was unprofessional to begin a personal relationship with a former client within 2 years of the termination of that professional relationship. Further, although the conduct was not defined in the rules as unprofessional at the time of the conduct, it was defined as unprofessional at the time of the application for renewal. It was appropriate for the court to conclude that Heinmiller was aware of the standards of her profession at the time of her conduct and that she was aware of the standards of her

profession and of the new rule at the time of her application, thus that she knew or should have known that she was violating standards. In other words, she knew she was wrong but she denied the conduct was “unprofessional” because it occurred prior to the formal adoption of the new rule. *Heinmiller v. Department of Health* 127 Wn. 2d 595, 903 P.2d 433 (1995).

Here, there have been no changes in the law that have affected this case since 2001 when the stipulation was signed. Nothing has happened that should have put Mr. Kincheloe on notice that his practice was actually “restricted.” In the 2001 stipulation that found that there was no admission of wrongdoing, that charges would be dismissed, and that certain terms and conditions of education and supervision had to be complied with for a year. A contracting party is entitled to rely primarily upon the terms of the contractual agreement, or stipulation, with the department. This is not a question of a situation where he knew or should have known that his answer was misleading, because all of the information available to him, gave no indication that it included “restrictions”, and the situation of agreeing to settle the matter allowed him to assume to the contrary..

The terms of the statute, “misrepresentation” and “concealment” generally require a showing of actual knowledge, and, per the above two

very limited circumstances, any exceptions are narrowly construed and do not apply to this case. This is not a case under which this court should consider extending those narrow holdings of exceptions to a showing of intentional concealment of information.

V. THE STATE WRONGFULLY OBJECTS TO THE USE OF CONTRACT ANALYSIS IN THE OPENING BRIEF.

In Superior Court, Mr. Kincheloe argued that he had a right to rely upon the actual terms of the contract that he signed with the department, see the last page of his reply brief. However, it seems that the State does not dispute the contract principles argued, and thus, if the court reaches a contract analysis for any of its opinion in this case, the law on the subject seems to be agreed by both parties.

VI. THE STATE ARGUES IT HAD “SUBSTANTIAL JUSTIFICATION” FOR ITS DENIAL OF THE LICENSE.

Mr. Kincheloe has the right to an award of fees in the appellate court, and for a remand to the Superior Court for an award of fees, if his appeal is granted. The State has not substantially challenged the law upon which this appeal is based, and it defends its decision, finally, by trying to extend two cases that carved out exceptions to the rules, into being cases that are now viewed as the general rule.

In so doing, the State has set up numerous fallacious arguments, each one to which Mr. Kincheloe has patiently responded and delineated, by

providing statutory and case law authority and analysis, and by applying logical argument in the face of general claims. The very reason for the fee award statute is to allow a light at the end of the tunnel for persons who rely upon fair treatment by the state in order to engage in their occupations and support their family. If there were no such relief, the relative lack of resources of an individual *vis a vis* the state would create a chilling effect based upon the cost of the legal system.

VII. CONCLUSION

The court should reverse the decision of the Department of Health and award reasonable attorneys fees to Mr. Kincheloe; Mr. Kincheloe should present his cost and fee bill to the court within 10 days of the date of the court's decision; this case should, if appropriate, also be remanded to the Superior Court for determination of fees on appeal below.

DATED this 16th day of August, 2012.



/s/ Jean Schiedler-Brown

Jean Schiedler-Brown

WSBA #7753, for Appellant

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IN THE APPELLATE COURT
FOR THE STATE OF WASHINGTON, DIVISION I

IN RE THE MATTER OF:

RANDALL J. KINCHELOE

vs.

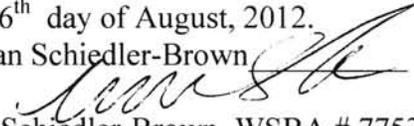
**DEPT. HEALTH, Health care Assistant
Program**

Respondant.

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I HEREBY CERTIFY THAT I CAUSE D a true copy of the Reply Brief of Appellant
and this certificate of mailing, to be mailed, first class, postage prepaid, to the address of record
for Counsel for Respondent, to wit;

Jason M. Howell, AAG
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Olympia, WA 98504-0109

On the 16th day of August, 2012.
/s/ Jean Schiedler-Brown


Jean Schiedler-Brown, WSBA # 7753
Attorney for Appellant Randall Kincheloe