

72162-3

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NO. 72162-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

LISA CUMMINGS
dba MOD Investigations,
Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,
Respondent

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF ISSUES ON APPEAL.....1

 1. Does substantial evidence support the Director’s findings that Cummings had an investigator-client relationship with Duncan and assisted him in locating or tracing Peddle, when the investigative services Cummings offered to clients included domestic tracking to locate family members or loved ones and the services she provided to Duncan included running background checks and monitoring Peddle’s movement using a GPS device?1

 2. Does substantial evidence support the Director’s findings that Cummings knew about the protection orders between Peddle and Duncan when she placed the tracking device on Peddle’s vehicle and/or accessed information from the device, when even before placing the device Cummings knew about Duncan’s criminal domestic violence charges and attended at least portions of court hearings where protection orders were discussed, and even after Cummings’s admitted knowledge of the protection orders she continued to access the GPS tracking information without notifying the authorities or Peddle or her representatives?1

 3. Assuming the above findings are supported by substantial evidence, did the Director properly conclude Cummings committed unprofessional conduct when Cummings assisted Duncan in locating, tracing, or contacting Peddle despite the court order prohibiting Duncan from harassing or contacting Peddle?2

 4. In addition and/or alternatively, did the Director properly conclude Cummings committed unprofessional conduct through her incompetence,

	negligence, or malpractice by not removing the tracking device or notifying Peddle or her representatives of its existence even after Cummings admitted knowledge of the protection orders between Peddle and Duncan?	2
5.	In addition and/or alternatively, did the Director properly conclude Cummings committed unprofessional conduct because she committed acts of moral turpitude or dishonesty by her conduct that endangered safety and showed disrespect for judicial authority?	2
6.	Did the Director properly consider the facts and circumstances of this case and act within her discretion in revoking Cummings’s private investigator licenses for eight years?.....	2
III.	COUNTERSTATEMENT OF THE CASE	3
IV.	STANDARD OF REVIEW.....	11
V.	ARGUMENT	13
A.	Because Cummings Does Not Properly Assign Error to Any Findings, They are Verities.....	15
B.	Even if Properly Challenged, the Director’s Findings of Fact Are Supported by Substantial Evidence.....	15
1.	Substantial evidence supports the findings that Cummings and Duncan had an investigator-client relationship and Cummings was assisting Duncan in locating or tracing Peddle.....	17
2.	Substantial evidence supports the findings that Cummings knew about the protections orders between Peddle and Duncan.....	23
C.	The Director Properly Concluded Cummings Committed Unprofessional Conduct.....	25

1.	Cummings violated RCW 18.165.160(11) and RCW 18.235.130(8) by assisting Duncan in locating, tracing, or contacting Peddle despite the court order prohibiting Duncan from harassing or contacting Peddle.	25	
	a.	Whether Cummings shared the GPS tracking information with Duncan is not necessary to support violation of RCW 18.165.160(11).	28
	b.	Inferential evidence is sufficient to support the Director’s conclusions, and the Director’s credibility determinations must be given deference.	30
2.	Cummings’s conduct was incompetence, negligence, or malpractice under RCW 18.235.130(4).	31	
3.	Cummings’s conduct demonstrated moral turpitude or dishonesty under RCW 18.235.130(1).	35	
D.	The Department’s Determination as to the Proper and Necessary Sanction for Cummings’s Unprofessional Conduct Should be Given Deference; the Eight-Year Revocation Imposed is Not Arbitrary or Capricious	40	
VI.	CONCLUSION	48	

TABLE OF AUTHORITIES

Cases

<i>Blueshield v. State Office of Ins. Comm'r</i> , 131 Wn. App. 639, 128 P.3d 640 (2006).....	27
<i>Brand v. Dep't of Labor & Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	40
<i>Brown v. State Dep't of Health, Dental Disciplinary Bd.</i> , 110 Wn. App. 778, 42 P.3d 976 (2002).....	37
<i>Brown v. State, Dep't of Health, Dental Disciplinary Bd.</i> , 94 Wn. App. 9, 972 P.2d 101 (1998).....	38
<i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972).....	13
<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510 (1997).....	12
<i>Citizens for a Safe Neighborhood v. City of Seattle</i> , 67 Wn. App. 436, 836 P.2d 235 (1992).....	13
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	27
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	21
<i>Dittman v. State of California</i> , 191 F.3d 1020 (9th Cir. 1999)	39
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	12, 16
<i>Haley v. Medical Disciplinary Bd.</i> , 117 Wn.2d 720, 818 P.2d 1062 (1991).....	36, 38, 39

<i>Heinmiller v. Dep't of Health,</i> 127 Wn.2d 595, 903 P.2d 433 (1995).....	45
<i>Hickethier v. Dep't of Licensing,</i> 159 Wn. App. 203, 244 P.3d 1010 (2011).....	31, 46, 47
<i>In re Disciplinary Proceeding Against Petersen,</i> 180 Wn.2d 768, 329 P.3d 853 (2014).....	15, 42, 43
<i>In re Disciplinary Proceeding Against Preszler,</i> 169 Wn.2d 1, 232 P.3d 1118 (2010).....	42
<i>In re McGrath,</i> 98 Wn.2d 337, 655 P.2d 232 (1982).....	37
<i>Maplewood Estate, Inc. v. Dep't of Labor & Indus.,</i> 104 Wn. App. 299, 17 P.3d 621 (2000).....	11
<i>Pasco Housing Auth. v. PERC,</i> 98 Wn. App. 809, 991 P.2d 1177 (2000).....	41
<i>Regan v. Dep't of Licensing,</i> 130 Wn. App. 39, 121 P.3d 371 (2005).....	46, 47
<i>Rios v. Dep't of Labor & Indus.,</i> 145 Wn.2d 483, 39 P.3d 961 (2002).....	46
<i>Safeco Ins. Co. v. Meyering,</i> 102 Wn.2d 385, 687 P.2d 195 (1984).....	13
<i>Shanlian v. Faulk,</i> 68 Wn. App. 320, 843 P.2d 535 (1992).....	42
<i>Smith v. Emp't Sec. Dep't,</i> 155 Wn. App. 24, 226 P.3d 263 (2010).....	11
<i>State v. Bencivenga,</i> 137 Wn.2d 703, 974 P.2d 832 (1999).....	30
<i>State v. Liden,</i> 138 Wn.2d 110, 156 P.3d 259 (2007).....	30

<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992)	12, 16, 30
<i>Stewart v. Dep't of Social & Health Svcs.</i> , 162 Wn. App. 266, 252 P.3d 920 (2011)	40
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993)	12, 15
<i>Tenino Aerie v. Grand Aerie</i> , 148 Wn.2d 224, 59 P.3d 655 (2002)	31
<i>United Nursing Homes, Inc. v. McNutt</i> , 35 Wn. App. 632, 669 P.2d 476 (1983)	15
<i>W. Ports Transp., Inc. v. Emp't Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002)	12, 13
<i>Wash. Fed'n of State Emps. v. Bd. of Trs. of Cent. Wash. Univ.</i> , 93 Wn.2d 60, 605 P.2d 1252 (1980)	41
<i>Wash. State Dep't of Health Unlicensed Practice Program v. Yow</i> , 147 Wn. App. 807, 199 P.3d 417 (2008)	45
<i>Waste Mgmt. of Seattle, Inc. v. Utilities and Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994)	27
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996)	11, 12, 16

Statutes

RCW 18.165	10, 13, 26, 40
RCW 18.165.010(11)	20, 26, 28
RCW 18.165.010(12)	20, 26
RCW 18.165.011(12)	23
RCW 18.165.150(1)	20

RCW 18.165.150(2).....	20
RCW 18.165.160	26
RCW 18.165.160(11).....	9, 14, 25, 26, 28, 30, 45
RCW 18.165.220	41, 48
RCW 18.185.200	11
RCW 18.230	40
RCW 18.235	10, 13, 26
RCW 18.235.005	38, 42
RCW 18.235.020(2).....	26
RCW 18.235.020(2)(a)(xii)	26, 42
RCW 18.235.110	41, 48
RCW 18.235.110(1).....	41
RCW 18.235.130	31
RCW 18.235.130(1).....	10, 14, 25, 31, 35, 38
RCW 18.235.130(10).....	10, 14, 25, 31
RCW 18.235.130(4).....	10, 14, 25; 31, 34, 35
RCW 18.235.130(8).....	10, 14, 25, 26, 31
RCW 34.05.464(4).....	30
RCW 34.05.510	11
RCW 34.05.558	11, 16
RCW 34.05.570(1)(a)	11

RCW 34.05.570(3).....	11
RCW 34.05.570(3)(e)	16
RCW 34.05.570(3)(i)	13
RCW 43.24.020	13, 42

Other Authorities

Webster’s Third New International Dictionary of the English Language (2002).....	32, 36
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I. INTRODUCTION

Lisa Cummings, a licensed private investigator, used the skills and methods of the private investigator profession to conceal a tracking device on Christine Peddle's vehicle despite the existence of multiple domestic violence protection orders prohibiting Cummings's client, Shaun Duncan, from contacting Peddle. Based on this conduct, and after an administrative hearing, the Director of the Department of Licensing revoked Cummings's private investigator agency and private investigator agent licenses for eight years. The Director's order is correct and supported by substantial evidence, and Cummings fails to establish there is any legal error. Further, Cummings's contention that the Director failed to consider relevant facts or properly exercise her discretion is groundless, and hence her contention that the eight-year revocation is arbitrary and capricious necessarily fails. The Court should affirm the Director's order.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Does substantial evidence support the Director's findings that Cummings had an investigator-client relationship with Duncan and assisted him in locating or tracing Peddle, when the investigative services Cummings offered to clients included domestic tracking to locate family members or loved ones and the services she provided to Duncan included running background checks and monitoring Peddle's movement using a GPS device?
2. Does substantial evidence support the Director's findings that Cummings knew about the protection orders between

Peddle and Duncan when she placed the tracking device on Peddle's vehicle and/or accessed information from the device, when even before placing the device Cummings knew about Duncan's criminal domestic violence charges and attended at least portions of court hearings where protection orders were discussed, and even after Cummings's admitted knowledge of the protection orders she continued to access the GPS tracking information without notifying the authorities or Peddle or her representatives?

3. Assuming the above findings are supported by substantial evidence, did the Director properly conclude Cummings committed unprofessional conduct when Cummings assisted Duncan in locating, tracing, or contacting Peddle despite the court order prohibiting Duncan from harassing or contacting Peddle?
4. In addition and/or alternatively, did the Director properly conclude Cummings committed unprofessional conduct through her incompetence, negligence, or malpractice by not removing the tracking device or notifying Peddle or her representatives of its existence even after Cummings admitted knowledge of the protection orders between Peddle and Duncan?
5. In addition and/or alternatively, did the Director properly conclude Cummings committed unprofessional conduct because she committed acts of moral turpitude or dishonesty by her conduct that endangered safety and showed disrespect for judicial authority?
6. Did the Director properly consider the facts and circumstances of this case and act within her discretion in revoking Cummings's private investigator licenses for eight years?

III. COUNTERSTATEMENT OF THE CASE

Appellant Lisa Cummings became a licensed private investigator in May 2011. Certified Appeal Board Record (CABR) 565 (Finding of Fact (FF) 4.3); Transcript 459.¹ As a private investigator, Cummings conducted surveillance and criminal background checks, and had a particular interest in cases involving missing children. CABR 565 (FF 4.4), 573 (FF 4.33.1), 575 (FF 4.40), 576 (FF 4.41), 1160-62; Transcript 353, 355-56, 379.

Cummings initially worked in partnership with private investigator Dyan Wiseman, including work on a missing child case. CABR 565 (FF 4.1), 566 (FF 4.5), 1145; Transcript 394. In September 2011, Cummings's partnership with Wiseman ended, and Cummings obtained a private investigator agency principal license for MOD Investigations in November 2011. CABR 566 (FF 4.6, 4.7); 367; Transcript 459.

The Department received a complaint against Cummings from Christine Peddle-Cornish (Peddle). CABR 576 (FF 4.42), 1052-56; Transcript 110-111, 265. The gravamen of the complaint was that in September 2011, Peddle's private investigator, Christian Martin, discovered a GPS tracking device on the vehicle Peddle drove. CABR 575

¹ The transcript of the hearing before the Office of Administrative Hearings is part of the certified agency record, but was filed separately. It is therefore paginated separately from the remainder of the record.

(FF 4.36), 1053-1056, 1069; Transcript 110-111, 136-138, 266. The Kirkland Police Department investigated and concluded the GPS device belonged to Cummings. CABR 1135-36. Peddle realized she knew Cummings because she had seen Cummings with Shaun Duncan at court hearings. CABR 576 (FF 4.42), 1053-1056, 1163-64; Transcript 117, 120-122, 131, 214.

Duncan and Peddle had been in a domestic relationship and had a child together. CABR 566 (FF 4.8-4.10); Transcript 112-113. The end of their relationship was contentious and involved custody issues, allegations of domestic violence, and litigation. CABR 566 (FF 4.10); Transcript 113. After Duncan's arrest for assaulting her, Peddle obtained no-contact/domestic-violence orders against Duncan on the following dates: May 2, 2011 (Kirkland Municipal Court); May 5, 2011 (King County District Court); May 11, 2011 (Fountain Hills Municipal Court, Arizona); May 19, 2011 (King County Superior Court); June 10, 2011 (King County Superior Court); June 24, 2011 (King County Superior Court). CABR 567-569 (FF 4.20-4.28), 1057-90; Transcript 113-116, 275-83.

The Municipal Court and Superior Court protection orders prohibited Duncan from “[c]oming near and from having any contact whatsoever, in person *or though others*, by phone, mail or any means, *directly or indirectly*” with Peddle and/or her son. CABR 568 (FF 4.20),

1057, 1079, 1081, 1086 (emphasis added). The District Court protection order restrained Duncan from “harassing, following, keeping under physical or *electronic surveillance*, cyberstalking . . . and using telephonic, audiovisual, or *other electronic means to monitor the actions, locations*, or wire or electronic communications” of Peddle and her son. CABR 568 (FF 4.21), 1068 (emphasis added).

Cummings first met Duncan through a mutual friend in May of 2011 when she was already working with Wiseman and had obtained her private investigator license. CABR 565 (FF 4.2), 566 (FF 4.11), 1138, 1148; Transcript 321, 360. At first, Cummings acted as clarity/life-coach to Duncan for which she did not receive payment. CABR 566 (FF 4.12), 1156; Transcript 364, 389, 551. The life coaching involved a long interview process and meeting with Duncan once or twice a week. CABR 566 (FF 4.12), 567 (FF 4.13), 1148; Transcript 360, 374-75, 556.

While Duncan was initially Cummings’s life-coach client, she also established a private investigator-client relationship with him after learning of his personal situation, his custody dispute with Peddle, and his fear that his child would be removed from the state. CABR 572-575 (FF 4.33), Transcript 339, 361, 561. Cummings’s activities included running background checks and researching Peddle’s court-related history, past relationships with at least two other men, and the custody history of

Peddle's older daughter.² CABR 571 (FF 4.29.10), 573 (FF 4.33.3), 574 (FF 4.33.13), 576 (4.41), 1136, 1138, 1146, 1160-61; Transcript 361-62, 364-65, 379, 428, 436, 450, 463.

Cummings told Duncan in the first few weeks she knew him that she had her private investigator license. CABR 572 (FF 4.33), 1148 (Cummings's letter to Department). Cummings testified at hearing that she told Duncan she was a private investigator at their third or fourth life-coaching session. Transcript 360, 390. Duncan also knew Cummings worked with missing children. CABR 570 (FF 4.29.7), 1148; Transcript 561. Further, Cummings knew (1) Duncan had pending court proceedings involving Peddle's domestic violence allegations and child custody, (2) Peddle had allegedly attempted to leave the state with the child, and (3) Duncan had been arrested as a result of Peddle's domestic violence allegations. CABR 567 (FF 4.13-4.18), 569-72 (FF 4.29), 574 (FF 4.33.12), 1148-49; Transcript 391, 401, 427-28, 571, 574-77.

Cummings attended four hearings involving Duncan's domestic situation with Peddle and/or his custody issues. CABR 567 (FF 4.19), 569-

² While Cummings asserts at App. Br. at 14 that the Department argued Cummings was a "volunteer" and not acting in a professional capacity, this was not the Department's assertion. Discussion of whether Cummings was a "volunteer" arose only during the administrative proceeding as a response to Cummings's motion for dismissal on the basis she was shielded from the Department's disciplinary action because of alleged statutory immunity under the child abuse reporting statute. CABR 197-98. Discussion of whether Cummings was a volunteer is a red herring.

72 (FF 4.29), 574 (FF 4.33.9), 1119, 1136, 1138, 1148; Transcript 272-78, 281-84, 288, 290-92, 372-73, 397-400, 564, 572. Protection orders were either discussed or issued at these hearings. CABR 567 (FF 4.19), 569-571 (FF 4.29), 1148; Transcript 273, 277, 282-83, 564. In a letter to the Department, Cummings admitted to attending four court hearings. CABR 1148-49; *see also* Transcript 365, 372-74. Her letter included details of what occurred at those hearings such as Peddle avoiding service, Duncan's attorney asking for a continuance, and a revision to Duncan's overnight visits with his son. CABR 1148-49. Cummings later testified that while she was at the court house for some hearings, she was not present inside the court room. Transcript 367-74, 397-400. In any event, the Director found Cummings was aware of the protection orders through her presence at hearings, including one on June 24, 2011, and/or multiple conversations with Duncan around the time of the hearings. CABR 569-572 (FF 4.29).

In late June 2011, Cummings concealed, for surveillance purposes, a GPS device that she owned onto the vehicle over which Peddle had sole possession. CABR 570 (FF 4.29.6), 572 (FF 4.30), 1135, 1138, 1149, 1154; Transcript 438. Cummings placed the device so that she could track Peddle's movements and location. CABR 572 (FF 4.30), 1136, 1138, 1150-51, 1157-58; Transcript 296, 362, 378-79. Cummings accessed information from the device a minimum of one to three times each week.

CABR 572 (FF 4.30), 573 (FF 4.33.5), 1137, 1138, 1150; Transcript 296, 362.

The GPS device remained on the vehicle Peddle drove from June 2011 through September 2011, when Peddle's investigator discovered it and it was removed by the Kirkland police. CABR 573 (FF 4.33.5), 575 (FF 4.34, 4.38), 847-885, 1152. During that time period, Cummings did not notify law enforcement, Peddle, or Peddle's representative, that she had installed the GPS device. CR 575 (FF 4.35), 1149; Transcript 376-77. Beginning in late July 2011, Cummings accessed information from the device in an effort to determine its location so she could remove it, but she was unable to do so because the vehicle did not move to a location she could access. CABR 572 (FF 4.30), 575 (FF 4.34), 847-885; 1149; Transcript 375-76, 380-81, 404-05.

Cummings claims she did not know about the protection orders until late July 2011, when Duncan informed her of them, and that it was only then she realized she needed to remove the GPS device.³ CABR 571 (FF 4.29.12), 1149; Transcript 375, 403. The Director did not find this explanation credible based on Cummings's knowledge of the domestic

³ Cummings in her brief cites to testimony indicating she attempted to remove the GPS device in April 2011. App. Br. at 23 (citing Transcript 404-05). This is inconsistent with her other testimony and statements to the Department that she attempted to remove the device after late July 2011. CABR 1149; Transcript 375.

violence allegations and hearing where protection orders were discussed.⁴
CABR 569-572 (FF 4.29).

Based on Peddle's complaint, the Private Investigator Program within the Business and Professions Division of the Department of Licensing investigated Cummings's conduct and subsequently issued a statement of charges against her. CABR 576 (FF 4.45), 1044-47; Transcript 264-65. Investigator James Clarkson conducted the investigation. CABR 576 (FF 4.43); Transcript 264.

Cummings requested a hearing to contest the charges. CABR at 1048-51. After a three day hearing before the Office of Administrative Hearings (OAH), the Administrative Law Judge (ALJ) issued an initial order. CABR 562-587. The ALJ determined Cummings had engaged in unprofessional conduct by "placing a concealed GPS tracking device on a vehicle operated by Christine Peddle, accessing the GPS device, and relating part or all of the information to Shaun Duncan, known to be the subject of a no-contact domestic violence protection order regarding Peddle." CABR 562-63 (Order Summary 2.1). The ALJ concluded Cummings engaged in unprofessional conduct under RCW 18.165.160(11) (assisting a client to locate, trace or contact a person

⁴ Even if Cummings's claim that she did not know about the protection order until late July 2011 were true, she continued to monitor the GPS device even after she knew of the protection orders, allegedly to determine the vehicle's location so she could remove the device. Transcript 375, 380-81.

protected by a court order), RCW 18.235.130(1) (commission of any act involving moral turpitude), RCW 18.235.130(4) (incompetence, negligence, or malpractice that results in harm or damage to another or creates unreasonable risk of harm), RCW 18.235.130(8) (violating any provision of Chapter 18.235 or Chapter 18.165), and RCW 18.235.130(10) (practice or operation of a business or profession outside the scope of practice or operation).

In reaching her conclusion, the ALJ explicitly found the Department's evidence more credible than Cummings's on the issues of whether Cummings knew about the protection orders, CABR 569-72 (FF 4.29), and whether there was a private investigator-client relationship between Cummings and Duncan. CABR 572-73 (FF 4.33). Cummings petitioned the Director of the Department of Licensing for review of the ALJ's decision. The Director in a final order adopted the ALJ's findings and conclusions and affirmed the ALJ's determination that Cummings had engaged in unprofessional conduct and her licenses should be revoked for eight years. CABR 588-610, 755-785.

Cummings petitioned the King County Superior Court for judicial review of the Director's final order. The superior court affirmed the Director's order and this appeal followed. Cummings sought and was granted a stay of the Director's order during the pendency of this appeal.

IV. STANDARD OF REVIEW

Having exhausted administrative remedies, Cummings now seeks judicial review of the Director's final order. Washington's Administrative Procedure Act (APA) governs judicial review of such decisions. RCW 18.185.200; RCW 34.05.510. The reviewing court must consider the Director's decision to be *prima facie* correct, and "the burden of demonstrating the invalidity of [the decision] is on the party asserting invalidity." RCW 34.05.570(1)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

Under the APA, a reviewing court may reverse if, among other things, the Director's decision (1) is not based on substantial evidence, (2) is based on an error of law, or (3) is arbitrary or capricious. RCW 34.05.570(3).

The standard of review is of particular importance in this case because Cummings incorrectly asks this Court to reweigh the evidence rather than applying the correct standard of whether the Director's findings are supported by substantial evidence. *See* RCW 34.05.558; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *Maplewood Estate, Inc. v. Dep't of Labor & Indus.*, 104 Wn.

App. 299, 304, 17 P.3d 621 (2000). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). Under this standard, it does not matter if the court would make different findings as long as “any fair-minded person” could have ruled the way the agency ruled. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

The reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411. A court may not substitute its judgment of the facts for that of the agency. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). It is the trier of fact that resolves conflicting testimony, evaluates the credibility of witnesses, and weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). A court sitting in its appellate capacity may not re-weigh evidence, witness credibility, or demeanor. *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002); *William Dickson Co.*, 81 Wn. App. at 411.

Questions of law are reviewed under the error of law standard and are subject to de novo review. While review is de novo, courts have consistently accorded a “heightened degree of deference” to an agency’s interpretation of the law it administers in view of the agency’s expertise. *W. Ports Transp.*, 110 Wn. App. at 449-50; *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

Finally, the question of whether or not the Director’s decision is arbitrary or capricious under RCW 34.05.570(3)(i) calls for the court to determine whether the Director’s decision is a “willful and unreasonable action, without consideration and a disregard of facts or circumstances.” *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 439, 836 P.2d 235 (1992) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972)). Even if the Court believes that the Director’s decision is erroneous, the decision is not arbitrary or capricious if it is reached after due consideration of the facts; or, more simply, where there is room for two opinions, the agency’s decision must prevail. *Id.*

V. ARGUMENT

Private investigators and investigative agencies are licensed by the Department of Licensing. *See* RCW 43.24.020. The requirements for licensing and the standards for their conduct are set forth in Chapter 18.165 (Private Investigators) and Chapter 18.235 (Uniform Regulation of

Business and Profession Act (URBP)) RCW. Cummings used the skills and methods of her licensed profession to locate and trace Peddle, a protected person, through the use of a hidden GPS device. Cummings did this despite knowing that protection orders issued by several courts specifically prohibited Duncan from monitoring Peddle's movements and despite a statutory provision specifically prohibiting assisting a client with monitoring the movements of a person in violation of a no-contact order.

The Director's findings that Duncan was Cummings's client, Cummings assisted Duncan, and Cummings knew about the protection orders are not properly challenged. Even if they are properly challenged, the findings are supported by substantial evidence. Consequently, the Director properly concluded Cummings's conduct was unprofessional conduct as set forth in RCW 18.165.160(11), RCW 18.235.130(1), (4), (8), and/or (10), and properly revoked Cummings's licenses for eight years. Any one of the statutory violations justifies the license revocations. The length of revocation is not arbitrary and capricious because it considers the facts and circumstances of this case and is based on case-by-case discussion of unprofessional conduct using a team of Department enforcement employees, thereby striving to ensure proportionality of sanction.

A. Because Cummings Does Not Properly Assign Error to Any Findings, They are Verities

Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407. The burden is on the party challenging the findings of fact to properly assign error and to establish that specific challenged findings are not supported by the record. *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 780, 329 P.3d 853 (2014); *see also* RAP 10.3(g) and (h); *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 634, 669 P.2d 476 (1983) (“Although a substantial part of its brief and oral presentation was devoted to arguing the facts, [the party] has not properly assigned error to any of the findings of fact. Therefore, they are verities on appeal.”).

Here, Cummings generally asserts that the findings that Duncan was Cummings’s client, Cummings assisted Duncan, and that Cummings knew about the protection orders, are not supported by substantial evidence. App. Br. at 7-16. But Cummings failed to specifically assign error to any of the Director’s findings of fact. The Court should treat them as verities.

B. Even if Properly Challenged, the Director’s Findings of Fact Are Supported by Substantial Evidence

If the Court deems the Director’s findings properly challenged, the Court should uphold them because they are supported by substantial

evidence. It is not for this court to reweigh the evidence. *Walton*, 64 Wn. App. at 415. Rather, the Court reviews the agency record in the light most favorable to the Department to determine whether the evidence was sufficient to persuade the trier of fact of the truth of the finding. RCW 34.05.558, RCW 34.05.570(3)(e); *William Dickson Co.*, 81 Wn. App. at 411. Even if the evidence here was conflicting and could lead to other reasonable interpretations, the court must uphold the Director's findings. *Fred Hutchinson Cancer Research Ctr.*, 107 Wn.2d at 713. Here, the Director properly considered all the evidence, found the Department's evidence to be both credible and persuasive, and made findings based on that evidence. Cummings's assertion that the Director's findings are not supported by substantial evidence is no more than a claim that each piece of the evidence for these facts could be interpreted differently and does not necessarily prove unprofessional conduct.⁵ This Court should reject Cummings's invitation to sit as the trier of fact and do anything other than confirm that the factual findings are supported by substantial evidence and there are no errors of law.

⁵ Given the standard of review for this appeal, Cummings jumps to a non-sequitur in stating: "[The] allegations are not true. Accordingly, Respondent was not able to support those elements with substantial evidence." App. Br. at 1. Cummings confuses her view of the truthfulness of the Department's allegations with whether substantial evidence supports the Director's findings.

1. Substantial evidence supports the findings that Cummings and Duncan had an investigator-client relationship and Cummings was assisting Duncan in locating or tracing Peddle.

Substantial evidence supports the findings that Cummings and Duncan had an investigator-client relationship and Cummings was assisting Duncan to locate, trace, or contact Peddle. CABR 566-576 (FF 4.11-4.19), 572-575 (FF 4.33) (credibility finding).

During the time period after Duncan had been arrested for a domestic violence incident, was the subject of no-contact orders for Peddle and his son, was homeless and staying at a friend's house, and was engaged in contentious custody litigation, Cummings was meeting with Duncan up to twice a week. CABR 1148; Transcript 360-61, 375, 556. Both Cummings and Duncan testified that Duncan shared information with Cummings regarding his relationship with Peddle and their child and that Cummings knew Duncan had been arrested for domestic violence and put in jail. Transcript 391, 401, 426-28, 571, 574-77. Cummings also knew enough about Duncan's relationship with Peddle that she was concerned about Peddle leaving the state with their child. CABR 1138, 1150. Cummings's knowledge of Duncan's relationship with Peddle and Cummings's subsequent conduct in placing the GPS device, the purpose of which was to track Peddle's movement, support the findings that

Cummings was acting as Duncan's private investigator and was assisting him in locating Peddle.

While certain elements of the extent of Cummings's and Duncan's relationship is potentially consistent with both a life-coach client relationship and an investigator-client relationship, the actions performed by Cummings show the existence of an investigator-client relationship. Cummings's services performed for clients as a private investigator included domestic tracking to locate runaways, family members, and lost loved ones—exactly the type of conduct Cummings performed for Duncan by installing the GPS device on Peddle's vehicle. CABR 573 (FF 4.33.1-4.33.4), 1136. In her own statement to the Kirkland Police Department, Cummings stated the services she provided to Duncan including running background checks and monitoring Peddle's movement through the use of a GPS device. CABR 1138. In her correspondence to the Department, she demonstrated her in-depth knowledge of Peddle's identity, affiliations, and transactions. CABR 1146-47.

The Director determined Cummings's claim that she was acting as Duncan's life coach was not credible given that it is private investigators, not life coaches, that use GPS devices and engage in surveillance. CABR 573 (FF 4.33.4) (specifically labeled a credibility finding); Transcript 361-62, 364-65, 450, 463. This distinction between a life coach and a private

investigator was recognized by Department of Licensing Assistant Administrator Mary Haglund in her testimony:

I'm not really familiar with what a life coach does, but the Department looked at this as the actions that she was taking, the behavior of running background checks, and I mean using a GPS and attaching a GPS to the car, these are all—these are things that a private investigator does.

Transcript at 463; *see also* Transcript 339 (Clarkson testified “there are issues related to the installation of the GPS unit, which is something that would to me clearly suggest the type of activity according the definition of what a private investigator would do for somebody if they were hired to locate or trace people.”). Thus, the Director’s determination that Cummings was acting as a private investigator for Duncan is supported by substantial evidence.

The Director also determined that Cummings’s claim that she was not assisting Duncan by placing the GPS device and performing other investigative services was not credible. CABR 572 (FF 4.33) (specifically labeled credibility finding), 575 (unnumbered paragraph) (specifically labeled credibility finding). Numerous facts in the record support these findings. Cummings had no other connection to Peddle or her son, or any reason to track their movements, other than Cumming’s relationship with Duncan. Cummings knew about Duncan’s custody dispute with Peddle and his fear the child would be removed from Washington because

Duncan provided that information to her. CABR 1138, 1150; Transcript 560-61, 571, 575. Based on that information and allegedly in an attempt to prevent exactly what Duncan feared, Peddle leaving the state with his child, Cummings placed a GPS on Peddle's vehicle. Cummings's self-serving assertion that she acted because of her general desire to protect vulnerable children, App. Br. at 4, is not credible (as the Director found) and does not negate the other evidence demonstrating Cummings was acting on Duncan's behalf.

Cummings's assertion that "It is self-evident that placing a GPS device on a car or otherwise tracking a person does not make someone a private investigator" and her example of a newspaper reporter, App. Br. at 13-14, are unpersuasive. If a person performs private investigation activities on behalf of a client, as did Cummings, then this does require licensure and following pertinent laws and rules. RCW 18.165.010(11), (12), RCW 18.165.150(1), (2).

Cummings disavowed having any client relationship with Duncan in part because he did not pay her. App. Br. at 4, 10-11. However, the testimony and evidence indicate lack of payment does not mean a client relationship did not exist. CABR 574 (FF 4.33.11). Cummings does not cite any legal provision that requires payment for services in order for a

client relationship to exist.⁶ There is no such requirement. While the Department's investigator testified that Cummings and Duncan may not have had a "conventional" private investigator-client relationship since there was no contract or receipts, Transcript at 302, this is not dispositive of whether that relationship existed. As Cummings acknowledged in her testimony, Duncan was her "clarity" or life-coach client, but Duncan did not pay her. Transcript 397. The same is true of Cummings having an investigator-client relationship with Duncan. Just because Duncan did not pay her does not mean she was not assisting him by providing private investigator services—primarily, tracking Peddle. Cummings also acknowledged in her February 15, 2012, letter to Clarkson that she had worked as a private investigator previously on a pro bono basis. CABR 1145. Consequently, the Director correctly found the lack of payment not dispositive of whether a private-investigator-client relationship existed. CABR 574 (FF 4.33.11).

Cummings asserts that the Kirkland Police Department found she did not place the GPS device on the car Peddle was driving at Duncan's behest. App. Br. at 5. The police report is not persuasive and irrelevant. It is the Department of Licensing, not the Kirkland Police Department, that

⁶ Courts may generally assume that where no authority is cited, counsel found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

is charged with the regulation and discipline of the private investigator profession. The elements and standards of proof differ in criminal and professional discipline proceedings. And, the Director's decision is presumed prima facie correct, while any determinations by the Kirkland Police Department are irrelevant.

Further, Cummings overstates the conclusions of the police report. The exhibit Cummings cites at App. Br. at 5 is an excerpt from the Duncan-Peddle parenting plan, not the police report itself. CABR 374. The police report itself states that a Kirkland Police Detective administered a Computer Voice Stress Analysis test and he "could not say that [Cummings] was being dishonest to the questions of particular interest regarding Duncan's involvement, and the passing of information from the GPS to Duncan or his attorney." CABR 1137. It is not clear what questions were asked during the stress analysis test; this matter is tried upon the administrative record. The police report made no conclusive statement regarding whether Cummings was or was not acting on Duncan's behalf. To the contrary, the report states "Cummings was informed of the potential for civil liability and revocation of her PI license based on her actions in this case knowing that there was an active order in the system between Duncan and Peddle." CABR 1137.

It was simply not credible that Cummings was acting as anything other than a private investigator and acting on Duncan's behalf when she engaged in the conduct described above.⁷ See RCW 18.165.011(12) (list of activities a private investigator performs). As set forth above, the Director's findings on this issue are supported by substantial evidence.

2. Substantial evidence supports the findings that Cummings knew about the protection orders between Peddle and Duncan.

The Director's findings regarding Cummings's knowledge of the protection orders are supported by substantial evidence. CABR 567-72 (FF 4.20-4.32). The Director weighed the credibility of the parties' testimony and found the Department's evidence more persuasive. Specifically, the Director found, based on Duncan's testimony, that he told Cummings about the domestic violence issue, and that he and Cummings met at the court house when he had a domestic violence hearing. CABR 560 (FF 4.29.2, FF 4.29.3) (credibility finding), Transcript 564, 572, 575-77.

Cummings admitted to the Department's investigator and the Kirkland Police Department attending at least a portion of multiple court

⁷ Cummings's assertion at App. Br. at 13 n.2 that Peddle's private investigator interrogated Cummings and arrived at the conclusion Cummings acted on her own in placing the GPS device is irrelevant because the court reviews whether the Director's findings are supported by substantial evidence in the record of proceedings. A witness's opinion of facts, especially from out of court questioning, is immaterial to this Court's inquiry.

hearings involving Peddle and Duncan, including the Kirkland Municipal Court matter, which was a criminal matter involving Duncan's domestic violence charges. CABR 1136, 1148; Transcript 272-73, 281-84, 288, 290-92, 372, 398, 400, 572. Cummings admitted to the Kirkland Police Department that she went to two court hearings involving Peddle and Duncan. CABR 1136; Transcript 365. In later correspondence to the Department and conversations with a Department investigator, Clarkson, Cummings admitted going to not just two, but four court hearings involving Peddle and Duncan. CABR 1148; Transcript 271-292. Clarkson's testimony and Cummings's written statements established that these hearings are the court proceedings at which the domestic violence protection orders were clearly an issue. Peddle also testified that she saw Cummings at court hearings at which the protection orders were at issue or discussed. Transcript 128.

Based on the above evidence and the demeanor and motivation of the witnesses, the Director found it was not credible that Cummings had a close relationship with Duncan, knew about his arrest, his being jailed for domestic violence, and his child custody dispute, and attended court hearings, yet did not know about the existence of any of the six protection orders issued by four different courts during a two month period. CABR 569-72 (FF 4.29). The protection orders were necessarily related to facts

about Duncan that Cummings freely admitted to knowing. The Director's findings on this issue are supported by substantial evidence.⁸

C. The Director Properly Concluded Cummings Committed Unprofessional Conduct

Based on the factual findings, which are supported by substantial evidence, the Director concluded Cummings engaged in unprofessional conduct under RCW 18.165.160(11), RCW 18.235.130(1), (4), (8), and/or (10).⁹ The Director correctly applied the law to the factual findings and Cummings fails to demonstrate any of the Director's conclusions are erroneous.

1. Cummings violated RCW 18.165.160(11) and RCW 18.235.130(8) by assisting Duncan in locating, tracing, or contacting Peddle despite the court order prohibiting Duncan from harassing or contacting Peddle.

RCW 18.165.160(11) defines unprofessional conduct as follows:

⁸ Cummings's assertion at App. Br. at 18 about how a different superior court judge found Peddle to not be credible in separate proceedings is not on-point here. The other proceedings did not involve whether Cummings engaged in unprofessional conduct nor whether and when Cummings knew about the protection orders, nor whether Cummings was present for court proceedings in which protection orders involving Peddle and Duncan were discussed. It is the Director's findings based on the record in this case that are on review. The Director's findings are supported by substantial evidence.

⁹ The Department in its administrative post-hearing brief and reply to the petition for Director's review clarified that it was withdrawing the charge under RCW 18.235.130(10) which provides "practice or operation of a business beyond the scope of practice or operation as defined by law or rule" is unprofessional conduct. However, the ALJ and Director still concluded Cummings violated this provision. CABR 549-61, 585 (CL 5.16), 611-30. This is permitted because the ultimate agency decision is vested in the Director and is based on the record presented. As discussed herein, the evidence in the record supports each violation found by the Director, including under RCW 18.235.130(10).

In any event, Cummings did not raise in superior court or now a challenge to the Director's conclusion under RCW 18.235.130(10) based on the Department's position taken in the administrative proceedings.

Assisting a client to locate, trace, or contact a person when the investigator^{10]} knows that the client is prohibited by any court order from harassing or contacting the person whom the investigator is being asked to locate, trace, or contact, as it pertains to domestic violence, stalking, or minor children.

Violation of RCW 18.165.160 is also a violation of RCW 18.235.130(8), as that provision describes a violation of any provision of the chapter (i.e., Chapter 18.235 RCW) or the chapters specified in RCW 18.235.020(2)—thereby including Chapter 18.165 RCW, concerning private investigators, *see* RCW 18.235.020(2)(a)(xii)—as unprofessional conduct.

To be unprofessional conduct under RCW 18.165.160(11), the Department must establish (1) the private investigator is asked to locate, trace, or contact a person (i.e. a private investigator-client relationship exists), (2) that person is protected by a protection order, and (3) the

¹⁰ A private investigator is defined in RCW 18.165.010(11) as a “person who is licensed under this chapter and is employed by a private investigator agency for the purpose of investigation, escort or body guard services, or property loss prevention activities.” A “private investigator agency” is defined in RCW 18.165.010(12) as follows:

a person or entity...engaged in the business of detecting, discovering, or revealing one or more of the following:

- (a) Crime, criminals, or related information;
- (b) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person or thing;
- (c) The location, disposition, or recovery of lost or stolen property;
- (d) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or to property;
- (e) Evidence to be used before a court, board, officer, or investigative committee;
- (f) Detecting the presence of electronic eavesdropping devices; or
- (g) The truth or falsity of a statement or representation.

private investigator knows about the protection order but nonetheless assists the client to locate, trace, or contact the protected person. The statute is clear that to be unprofessional conduct, Cummings must have only “assisted” Duncan in locating, tracing, or contacting Peddle or their son; it does not matter whether Duncan actually made contact with Peddle or their son in violation of the protection order. *See Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (it is a well settled rule of statutory construction that a court must give effect to all the words in a statute and to render no portion of a statute meaningless or superfluous). This statute must be interpreted consistent with its purpose to protect the public, especially persons protected by court orders. *See Blueshield v. State Office of Ins. Comm’r*, 131 Wn. App. 639, 648, 128 P.3d 640 (2006) (courts favor statutory interpretation that is consistent with the spirit or purpose of the enactment rather than literal reading that renders the statute ineffective). To the extent this statute may be ambiguous, the Department’s interpretation is entitled to deference. *See Waste Mgmt. of Seattle, Inc. v. Utilities and Transp. Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994) (“Where an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining legislative intent.”).

Cummings does not dispute that she placed a GPS tracking device on Peddle's vehicle in late June 2011. And, the Department's evidence presented at the hearing established Peddle had protection orders prohibiting Duncan from contacting her. CABR 1057-90. As set forth above, substantial evidence supports the Director's findings that Duncan was Cummings's client, Cummings assisted Duncan, and Cummings knew about the protection orders. Despite those facts, Cummings placed a GPS device on Peddle's vehicle, thereby assisting Duncan in locating, tracing, or contacting Peddle. CABR at 569-71 (FF 4.29). The conclusion of unprofessional conduct under RCW 18.165.160(11) should be affirmed. CABR 578-79 (Conclusion of Law (CL) 5.4-5.6).

a. Whether Cummings shared the GPS tracking information with Duncan is not necessary to support violation of RCW 18.165.160(11).

As Haglund testified, the terms "private investigator" and "private investigator agency" include someone who is engaged in the business of detecting, discovering, or revealing the identity, habits, conduct, activity, movement, or whereabouts of any person. Transcript 485-89; *see also* RCW 18.165.010(11), (12). Despite Cummings's assertions to the contrary, App. Br. at 11, it is not necessary to support a violation of RCW 18.165.160(11) that Cummings shared this tracking information with Duncan.

Cummings may not have shared the information with Duncan simply because the movements Cummings was looking for, Peddle leaving the state, had not happened. Under the plain language of the statute, just by placing the device, Cummings was assisting Duncan in locating Peddle since at any time Cummings could look up the vehicle's whereabouts and locate Peddle and/or her son.

In any event, however, the Director found Cummings did in fact communicate information to Duncan and these findings are supported by substantial evidence. CABR 572 (FF 4.33), 575 (unnumbered FF). Cummings had no other connection to Peddle or her son, or any reason to track their movements, other than Cummings's relationship with Duncan. Cummings knew about Duncan's custody dispute with Peddle and his fear the child would be removed from Washington because she communicated with Duncan one to two times per week. CABR 1138, 1150; Transcript 560-61, 571, 575. The Director properly found it more likely than not that Duncan and Cummings communicated about Peddle and that Cummings informed Duncan of her investigation.

b. Inferential evidence is sufficient to support the Director's conclusions, and the Director's credibility determinations must be given deference.

Cummings appears to argue that the Director cannot make reasonable inferences from the evidence or consider circumstantial evidence, even under the substantial evidence standard applicable to the findings here. App. Br. at 8-17. To the contrary, inference is an accepted and common method of adjudicative reasoning employed as a matter of necessity by every trier of fact, even in criminal cases with a heightened burden of proof. *See e.g. State v. Bencivenga*, 137 Wn.2d 703, 708-09, 974 P.2d 832 (1999). Similarly, circumstantial evidence is authorized in all judicial proceedings, even criminal cases, and is given the same weight as direct evidence. *State v. Liden*, 138 Wn.2d 110, 118-19, 156 P.3d 259 (2007).

Further, the Director's credibility determinations are appropriate and must be given due regard. It was for the Director to resolve conflicting testimony, evaluate witness credibility, and weigh the persuasiveness of the evidence. *Walton*, 64 Wn. App. at 415-16; *see also* RCW 34.05.464(4).

While the Director properly concluded that Cummings violated RCW 18.165.160(11) based on all the evidence presented, the Director

also properly concluded that Cummings violated multiple provisions in RCW 18.235.130. Any of these violations is sufficient to justify the Department's decision to revoke Cummings's licenses. The Court need not necessarily reach the additional findings of violation. However, the Director's conclusions concerning violations under RCW 18.235.130(1), (4), (8), and (10), discussed below, are without error.

2. Cummings's conduct was incompetence, negligence, or malpractice under RCW 18.235.130(4).

The Director properly concluded Cummings engaged in unprofessional conduct as set forth in RCW 18.235.130(4). CABR at 582 (CL 5.11-5.12). This provision defines unprofessional conduct as “[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another.” *See also Hickethier v. Dep't of Licensing*, 159 Wn. App. 203, 213, 244 P.3d 1010 (2011) (“Conduct that falls below a legal standard established for the protection of others against unreasonable risk amounts to negligence” that is subject to discipline under the URBP). Incompetence, negligence, and malpractice are not further defined in the URBP. In the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

A standard definition of “incompetent” is “inadequate to or unsuitable for a particular purpose...one incapable of doing properly what is required.” Webster’s Third New International Dictionary of the English Language 1144 (2002). A standard definition of “negligence” is “failure to exercise the care that a prudent person usually exercises.” *Id.* at 1513. A standard definition of “malpractice” is “a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury, loss or damage to the recipient of those service . . . or that affects the public interest adversely.” *Id.* at 1368.

Here, the Director concluded that Cummings’s poor judgment in failing to take steps to remove the GPS tracking device from Peddle’s vehicle, even after Cummings admitted awareness of the protection orders, fell below the standard of care expected and presented unreasonable risk of harm. The Director concluded: “Cummings’ installation of a GPS device and monitoring of Peddle’s whereabouts undermined the court system and protection orders that were put into place to protect victims of domestic violence. That Cummings’ continued surveillance and failure to take affirmative steps to remove the device when she was aware of the no-contact orders demonstrated poor judgment and incompetence.” CABR 582 (CL 5.12).

Cummings admitted in her testimony and in her February 15, 2012 letter to Clarkson that she knew about the protection orders in late July 2011. CABR 1149; Transcript 368, 375, 403. Yet, she took no action other than some unsuccessful attempts to remove the device. Transcript 375-77. Notably, to even know where the car was to remove the device, she accessed the GPS device records—and at this point in time, she admits she knew there was a protection order prohibiting such monitoring by Duncan, her client. Cummings did not tell anyone about what she had done or seek anyone’s assistance in remedying what she admitted in testimony and in her letter to Clarkson was a mistake. CABR 1147; Transcript 382, 420-21. As Haglund testified, her failure to do so was below the standard expected of a licensed private investigator in Washington. Transcript 466.

The harm or potential to harm from Cummings’s failure to remove the GPS tracking device stemmed from the fact that Cummings disregarded the protection provided Peddle and her son by valid court orders. Further, Cummings’s use of the GPS device became an issue in the court proceeding between Peddle and Duncan; Peddle testified it impacted the child relocation decision, CABR 142-44, and the superior court commissioner even specifically mentioned it in her ruling as it related to Duncan’s violation of the no-contact orders through his use of Cummings’s investigator services. CABR 1118-19. Cummings passing

along the results of her investigation, CABR 572 (FF 4.33), or at least having the capacity to do so, created the potential for harm to Peddle or her son.

The Director correctly found Cummings did know about the protection orders against Duncan when she placed the GPS tracking device on Peddle's vehicle. But, even if Cummings did not know about the orders when she concealed the GPS device, she should have known about the orders and her failure to inquire into was incompetence, negligence, or malpractice and therefore unprofessional conduct. This is alternative grounds for the Director's findings concerning violation of RCW 18.235.130(4).

Numerous facts in the record demonstrate that Cummings, at the very least, should have known about the no-contact orders. Cummings testified that she knew at least some details about the relationship between Peddle, Duncan, and their child. Transcript 361, 364-65, 428, 436. Duncan's testimony provided further evidence of what he told Cummings about his relationship with Peddle including that it involved domestic violence which had led to him being arrested and placed in jail. Transcript 561, 574-77. Cummings knew enough that she thought placing a GPS tracker was warranted. Transcript 296, 378-79. But, she never asked any follow up questions of Duncan before she placed the device despite having

attended multiple court hearings, Transcript 426-30, and despite no-contact orders being routine in domestic violence cases. She never checked with the court or police to determine if there were any protection orders before she placed the device. Transcript 426-30. As Haglund testified, Cummings's failure to do so was below the standard expected of a licensed private investigator in Washington. Transcript 466-48.

Cummings acted incompetently and negligently and committed malpractice by failing to perform the duties of her profession and not ascertaining the propriety of her actions despite attending court hearings, the subject of which were protection orders between Duncan and Peddle. The Director's conclusion of unprofessional conduct under RCW 18.235.130(4) should be affirmed.

3. Cummings's conduct demonstrated moral turpitude or dishonesty under RCW 18.235.130(1).

The Director properly concluded Cummings engaged in unprofessional conduct as set forth in RCW 18.235.130(1). CABR at 581 (CL 5.8-5.10). This provision defines unprofessional conduct as "the commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession or operation of the person's business, whether the act constitutes a crime or not." RCW 18.235.130(1).

While “turpitude” and “dishonesty” are undefined in the URPB, a standard definition of “turpitude” is “inherent baseness . . . depravity,” Webster’s Third New International Dictionary of the English Language 2469 (2002), and of “dishonesty” is “lack of honesty, probity, or integrity in principal; disposition to defraud, deceive, or betray.” *Id.* at 650; *see also* *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991) (court discerned meaning of term “moral turpitude” by relation to other provisions as well as by referring to the commonly understood definition within the medical community).

The Director concluded Cummings’s “continued surveillance and monitoring of Peddle’s location rose to the level of an act of moral turpitude . . . [because Cummings] conducted an investigation of Ms. Peddle, with knowledge of Mr. Duncan’s arrest on a criminal charge of domestic violence (against Ms. Peddle), and the on-going custody issues.” CABR 581 (CL 5.10). The Director further concluded that as a licensed private investigator Cummings “knew or should have known that she was prohibited from locating or tracing Ms. Peddle because Ms. Peddle had obtained a number of no-contact orders pertaining to domestic violence and Mr. Duncan. Nevertheless, [Cummings] persisted in tracking, monitoring and locating Ms. Peddle’s whereabouts.” CABR

581 (CL 5.10). As such, Cummings's actions evidence disrespect for judicial authority.

As Haglund testified, private investigators are conferred a license by the state and they must therefore conduct themselves with integrity and exhibit good judgment in their actions in order for the public to have confidence in the profession. Transcript at 465. Integrity and good judgment entails refraining from actions that are contrary to society's commonly accepted notions of good morals, honesty, and justice. *See In re McGrath*, 98 Wn.2d 337, 655 P.2d 232 (1982) (attorney discipline case in which the court applied a standard of "moral turpitude" that looked at whether the conduct in question violates commonly accepted standards of good morals, honesty, and justice).

Cummings is incorrect that a statutory violation amounting to moral turpitude is limited to egregious facts like a sex offense.¹¹ App. Br. at 20. For example, *McGrath*, an attorney discipline case, did not involve a sex offense but rather a conviction for assault, but the attorney's conduct was still considered moral turpitude under the Rules of Professional Conduct. 98 Wn.2d at 342-43. And in *Brown v. State Dep't of Health, Dental Disciplinary Bd.* the court upheld the revocation of a dentist's

¹¹ While Cummings cites *Brown v. State Dep't of Health, Dental Disciplinary Bd.*, 110 Wn. App. 778, 42 P.3d 976 (2002), in support of this proposition, this case did not involve any allegation of moral turpitude as a basis for professional discipline.

license based, in part, on his moral turpitude in carrying out fraudulent billing schemes at his dental practice. 94 Wn. App. 9, 19, 972 P.2d 101 (1998).

In any event, RCW 18.235.130(1) should be interpreted in light of the purposes of the URBP of protecting the public from unsafe professional practices. The purposes of the URBPA include assuring the public of the adequacy of conduct by professionals. *See* RCW 18.235.005; *Haley*, 117 Wn.2d at 743 (purposes of professional discipline are “to protect the public and the profession’s standing in the eyes of the public”).

Here, even assuming Cummings did not know about the protection order until July 2011, when she did learn of it and could not herself solve the problem, she did not do the honest or professional thing and take any steps to notify those who could remove the GPS device. CABR 581 (CL 5.10), Transcript 376-77. She did not tell Peddle, the police, or any of the number of attorneys involved in the custody dispute and domestic violence matter. CABR 575 (FF 4.34-4.38); Transcript 376-77. Instead, she continued to violate court orders prohibiting her, on Duncan’s behalf, from monitoring Peddle’s whereabouts. Her conduct demonstrates her unfitness to practice as a private investigator and is directly related to the skills needed to practice the profession of a private investigator.

Cummings argues that her conduct must have occurred in the course of her profession to constitute unprofessional conduct. App. Br. at 19-21. This argument is inconsistent with *Haley* which held an act of moral turpitude need not have occurred in the course of the profession. 117 Wn.2d at 733. Here, this is not important because Cummings's misconduct was in the course of her profession. But even if it was not, *Haley* would support a finding of unprofessional conduct.

Citizens correctly presume that the State will not grant a license to an individual who poses a potential threat to customers. The State may require good moral character of a professional whose duties involve close contact with clients. *Dittman v. State of California*, 191 F.3d 1020, 1032 (9th Cir. 1999). The Department established Cummings exercises poor judgment and is capable of taking advantage of individuals in a vulnerable position and should therefore not be a licensed private investigator because of her unprofessional conduct. *See Haley*, 117 Wn.2d at 726 (the Court interpreted "moral turpitude" provision as prohibiting conduct indicating unfitness to practice the profession). The Director's conclusion of unprofessional conduct should be affirmed.

D. The Department's Determination as to the Proper and Necessary Sanction for Cummings's Unprofessional Conduct Should be Given Deference; the Eight-Year Revocation Imposed is Not Arbitrary or Capricious

Cummings argues the Director acted in an arbitrary and capricious manner in ordering the eight-year revocation of Cummings's private investigator licenses by not considering all the facts. App. Br. at 32-37. This is incorrect. The Department determined that the least restrictive, yet necessary, remedy for Cummings's conduct was an eight-year revocation. The arbitrary or capricious standard requires Cummings to show that the Director's decision was "willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision."¹² *Stewart v. Dep't of Social & Health Svcs.*, 162 Wn. App. 266, 273, 252 P.3d 920 (2011). Cummings has not met this high standard.

The Department does not argue, as asserted by Cummings at App. Br. at 29-30, that its discretion to sanction is "unlimited" or "not reviewable." The Department's authority to discipline is as prescribed under Chapters 18.165 and 18.230 RCW, and is subject to judicial review

¹² Cummings states that "Respondent admitted that the determination was arbitrary." App. Br. at 35. However, this statement is not supported by the passage she quotes. Indeed, this is a far cry from cases where a determination is explicitly admitted to be arbitrary. *See, e.g., Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674-75, 989 P.2d 1111 (1999) (insufficient justification for fee award existed when trial judge's comments on the record included, "when I did my initial calculation, and I did that kind of arbitrarily. I did not put his full hours in," and "I put arbitrarily \$100 an hour for [the associate attorney] and I came out to a little over 10,000. I, frankly, reduced those, because of all the stand-around time that was not productive time.").

under the arbitrary and capricious standard. Any one instance of unprofessional conduct, meeting any ground of unprofessional conduct, authorizes disciplinary action. RCW 18.235.110. Upon finding unprofessional conduct, the Department pursuant to the URBP “may” among other things, suspend or revoke the license, order payment of fine, and order any other corrective action. RCW 18.235.110. The Department has discretion to combine any of these remedies. RCW 18.235.110(1). Under the private investigator laws, upon a finding of unprofessional conduct, the Director may issue an order providing for a number of remedies or any combination thereof, including license revocation or suspension for a fixed or indefinite term, payment of penalties, and more. RCW 18.165.220.

The Department’s choice of remedy within its statutory authority is entitled to deference. *See Brown at App. 7, 16.* “When discretion is conferred on an agency by statute for the express purpose of accomplishing the goals of particular legislation, the matter [with respect to remedies] is ‘peculiar’ for the agency to decide.” *Pasco Housing Auth. v. PERC*, 98 Wn. App. 809, 814, 991 P.2d 1177 (2000); *Wash. Fed’n of State Emps. v. Bd. of Trs. of Cent. Wash. Univ.*, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980) (“Because the HEPB is the legislatively designated agency to enforce the unfair labor practice provisions of the Higher

Education Personnel Law, its determination as to remedies should be accorded considerable judicial deference.”). The Department is the designated agency for enforcement of the private investigator laws. RCW 18.235.005, 18.235.020(2)(a)(xii), 43.24.020.

Notably, agencies “need not fashion identical remedies” when imposing sanctions, and the courts may not “enter the allowable area of agency discretion.” *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992). The specifics of penalties imposed are within “the allowable area” of an agency’s discretion into which the courts will not intrude. *Id.*

Under the Supreme Court’s recent opinion in *In re Disciplinary Proceeding Against Petersen*, a sanction imposed by an agency is not arbitrary and capricious if it is in line with sanctions imposed in other cases. *See* 180 Wn.2d at 790-92. The party facing discipline “bears the burden of showing the Board’s recommended sanction is not proportionate.” *Id.* at 790 (quoting *In re Disciplinary Proceeding Against Preszler*, 169 Wn.2d 1, 38, 232 P.3d 1118 (2010)). The Court maintained that principle but departed from it in *Petersen* because the disciplinary board’s regulations explicitly established an aspiration to consistency with disciplinary sanctions and the hearing officer did not consider whether his recommended sanction deviated significantly from other disciplinary actions. *Id.* at 791. The Court therefore remanded for such a

proportionality inquiry, pointing to other particular cases for potential comparison. *Id.* at 791 n.20.

Here, Cummings cannot meet her burden of showing that the sanction deviated from other disciplinary sanctions; she fails to cite any evidence demonstrating the sanction is disproportionate. Contrary to Cummings's assertion that the Department's sanction did not consider the facts and circumstances of the case, Haglund provided ample testimony regarding how the Department exercises its discretion in determining the appropriate sanction. She testified about the purpose of the Private Investigator statute, the URPB, and disciplining a licensee. Transcript 446-49, 456-57.

Haglund also testified about the severity of Cummings's conduct in comparison to other cases and that the risk that conduct created to Peddle and Duncan justified an eight-year revocation. Transcript 464, 468-71, 665. This is the inquiry described in *Petersen*. There, the hearing officer did not consider proportionality of the sanction, but here, in contrast, the Department considered Cummings's conduct in relation to other sanctions imposed against private investigators. Transcript 468-71, 665. The Department's requested sanction at hearing, which was ultimately imposed by the Director, was based on its case-by-case analysis of unprofessional conduct using a team of Department employees within

its Protection Services Program. CABR 577 (FF 4.49); Transcript 665. The Department, as the agency charged with enforcement, is in the position to know whether its recommended sanction is in line with that imposed against other licensees. According to Haglund, an eight-year revocation was necessary in order to protect the public and protect the reputation of the profession in the eyes of the public. Transcript 464 (“This takes a different kind of light when we are talking about somebody who is under a no contact order, which the domestic violence already makes it really clear that there is an element of danger here at play.”), 471 (“Because of the risk and the actions of Lisa Cummings that were so close to the point of something could have turned into a more violent situation or the potential of death, I mean it’s very clear that to protect the public this private investigator should not be allowed to practice.”). Cummings’s unprofessional conduct established in this case is inconsistent with the responsibility entrusted to her by licensure by the Department.

Cummings baldly asserts, without further support or citation, that “there was no risk to the public and arguably no risk to Peddle.” App. Br. at 35. This is untrue. The courts that issued the orders protecting Peddle from Duncan concluded there was a threat to Peddle. It was not for Cummings to decide whether Peddle was worthy of the protection from Duncan required by those orders. Further, the exercise of such poor

judgment put the public at risk, and it is the Department's responsibility to regulate the professional conduct of its licensees. As Haglund testified, Cummings's threat to the public based on her tracking an individual protected by court orders was a primary concern to the Department. CABR 577 (FF 4.51); Transcript 464, 468-71. That the Legislature shares this concern is evident from the Legislature's decision to specifically include in the definition of unprofessional conduct a private investigator assisting her client in locating a person protected by a court order. RCW 18.165.160(11). While Cummings does not consider her activity to be a serious violation, the Department and the Legislature obviously disagree with her.

While Cummings complains about the length of the sanction given her inexperience as a private investigator and her allegedly worthy motive, App. Br. at 33, arbitrary or capricious action cannot be measured by the apparent "harshness" of a sanction. *Wash. State Dep't of Health Unlicensed Practice Program v. Yow*, 147 Wn. App. 807, 830, 199 P.3d 417 (2008) (citing *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995)). When an agency takes action against a license after the licensee had ample opportunity to be heard, the agency's action is not arbitrary or capricious even if the court would have reached a different result under the same facts. *Id.* Further, "neither the existence of

contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.” *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 505, 39 P.3d 961 (2002).

The record is clear that Cummings received a hearing at which the facts were considered and she had the opportunity to present her arguments.¹³ The Director carefully reviewed the hearing testimony and the ALJ’s decision before affirming the findings and revoking Cummings’s licenses. CABR 755-85. This revocation is furthermore consistent with *Regan v. Dep’t of Licensing*, 130 Wn. App. 39, 60, 121 P.3d 371 (2005). In *Regan*, the court held that the Director’s five year revocation of Regan’s bail bond licenses, while harsh, was imposed after due consideration, and not arbitrary and capricious. *Id.*

Similarly in *Hickethier*, the Director’s revocation of a real estate broker’s license for five years based on multiple violations of the standards of professional conduct was not arbitrary and capricious. 159 Wn. App. at 220. The revocation was based on due consideration of facts

¹³ Cummings’s argument at App. Br. at 36-37 that the Department’s decision not to interview Duncan during its investigation made the Department’s ultimate actions arbitrary and capricious is unpersuasive. Cummings got the chance to present Duncan’s testimony at hearing, and the agency’s final action fully took into account Duncan’s testimony (and its lack of credibility). The Department’s conduct of investigation and imposition of sanctions in a way other than Cummings would see fit does not make the Department’s action arbitrary and capricious.

by the Director. Like in *Regan* and *Hickethier*, here the Director revoked Cummings's licenses after due consideration, and there is no showing that she acted arbitrarily or capriciously. It is not this Court's role to second guess the Department's discretionary decision after due consideration regarding the length of revocation. The Director's order should therefore be affirmed.

Despite Cummings's attempt to justify her behavior because she was motivated out of concern Peddle would take her child out of state, the Director not being persuaded by this justification does not render the eight-year revocation arbitrary or capricious. Cummings cites to no provision where either URBP or the private investigator statutes require the Director to consider any specific mitigating circumstances or give any circumstance more or less weight. No such requirement exists. Cummings's alleged motive in wanting to help children does not excuse her failure to comply with the standards of professional conduct.

The Director here determined that Cummings's unprofessional conduct was severe and required an eight-year disciplinary sanction because it involved violations of court orders meant to protect Peddle and other similarly situated individuals. The eight-year revocation did not disregard the facts and circumstances of Cummings's case; it just placed emphasis on the purpose of regulating the private investigator profession

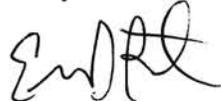
rather than on Cumming's excuses for her conduct. The eight-year revocation should be affirmed, as it is not arbitrary and capricious.

VI. CONCLUSION

RCW 18.165.220 and RCW 18.235.110 allow the Director of the Department of Licensing to revoke private investigator licenses upon determination that the licensee engaged in unprofessional conduct. Based on the unprofessional conduct set forth above and in order to protect the public, the Director's order revoking Cummings's licenses for eight years should be affirmed, as it supported by substantial evidence and free of any legal error.

RESPECTFULLY SUBMITTED this 17th day of October, 2014.

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PROOF OF SERVICE

I, Judy St. John, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.
2. That on the 20th day of October 2014, I caused to be served a copy of **Respondent's Brief** on the Appellants of record on the below date as follows:

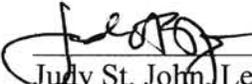
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Original filed via ABC Legal Messenger
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600 University St.
Seattle, WA 98101-4170

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SEATTLE, WA 98101

I DECLARE UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON that the
foregoing is true and correct.

Dated this 20th day of October 2014 in Seattle, Washington



Judy St. John, Legal Assistant