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WASHINGTON STATE
SUPREME COURT

Court of Appeals N^o 72495-9-I

**BEFORE THE COURT OF APPEALS, DIVISION I
IN AND FOR THE STATE OF WASHINGTON**

MARK BESOLA

Appellant,

v.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON

Respondent.

PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,
CAUSE N^o 13-2-24470-5
HON. MARY ROBERTS, JUDGE

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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1. IDENTITY OF MOVING PARTY

Through his undersigned counsel, Petitioner prays the court for the relief designated in part 2.

2. DECISION BELOW

Petitioners seek review of the decision of the Court of Appeals filed by Division I of the Court of Appeals on February 1, 2016. A copy of the Opinion is in the Appendix at pages A-1 through A-4.

3. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held whether a criminal conviction is “related to” a professional license holder’s practice is a moot issue?
2. Did the court of appeals err when it held Dr. Besola was not entitled to attorney’s fees and expenses under the Equal Access to Justice Act?

4. STATEMENT OF THE CASE

The factual and procedural history as set out in the decision of the court of appeals is adopted and incorporated herein, with the following additions.

On December 15, 2015, the Department of Health (respondent herein) filed a motion to dismiss¹ Dr. Besola’s appeal as moot. The Department had very recently reinstated Dr. Besola’s license following the Supreme Court overturning Dr. Besola’s criminal conviction.

¹ Attached hereto as Appendix B.

tions that triggered the suspension of his professional license.

On December 18, 2015, Dr. Besola filed a Response to the Department's motion to dismiss.² Dr. Besola disputed the Department's assertion that his appeal was moot and argued specifically the Department lacked authority to, and was not "substantially justified," in suspending Dr. Besola's license since the crimes he had been accused of committing were unrelated to his practice of veterinary medicine. Dr. Besola further argued the Court of Appeals should have awarded him his attorney's fees and under the Equal Access to Justice Act (Ch. 4.84 RCW).

Despite Dr. Besola's clear response arguing that the appeal was not moot, the Court of Appeals held "the parties agree that this action renders the merits of Besola's appeal moot" and denied Dr. Besola's request for attorney fees and costs under the Equal Access to Justice Act because he did not prevail on the merits of his appeal.

5. WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

² Attached hereto as Appendix C.

(2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(Emphasis added.)

A. Review should be accepted because the court of appeals erroneously and prematurely found that the issues in Dr. Besola’s case were moot.

1. *Dr. Besola did not agree that the overturning of his criminal convictions rendered his administrative appeal moot.*

The Court of Appeals held: “... the parties agree that this action renders the merits of Besola’s appeal moot” The record does not support that holding. In his Response to the Department’s motion to dismiss, Dr. Besola specifically argued the Supreme Court’s decision did not render his appeal moot because the suspension of his license by the Veterinary Board was not “substantially justified” because there was — and is — no nexus between the crimes Dr. Besola was accused of committing and Dr. Besola’s veterinary practice. Dr. Besola in no way agreed that his appeal was moot and the Court of Appeals’ finding to the contrary is clearly erroneous.

2. *Even if the Court of Appeals could no longer order the Department to reinstate Dr. Besola's license, Dr. Besola's appeal was not moot since the issue of the correct standard to determine whether alleged misconduct is "substantially related" to the license holder's practice is an important public issue that is likely to reoccur.*

"A case is moot if a court can no longer provide effective relief."³

This case is not moot, but assuming *arguendo* it is, then as a general rule, an appellate court will not review a moot case.⁴ But an appellate court may review a moot case if it presents issues of continuing and substantial public interest.⁵ In deciding whether a case presents issues of continuing and substantial public interest three factors are determinative: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur."⁶ A fourth factor that "may also play a role" is "the level of genuine adverseness and the quality of advocacy of the issues."⁷

The primary issue in Dr. Besola's appeal is what the correct

³ *Orwick v. City of Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984). But, of course, there is indeed relief the court can grant in this matter: an attorney fee award.

⁴ *Id.*

⁵ *Westerman v. Cary*, 125 Wash.2d 277, 286, 892 P.2d 1067 (1994).

⁶ *Id.* (quoting *Hart v. Dep't of Soc. & Health Servs.*, 111 Wash.2d 445, 448, 759 P.2d 1206 (1988)).

⁷ *Id.* (quoting *Hart*, 111 Wash.2d at 448, 759 P.2d 1206).

standard to be applied when determining whether purported misconduct on the part of a license holder “relates to” his or her practice under RCW 18.130.180(1) and (17).

While Dr. Besola’s license may have already been reinstated, the issue of what conduct on the part of a professional license holder “relates to his or her practice for purposes of suspension of the license is an issue of public importance that will definitely reoccur in the future and regarding which an authoritative determination is desirable to provide future guidance to public officers. This issue will be of central importance in virtually every future action to suspend a professional license in Washington on the grounds that conduct by the license holder has rendered them unfit to hold the license.

The parties in this case had provided the Court of Appeal with in-depth briefing and argument on this very issue and presented very different interpretations of the law surrounding the applicable test. The Court of Appeals had more than sufficient briefing to address this issue.

The record did not support the Court of Appeals’ conclusion that Dr. Besola’s appeal was moot. Further, the issue is one of great public importance that will recur in the future.

B. Review should be accepted to determine what test applies to whether a criminal conviction is “related to” a professional license holder’s practice for purposes of suspension of that license.

1. *Conviction of a crime is not equivalent to a finding that the acts underlying the conviction “related to” the convicted party’s profession RCW 18.130.180.*

The Department charged Dr. Besola with unprofessional conduct in violation of RCW 18.130.180(1) and (17) which provides, in pertinent part:

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

The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action.

Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder of the crime described in the indictment or information, and of the person's violation of the statute on which it is based ...

...

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession.

AR 3-5.

Under RCW 18.130.180(1) the commission of any act of moral turpitude, dishonesty, or corruption relating to the practice of the person's profession is unprofessional conduct even if the act does not constitute a crime. Under RCW 18.130.180(1) conviction of a crime for an act involving moral turpitude, dishonesty, or corruption relating to the person's practice of their profession is conclusive evidence at a disciplinary hearing of the guilt of that person of that crime. However, RCW 18.130.180(1) does **not** mandate that conviction of a crime is proof that the acts underlying the crime were ***related to the convicted person's practice.***

Similarly, under RCW 18.130.180(17) conviction of a misdemeanor or gross misdemeanor ***related to the person's practice*** constitutes unprofessional conduct for which a professional can be disciplined. Again, as with RCW 18.130.180(1), nothing in RCW 18.130.180(17) mandates that conviction of a crime is automatically proof that the conduct related to the person's profession.

The Board of Governors erroneously interpreted RCW 18.130.180(1) and (17) when it found that the acts underlying Dr. Besola's convictions were related to his practice simply because he was convicted of them.

2. *The test for determining whether the acts underlying Dr. Besola's convictions related to his*

practice was not whether the convictions would “lower the standing of the profession in the eyes of the public.”

To establish that Dr. Besola’s convictions for possession and distribution of child pornography were convictions for acts “related to” his profession the board relied entirely upon the testimony of one witness who testified abstractly “children do come to veterinarian clinics along with their families.” AR 1033. Citing this testimony and *Haley v. Medical Disciplinary Board*, 177 Wn.2d 720, 818 P.2d 1062 (1991), the Board of Governors found that Dr. Besola’s convictions were related to the practice of his profession because “it lowers the standing of the profession in the public’s eyes. The public view of the professionalism of veterinarians is diminished when a veterinarian is guilty of possessing child pornography and dealing in child pornography.” AR 1037-1038.

Contrary to the testimony relied on by the Board, Dr. Amelia Besola, Dr. Besola’s sister and partner in his veterinary practice, testified that her and her brother’s clients are mostly aging baby boomers and that it was very rare for children to come into the office. AR 1190-1191. Dr. Amelia Besola also testified that she saw 80% of the patients that came to their clinic. AR 1190.

The Board of Governors erred and applied the wrong test to de-

termine whether or not Dr. Besola's conduct "related to" his profession. In *Haley*, the Washington State Medical Disciplinary Board imposed sanctions against Dr. Theodore Haley after ruling that his sexual relationship with a former teenage patient constituted unprofessional conduct. Haley appealed and the Washington Supreme Court affirmed the Board's decision.

The Supreme Court agreed with the Board of Governor's determination that Haley's extended sexual conduct with an underage former patient constituted unprofessional conduct under RCW 18.130.180(1). In so agreeing, the Supreme Court held, "We construe the "related to" requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062.

In explaining this "related to" standard, the *Haley* court discussed *In re Kindschi*, 52, Wn.2d 8, 319 P.2d 824 (1958), a case where a physician had his license suspended after he was convicted of tax fraud:

The tax fraud was not related to the physician's diagnosis, care, or treatment of any patient. We nonetheless upheld the Board, and in doing so we took a broad view of the required relationship between the improper conduct and the practice of the profession. ***A medical disciplinary proceeding***, we ex-

plained, is taken for two purposes: to protect the public, and to protect the standing of the medical profession in the eyes of the public. *In re Kindschi*, at 11, 319 P.2d 824; cf. *In re McGrath*, 98 Wn.2d 337, 345, 655 P.2d 232 (1982) (identifying similar purposes in regard to disciplining attorneys). We stated that the due process and equal protection clauses of the United States Constitution apply to disciplinary proceedings, and that no person may be prevented from practicing a profession except for valid reasons. *In re Kindschi*, 52 Wn.2d at 11–12, 319 P.2d 824 (citing *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957)). Conviction for tax fraud, we explained, is a valid reason to take disciplinary action against a physician:

The public has a right to expect the highest degree of trustworthiness of the **members of the medical profession**. We believe there is a rational connection between income tax fraud and one's fitness of character or **trustworthiness to practice medicine**, so that the legislature can properly make fraudulent conduct in such instances a ground for revoking or suspending the license of **a doctor**.

In re Kindschi, 52 Wn.2d at 12, 319 P.2d 824. Being convicted of tax fraud does not indicate any lack of competence in the technical skills needed to be a **physician**. Rather, it indicates a lack of the high degree of trustworthiness the public is entitled to expect from **a physician**. It raises a reasonable apprehension that **the physician** might abuse the trust inherent in professional status, and it diminishes the profession's standing in the public's eyes. Trust is essential to ensure treatment will be accepted and advice followed.

Haley, 117 Wn.2d at 731-732, 818 P.2d 1062 (emphasis added).

The *Haley* court ultimately held:

In sum, Dr. Haley's conduct indicates unfitness to practice medicine in two ways: it raises concerns about his propensity to abuse his professional position, ***and it tends to harm the standing of the profession in the eyes of the public***, which both lead to reasonable apprehension about the public welfare. Therefore, the Board properly concluded that Dr. Haley engaged in acts of unprofessional conduct under RCW 18.130.180(1).

Haley, 117 Wn.2d at 736, 818 P.2d 1062 (emphasis added).

In reaching this conclusion, the *Haley* court noted it is only because physicians are responsible for maintaining the public health that the State could punish a physician for committing an act that impugns the integrity of the medical profession:

It should be emphasized that the concerns with protecting the integrity of the profession and protecting the public are not unrelated. Indeed, ***constitutional constraints mandate that any state-imposed requirement for practicing a profession must be rationally related to a legitimate state interest...*** The concern with protecting the medical profession, if viewed as a concern with preserving the interests of physicians themselves, is difficult to regard as a legitimate state interest or as rationally related to fitness to practice medicine. As an interest of the state, however, ***preserving professionalism is not an end in itself. Rather, it is an instrumental end pursued in order to serve the state's legitimate interest in promoting and protecting the public welfare.*** To perform their professional duties effectively, ***physicians*** must enjoy the trust and confidence of their patients. ***Conduct that lowers the public's esteem for physicians erodes that trust and confidence, and***

so undermines a necessary condition for the profession's execution of its vital role in preserving public health through medical treatment and advice.

Haley, 117 Wn.2d at 733-734, 818 P.2d 1062.

The correct inference from the above quoted passage is that, had Haley been a practitioner of some profession other than a physician responsible for preserving the public health, the *Haley* court would have found no legitimate state interest in protecting the professionalism of the profession such that the State could interfere with Haley's practice of his profession because Haley committed some act that lowered the standing of the profession in the eyes of the public. It is only because a lessening of the public's view of the integrity of ***physicians*** would arguably cause harm to the public welfare that the *Haley* court adopted the rule that any act committed by ***a physician***, even if not in the course of the practice of his or her profession, could be considered unprofessional conduct related to his or her profession under RCW 18.130.180.

In finding that Haley's conduct was "related to" his profession because Haley's conduct lowered the esteem of the medical profession in the eyes of the public, the *Haley* court created a rule of determining when a ***physician's*** conduct could be considered "related to" his or her profession. *Haley* did not, as claimed by the Board

of Directors in their decision, establish a broad rule that any conduct by any member of any profession would be considered “related to” that individual’s profession simply because it lessened the view of that profession in the eyes of the public. Rather, *Haley* established a broader rule applicable **only to physicians** since physicians are critical to maintaining public health. Any action taken by a physician which might cause the public to lower its trust of physicians was “related to” that physician’s practice of his or her profession. In other words, the “lower the public’s opinion” test for whether or not the conduct of a professional is related to the professional’s profession applies only to physicians due to the special status of physicians in our society.

As stated in *Haley*, the State has no interest in protecting the reputation of a profession simply for the sake of that profession. *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062. It was only because physicians are involved in protecting the public health that the *Haley* court found a legitimate state interest in protecting the professionalism and reputation of physicians. *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062.

This conclusion is confirmed in *Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors*, 161 Wn. App.

758, 255 P.3d 799 (2011). In *Ritter*, Ritter was a licensed professional engineer who began working for the City of Lacey in 1996 as public works director. In 2007 Ritter was convicted of three counts of child molestation involving a family member that occurred in 1998. Ritter did not commit the offenses in the workplace or otherwise in any other professional capacity. The convictions were Ritter's first criminal convictions and he was not accused of any other similar conduct.

In 2008, the Board of Registration for Professional Engineers and Land Surveyors initiated disciplinary proceedings against Ritter. The Board alleged that, based solely on his child molestation convictions, Ritter had committed unprofessional conduct under RCW 18.235.130(1). The Board found that Ritter's crimes constituted unprofessional conduct and suspended his license.

The Court of Appeals held that the Board had misinterpreted and misapplied the law when it found that Ritter's convictions related to his profession and suspended his license on the basis of those convictions alone. The *Ritter* court discussed *Haley* and the rule established in *Haley* for physicians and then found that Ritter's conduct had no relation to his practice of his profession:

In our review of the record, we do not have reasonable concerns that based solely on his convictions, Ritter

would abuse his status as a professional engineer. Unlike *Haley*, in which the professional was a physician who had child patients, the record shows that Ritter is a professional engineer whose business is done with adults. When professionals regularly interact with children, such as physicians or attorneys, **and when the evidence in the record shows that the professional used their skill or standing to take advantage of children**, courts could reasonably say that a child molestation conviction relates to the practice of that professional. *E.g.*, *Haley*, 117 Wn.2d 720, 818 P.2d 1062. **But where, as here, the record does not show that Ritter regularly interacted with children or that Ritter used his professional position to take advantage of children, we cannot say that Ritter's child molestation convictions are related to the practice of professional engineering.**

Ritter, 161 Wn.App., at 767, 255 P.3d 799 (emphasis added).

In other words, because Ritter was not a physician and because his crimes were not committed in the course of the practice of his profession and were not facilitated by Ritter exploiting his membership in the profession, then Ritter's crimes were not "related to" Ritter's practice of his profession.

In so ruling, the *Ritter* court noted that the *Haley* court construed the "related to" requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062. The court held that the "conduct need not have occurred during the actual exercise of professional or occupational skills, nor need the conduct raise general doubts about the individual's grasp of those skills." *Haley*, 117 Wn.2d at 733, 818 P.2d 1062. Instead, the "conduct may indicate unfitness to practice medicine

if it raises reasonable concerns that the individual may abuse the status of being a physician in such a way as to harm members of the public, or if it lowers the standing of the medical profession in the public's eyes.”

Haley, 117 Wn.2d at 733, 818 P.2d 1062.

Haley and *Ritter* establish that there is one test for whether or not a professional's conduct is related to his or her profession that is applicable to all professionals, but that there is a second broader test applicable only to physicians due to their special relationship to the public. The test applicable to all professionals, including physicians, to determine whether a professional's conduct “relates to” his or her profession is whether or not the conduct raises reasonable concerns that the individual may abuse the status of being a professional in such a way as to harm members of the public. In addition to this general test, because physicians are responsible for maintaining public health, a physician's conduct can also be found to “relate to” the practice of medicine if it lowers the standing of the medical profession in the public's eyes.

Because Dr. Besola is not a physician, the test applicable to determining whether or not his convictions “relate to” his practice as a veterinarian is whether or not his conduct raises reasonable concerns that he would abuse the status of being a veterinarian in such

a way as to harm members of the public. Whether or not Dr. Besola's actions lessened the public's opinion of veterinarians as a class is irrelevant to whether or not Dr. Besola's actions were related to his practice as a veterinarian. Under *Haley*, because veterinarians are not responsible for preserving the public health, the State has no legitimate interest in preserving the professionalism and reputation of veterinarians in the eyes of the public such that it can interfere with Dr. Besola's right to practice his profession. The Board of Governors oversimplified and misstated the law when it held that the test to determine whether or not Dr. Besola's conduct "related to" the practice of his profession was simply if his conduct lowered the standing of the profession in the eyes of the public.

Even if the Court of Appeals could not offer relief to Dr. Besola, the question of what test applied when determining whether Dr. Besola's, and, in the future and professional license holder, convictions were "related to" his profession is an issue the Court of Appeals should have decided. This issue is one of substantial public import and is one that will recur many times in the future.

C. Review should be accepted to determine whether Dr. Besola is entitled to attorneys' fees and costs under RCW 4.84.350.

RAP 18.1 provides that a party may recover attorney's fees in the

Court of Appeals where applicable law grants a party the right to recover reasonable attorneys fees, and where the party requests fees and provides argument in its brief regarding the fees.⁸

RCW 4.84.350 provides, in pertinent part,

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.

“Substantially justified,” for purposes of equal access to justice act (EAJA), under which court must award attorney fees and other expenses to qualified party that prevails on judicial review of agency action unless court finds that agency action was substantially justified or that circumstances make an award unjust, means justified to a degree that would satisfy a reasonable person, and it requires the agency to show that its position has reasonable basis in law and

⁸ RAP 18.1(a), (b).

fact.⁹

For purposes of statute providing for attorney fee award to prevailing party on judicial review of administrative agency action unless court finds that agency action was substantially justified or that circumstances make an award unjust, the agency has the burden of showing that fees should be denied because its action was substantially justified; to meet this burden, the agency must demonstrate that its position has a reasonable basis in law and fact.¹⁰

Thus, the Department has the burden of demonstrating that its order depriving Dr. Besola of his license to practice veterinary medicine had a reasonable basis in law and in fact. The Department has the burden of demonstrating to this court that its actions had a reasonable basis in law and fact such that a reasonable person would be satisfied that the revocation of Dr. Besola's license was justified.

A "qualified party" means (a) an individual whose net worth did not exceed one million dollars at the time the petition for judicial review was filed or (b) a sole owner of a business or organization whose net worth did not exceed five million dollars at the time the

⁹ *Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (Per Alexander, C.J., with three Justices concurring, one Justice agreeing, and two Justices concurring in part and dissenting in part).

¹⁰ *The Language Connection, LLC v. Employment Sec. Dept. of State* 149 Wn.App. 575, 586-587, 205 P.3d 924, as modified (2009).

initial petition for judicial review was filed. RCW 4.84.340.

Dr. Besola is a “qualified party” under RCW 4.84.340 because his net worth is less than one million dollars.¹¹

As discussed above, the Board misinterpreted the applicable law in determining whether or not Dr. Besola’s criminal convictions related to his veterinary practice and the facts of this case do not support the Board’s finding that Dr. Besola’s conviction did relate to his practice. Because the Board misinterpreted that legal standard applicable to determining whether or not Dr. Besola’s criminal convictions relate to his veterinary practice, the Department can never establish that its actions were reasonable or justified.

The Court of Appeals did not address this issue due to its erroneous finding that Dr. Besola’s appeal was moot and her therefore could not prevail on the merits of his appeal. The Supreme Court should review this issue since the Court of Appeals’ ruling was based on an erroneous interpretation of the facts of the case and Dr. Besola should prevail on the merits of his appeal.

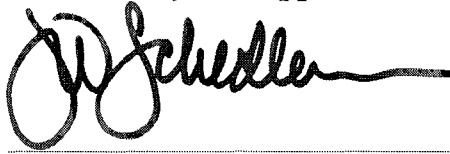
¹¹ See Declaration of Dr. Besola, attached to Dr. Besola’s Opening Brief in the Court of Appeals.

6. CONCLUSION

For the reasons stated above, this court should grant review of this matter.

Respectfully submitted, Tuesday, March 1, 2016.

SCHEDLER BOND, PLLC
Attorneys for Appellant

A handwritten signature in black ink, appearing to read "J. Schedler", written over a horizontal line.

by John W. Schedler, WSBA N^o 8563

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2016, I caused to be served a true and correct copy of the foregoing document on the party listed below via:

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Via:

U.S. Mail
 Facsimile
 King County eSvc
 Email

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

Signed at Mercer Island, Washington, Tuesday, September 23, 2014.



John W. Schedler, WSBA No 8563

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK L. BESOLA,)
)
 Appellant,)
)
 v.)
)
 DEPARTMENT OF HEALTH, STATE)
 OF WASHINGTON,)
)
 Respondent.)
)

NO. 72495-9-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: February 1, 2016

2016 FEB -1 AM 8:58
COURT OF APPEALS
STATE OF WASHINGTON

LAU, J. — Dr. Mark Besola, a veterinarian, appeals the Board of Veterinary Governors' order suspending his license to practice. While this appeal was pending, the Board reinstated Besola's license. The parties agree that this action renders the merits of Besola's appeal moot. But, Besola contends that he is entitled to attorney fees under the Equal Access to Justice Act, RCW 4.84.350. Because Besola never prevailed on the merits of his appeal, he is not a prevailing party within the meaning of the act and therefore is not entitled to fees. We dismiss his appeal on mootness grounds and deny his attorney fees request.

FACTS

On April 20, 2012, a jury convicted Dr. Mark Besola, a veterinarian, on one count of possession of depictions of a minor engaged in sexually explicit conduct and one count of dealing in such depictions. Following these convictions, the Board of Veterinary Governors determined that Besola had committed professional misconduct as defined by RCW 18.130.180(1) and RCW 18.130.180(17). Accordingly, the Board indefinitely suspended Besola's license to practice as a veterinarian. Besola appealed the Board's order, and the superior court affirmed. Besola sought review in this court.

While Besola's appeal of his suspended veterinary license was pending, the Washington Supreme Court reversed his criminal convictions. See State v. Besola, 184 Wn.2d 605, 359 P.3d 799 (2015). Based on this decision, the Board vacated its earlier suspension order and unconditionally reinstated Besola's license to practice as a veterinarian. The Board's suspension order is moot. A case is moot if the court can no longer provide effective relief. State v. Beaver, 184 Wn.2d 321, 358 P.3d 385 (2015). Besola claims he is entitled to an award of attorney fees as the prevailing party.

ANALYSIS

Besola claims he is entitled to attorney fees under the Equal Access to Justice Act, RCW 4.84.350, because he prevailed before the Board. We disagree.

Besola is not a prevailing party within the meaning of the act because he never obtained a successful judgment on the merits of his appeal. The act directs the court to award fees to a party who prevails on the merits unless it finds that the challenged agency action was substantially justified:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action . . . unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). “A party must prevail on the merits before being considered a prevailing party.” Ryan v. State Dep’t. of Soc. & Health Servs., 171 Wn. App. 454, 476, 287 P.3d 629 (2012). “[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” Parmelee v. O’Neel, 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)).

Although Besola obtained the relief he sought when his veterinary license was reinstated, that relief did not come from this court. The Board’s decision to vacate its earlier order suspending Besola’s license was entirely unrelated to this appeal. We never addressed the main issue of whether the Board acted reasonably when it suspended Besola’s license, and thus never had an opportunity to “materially [alter] the legal relationship between the parties by modifying the [Board’s] behavior in a way that directly benefit[ed] [Besola].” Parmelee, 168 Wn.2d at 522 (quoting Farrar, 506 U.S. at 111-12). Because we never addressed the merits or granted any relief whatsoever to Besola, he is not a “prevailing” party.

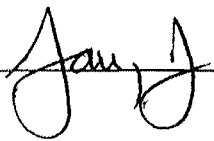
But even if we assumed Besola prevailed within the meaning of the act, we need not award fees if we conclude “that the agency action was substantially justified.” RCW

4.84.350(1). For an agency action to be substantially justified, it “need not be correct, only reasonable.” Raven v. Dep’t. of Soc. Health Servs., 177 Wn.2d 804, 832, 306 P.3d 920 (2013).

The agency action was reasonable here. Besola was convicted in April 2012. The Board reasonably relied on these convictions when it filed administrative charges against Besola in September 2012 and eventually suspended his license in June 2013. Besola’s convictions remained valid until the Washington Supreme Court reversed them in November 2015. Under these circumstances, the Board acted reasonably when it relied on Besola’s convictions despite their subsequent reversal. We conclude the Board’s action was substantially justified when it suspended Besola’s veterinary license.

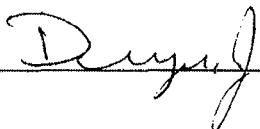
CONCLUSION

For the foregoing reasons, we dismiss the appeal as moot and decline to award attorney fees.

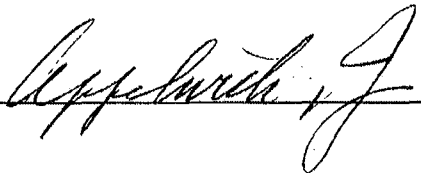


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WE CONCUR:



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A handwritten signature in cursive script, appearing to read "Appelwhite, J.", is written over a horizontal line.

NO. 72495-9-I

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

MARK L. BESOLA,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF HEALTH,
VETERINARY BOARD OF
GOVERNORS,

Respondent.

RESPONDENT'S
MOTION TO DISMISS
FOR REVIEW AS
MOOT

I. IDENTITY OF PARTY

The Respondent, Washington State Department of Health (Department) and Veterinary Board of Governors (Board) moves to dismiss the pending action as moot.

II. STATEMENT OF RELIEF SOUGHT

This Court should dismiss the appeal currently pending before this Court. Oral argument is currently scheduled in this case on January 7, 2016. The order that is the subject of the appeal was vacated by the Veterinary Board of Governors on December 8, 2015, thereby rendering all appeals of that order moot.

III. FACTS RELEVANT TO MOTION

Appellant Mark Besola was a licensed veterinarian convicted in April 2012 after a jury trial in Pierce County Superior Court of one count of possession of depictions of a minor engaged in sexually explicit conduct and one count of dealing in depictions of such conduct. Both are class B felonies. Dr. Besola was sentenced to 35 months in prison, followed by 36 months of community custody. The judgment and sentence prohibited Dr. Besola from having any contact with minors during his term of community custody and required him to obtain a psychosexual evaluation, comply with any treatment recommendations, and to register as a sex offender.

In September 2012, following his criminal convictions, the Veterinary Board issued a Statement of Charges to Dr. Besola that charged him with unprofessional conduct, alleging that he violated RCW 18.130.180(1) for engaging in acts of moral turpitude, dishonesty or corruption related to his profession, and 18.130.180(17) for being convicted of a felony related to the practice of his profession.

The Board held a full evidentiary hearing on June 11, 2013. The Board subsequently issued findings of fact, conclusions of law, and a final order, concluding that Dr. Besola had committed unprofessional conduct as defined in RCW 18.130.180(1) and (17). The Board indefinitely suspended his license and required that, prior to seeking reinstatement of his

veterinarian license, Dr. Besola provide satisfactory proof that he completed all prison and community custody requirements related to his criminal convictions, as well as undergoing a psychosexual evaluation. *See* the Board's Final Order, appended as Appendix A to this Response.

This Court affirmed his convictions in an unpublished decision.¹ However, the Washington State Supreme Court overturned the convictions on November 5, 2015.²

Based on the Supreme Court decision, the Veterinary Board of Governors vacated its final order on December 8, 2015, and reinstated Dr. Besola's license. *See* Appendix B to this Motion.

IV. ARGUMENT

A case is moot if a court can no longer provide effective relief. *In re Recall of Seattle School Dist. No. 1 Directors*, 162 Wn.2d 501, 505, 173 P.3d 265 (2007). This case is now moot because the Veterinarian Board of Governors vacated its final order in Dr. Besola's case on December 8, 2015, and reinstated his license. Based on that action, this Court can no longer provide Dr. Besola with effective relief. Any collateral issues raised on

¹ *State v. Besola & Swenson*, No. 71432-5 (Wash. Ct. Apps., Div. I, May 19, 2014) (unpublished), 181 Wn.App.1013, 2014 WL 2155229, at *19. Dr. Besola filed his appeal in Division Two, which transferred the matter to Division One for expediency.

² *State v. Besola & Swenson*, 359 P.3d 799 (2015).

appeal, including the Department's cross appeal, are better left for litigation in a case that is not moot.

V. CONCLUSION

The Veterinarian Board of Governors vacated its order against Dr. Besola and reinstated his license after the Washington State Supreme Court overturned his criminal convictions. The case is now moot. The Department respectfully requests that this Court dismiss the appeal as moot.

RESPECTFULLY SUBMITTED this 10th day of December, 2015.

ROBERT W. FERGUSON
Attorney General



TRACY L. BAHM, WSBA # 22950
Assistant Attorney General
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Olympia, WA 98504-0100

APPENDIX A

ATTORNEY GENERAL
OF WASHINGTON

JUN 24 2013

GOVERNMENT COMPLIANCE
& ENFORCEMENT

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
VETERINARY BOARD OF GOVERNORS

In the Matter of:

MARK L. BESOLA,
Credential No. VET.VT.00004120,

Respondent.

Master Case No. M2012-512

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

APPEARANCES:

Mark L. Besola, Respondent, by
John W. Schedler, Attorney at Law

Department of Health Veterinary Program (Department), by
Office of the Attorney General, per
Cassandra Buyserie, Assistant Attorney General

PANEL: Daniel Haskins, DVM, Panel Chair
Brett Bower, DVM
Linda Crider, DVM

PRESIDING OFFICER: Frank Lockhart, Health Law Judge

A hearing was held in this matter on June 11, 2013, regarding allegations of unprofessional conduct. Credential suspended.

ISSUES

Did the Respondent commit unprofessional conduct as defined by RCW 18.130.180(1) and (17).

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

SUMMARY OF PROCEEDINGS

At the hearing, the Department presented the testimony of Kevin Johnson, Detective, Pierce County Sheriff's Office; and Jerry Pospisil, DVM,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

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Master Case No. M2012-512

expert witness. The Respondent testified on his own behalf and presented the testimony of Amelia Besola, DVM; and Christmas Covell, Ph.D., expert witness.

The Presiding Officer admitted the following Department exhibits:

- Exhibit D-1: Washington State Credential for the Respondent;
- Exhibit D-2: Pierce County Superior Court No. 09-1-03223-0 Verdict Forms I and II, dated April 20, 2012;
- Exhibit D-3: Pierce County Superior Court No. 09-1-03223-0 Determination of Probable Cause, dated July 7, 2009;
- Exhibit D-4: Pierce County Superior Court No. 09-1-03223-0 Information, dated July 7, 2009;
- Exhibit D-5: Pierce County Superior Court No. 09-1-03223-0 Judgment and Sentence, dated June 8, 2012;
- Exhibit D-6: Pierce County Superior Court No. 09-1-03223-0 Order Clarifying Conditions of Release Pending Appeal, dated June 15, 2012; and
- Exhibit D-8: Curriculum Vitae of Dr. Jerry Pospisil.

The Presiding Officer admitted the following Respondent exhibit:

- Exhibit R-2: Curriculum Vitae of Christmas Covell, Ph.D.

I. FINDINGS OF FACT

1.1 The Respondent was granted a license to practice as a veterinarian in the state of Washington on July 30, 1990. The Respondent's credential is currently active.

1.2 For the past 15 years, the Respondent has been in practice with his sister, who is also a veterinarian, at a small clinic limited to treating cats and dogs. Children sometimes come to the clinic, usually accompanied by parents or other adults.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
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1.3 In April 2009, Pierce County detectives executed a search warrant on the Respondent's residence and recovered from his bedroom hundreds of pornographic DVDs. A number of the DVDs contained images of minor children (some appearing to be as young as 7 years of age) engaged in sexual intercourse with each other and with an adult male.¹

1.4 On April 20, 2012, the Respondent was found guilty after jury trial of one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, a class B felony, and one count of Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct, a class B felony. The Respondent was sentenced to 35 months of prison followed by 36 months of community custody. The Respondent is required to register as a sex offender. The Respondent is also forbidden to have contact with minor children while he is on community custody. (See Exhibit D-5, Judgment and Sentence.)

1.5 The commencement of the Respondent's prison sentence has been delayed while the Court of Appeals hears his appeal, but he is currently under the supervision of the community custody program.

1.6 As part of his sentence, the Superior Court ordered a psychosexual evaluation. Christmas Covell, Ph.D., a certified sex offender treatment provider, conducted that evaluation. Dr. Covell testified that the type of evaluation she conducted is required by the Department of Corrections (DOC) to evaluate a defendant for

¹ In addition, one of the DVDs found contained a film clip of an unidentified female (in her late teens or early adulthood) engaged with sexual conduct with a German shepherd. There was no question that the DVD was found in the Respondent's bedroom, in fact, there were 2 copies of it, but it was not clear what role, if any, this DVD played in the Respondent's subsequent criminal trial. While bestiality is defined in RCW 16.52.205 as animal cruelty, the Respondent was never charged with animal cruelty. The Respondent claimed that the DVD belonged to his roommate.

FINDINGS OF FACT,
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placement in the corrections system and for determination of conditions for community custody. (These are not the same type of psychosexual evaluations that the Department of Health authorizes for assessing whether a particular professional is safe to practice his or her profession.) In terms of Dr. Covell's assessment for DOC purposes, she opined that the Respondent was at a low risk to reoffend.

1.7 Credibility Finding: The Department's expert witness, Jerry Pospisil, DVM, testified that children do come to veterinarian clinics along with their families. The Respondent's expert witness, Christmas Covell, Ph.D., testified as to her aforementioned DOC evaluation of the Respondent. The Veterinary Board of Governors (Board) found both experts to be fully credible, but also found that their respective testimony was not material to the determination of unprofessional conduct. The Board did give Dr. Covell's opinion as to the likelihood of reoffending some consideration as a mitigating factor in terms of sanctions, but ultimately the facts of the case, rather than the experts' testimony, were the determining factors. The Board did not find the Respondent's denial of his actual guilt of the crimes to be either credible or not-credible, because it is trumped by the rule found in RCW 18.130.180(1) that a "judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder."

II. CONCLUSIONS OF LAW

2.1 The Board has jurisdiction over the Respondent and subject of this proceeding. RCW 18.130.040 RCW.

FINDINGS OF FACT,
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2.2 Except as otherwise required by law, the Department bears the burden of proving the allegations set forth in the Statement of Charges by a preponderance of the evidence. WAC 246-11-520. The Washington Supreme Court has held the standard of proof in disciplinary proceedings against physicians is proof by clear and convincing evidence. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534 (2001), cert. denied, 535 U.S. 904 (2002). In 2006, the Washington Supreme Court extended the *Nguyen* holding to all professional disciplinary proceedings. *Ongom v. Dept. of Health*, 159 Wn.2d 132 (2006), cert. denied 550 U.S. 905 (2007). However, in 2011, the Washington Supreme Court overruled *Ongom*, but declined to overrule *Nguyen*. *Hardee v. Dept. of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011).

2.3 Given the legal uncertainty regarding the standard of proof for disciplinary proceedings, the evidence in this matter is evaluated under both the clear and convincing standard, as well as the preponderance of the evidence standard.

2.4 The Board used its experience, competency, and specialized knowledge to evaluate the evidence. RCW 34.05.461(5).

2.5 The Department alleged that the Respondent's conduct violated RCW 18.130.180(1) which defines unprofessional conduct as:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction

FINDINGS OF FACT,
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and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW.

2.6 As the plain language of the statute states, a conviction of a crime is conclusive evidence of the guilty of the license holder. The only question is whether the possessing of, and dealing in, child pornography rises to the level of moral turpitude.

2.7 Whether conduct rises to the level of moral turpitude is analyzed under the Washington Supreme Court case of *Haley v. Medical Discipline Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991) which held:

RCW 18.130.180(1) provides that for any person under the jurisdiction of the uniform disciplinary act, RCW 18.130, "[t]he commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession" constitutes unprofessional conduct. The principal question that arises in applying this statute concerns the relationship between the practice of the profession and the conduct alleged to be unprofessional. To serve as grounds for professional discipline under *RCW 18.130.180(1)*, conduct must be "related to" the practice of the profession. We construe the "related to" requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession.

In re Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958) illuminates the nature of this requirement. There, the Board had suspended a physician's license to practice medicine after he was convicted of tax fraud. The tax fraud was not related to the physician's diagnosis, care, or treatment of any patient. We nonetheless upheld the Board, and in doing so we took a broad view of the required relationship between the improper conduct and the practice of the profession. A medical disciplinary proceeding, we explained, is taken for two purposes: to protect the public, and to protect the standing of the medical profession in the eyes of the public. *Id* at 731.

The *Haley* court also noted that whether particular conduct renders a professional unfit to practice is determined in light of the purpose of professional

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discipline and "the common knowledge and understanding of members of the particular profession. . . ." *Id* at 743.

2.8 The *Haley* court articulated that there are two alternative methods by which conduct could be "related to" one's profession:

As we explained above, conduct may indicate unfitness to practice the profession either by raising concerns that the individual may use the professional position to harm members of the public, or by tending to lower the standing of the profession in the public's eyes, thereby affecting the quality of public health which is a legitimate public concern. *Id* at 738, (emphasis added).

The Board finds the Respondent's conduct is related to the practice of his profession because it lowers the standing of the profession in the public's eyes. The public view of the professionalism of veterinarians is diminished when a veterinarian is guilty of possessing child pornography and dealing in child pornography.²

2.9 The Department proved by both a preponderance of the evidence and by clear and convincing evidence that the Respondent committed unprofessional conduct as defined in RCW 18.130.180(1).

2.10 The Department also alleged that the Respondent's conduct violated RCW 18.130.180(17) which defines unprofessional conduct as:

² As stated above, the two alternative methods by which conduct can be "related to" the practice of the profession are (a) "whether the individual might use the professional position to harm members of the public" or (b) whether the conduct "lowers the standing of the profession in the eyes of the public." Because the Board finds that the possession of, and dealing in, child pornography lowers the standing of the profession in the eyes of the public, the Board need not reach the issue of whether the Respondent might actually put children at risk on the job. Nor does the Board need to consider the video of the young woman engaged in bestiality that was found in the Respondent's bedroom. While the concept that a veterinarian might possess bestiality videos is deeply disturbing, the possession of child pornography is sufficient in and of itself for a finding of unprofessional conduct. No additional evidence is necessary to meet the "relatedness" requirement of RCW 18.130.180(1).

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

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Master Case No. M2012-512

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

2.11 The Respondent admitted the convictions but, as with the allegation of a violation of RCW 18.130.180(1), argued that the convictions are not "related to" the practice of his profession. The Board applies the same *Haley* analysis, discussed above, to the Respondent's actual convictions and determines that both the conduct the convictions describe, and the convictions themselves, are related to the practice of the Respondent's profession. Thus, the Department proved by both a preponderance of the evidence and by clear and convincing evidence that the Respondent committed unprofessional conduct as defined in RCW 18.130.180(17).

2.12 The Department requested that the allegations in the Statement of Charges be affirmed and that the Respondent's credential be permanently revoked. The Board declines to do this because, pursuant to WAC 246-16-800(2)(b)(ii), permanent revocation requires a showing that the Respondent can never be rehabilitated, and no such evidence was offered. In the alternative, the Department requested that the Respondent's credential be suspended until the conclusion of his prison sentence and his community custody sentence and that he be required to undergo a psychosexual evaluation that assesses his safety to practice as a veterinarian before petitioning for reinstatement. The Respondent argued that the Department did not prove that the Respondent's conduct or convictions were related to

FINDINGS OF FACT,
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his profession and that therefore no sanctions should be imposed. In the alternative, the Respondent argued that any sanction should be of a short duration.

2.13 In determining appropriate sanctions, public safety must be considered before the rehabilitation of the Respondent. RCW 18.130.160. Determining which sanction schedule the Respondent misconduct falls into is somewhat problematic: Normally, Tier B of WAC 246-16-860 (Criminal Convictions) would be the appropriate schedule because the Respondent was convicted of 2 Class B felonies. However, WAC 246-16-860 excludes sexual offenses. WAC 246-16-820 (Sexual Misconduct or Contact) includes convictions for sexual misconduct, but the tiers appear to differentiate the misconduct levels by describing misconduct between people. Because the unprofessional conduct in this case (child pornography) is not described in a sanctioning schedule in Chapter 246-16, the panel used its judgment to determine sanctions, pursuant to WAC 246-16-800(2)(d). The aggravating factors in this case are numerous and include the gravity of the conduct, the number of child pornography DVDs found by the police, the vulnerability of the children in the videos (those children being the real victims in this case), and the criminal motivation involved. The only mitigating factor is the lack of prior discipline. The Board also considered the Respondent's legal situation and the fact that his criminal convictions are on appeal. The fact is, that at some future point in time, the Respondent will either have completed his entire sentence or his conviction might be reversed or otherwise resolved by the appellate courts. It is the intent of the Board to construct an Order in this case that is flexible enough to protect the public no matter how the Respondent's criminal case unfolds.

FINDINGS OF FACT,
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III. ORDER

3.1 The Respondent's license to practice as a veterinarian in the state of Washington is INDEFINITELY SUSPENDED.

3.2 Prior to seeking the reinstatement of his license to practice as a veterinarian, the Respondent must provide satisfactory proof that he has completed all prison and community custody requirements related to his criminal convictions.

3.3 In addition to the requirement set forth in Paragraph 3.2 above, the Respondent must undergo a psychosexual evaluation within 90 days of his reinstatement request. The psychosexual evaluation must be performed by an evaluator pre-approved by the Board to determine whether the Respondent is safe to practice his profession. The Respondent shall sign all releases necessary to provide the Board with and the Department with the evaluation results.

3.4 Once the Respondent has successfully completed the requirements set forth in Paragraphs 3.2 and 3.3 above, the Board may impose terms and conditions which it deems necessary to protect the health and safety of the public under RCW 18.130.160. Such terms and conditions may include, but are not limited to, a period of probation and/or monitoring.

3.5 The Respondent may not seek modification of this order.

3.6 Change of Address. The Respondent shall inform the program manager and the Adjudicative Service Unit, in writing, of changes in his residential and/or business address within 30 days of such change.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

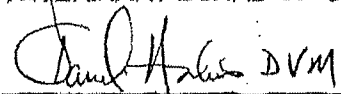
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3.7 Assume Compliance Costs. The Respondent shall assume all costs of complying with all requirements, terms, and conditions of this order.

Dated this 20 day of June, 2013.

VETERINARY BOARD OF GOVERNORS



DANIEL HASKINS, DVM
Panel Chair

CLERK'S SUMMARY

<u>Charge</u>	<u>Action</u>
RCW 18.130.180(1)	Violated
RCW 18.130.180(17)	Violated

NOTICE TO PARTIES

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

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

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health Veterinary Program
P.O. 47874
Olympia, WA 98504-7874

FINDINGS OF FACT,
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The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Board does not respond in writing within 20 days of the filing of the petition.

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

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at:

<http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx>

FINDINGS OF FACT,
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APPENDIX B

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
VETERINARY BOARD OF GOVERNORS

In the Matter of

MARK L. BESOLA
Credential No. VET.VT.00004120

Respondent

No. M2012-512

**ORDER VACATING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
FINAL ORDER**

This matter comes before the Veterinary Board of Governors (Board) as a result of the Washington State Supreme Court's ruling of November 5, 2015 (*State v. Besola*, No. 90554-1). The Board, having reviewed the record, issues the following:

1. PROCEDURAL BACKGROUND AND FACTS

1.1 Respondent is a veterinarian, credentialed by the State of Washington at all times applicable to this matter.

1.2 On June 20, 2013, the Board entered a Findings of Fact, Conclusions of Law and Final Order against Respondent in the above-captioned matter. In that Order, the Board determined that the Respondent committed unprofessional conduct as defined under RCW 18.130.180(1) and (17). The Board's determination was based on the Respondent's criminal conviction in Pierce County Superior Court No. 09-1-03223-0. The Board indefinitely suspended the Respondent's credential to practice as a veterinarian.

1.3 On November 5, 2015, the Washington State Supreme Court held that, in the Respondent's criminal case, the evidence presented against the Respondent was the product of an invalid search warrant, and the Respondent's convictions must be reversed.

2. CONCLUSIONS OF LAW

Based on the Findings of Fact, the Board makes the following Conclusions of Law:

2.1 The Board has jurisdiction over Respondent and over the subject matter of this proceeding.

2.2 Because the Board based its finding of misconduct on the Respondent's criminal convictions, and those convictions have been reversed, there is no lawful basis

ORDER TO VACATE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER
NO. M2012-512

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ORIGINAL

for a finding of misconduct or to maintain the suspension of the Respondent's credential.

2.3 As required by law, and in the interests of justice, the findings of professional misconduct issued against the Respondent should be vacated.

3. ORDER

Based on the Findings of Fact and Conclusions of Law, the Board ORDERS:

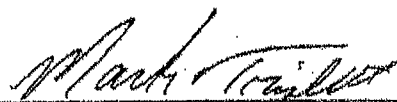
3.1 The Board's Order issued on June 20, 2013, is VACATED, the charges are dismissed, and the Respondent's license to practice as a veterinarian in the State of Washington is REINSTATED, subject to all other terms and conditions for valid licensure. The Respondent is publicly exonerated as set forth in RCW 18.130.110.

DATED: 12-8-15 2015

STATE OF WASHINGTON
VETERINARY BOARD OF GOVERNORS


ETHAN C. NELSON, DVM
PANEL CHAIR

PRESENTED BY:


MARK TRIPLETT WSBA #31179
PROGRAM REPRESENTATIVE

12/4/15
DATE

ORDER TO VACATE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER
NO. M2012-512

PAGE 2 OF 2

Nº 72495-9-I

**BEFORE THE COURT OF APPEALS, DIVISION I
IN AND FOR THE STATE OF WASHINGTON**

MARK L. BESOLA

Appellant,

v.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON

Respondent.

**APPELLANT'S RESPONSE TO MOTION FOR
DISMISSAL AS MOOT**

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,
CAUSE Nº 13-2-24470-5
HON. MARY ROBERTS, JUDGE

John W. Schedler
WSBA Nº 8563
Attorney for Appellant

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gineers and Land Surveyors*, 161 Wn. App. 758, 255 P.3d
799 (2011)3

Other Authorities

Equal Access to Justice Act, Ch. 4.84, RCW. 2

1. **IDENTITY OF MOVING PARTY**

Appellant Mark Besola prays the court grant the relief designated in part 2.

2. **STATEMENT OF RELIEF SOUGHT**

A. The motion to dismiss by the State should be denied because appellant seeks additional relief under the Equal Access to Justice Act, Ch. 4.84, RCW.

B. Appellant prays leave to make application for an attorney fee award pursuant to the Equal Access to Justice Act, Ch. 4.84, RCW.

3. **FACTS RELEVANT TO MOTION**

On November 5, 2015, the Washington Supreme Court handed down *State v. Besola*, 2015 WL 6777228 (2015). The Supreme Court held the search of Mark Besola's residence that led to the discovery of all the evidence that supports his criminal convictions was an unlawful and unconstitutional search. The Supreme Court vacated the conviction and remanded for further proceedings. *Besola*, 2015 WL 6777228, slip op pp. 6-7.

The charge against Dr. Besola in these proceedings is *solely* based upon his criminal convictions. All the evidence considered by the Veterinary Board of Governors was derived from the illegal search described above. The State conceded its prosecution was unlawful in its Order Vacating Findings of Fact, Conclusions of Law and Final Order dated December 8, 2015. Appendix, p. 1.¹

Because the Department of Health had no jurisdiction and the evidence was unlawfully obtained, Dr. Besola sought relief under the Equal Access to Justice

¹ This document is the basis for the State's claim this proceeding is now moot.

Act (Ch. 4.84, RCW) in his opening brief (App. Open Brf, p. 20) and Petition for Judicial Review (CP 95). Appendix, p.3.

4. **GROUND FOR RELIEF AND ARGUMENT**

A. Because further relief is sought, this matter is not moot.

If the court can grant some relief, a pending appeal is not moot. Cf. *In re Recall of Seattle School Dist. No. 1 Directors*, 162 Wn.2d 501, 505, 173 P.3d 265 (2007).

B. Appellant is Entitled to Relief under the Equal Access to Justice Act.

The Supreme Court's decision in *State v Besola* forcefully reiterates the Supreme Court's binding precedent from 1992:

For guidance, we look to a 1992 case, *State v. Perrone*, that involved similar circumstances. We unanimously held that the *Perrone* warrant failed to meet the particularity requirement of the Fourth Amendment, in part because it provided for the seizure of items that were legal to possess, such as adult pornography. **That holding is binding in this case, where the warrant similarly provided for the seizure of items that were legal to possess.** (emphasis added) (citations omitted).

Besola, slip op. p. 2.

On the merits, Dr. Besola has prevailed completely in this matter. Applying *Besola* to this matter there is but one conclusion to be drawn: the agency action at issue was brought in defiance of the law and in derogation of Dr. Besola's constitutional liberties. Hence, the prosecution (*i.e.*, agency action) by the Veterinary Board of Governors was in no sense "substantially justified." RCW 4.84.350(1). This is precisely the abuse the Equal Access to Justice Act (Ch. 4.84, RCW) was enacted to address.

Undecided but very much relevant to this issue is the absence of Department of Health jurisdiction. There is simply no nexus between the crime Dr. Besola

was accused of and veterinary medicine and, hence, the State has no power to sanction Dr. Besola. *Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011)

Dr. Besola should be allowed to make application for an attorney fee award as prayed for.

Respectfully submitted: Friday, December 18, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Schedler", with a long horizontal flourish extending to the right.

John W. Schedler, WSBA No 8563
Attorney for Appellant

APPENDICES

1. Order Vacating Findings of Fact, Conclusions of Law and Final Order dated December 8, 2015.
 2. Petition for Judicial Review of Agency Action (CP 82-97);
-

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2015, I caused to be served a true and correct copy of the foregoing document on the party listed below via:

Tracy Bahm, AAG | Colin Caywood, AAG
OFFICE OF THE ATTORNEY GENERAL
PO Box 40100
Olympia, WA 98504-0100
Email: TracyB@ATG.WA.GOV |
ColinC@ATG.WA.GOV | DARLAA@ATG.WA.GOV

Via:

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	King County eSvc
<input checked="" type="checkbox"/>	Email

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

Signed at Mercer Island, Washington, Friday, December 18, 2015.



John W. Schedler, WSBA No 8563

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
VETERINARY BOARD OF GOVERNORS

In the Matter of

MARK L. BESOLA
Credential No. VET.VT.00004120

Respondent

No. M2012-512

**ORDER VACATING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
FINAL ORDER**

This matter comes before the Veterinary Board of Governors (Board) as a result of the Washington State Supreme Court's ruling of November 5, 2015 (*State v. Besola*, No. 90554-1). The Board, having reviewed the record, issues the following:

1. PROCEDURAL BACKGROUND AND FACTS

1.1 Respondent is a veterinarian, credentialed by the State of Washington at all times applicable to this matter.

1.2 On June 20, 2013, the Board entered a Findings of Fact, Conclusions of Law and Final Order against Respondent in the above-captioned matter. In that Order, the Board determined that the Respondent committed unprofessional conduct as defined under RCW 18.130.180(1) and (17). The Board's determination was based on the Respondent's criminal conviction in Pierce County Superior Court No. 09-1-03223-0. The Board indefinitely suspended the Respondent's credential to practice as a veterinarian.

1.3 On November 5, 2015, the Washington State Supreme Court held that, in the Respondent's criminal case, the evidence presented against the Respondent was the product of an invalid search warrant, and the Respondent's convictions must be reversed.

2. CONCLUSIONS OF LAW

Based on the Findings of Fact, the Board makes the following Conclusions of Law:

2.1 The Board has jurisdiction over Respondent and over the subject matter of this proceeding.

2.2 Because the Board based its finding of misconduct on the Respondent's criminal convictions, and those convictions have been reversed, there is no lawful basis

ORDER TO VACATE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER
NO. M2012-512

PAGE 1 OF 2

for a finding of misconduct or to maintain the suspension of the Respondent's credential.

2.3 As required by law, and in the interests of justice, the findings of professional misconduct issued against the Respondent should be vacated.

3. ORDER

Based on the Findings of Fact and Conclusions of Law, the Board ORDERS:


3.1 The Board's Order issued on June 20, 2013, is VACATED, the charges are dismissed, and the Respondent's license to practice as a veterinarian in the State of Washington is REINSTATED, subject to all other terms and conditions for valid licensure. The Respondent is publicly exonerated as set forth in RCW 18.130.110.

DATED: 12-8-15, 2015

STATE OF WASHINGTON
VETERINARY BOARD OF GOVERNORS


ETHAN C. NELSON, DVM
PANEL CHAIR

PRESENTED BY:


MARK TRIPLETT WSEA #31179
PROGRAM REPRESENTATIVE

12/4/15
DATE

ORDER TO VACATE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER
NO. M2012-512

PAGE 2 OF 2

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KING COUNTY
SUPERIOR COURT CLERK
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CASE NUMBER: 13-2-24470-5 KNT

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HON. MARY ROBERTS, DEPT.4.

**BEFORE THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

In re

MARK L. BESOLA,

Petitioner,

Vs.

DEPARTMENT OF HEALTH, STATE
OF WASHINGTON,

Respondent.

№ 13-2-24470-5

**PETITION FOR JUDICIAL RE-
VIEW OF AGENCY ACTION
(RCW 34.05.570)**

I. PETITION FOR JUDICIAL REVIEW

Mark Besola seeks judicial review of the Findings of Fact, Conclusions of Law and Final Order issued on June 20, 2013 by the Department of Health. A copy of that order is attached hereto.

II. JURISDICTION

1. This Court has jurisdiction pursuant to the Washington Administrative Procedure Act, RCW 34.05 *et seq.*

III. PARTIES, PARTICIPANTS, AND VENUE

2. Petitioner Mark Besola's principle place of business is within King County, Washington. The business is located at:

**PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 1**

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1115 S. 347th Place
Federal Way, WA 98003

3. John W. Schedler is the attorney of record for Mr. Besola. His mailing address is:

John W. Schedler, Esq.
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2448 76th Ave. SE, Suite 202
Mercer Island, WA 980404
Tel. 206-550-9831 Fax 866-580-4853
Email: JOHN@SCHEDLERSCHAMBERS.COM

4. Respondent is the Washington State Department of Health and its decisions are subject to the Washington Administrative Procedure Act. The Department's mailing address is:

Washington State Department of Health Veterinary Program
P.O. Box 47874
Olympia, WA 98504

5. Venue in this Court is proper under the Washington Administrative Procedure Act. RCW 34.05.514(1) provides that proceedings for review under RCW Chapter 34.05 may, at the petitioner's option, proceed in the superior court of the petitioner's principal place of business. Petitioner Besola's principle place of business is in King County.

IV. BACKGROUND FACTS

6. On April 20, 2012, Dr. Besola was found guilty of one count of dealing in depictions of a minor engaged in sexually explicit conduct and one count of possession of depictions of a minor engaged in sexually explicit conduct in Pierce County Superior Court Cause No. 09-1-03223-0. The convictions have been appealed to Division 2 of the Washington State Court of Appeals.

**PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 2**

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1 7. On September 27, 2012, the Department charged Dr. Besola with unprofes-
2 sional conduct "in violation of RCW 18.130.180(1) and (17)" (Statement of Charges, ¶
3 2.1).

4 8. As a veterinarian, Dr. Besola's practice consists of: advertising his ability
5 and/or willingness to or, in fact, diagnosing, prognosing, or treating diseases, de-
6 formities, defects, wounds, or injuries of animals; prescribing or administering
7 drugs, medicines, or treatments to animals; performing operations, manipulations,
8 or applying any apparatus or appliance for cure, amelioration, correction or reduc-
9 tion or modification of any animal disease, deformity, defect, wound or injury for
10 hire, fee, compensation, or reward, promised, offered, expected, received, or accept-
11 ed directly or indirectly; or performing manual procedures for the diagnosis of preg-
12 nancy, sterility, or infertility upon livestock; or implanting any electronic device for
13 the purpose of establishing or maintaining positive identification of animals. RCW
14 18.92.010.

15 9. In April of 2009, police executed a search warrant at the residence where Dr.
16 Besola resided with his roommate and discovered hundreds of pornographic DVDs,
17 including two copies of one DVD that contained a clip of an unidentified adult female
18 engaged in sexual conduct with a German shepherd dog.

19 10. On April 20, 2012, Dr. Besola was convicted of one count possession of depic-
20 tions of a minor engaged in sexually explicit conduct and of one count of dealing in
21 depictions of a minor engaged in sexually explicit conduct. Dr. Besola was not
22 charged with or found guilty of any crime related to the DVDs involving the dog.

23 11. Dr. Besola has appealed his criminal convictions.
24
25

**PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 3**

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1 12. On September 26, 2012, the Department issued a Statement of Charges alleg-
2 ing that Dr. Besola committed unprofessional conduct in violation of RCW
3 18.130.180(1) and (17) when Dr. Besola: (1) was convicted of dealing in depictions of
4 a minor engaged in sexually explicit conduct; (2) was convicted of possession of de-
5 pictions of a minor engaged in sexually explicit conduct; and (3) possessed a video
6 depicting a German shepherd dog having sexual intercourse with a young woman.
7 The Department alleged that Dr. Besola's convictions and conduct amounted to
8 moral turpitude and were related to the practice of Dr. Besola's profession under *Ha-*
9 *ley v. Medical Disciplinary Board*, 117 Wn.2d 729, 818 P.2d 1062 (1991) and *In re*
10 *Kindschi*, 52 Wn.2d 8, 319 P.2d 828 (1958).

11 13. On January 14, 2013, Dr. Besola moved to dismiss the charges against him in
12 this matter on the basis that his convictions related to child pornography had noth-
13 ing to do with his practice as a veterinarian and therefore did not constitute "unpro-
14 fessional conduct" under RCW 18.130.180(1) and (17).

15 14. On January 22, 2013, Dr. Besola filed a Motion to Strike Allegations From
16 Statement of Charges or Other Relief praying the presiding officer strike the lan-
17 guage in the Statement of Charges referring to the dog video and to exclude all refer-
18 ences to the dog video. Dr. Besola requested, in the alternative, that the presiding
19 officer direct the government to file an Amended Statement of Charges omitting any
20 charges referencing the video of the dog. Dr. Besola argued that any charges regard-
21 ing the dog video would infringe upon Dr. Besola's First Amendment rights.

22 15. On February 1, 2013, Dr. Besola filed a Motion for Summary Judgment in
23 which he argued that the charges against him should be dismissed because he could
24 not be punished for activity that is protected by the First Amendment and that there
25

PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 4

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1 was no evidence that the conduct that was the basis of his convictions was related to
2 his practice as a veterinarian.

3 16. On February 19, 2013, the Health Law Judge issued an order denying Dr. Be-
4 sola's motions to dismiss the charges, to strike the allegations, and for summary
5 judgment.

6 17. On June 11, 2013, a hearing was held regarding the allegations against Dr. Be-
7 sola of unprofessional conduct.

8 18. At the hearing it was learned one of the panel members is a client of petition-
9 er's counsel. Dr. Besola objected and the objection was overruled.

10 19. At hearing the presiding officer decline to place in to the record his instruc-
11 tions on the law and issues to the hearing panel. Dr. Besola objected and the objec-
12 tion was overruled.

13 20. The Department Board of Governors found that Dr. Besola's convictions were
14 acts of unprofessional conduct and suspended Dr. Besola's license to practice indefi-
15 nitely. The Board of Governors explicitly stated that it was finding that Dr. Besola
16 engaged in acts of unprofessional conduct based solely on Dr. Besola's alleged pos-
17 session of and dealing in child pornography. The Board of Governors explicitly stat-
18 ed that it did not consider the issue of Dr. Besola's alleged possession of a video of
19 bestiality.

20 21. Relying on *Haley v. Medical Discipline Board*, 117 Wn.2d 720, 818 P.2d 1062
21 (1991), the Board of Governors held that Dr. Besola's "conduct is related to the prac-
22 tice of his profession because it lowers the standing of the profession in the public's
23 eyes. The public view of the professionalism of veterinarians is diminished when a
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25

PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 5

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1 veterinarian is guilty of possessing child pornography and dealing in child pornogra-
2 phy.”

3
4 **V. REASONS PETITIONER IS ENTITLED TO RELIEF**

5 Under RCW 34.05.570(3), upon review of an agency order in an adjudicative
6 proceeding, a petitioner is entitled to relief only if the review court determines that,
7 inter alia;

8 The order is outside the statutory authority or jurisdiction of the agen-
9 cy conferred by any provision of law;

10 The agency has erroneously interpreted or applied the law;

11 The order is not supported by evidence that is substantial when viewed
12 in light of the whole record before the court, which includes the agency
record for judicial review, supplemented by any additional evidence re-
ceived by the court under this chapter; or

13 The order is arbitrary or capricious.

14 22. The Board of Governors found that “the Department proved by both a
15 preponderance of the evidence and by clear and convincing evidence that [Dr. Be-
16 sola] committed unprofessional conduct as defined in RCW 18.130.180(1).” The
17 Board of Governors also found that the Department had proved by both a prepon-
18 derance of the evidence and by clear and convincing evidence that Dr. Besola com-
19 mitted unprofessional conduct as defined in RCW 18.130.180(17).

20 23. In so ruling, the Board of Governors rejected Dr. Besola’s arguments
21 that his convictions for possession and distribution of child pornography were not
22 related to his practice of his profession as required under RCW 18.130.180(1).

23 24. Dr. Besola is entitled to relief because the Board of Governor’s deter-
24 mination that Dr. Besola’s convictions for possession and distribution of child por-
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**PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 6**

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1 nography constituted moral turpitude related to his profession was not supported by
2 substantial evidence when the whole record is reviewed. This renders the Board's
3 decision outside the statutory authority of the Department of Health, an erroneous
4 application of the law, and arbitrary and capricious.

5 A. *The Board of Governors misinterpreted the law in finding that the fact*
6 *of Dr. Besola's convictions established that the conduct underlying*
7 *those convictions "related to" Dr. Besola's practice under RCW*
8 *18.130.180(1) and (17).*

9 25. The Board of Governors erred in finding that the fact of Dr. Besola's
10 convictions established that the actions underlying the convictions were "related to"
11 Dr. Besola's practice as a veterinarian. Under RCW 18.130.180(1) the commission of
12 any act of moral turpitude, dishonesty, or corruption relating to the practice of the
13 person's profession is unprofessional conduct even if the act does not constitute a
14 crime. Under RCW 18.130.180(1) conviction of a crime for an act involving moral
15 turpitude, dishonesty, or corruption relating to the person's practice of their profes-
16 sion is conclusive evidence at a disciplinary hearing of the guilt of that person of that
17 crime. However, RCW 18.130.180(1) does **not** mandate that conviction of a crime is
18 proof that the acts underlying the crime were ***related to the convicted person's***
19 ***practice.***

20 26. Similarly, under RCW 18.130.180(17) conviction of a misdemeanor or
21 gross misdemeanor ***related to the person's practice*** constitutes unprofessional
22 conduct for which a professional can be disciplined. Again, as with RCW
23 18.130.180(1), nothing in RCW 18.130.180(17) mandates that conviction of a crime is
24 automatically proof that the conduct related to the person's profession.
25

PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 7

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1 27. The Board of Governors incorrectly interpreted RCW 18.130.180(1) and
2 (17) when it found that the acts underlying Dr. Besola's convictions were related to
3 his practice simply because he was convicted of them.

4 *B. The Board of Governors misinterpreted the law when it found that the*
5 *applicable legal test was whether or not Dr. Besola's convictions*
6 *would lower the standing of veterinary medicine in the public's eyes.*

7 28. The Board of Governors did not consider the video involving the dog in
8 determining whether or not Dr. Besola had committed unprofessional conduct. Fur-
9 ther, the board did not consider Dr. Besola's testimony denying he committed the
10 crimes because it found that his testimony was "trumped by the rule found in RCW
11 18.130.180(1) that a judgment and sentence is conclusive evidence at the ensuing
12 disciplinary hearing of the guilt of the license holder."

13 29. Instead, to establish that Dr. Besola's convictions for possession and
14 distribution of child pornography were convictions for acts "related to" his profes-
15 sion the board relied entirely upon the testimony of one witness who testified that
16 "children do come to veterinarian clinics along with their families." Citing this tes-
17 timony and *Haley v. Medical Disciplinary Board*, 177 Wn.2d 720, 818 P.2d 1062
18 (1991), the Board of Governors found that Dr. Besola's convictions were related to
19 the practice of his profession because "it lowers the standing of the profession in the
20 public's eyes. The public view of the professionalism of veterinarians is diminished
21 when a veterinarian is guilty of possessing child pornography and dealing in child
22 pornography."

23 30. The Board of Governors did not apply the correct test to determine
24 whether or not Dr. Besola's conduct "related to" his profession. In *Haley*, the Wash-
25 ington State Medical Disciplinary Board imposed sanctions against Dr. Theodore
Haley after ruling that his sexual relationship with a former teenage patient consti-

**PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 8**

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1 tuted unprofessional conduct. Haley appealed and the Washington Supreme Court
2 affirmed the Board's decision.

3 31. The Supreme Court agreed with the Board of Governor's determination
4 that Haley's extended sexual conduct with an underage former patient constituted
5 unprofessional conduct under RCW 18.130.180(1). In so agreeing, the Supreme
6 Court held, "We construe the "related to" requirement as meaning that the conduct
7 must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of,
8 the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062.

9 32. In explaining this "related to" standard, the *Haley* court discussed *In re*
10 *Kindschi*, 52, Wn.2d 8, 319 P.2d 824 (1958), a case where a physician had his license
11 suspended after he was convicted of tax fraud:

12 The tax fraud was not related to the physician's diagnosis, care, or
13 treatment of any patient. We nonetheless upheld the Board, and in doing
14 so we took a broad view of the required relationship between the
15 improper conduct and the practice of the profession. **A medical dis-**
16 **ciplinary proceeding**, we explained, is taken for two purposes: to
17 protect the public, and to protect the standing of the medical profes-
18 sion in the eyes of the public. *In re Kindschi*, at 11, 319 P.2d 824; *cf. In*
19 *re McGrath*, 98 Wn.2d 337, 345, 655 P.2d 232 (1982) (identifying similar
20 purposes in regard to disciplining attorneys). We stated that the
21 due process and equal protection clauses of the United States Constitu-
22 tion apply to disciplinary proceedings, and that no person may be pre-
23 vented from practicing a profession except for valid reasons. *In re*
24 *Kindschi*, 52 Wn.2d at 11-12, 319 P.2d 824 (*citing Schware v. Board of*
25 *Bar Examiners of New Mexico*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d
796 (1957)). Conviction for tax fraud, we explained, is a valid reason to
take disciplinary action against a physician:

26 The public has a right to expect the highest degree of
27 trustworthiness of the **members of the medical profes-**
28 **ession**. We believe there is a rational connection be-
29 tween income tax fraud and one's fitness of character or
30 **trustworthiness to practice medicine**, so that the
31 legislature can properly make fraudulent conduct in such
32 instances a ground for revoking or suspending the license
33 of **a doctor**.

PETITION FOR JUDICIAL REVIEW
OF AGENCY ACTION - 9

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1 *In re Kindschi*, 52 Wn.2d at 12, 319 P.2d 824. Being convicted of tax
2 fraud does not indicate any lack of competence in the technical skills
3 needed to be a **physician**. Rather, it indicates a lack of the high de-
4 gree of trustworthiness the public is entitled to expect from **a physi-
cian**. It raises a reasonable apprehension that **the physician** might
5 abuse the trust inherent in professional status, and it diminishes the
6 profession's standing in the public's eyes. Trust is essential to ensure
7 treatment will be accepted and advice followed.

8 *Haley*, 117 Wn.2d at 731-732, 818 P.2d 1062 (emphasis added).

9 33. The *Haley* court ultimately held:

10 In sum, Dr. Haley's conduct indicates unfitness to practice medicine in
11 two ways: it raises concerns about his propensity to abuse his profes-
12 sional position, **and it tends to harm the standing of the pro-
13 fession in the eyes of the public**, which both lead to reasonable
14 apprehension about the public welfare. Therefore, the Board properly
15 concluded that Dr. Haley engaged in acts of unprofessional conduct
16 under RCW 18.130.180(1).

17 *Haley*, 117 Wn.2d at 736, 818 P.2d 1062 (emphasis added).

18 34. In reaching this conclusion, the *Haley* court noted it is only because
19 physicians are responsible for maintaining the public health that the State could
20 punish a physician for committing an act that impugns the integrity of the medical
21 profession:

22 It should be emphasized that the concerns with protecting the integrity
23 of the profession and protecting the public are not unrelated. Indeed,
24 **constitutional constraints mandate that any state-imposed
25 requirement for practicing a profession must be rationally
related to a legitimate state interest ...** The concern with pro-
tecting the medical profession, if viewed as a concern with preserving
the interests of physicians themselves, is difficult to regard as a legiti-
mate state interest or as rationally related to fitness to practice medi-
cine. As an interest of the state, however, **preserving professional-
ism is not an end in itself. Rather, it is an instrumental end
pursued in order to serve the state's legitimate interest in
promoting and protecting the public welfare.** To perform their
professional duties effectively, **physicians** must enjoy the trust and
confidence of their patients. **Conduct that lowers the public's es-
teem for physicians erodes that trust and confidence, and so
undermines a necessary condition for the profession's exe-
cution of its vital role in preserving public health through
medical treatment and advice.**

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1 *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062.

2 35. It is only because a lessening of the public's view of the integrity of
3 **physicians** would arguably cause harm to the public welfare that the *Haley* court
4 adopted the rule that any act committed by **a physician**, even if not in the course of
5 the practice of his or her profession, could be considered unprofessional conduct re-
6 lated to his or her profession under RCW 18.130.180.

7 36. In finding that *Haley's* conduct was "related to" his profession because
8 *Haley's* conduct lowered the esteem of the medical profession in the eyes of the pub-
9 lic, the *Haley* court created a rule of determining when a **physician's** conduct could
10 be considered "related to" his or her profession. *Haley* did not, as claimed by the
11 Board of Director's in their decision, establish a broad rule that any conduct by any
12 member of any profession would be considered "related to" that individual's profes-
13 sion simply because it lessened the view of that profession in the eyes of the public.
14 Rather, *Haley* established a broader rule applicable **only to physicians** since phy-
15 sicians are critical to maintaining public health, any action taken by a physician
16 which might cause the public to lower its trust of physicians was "related to" that
17 physician's practice of his or her profession. In other words, the "lower the public's
18 opinion" test for whether or not the conduct of a professional is related to the profes-
19 sional's profession applies only to physicians due to the special status of physicians
20 in our society.

21 37. This conclusion is upheld by *Ritter v. State, Bd. of Registration for*
22 *Professional Engineers and Land Surveyors*, 161 Wash. App. 758, 255 P.3d 799
23 (2011). In *Ritter*, Ritter was a licensed professional engineer who began working for
24 the City of Lacey in 1996 as public works director. In 2007 Ritter was convicted of
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1 three counts of child molestation involving a family member that occurred in 1998.
2 Ritter did not commit the offenses on the workplace or otherwise in any other pro-
3 fessional capacity. The convictions were Ritter's first criminal convictions and he
4 was accused of any other similar conduct.

5 38. In 2008, the Board Registration for Professional Engineers and Land
6 Surveyors initiated disciplinary proceedings against Ritter. The Board alleged that,
7 based solely on his child molestation convictions, Ritter had committed unprofes-
8 sional conduct under RCW 18.235.130(1). The Board found that Ritter's crimes con-
9 stituted unprofessional conduct and suspended his license.

10 39. The Court of Appeals held that the Board had misinterpreted and mis-
11 applied the law when it found that Ritter's convictions related to his profession and
12 suspended his license on the basis of those convictions alone. The *Ritter* court dis-
13 cussed *Haley* and the rule established in *Haley* for physicians and then found that
14 Ritter's conduct had no relation to his practice of his profession:

15 In our review of the record, we do not have reasonable concerns that
16 based solely on his convictions, Ritter would abuse his status as a pro-
17 fessional engineer. Unlike *Haley*, in which the professional was a phy-
18 sician who had child patients, the record shows that Ritter is a profes-
19 sional engineer whose business is done with adults. When profession-
20 als regularly interact with children, such as physicians or attorneys,
21 **and when the evidence in the record shows that the profes-**
22 **sional used their skill or standing to take advantage of chil-**
23 **dren**, courts could reasonably say that a child molestation conviction
24 relates to the practice of that professional. E.g., *Haley*, 117 Wn.2d 720,
25 818 P.2d 1062. **But where, as here, the record does not show**
that Ritter regularly interacted with children or that Ritter
used his professional position to take advantage of children,
we cannot say that Ritter's child molestation convictions
are related to the practice of professional engineering.

23 *Ritter*, 161 Wn.App. at 767, 255 P.3d 799 (emphasis added).

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1 In other words, because Ritter was not a physician and because his crimes
2 were not committed in the course of the practice of his profession and were not facil-
3 itated by Ritter exploiting his membership in the profession, then Ritter's crimes
4 were not "related to" Ritter's practice of his profession.

5 40. In so ruling, the *Ritter* court noted that the *Haley* court
6 ... construed the "related to" requirement as meaning that the conduct
7 must indicate unfitness to bear the responsibilities of, and to enjoy the
8 privileges of, the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062.
9 The court held that the "conduct need not have occurred during the ac-
10 tual exercise of professional or occupational skills, nor need the con-
11 duct raise general doubts about the individual's grasp of those skills."
12 *Haley*, 117 Wn.2d at 733, 818 P.2d 1062. Instead, the "conduct may
13 indicate unfitness to practice medicine if it raises reasonable concerns
14 that the individual may abuse the status of being a physician in such a
15 way as to harm members of the public, or if it lowers the standing of
16 the medical profession in the public's eyes." *Haley*, 117 Wn.2d at 733,
17 818 P.2d 1062.

18 41. *Haley* and *Ritter* establish that there is one test for whether or not a
19 professional's conduct is related to his or her profession that is applicable to all pro-
20 fessionals, but that there is a second broader test applicable only to physicians due to
21 their special relationship to the public. The test applicable to all professionals, in-
22 cluding physicians, to determine whether a professional's conduct "relates to" his or
23 her profession is whether or not the conduct raises reasonable concerns that the in-
24 dividual may abuse the status of being a professional in such a way as to harm mem-
25 bers of the public. In addition to this general test, because physicians are responsi-
ble for maintaining public health, a physician's conduct can also be found to "relate
to" the practice of medicine if it lowers the standing of the medical profession in the
public's eyes.

42. Because Dr. Besola is not a physician, the test applicable to determin-
ing whether or not his convictions "relate to" his practice as a veterinarian is whether

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1 or not his conduct raises reasonable concerns that he would abuse the status of being
2 a veterinarian in such a way as to harm members of the public. Whether or not Dr.
3 Besola's actions lessened the public's opinion of veterinarians as a class is irrelevant
4 to whether or not Dr. Besola's actions were related to his practice as a veterinarian.
5 The Board of Governors oversimplified and misstated the law when it held that the
6 test to determine whether or not Dr. Besola's conduct "related to" the practice of his
7 profession was simply if his conduct lowered the standing of the profession in the
8 eyes of the public.

9 C. *The Board of Directors' Order is not supported by substantial evi-*
10 *dence in the record.*

11 43. As discussed above, the proper test to be applied in determining
12 whether or not Dr. Besola's convictions "relate to" his practice as a veterinarian is
13 whether or not his conduct raises reasonable concerns that he would abuse the status
14 of being a veterinarian in such a way as to harm members of the public.

15 44. Dr. Besola's convictions were based on the discovery of pornographic
16 materials inside his bedroom in his residence. There was no evidence indicating that
17 Dr. Besola used his veterinary practice to distribute, collect, create, or in any other
18 way utilize child pornography. The record is simply void of any connection between
19 Dr. Besola's alleged possession and distribution of child pornography and his activi-
20 ties as a veterinarian

21 45. Dr. Besola's case is like *Ritter* and unlike *Haley* in that there is abso-
22 lutely no evidence that Dr. Besola used his profession to facilitate the crimes he was
23 convicted of committing in any manner.
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1 46. The Board's findings were made notwithstanding the unrefuted testi-
2 mony of Christmas Covell, PhD, who performed a psycho-sexual evaluation of Dr.
3 Besola and concluded (a) that he is not a pedophile and (2) not a sexual predator.

4 47. The Board's determination that Dr. Besola's convictions "relate to" his
5 professional practice lacks *any* evidence in the record.

6 *E. The Hearing Panel violated the Appearance of Fairness Doctrine*
7 *and its decision is therefore void ab initio.*

8 48. In assigning to the hearing a person who is a client of petitioner vio-
9 lates the Appearance of Fairness Doctrine.

10 *F. Failure to make a record of how the hearing panel was instructed on*
11 *the law and issues denied petitioner due process of law.*

12 49. By failing to make a record of the presiding officer's instructions on the
13 law and issues to the hearing panel, the agency failed to grant due process of law, was
14 arbitrary and capricious, and denied petitioner a record upon which to evaluate
15 whether the hearing panel erroneously interpreted or applied the law.

16 **V. PRAYER FOR RELIEF**

17 Petitioner Mark Besola prays the Decision of the Veterinary Board of Govern-
18 nors be vacated and judgment be entered against Respondent as follows:

19 50. That the June 20, 2013 Findings of Fact, Conclusions of Law, and Final
20 Order issued under Master Case No. M2012-512 by the Department of Health Veter-
21 inary Board of Governors of the State of Washington be reversed and held for
22 naught; and

23 51. That Dr. Besola's license be reinstated;

24 52. That Dr. Besola be granted an award of attorney fess and costs pursu-
25 ant to RCW 4.84.340 & 350; and

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1 53. That Dr. Besola be awarded any addition equitable, legal, or injunctive
2 relief the Court finds appropriate and just.

3
4 Respectfully submitted this 12th day of July, 2013.

5 SCHEDLER BOND, PLLC
6 Attorneys for Petitioner
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8 By: John W. Schedler, WSBA No 8563

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