

RECEIVED
E APR 13 2016
WASHINGTON STATE
SUPREME COURT

NO. 92883-5

SUPREME COURT OF THE STATE OF WASHINGTON

MARK BESOLA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, VETERINARY
BOARD OF GOVERNORS,

Respondent.

**ANSWER TO APPELLANT'S MOTION FOR DISCRETIONARY
REVIEW OF MOOT CASE**

ROBERT W. FERGUSON
Attorney General

TRACY L. BAHM
Assistant Attorney General
WSBA No. 22950
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

ORIGINAL

TABLE OF CONTENTS

I. NATURE OF THE CASE.....1

II. IDENTITY OF PARTY1

III. REQUEST FOR RELIEF.....1

IV. STATEMENT OF THE CASE2

 A. Factual Background2

 B. Procedural Background.....3

V. ARGUMENT4

 A. Besola’s Motion For Discretionary Review Should Be Denied Because The Court Of Appeals Properly Found The Case Is Moot.....4

 B. There Is No Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.....5

 C. Besola Is Not Entitled To Attorney Fees Under The Equal Access To Justice Act.....7

VI. CONCLUSION12

TABLE OF AUTHORITIES

Cases

<i>Besola v. Dept. of Health</i> , No. 72495-9-I, 2016 WL 398166, (Wash. Ct. Apps., Div. I, Feb. 1, 2016) (unpublished).....	4
<i>Haley v. Medical Disciplinary Bd.</i> , 117 Wn.2d 720, 818 P.2d 1062 (1991).....	10, 11
<i>Hart v. Dep't of Soc. & Health Servs.</i> , 111 Wn.2d 445, 759 P.2d 1206 (1988).....	6, 7
<i>In re Pers. Restraint Petition of Mattson</i> , 166 Wn.2d 730, 214 P.3d 141 (2009).....	6
<i>In re Recall of Seattle School Dist. No. 1 Directors</i> , 162 Wn.2d 501, 173 P.3d 265 (2007).....	4
<i>Moen v. Spokane City Police Dep't</i> , 110 Wn. App. 714, 42 P.3d 456 (2002).....	9
<i>New York v. Ferber</i> , 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).....	10
<i>Parmelee v. O'Neel</i> , 168 Wn.2d 515, 229 P.3d 723 (2010).....	8
<i>Ryan v. State, Dep't of Soc. & Health Servs.</i> , 171 Wn. App. 454, 287 P.3d 629 (2012).....	8
<i>Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	9
<i>Standow v. Spokane</i> , 88 Wn.2d 624, 564 P.2d 1145 (1977).....	11
<i>State v. Beaver</i> , 184 Wn.2d 321, 358 P.3d 385 (2015).....	4, 6

<i>State v. Besola & Swenson</i> , 184 Wn.2d 605, 359 P.3d 799 (2015).....	4
<i>State v. Besola & Swenson</i> , No. 71432-5, 181 Wn. App. 1013, 2014 WL 2155229, at *19 (Wash. Ct. Apps., Div. I, May 19, 2014) (unpublished).....	4
<i>State v. Ehli</i> , 115 Wn. App. 556, 62 P.3d 929 (2003).....	10
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	6
<i>State v. Luther</i> , 157 Wn.2d 63, 134 P.3d 205 (2006).....	10

Statutes

RCW 18.130.040(2)(b)(xiv)	11
RCW 18.130.180(1).....	2, 3, 10
RCW 18.130.180(17).....	3, 9
RCW 18.92	11
RCW 34.05	3
RCW 34.05.574(1).....	5
RCW 4.84.350	4
RCW 4.84.350(1).....	7, 8

Rules

RAP 13.4(b)	1
-------------------	---

I. NATURE OF THE CASE

On February 1, 2016, Division I of the Court of Appeals issued a decision dismissing Besola's appeal as moot and denying him attorney fees. He now asks this Court to review that decision. This request is inappropriate for discretionary review because it does not meet any of the considerations governing acceptance of review as set forth in RAP 13.4(b).

II. IDENTITY OF PARTY

The Respondent, Washington State Department of Health (Department), Veterinary Board of Governors (Board) opposes the Appellant's Motion for Discretionary Review.

III. REQUEST FOR RELIEF

This Court should deny Besola's Motion for Discretionary Review of the February 1, 2016, decision of the Court of Appeals finding that the case is moot. Besola cannot and does not satisfy the requirements of RAP 13.4(b). First, his case is moot since he has already received the relief sought (reinstatement of his veterinary license) and this Court may not provide him with additional relief on that issue. Although he contends the Board's original decision conflicted with case law (a contention Respondents dispute), the Board vacated its decision and the Court of Appeals did not reach the substantive issue because it found the appeal to be moot. Second,

because of the unique facts of this case, Besola cannot show there is any issue of substantial public interest that should be determined by this Court. Finally, the Court of Appeals correctly determined that Besola is not entitled to attorney fees under the Equal Access to Justice Act (EAJA) because he was not a prevailing party under the statute and, even had he prevailed, the Board's action was substantially justified when it suspended Besola's veterinary license.

IV. STATEMENT OF THE CASE

A. Factual Background

Besola is a licensed veterinarian. He was 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 crimes are class B felonies. Besola was sentenced to 35 months in prison, followed by 36 months of community custody. The judgment and sentence prohibited 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 Besola that alleged unprofessional conduct under 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.

B. Procedural Background

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 (Final Order), concluding that Besola had committed unprofessional conduct as defined in RCW 18.130.180(1) and (17). The Veterinary Board indefinitely suspended his license and required that, prior to seeking reinstatement of his veterinarian license, Besola provide satisfactory proof that he completed all prison and community custody requirements related to his criminal convictions. Besola was also required to undergo a psychosexual evaluation.

Besola sought judicial review of the Final Order by the King County Superior Court, pursuant to the Administrative Procedure Act (APA), RCW 34.05. On September 12, 2014, the reviewing superior court affirmed the Veterinary Board's Final Order.

Separately, Besola also appealed his criminal convictions. The Court of Appeals affirmed his convictions in an unpublished decision in

May 2014.¹ However, this Court overturned the convictions on November 5, 2015.²

Because the Supreme Court decision overturned the convictions, the Veterinary Board vacated its Final Order on December 8, 2015, and reinstated Besola's license. The Board then moved to dismiss the appeal pending in the Court of Appeals as moot. That motion was granted. The Court also ruled that Besola was not a prevailing party within the meaning of the Equal Access to Justice Act, RCW 4.84.350, and that even if he had been, the agency action was reasonable. *Besola v. Dept. of Health*, No. 72495-9-I, 2016 WL 398166, (Wash. Ct. Apps., Div. I, Feb. 1, 2016) (unpublished).

V. ARGUMENT

A. **Besola's Motion For Discretionary Review Should Be Denied Because The Court Of Appeals Properly Found The Case Is Moot**

A case is moot if a court can no longer provide effective relief. *State v. Beaver*, 184 Wn.2d 321, 358 P.3d 385 (2015); *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 Besola's case on December 8, 2015,

¹ *State v. Besola & Swenson*, No. 71432-5, 181 Wn. App. 1013, 2014 WL 2155229, at *19 (Wash. Ct. Apps., Div. I, May 19, 2014) (unpublished).

² *State v. Besola & Swenson*, 184 Wn.2d 605, 359 P.3d 799 (2015).

and reinstated his license. Based on that action, this Court can no longer provide Besola with effective relief under the Administrative Procedure Act. Had Besola prevailed on the merits, he would have been entitled under RCW 34.05.574(1) to have the Board's Final Order set aside and his license reinstated—exactly the relief he already has obtained. There is no further relief available to him under the APA, and this case therefore is moot.

B. There Is No Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court

Because this case is moot, the Court of Appeals did not address the issue Besola attempts to place before this Court: whether his convictions for sexual exploitation of children are related to the practice of veterinary medicine. After his convictions were overturned by this Court, the Board vacated its decision reaching that conclusion and reinstated his license. The issue no longer is live in this case.

But even if the issue were live, it is not an issue of substantial public interest that should be determined by this Court. To determine whether a case presents an issue of continuing and substantial public interest, the Court considers three factors: “ (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the

likelihood of future recurrence of the question.’ ” *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012) (quoting *In re Pers. Restraint Petition of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009)). As a fourth factor, the court may also consider the level of adversity between the parties. *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988).

The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are sufficiently important to the appellate court. *Hart*, 111 Wn.2d at 449. This exception is not used in cases that are limited to their specific facts. *Id.* (citing cases); *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015) (citing *Hart*).

Hart presents a good analogy for this case, as it also involved a licensing issue related to an individual. In *Hart*, the appellant claimed a violation of due process when her license application was denied, but this Court found her claim to be moot because it could provide her no relief. *Hart*, 111 Wn.2d at 447. The Court rejected her argument that her claim was of continuing and substantial public interest and thus reviewable: “A decision on Hart’s due process claim . . . is limited to the facts of the present case and takes this case out of the public interest exception.” *Id.* at 451. The Court observed that there was little likelihood that the same

facts would recur and explained that “[d]ecisions of moot cases with limited fact situations provide little guidance to other public officials.” *Id.* On that basis, the Court “decline[d] to invoke the [public interest] exception on these limited facts to issue an essentially advisory opinion.” *Id.*

This case does not involve an issue of substantial public interest because the facts of this case are unique. The conviction of a veterinarian for possession and distribution of child pornography is an uncommon occurrence. It may never occur again. Just as in *Hart*, there is no basis for concluding that the public has a substantial interest in having the Supreme Court rule on whether those particular crimes are related to the practice of the veterinary profession in a moot case.

C. Besola Is Not Entitled To Attorney Fees Under The Equal Access To Justice Act

As a threshold matter, the EAJA requires the party seeking attorney’s fees to have prevailed in the judicial review of agency action. RCW 4.84.350(1). A party has prevailed if it has “obtained relief on a significant issue that achieves some benefit that the qualified party sought.” *Id.* This provision requires the party seeking fees to prevail on

the merits before being deemed a prevailing party. *Ryan v. State, Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 476, 287 P.3d 629 (2012) (citing *Parmelee v. O'Neel*, 168 Wn.2d 515, 522, 229 P.3d 723 (2010)). Besola did not “prevail” in this matter in any way that would entitle him to attorney’s fees under EAJA. In fact, Besola has not prevailed at any level of review on any issue related to the Board’s misconduct charges. The Veterinary Board of Governors (Board) vacated the order that is the subject of this appeal on its own initiative after the Supreme Court overturned his criminal convictions, but not because of any argument Besola presented in this case. Besola did prevail in his criminal case based on constitutional search and seizure issues, but his having done so has no bearing on his claim for attorney fees under the EAJA. Besola has not prevailed in this case, and is therefore not entitled to fees under the EAJA.

Second, even if this Court were to determine that Besola prevailed as defined under the EAJA, Besola should not be granted attorney’s fees. Attorney fees are not authorized under the EAJA where the agency action was “substantially justified” or when “circumstances make an award unjust.” RCW 4.84.350(1). A position is substantially justified if it would

satisfy a “reasonable person.” *Silverstreak, Inc. v. Washington State Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (quoting *Moen v. Spokane City Police Dep’t*, 110 Wn. App. 714, 721, 42 P.3d 456 (2002)). In the administrative context, this is a difficult standard for the fee-seeking party to overcome. In *Silverstreak*, for example, the agency changed its interpretation of a regulation in reliance on factors set out in two Court of Appeals decisions, but this Court held that the agency was equitably estopped from applying the changed interpretation to the appellant, finding that to do so would result in a “manifest injustice.” *Silverstreak*, 159 Wn.2d at 889. But the Court denied attorney’s fees under the EAJA because the agency’s actions were substantially justified. *Id.* at 892–93.

The Board’s charges against Besola were based on his criminal convictions. *See* RCW 18.130.180(17). The Superior Court issued the judgment and sentence as to Besola’s convictions on June 8, 2012 (following guilty verdicts by jury on April 20, 2012). The Veterinary Board responded by issuing administrative charges against Besola on September 27, 2012. The Board was substantially justified in relying on those convictions when it issued administrative charges against Besola and took action to suspend his license. Both case law and the record support the Board’s conclusion that the conduct for which Besola was convicted

constitutes moral turpitude related to the practice of the veterinary profession.

Courts have established that dealing in child pornography is a form of sexual exploitation or sexual abuse. *See, e.g., New York v. Ferber*, 458 U.S. 747, 758-60, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (distribution of child pornography photographs constitutes sexual abuse by creating and distributing a permanent record); *State v. Luther*, 157 Wn.2d 63, 74, 134 P.3d 205 (2006) (“Individuals seeking to obtain actual child pornography . . . are part of the child pornography market with its sexual exploitation and abuse of children.”); *State v. Ehli*, 115 Wn. App. 556, 560, 62 P.3d 929 (2003) (child pornography “is sexual exploitation that victimizes the child”). Sexual exploitation of children constitutes moral turpitude, and Besola does not argue otherwise.

Under the Uniform Disciplinary Act, RCW 18.130.180(1), moral turpitude and its relation to a profession are construed in the context of the specific facts and in relation to the purposes of a professional discipline. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 742-43, 818 P.2d 1062 (1991). To be “related to” the practice of the profession, “the conduct must indicate unfitness to bear the responsibilities of, and enjoy the privileges of, the profession. *Id.* at 731. The Board has been

statutorily vested with the authority to decide such matters with respect to veterinary medicine. RCW 18.92; 18.130.040(2)(b)(xiv).

The Board reasonably found that Besola's convictions for possessing and dealing in child pornography, involving children as young as seven years old, were related to the practice of veterinary medicine. It found that children come to his veterinary clinic. Final Order at 2.³ Consistent with *Haley*, it also found that Besola's conduct diminished the profession in the public view. *Id.* at 7. See *Haley*, 117 Wn.2d at 738 ("conduct may indicate unfitness to practice the profession . . . 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"). Although Besola argues that *Haley's* holdings are limited only to physicians, it is noteworthy that one of the decisions this Court relied on in its analysis in *Haley* was a case involving taxicab licenses.⁴ The Board's reliance on *Haley* was reasonable and its suspension of his license was substantially justified.

Besola has not prevailed at any stage of his appeal, and even had he done so, the Board's actions were substantially justified. Besola is not entitled to attorney fees at any stage of his appeal.

³ A copy of the Final Order is attached to Besola's Motion, at pages B-6 through B-17 of the Appendix.

⁴ *Standow v. Spokane*, 88 Wn.2d 624, 564 P.2d 1145 (1977).

VI. CONCLUSION

The Board's actions were reasonable, appropriate, and substantially justified when, following a full hearing, it relied on Besola's criminal convictions for possession and dealing of child pornography in suspending his license to practice veterinary medicine. The Board's actions also were reasonable, appropriate, and substantially justified when it vacated its order and reinstated his license shortly after the Supreme Court overturned those same convictions. Thereafter, the Court of Appeals correctly found that the case was moot. This case involves specific and unique facts that are unlikely to recur and that do not raise any issue of substantial public interest warranting this Court's review. Besola's Motion for Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 13th day of April, 2016.



TRACY L. BAHM, WSBA No. 22950
Assistant Attorney General
Attorney for Respondent
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

RECEIVED
APR 13 2016
WASHINGTON STATE
SUPREME COURT

NO. 92883-5

SUPREME COURT OF THE STATE OF WASHINGTON

MARK L. BESOLA,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF HEALTH,
VETERINARY BOARD OF
GOVERNORS,

Respondent.

DECLARATION OF
SERVICE

I, Darla Aumiller, make the following declaration:

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

2. On April 13, 2016, I caused to be served a true and correct copy of Respondent's Answer to Appellant's Motion for Discretionary Review of Moot Case and this Declaration of Service by placing same in the U.S. mail via state Consolidated Mail Service and via e-mail to:

John W. Schedler
Schedler Bond PLLC
2448 76th Ave SE, Ste 202
Mercer Island, WA 98040
John@SchedlersChambers.com

ORIGINAL

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

DATED this 13th day of April, 2016, at Olympia, Washington.


DARLA AUMILLER
Legal Assistant