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NO. 69662-9  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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THOMAS J. OGDEN,

Appellant

Vs.

WASHINGTON STATE CRIMINAL  
JUSTICE TRAINING COMMISSION,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
No. 12-2-02512-6 KNT

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**APPELLANT'S OPENING BRIEF**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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## I. INTRODUCTION

Appellant Thomas Ogden respectfully requests that this court vacate the Washington State Criminal Justice Training Commission's ("the Commission") Order of Default and dismiss the Order Revoking his Peace Office Certification. Alternatively, Mr. Ogden requests that this Court vacate the Order of Default issued by the Commission and remand this matter to the Commission for a full and fair hearing on the agency's petition to revoke. Mr. Ogden was deprived of a full hearing by the Commission's arbitrary application of its rules, resulting in an agency decision in violation of due process.

Prior to the Commission's decision, Mr. Ogden had voluntarily surrendered his Certification, rendering the matter moot because there was no action left for the Commission to take. Further, the Commission lacked jurisdiction to hear this matter after Mr. Ogden voluntarily surrendered his Certification. Nonetheless, the Commission found Mr. Ogden to be in default and revoked his Certification. In so doing, the Commission applied statutes to support the denial of due process to Mr. Ogden while simultaneously ignoring those statutes and laws requiring it to dismiss this case. The Commission was in error to find that it had the authority and jurisdiction to take action against Mr. Ogden's surrendered license. The

superior court compounded this error by affirming the Commission's flawed decision.

## II. ISSUES ON APPEAL

### *Assignments of Error*

1. It was error for the Commission to find that it had jurisdiction to render a decision regarding Mr. Ogden.
2. It was error for the Commission to set the hearing date without the full Commission present and outside of 180 days of Mr. Ogden's notice of appeal.
3. It was error for the Commission to deny Mr. Ogden's motion to vacate default judgment.

### *Issues relating to Assignments of Error*

1. Was it error for the Commission to render a decision in this matter when it has no jurisdiction over non-certified individuals who are not applicants and continuing jurisdiction is inapplicable under its limited statutory scheme?
2. Was it error for the Commission to hold a hearing in this matter when the surrender of Mr. Ogden's certification has made a decision moot?
3. Was it error under RCW 139-06-070 for the Presiding Member of the Commission panel to set the hearing date in the absence of the whole panel?
4. Was it error under RCW 43.101.155 for the Commission to fail to hold the revocation hearing within 180 days of Mr. Ogden's notice of appeal?
5. Was it error for the Commission to fail to vacate the default judgment under RCW 34.05 *et seq.* when good cause exists and such a failure substantially frustrates the interests of justice?

### **III. STATEMENT OF THE CASE**

#### **A. Background of Mr. Ogden**

On February 8, 2008, Mr. Ogden was granted peace officer certification by the Criminal Justice Training Commission. Mr. Ogden was employed as a police officer by the Tacoma Police Department from December 24, 2007 until he was discharged around March 23, 2010. CP 4.

Prior to the events leading to his dismissal, Mr. Ogden had no adverse disciplinary history with the Tacoma Police Department or with either of the two agencies that had previously employed him. CP 58 (under "Past Performance"). To the contrary, he had received multiple commendations for his "innovation in solving a series of residential burglaries." Even after the disciplinary investigation leading to his discharge began, his sergeant during these events, Frank Richmond, thought highly enough of Mr. Ogden's intelligence and capabilities as a law enforcement officer that Sgt. Richmond recommended him for detective program shadowing, an initial step in the process for becoming a detective. CP 202-204.

**B. The Criminal Justice Training Commission seeks revocation of Mr. Ogden's Certification.**

On or about April 7, 2011, Mr. Ogden received a Statement of Charges from the Commission, which sought to revoke his Peace Officer Certification for alleged disqualifying misconduct. CP 9-10. Mr. Ogden timely exercised his right to a hearing by returning the Request for Hearing form to the Commission. CP 11. A prehearing conference was held on June 30, 2011 and the hearing regarding revocation of Mr. Ogden's certification was set for October 19, 2011 at 10 am. CP 18-21. Not all of the members of the Panel were present when the hearing date was set.

On August 26, 2011, Mr. Ogden voluntarily surrendered his peace officer certification. CP 185. The Commission purported in an order that the surrender was not accepted, despite no evidence that the Commission discussed Mr. Ogden's surrender, or even if the Commission has authority to reject such a surrender. CP 279-280. Mr. Ogden thereafter sought relief by filing a Superior Court action to prevent the Commission from moving forward with its effort to revoke his surrendered certification. CP 259.

On October 20, 2011 a Prehearing Conference was held with fewer than all of the Hearing Panel present. CP 508:13-506:13. At the hearing, the revocation hearing was continued until December 19-20, 2011. CP

512:13-14. The Third Prehearing Order asserts that the “[Mr. Ogden] agreed to waive the 180 day period and extend the time for which a hearing can be held to December 31, 2011.” *Id.* The order also reflects that Mr. Ogden was not present for the hearing but appeared through his attorney, and therefore did not himself sign the order. *Id.* A written agreement to extend the November 4, 2011 deadline for hearing was not signed until the date the Commission claims Mr. Ogden was in default.

After the prehearing conference, the Commission learned that one of its witnesses could not be present, and a new date was requested. CP 323. Mr. Ogden was not present for this informal meeting, and was not given formal notice of the meeting. There is no evidence that Mr. Ogden agreed to the new date, other than the statements made by his attorney. More importantly it appears that none of the hearing panel members were present for this meeting in clear violation of WAC 139-60-070. Chief Robert Torgensen, the Presiding Member of the Commission panel set to hear the allegations of misconduct against Mr. Ogden, purported solely to move the hearing date to December 15-16, 2011. CP 285. This unlawful order was not personally served on the Mr. Ogden, but rather was sent to his attorney.

On Monday, December 12, 2011, Mr. Ogden contacted his attorney to go over his testimony. Mr. Ogden was erroneously advised by

counsel that the hearing date had been reset, at the Commission's request to December 19-20, 2011, rather than December 15-16, 2011. CP 287. Mr. Ogden relied on this advice and moved a business trip from December 19-20, 2011 to December 15, 2011. As a result of this misunderstanding, Mr. Ogden was out of state on the first day of the hearing. *Id.*

By the time his counsel discovered the error regarding the hearing date, Mr. Ogden was unable to change his travel plans yet again. *Id.* Mr. Ogden immediately asked for a continuance of the hearing date. By email, the Chief Presiding Panel Member denied the motion for a continuance, and stated that if Mr. Ogden did not show up for the first day of the hearing, the Hearing Panel would find him in default. CP 286-287. No other members of the Hearing Panel were present when the Presiding Member unilaterally ruled and informed Mr. Ogden of his intention to default him.

Mr. Ogden filed an affidavit explaining the circumstances precluding his appearance at the first day of the of a two-day hearing, as well as a waiver of his presence at the first day. CP 400-401. Mr. Ogden fully planned to attend and testify on the second day of the hearing along with one of the Commission's witnesses, Chief Ramsdell. In other words, the Commission itself was unable to put its entire case on during the first day of the hearing.

The full Hearing Panel finally met on December 15, 2011, orally ruled that Mr. Ogden was not entitled to a continuance, and found him in default even though his attorney was present and fully ready to proceed with the hearing. CP 528:3-526:7. That Mr. Ogden would have been present for the second day of the hearing and prepared to testify was not considered by the Commission. Mr. Ogden subsequently moved to vacate the Order of Default and to dismiss the revocation proceedings based upon irregularities in the proceeding. CP 294-307. His motion was denied by the Commission. CP 448-49. The Commission then entered an order on December 24, 2011, and amended on December 29, 2011, declaring Mr. Ogden to be in default and revoking his Peace Officer Certification. CP 335-351.

The Commission had no authority under its governing statutes to take action once it had lost jurisdiction over Mr. Ogden. Regardless, it unlawfully set a hearing date, and even though Mr. Ogden appeared by and through his attorney on the first day of the hearing, the Commission erroneously ruled him to be in default. Mr. Ogden timely appealed to superior court, and on November 2, 2012, the superior court upheld the Criminal Justice Training Commission's finding of default and the revocation of Mr. Ogden's peace officer certification. Mr. Ogden timely appealed to this Court.

#### IV. ARGUMENT

##### **A. The Commission had no authority to render a decision in this action because it lost jurisdiction over Mr. Ogden.**

1. The Commission has no jurisdiction over uncertified individuals who are not applicants.

The Commission is an administrative agency with limited jurisdiction. Administrative agencies are “creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute.” *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P .2d 962 (1998). The Commission’s statutory authority regarding peace officers is to “[g]rant, deny, or revoke certification of peace officers,” RCW 43.101.085(6), and to establish requirements for maintaining peace officer certification. RCW 43.101.095(3). The Commission’s jurisdiction is thus limited to applicants for certification or reinstatement and peace officers holding a certification. Because Mr. Ogden has voluntarily surrendered his certificate, he falls within neither category. The Commission has no authorization to fine officers, enter injunctions against them, or issue advisory opinions.

The Legislature has the ability to grant broader authority to administrative agencies if it chooses, and has explicitly done so for most

health professions. The commissions and boards regulating health professions specifically retain jurisdiction to discipline license holders even after their licenses have expired or been revoked. This is so because the statutory and regulatory jurisdiction granted to those commissions is broader, and explicitly extends beyond the mere granting or revocation of credentials. For example, in *Brown v. State*, 110 Wn. App. 778, 779, 42 P.3d 976 (2002), Mr. Brown appealed the Commission of Chiropractic Quality Assurance's final order to revoke his license for 10 years, fine him \$30,000, prohibit him from practicing until his license is reinstated and prohibit him from representing himself as a licensed chiropractor. Brown argued that the Commission lacked jurisdiction because his license had expired. *Id.* The Court found that the Commission did have jurisdiction under WAC 246-11-209(1), because the statute explicitly provides "[t]he board has jurisdiction over all licenses issued by the board and over all holders of and applicants for licenses as provided in RCW 18.130.040(2)(b) and (3). Such jurisdiction is retained even if an applicant requests to withdraw the application, or licensee surrenders or fails to renew a license." *Id.* at 783 (emphasis added). Additionally, the Court found that RCW 18.130.050(2) gives the chiropractic commission authority to investigate and hold hearings on "all ... reports of unprofessional conduct" without distinction between expired and active

licenses. *Id.* at 784. There is no similar language in the statutes or regulations applicable in this case to the Commission's authority regarding peace officers in Chapter 43.101 RCW and Chapter 139-06 WAC. *See* RCW 43.101.080 and RCW 43.101.085.

The breadth of authority granted to the Criminal Justice Training Commission is, however, very similar to the breadth of authority granted to the Professional Educator Standards Board, the public agency responsible for granting and revoking public school educational credentials. RCW 28A.410.010 grants the following authority to the Professional Educator Standards Board:

The Washington professional educator standards board shall establish, publish, and enforce rules determining eligibility for and certification of personnel employed in the common schools of this state, including certification for emergency or temporary, substitute or provisional duty and under such certificates or permits as the board shall deem proper or as otherwise prescribed by law. .... The superintendent of public instruction shall act as the administrator of any such rules and have the power to issue any certificates or permits and revoke the same in accordance with board rules.

RCW 28A.410.010. The statutes granting authority to the Criminal Justice Training Commission are, if anything, narrower, providing:

The purpose of such commission shall be to provide programs and standards for the training of criminal justice personnel. RCW 42.101.020.

In addition to its other powers granted under this chapter, the commission has authority and power to...Grant, deny,

or revoke certification of peace officers under the provisions of this chapter. RCW 43.101.085(6).

(1) Upon request by a peace officer's employer or on its own initiative, the commission may deny or revoke certification of any peace officer, after written notice and hearing, if a hearing is timely requested by the peace officer under RCW 43.101.155, based upon a finding of one or more of the following conditions:

(a) The peace officer has failed to timely meet all requirements for obtaining a certificate of basic law enforcement training, a certificate of basic law enforcement training equivalency, or a certificate of exemption from the training;

(b) The peace officer has knowingly falsified or omitted material information on an application for training or certification to the commission;

(c) The peace officer has been convicted at any time of a felony offense under the laws of this state or has been convicted of a federal or out-of-state offense comparable to a felony under the laws of this state; except that if a certified peace officer was convicted of a felony before being employed as a peace officer, and the circumstances of the prior felony conviction were fully disclosed to his or her employer before being hired, the commission may revoke certification only with the agreement of the employing law enforcement agency;

(d) The peace officer has been discharged for disqualifying misconduct, the discharge is final, and some or all of the acts or omissions forming the basis for the discharge proceedings occurred on or after January 1, 2002;

(e) The peace officer's certificate was previously issued by administrative error on the part of the commission; or

(f) The peace officer has interfered with an investigation or action for denial or revocation of certificate by: (i) Knowingly making a materially false statement to the commission; or (ii) in any matter under investigation by or otherwise before the commission, tampering with evidence or tampering with or intimidating any witness.

RCW 43.101.105. The Commission's authority, like that of the Professional Educator Standards Board, is statutorily limited to granting or denying certification. Without a grant of authority over uncertified individuals not applying for certification or reinstatement, the Commission lacks any statutory authority to maintain an action against such persons. Thus, the Commission had jurisdiction over Mr. Ogden because he was neither a peace officer nor an applicant.

Because the Professional Educator Standards Board's grant of authority, like the Commission's grant of authority, is limited to the granting or denial of a credential, the Board explicitly recognizes that once the credential is surrendered, it no longer has jurisdiction over the credential holder—even if revocation proceedings have already begun.

See WAC 181-86-013(1):

A holder of a certificate who has not received a final order for revocation of his or her certificate may voluntarily surrender his or her certificate to the superintendent of public instruction if the certificate holder believes that he or she is or might be ineligible to hold a certificate for any reason which is or might constitute grounds for revocation of the certificate other than conviction of a felony crime stated within WAC 181-86-013(1).

Notably, voluntary surrender is not allowed for the list of felony crimes in WAC 181-86-013 because RCW 28A.400.322 lists those crimes as a basis for mandatory permanent revocation of the credential, and thus

the statutory scheme affirmatively requires that where those convictions exist, the credential must be revoked, not surrendered. There is no similar mandatory-revocation provision anywhere in the statutory scheme governing the Criminal Justice Training Commission. See RCW 43.101.105(1) (“the commission may deny or revoke certification”) (emphasis added). The surrender form that Mr. Ogden completed was modeled on the Professional Educator Standards Board’s surrender form for the teaching credential, with the exception of the list of mandatory-revocation crimes specific to the teaching credential. See RCW 28A.400.322; CP 294-293. Like the Professional Educator Standards Board, the Criminal Justice Training Commission has a narrow statutory mandate that deprives the Commission of jurisdiction once the Certification is surrendered.

Both the similarity between the authority granted to the Professional Educator Standards Board and the Criminal Justice Training Commission, and the difference from the broad grants of authority made to the boards governing the health professions, make sense given the nature of the credentials and professions. Both the teaching credential and the Peace Officer Certification are credentials required for employment by a public agency to which citizens are expected to surrender some amount of discretion and trust. Once the former credential holder is no

longer employed by that public agency, he or she is no longer in the same position of trust. By contrast, the health professions are usually offering and marketing their services directly to the public, and thus there is a need for a broader grant of jurisdiction so that, for example, the Chiropractic Quality Assurance Commission can use fines and injunctions to protect the public and ensure that unlicensed Chiropractors are not offering unregulated services to the public at a local strip mall. No similar such concerns exist in the case of Mr. Ogden.

2. Continuing jurisdiction is inapplicable under the Commission's limited statutory scheme regarding peace officer certification.

The Commission had no continuing jurisdiction over Mr. Ogden. In professional licensing cases, courts have occasionally applied the doctrine of continuing jurisdiction to hold that once a professional licensing board starts proceedings against an individual, its jurisdiction continues until the proceeding is finished. In *Nims v. Washington Bd. of Registration*, 113 Wn.App. 499, 507, 53 P.3d 52 (2002), involving a Professional Engineer, Mr. Nims chose not to renew his engineering license after the Board of Registered Professional Engineers started a disciplinary proceeding against him. *Id.* at 506. He argued that the Board lacked statutory authority for jurisdiction after his license was not renewed, based on RCW 18.43.110, which provides that the Board shall

have the exclusive power to discipline a “registrant,” and on WAC 196-27-010(4), which defines a registrant as “any person holding a certificate of registration issued by this board.” *Id.* The *Nims* court held that “once a professional licensing proceeding has begun, the board retains jurisdiction until it is completed.” *Id.* This holding was expressly based on the court’s reading of RCW 18.43.110, the statute regarding discipline of engineers and land surveyors. That section in turn cross-references to broad powers available under RCW 18.235.110, the “unprofessional conduct” section of the Business and Professions Act, which, like the medical licensing acts, grants broad powers to fine licensees and take “other corrective action.” Under RCW 18.235.020, the unprofessional conduct section, application of the Business and Professions Act is limited only to the businesses and professions licensed under that Act.

Notably, the *Nims* court also relied on a constructed analogy between what it saw as the administrative agency’s powers under RCW 18.43.110 and the powers available to Courts in matters dealing with criminal sentencing and probation. *Nims*, 113 Wn.App. at 507, fn.7. Proceedings in a criminal matter, however, are distinctly different from proceedings in an administrative matter in which the object of contention is not even a license, but a certification. The Criminal Justice Training Commission is not a professional licensing board under the Business and

Professions Act, and the Peace Officer Certification is not a professional license. See RCW 18.235.020 (Peace Officer not listed among covered professions, Criminal Justice Training Commission not listed among professional licensing boards). While courts have found hearings to revoke a professional license are quasi-criminal, no such finding has ever been made for a certification. See *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). It would be error to rely on the same logic when the issues at state are distinct.

Thus, hearings held by the Criminal Justice Training Commission are not “professional licensing proceedings” under *Nims* and the court’s holding there is inapplicable to the case at bar. The legislature made an intentional choice to grant agencies like the Commission and the Professional Educator Standards Board narrower authority than the professional licensing boards, and the Commission, like the Professional Educator Standards Board, cannot step outside its narrow statutory authority. It had no authority to decide a moot matter, and it was error to continue the action against Mr. Ogden.

**B. A hearing over the revocation of Mr. Ogden’s Peace Officer Certification was moot because the Certification had been voluntarily surrendered.**

Mr. Ogden voluntarily surrendered his Peace Officer Certification on August 26, 2011, leaving nothing for the Commission to decide. A

case is technically moot if the court cannot provide the relief originally sought, *In re Swan, son*, 115 Wn.2d 21, 24, 804 P.2d 1 (1990), or can no longer provide effective relief. *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). In some instances, however, a court may exercise its inherent powers to decide a moot matter if it involves “matters of continuing and substantial public interest”. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). The criteria to be considered in determining whether a sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur. *Id.* at 558. Further, administrative tribunals like the Commission may not hear moot matters because they lack the inherent jurisdiction of a court sitting in appeal because administrative agencies lack inherent or common-law powers and may only exercise those powers conferred by statute. *Skagit Surveyors*, 135 Wn.2d at 558.

The only relief sought by the Commission here was the revocation of Mr. Ogden’s Peace Officer Certification. CP 9-10. The only matter over which any statute grants this administrative agency power is the training of Peace Officers and the granting and revocation of the Peace Officer Certification. Mr. Ogden now holds no Peace Officer Certification. After

Mr. Ogden surrendered his certification on August 26, 2011, the Commission had no other issue to resolve. It does not have the authority to impose a fine, and it also lacks the power of a professional board to determine what kind of requirements Mr. Ogden would be subject if he were to petition for reinstatement at this time—those matters are already set forth in statute. *See* RCW 43.101.115 and RCW 43.101.125. Therefore, there is no matter that was within the powers of the Commission to hear, and the action should have been dismissed as moot.

Even if the Commission had inherent powers to hear moot matters, all of the factors allowing a court to consider a moot matter are absent in this case. *See Sorenson*, 80 Wn.2d at 558. This matter is not one of significant public interest. There is already at least one precedential decision holding that conduct similar to that which Mr. Ogden is alleged to have committed is a valid basis for revocation of the Certification. *See In re Martin*, 154 Wn. App. 252, 271, 223 P.3d 1221 (2009). This case therefore does not present unanswered questions of the kind that justify review of a moot matter because there is already an authoritative determination to guide public officers. Lastly, the only way this question could recur would be if Mr. Ogden petitioned for reinstatement of his Certification. If he should do so, the Commission would then be able to address the nature of Mr. Ogden's discharge from the Tacoma Police

Department and what impact that would have on his petition to be reinstated as a peace officer. The Commission would suffer no prejudice to its case by making a determination at that time. This matter lacks any factors which would allow for review by the Commission and it was error to not dismiss it as moot.

**C. The Hearing date was set in violation of WAC 139-06-070 and therefore Mr. Ogden was not in default**

Even if this court finds that the Commission properly had jurisdiction over this matter and that it was not moot, the hearing date was unlawfully established. WAC 139-06-070 governs the setting of hearing dates, stating in relevant part:

(1) Upon receipt of a request for hearing, *the hearing panel shall set the date and time of the hearing*, and the date and time of a prehearing conference. Hearings will be held at the commission's training facility located at: 19010 1st Avenue South, Burien, Washington, 98148, unless the panel determines otherwise.

WAC 139-06-070 (emphasis added). No WAC provision allows for less than the full hearing panel to set the hearing date. WAC 139-06-090 is the regulation relevant to establishing Prehearing Conferences. That regulation states:

The parties or their attorneys shall attend the prehearing conference(s), which may be held telephonically, and which may be conducted by the presiding member of the hearing panel. The parties shall be prepared to discuss the timing and filing of any motions, and of witness and exhibit lists, as well

as the need for discovery. A prehearing order shall be issued at the conclusion of the conference.

WAC 139-06-090. Nothing in this regulation, or any other regulation, permits the Presiding Member alone to establish a different hearing date other than the date established by the entire Hearing Panel in accordance with WAC 139-06-070. The regulation, using mandatory language, states that only panel as a whole can schedule hearing dates. Chief Robert Torgensen, the Presiding Member in this case, independently set a date anyway. As a consequence, Mr. Ogden cannot be held in default because no hearing date was ever lawfully established by the panel. Mr. Ogden therefore did not fail to appear at any lawful hearing.

**D. The Commission failed to hold the revocation hearing within 180 days requiring dismissal.**

Similarly, the Commission failed to comply with the statutory time limitation for holding Mr. Ogden's revocation hearing. The Commission is statutorily required to hold a revocation hearing within 180 days of the date the officer filed his notice of appeal. It did not do so. RCW 43.101.155 states:

2) If a hearing is requested, the date of the hearing must be scheduled not earlier than ninety days nor later than one hundred eighty days after communication of the statement of charges to the officer; the one hundred eighty-day period may be extended on mutual agreement of the parties or for good cause. The commission shall give written notice of hearing at

least twenty days prior to the hearing, specifying the time, date, and place of hearing.

RCW 43.101.155. Here, Mr. Ogden filed his notice of appeal, and the last date by which the hearing could have been set was November 10, 2011. Mr. Ogden never personally waived the 180-day statutory time limitation nor agreed to alter the time limitation. Instead, Mr. Ogden's lawyer orally agreed to extend the time limitation on or about October 20, 2011 without Mr. Ogden's presence.

The Commission made a distinction between Mr. Ogden and his attorney. The Commission ruled that because the Mr. Ogden's attorney showed up for the first day of hearing, and not Mr. Ogden himself, he was in default. In other words, the Commission ruled that Mr. Ogden's attorney could not act in a representative capacity. Applying this ruling to the Commission's earlier actions renders the oral agreement to waive in the future the 180-day time limitation made by Mr. Ogden's lawyer ineffective, as the waiver was not performed by Mr. Ogden himself. If an attorney may not act in representative capacity, any purported waiver by the attorney is insufficient.

The Commission argued that the term "party" broadly means the Respondent or his attorney. However a reference to WAC 139-06-090 makes a clear distinction between the party and his attorneys:

*The parties or their attorneys* shall attend the prehearing conference(s), which may be held telephonically, and which may be conducted by the presiding member of the hearing panel. The parties shall be prepared to discuss the timing and filing of any motions, and of witness and exhibit lists, as well as the need for discovery. A prehearing order shall be issued at the conclusion of the conference.

WAC 139-06-090 (emphasis added). Therefore, under basic concepts of construction only a waiver by Mr. Ogden could have been effective under RCW 43.101.155 to waive or alter his right to a hearing within 180 days. He never did so. Having failed to comply with the mandatory statutory time limitations for holding a hearing, the Commission should have dismissed the case against Mr. Ogden, rather than holding him in default. The Hearing Panel failed to act on or before the statutorily prescribed date of November 10, 2011, and lacked jurisdiction to act against Mr. Ogden after that date. *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416, *review denied*, 155 Wn.2d 1003, 122 P.3d 185 (2005) (an administrative agency has only those powers expressly granted or necessarily implied by statute).

The Commission will suffer no prejudice or be any way stymied in its purpose by finding a lack of jurisdiction in this case. Mr. Ogden currently holds no Peace Officer Certification, and were he to seek to obtain another Certification, the Commission would have the power at that

point to deny Mr. Ogden's request. In the meantime, any action taken is moot. The case against Mr. Ogden should be dismissed.

Alternatively, if this court finds that Mr. Ogden is statutorily permitted to have an attorney undertake certain acts for him in a representative capacity, then logically Mr. Ogden was not in default on the first day of hearing when he waived his presence and allowed his attorney to defend him with the full intention of testifying on the second day of the hearing after the Commission concluded its case. In that instance, the Order of Default should be vacated and the case remanded for a fair hearing on the merits.

**E. Good cause exists to vacate the default judgment under the Washington Administrative Act, RCW 34.05 *et seq.*, and it would substantially frustrate the interests of justice if the default order stands when it was through no fault of Mr. Ogden.**

Default judgments are not favored in a proceeding, and one should not have been issued here. *Morton v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2008), citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). It was manifestly unjust to deny Mr. Ogden a fair opportunity to present his case when his inability to attend the first day of hearing was through no fault of his own. He understandably relied on his counsel's mistaken representation that the hearing date had been changed to December 19-20, 2011. C9 287.

When a party demonstrates good reason for not being in attendance, the order of default should be vacated. *Morin*, 160 Wn.2d at 754. It is strongly preferable that parties be given “their day in court and have controversies determined on their merits.” *Id.* (citations omitted). “A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms.” *Id.*, citing *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). As noted by the Washington State Supreme Court, “[F]or more than a century, it has been the policy ... to set aside default judgments liberally.” *Id.*, citing *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (“where there is a showing not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.”).

In *Sacotte Construction, Inc. v. National Fire & Marine Insurance Co.*, 143 Wn.App. 410, 177 P.3d 1147 (Div. I, 2008), the Court of Appeals vacated a default judgment against an insurer. *Id.* at 418. The Court examined various factors in determining whether to vacate a default judgment, and stated a moving party must demonstrate “(1) that there is a substantial evidence supporting a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect..., (3) that the party acted with

due diligence after receiving notice that the default judgment was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside.” *Id.* at 418. In this case, there is substantial evidence that Mr. Ogden’s conduct does not justify a revocation of his certification. Mr. Ogden did not appear at his hearing because he reasonably relied on representations made by his attorney. He then immediately moved to vacate the default judgment, which was denied by the Commission. Additionally, it is extremely unlikely that the Commission will suffer any hardship if it is required to contest Mr. Ogden’s case on the merits. There is good cause to vacate the default judgment in this case.

Similarly in *Barr v. MacGugan*, 119 Wn.App. 43, 78 P.3d 660 (2003), the Court of Appeals affirmed the trial court’s decision to vacate an order of default when the plaintiff’s attorney suffered from severe clinical depression. *Id.* at 46. The *Barr* Court held it was “not incompetence or deliberate inattention to his workload” that caused the attorney to neglect his practice and found support in parallel federal rules for its decision that an attorney’s mistake may be grounds to set-aside or vacate a judgment. *Id.* at 47. This is because there is a strong policy favoring the resolution of disputes on their merits; proceedings to set aside a default judgment are equitable in nature “and the relief sought or

afforded is to be administered in accordance with equitable principles and terms.” *Morin*, 160 Wash.2d at 754.

Conversely in *Graves v. Dep’t of Employment Security*, 144 Wn.App. 302, 306, 182 P.3d 1004 (2008), the claimant was denied unemployment compensation for failure to comply with the statutory reporting requirements. *Id.* at 306. When the claimant appealed the termination of his benefits, he did not appear at the hearing because he mismarked the hearing date on his calendar. *Id.* at 307. On appeal, Division Two found that a claimant for unemployment benefits who fails to appear at a hearing because he mismarked the hearing date on a personal calendar was not “good cause” for vacating a default judgment. *Id.* at 310. The *Graves* court found it significant that the claimant’s responsibility was only to “properly note the correct hearing date on his calendar or to timely contact the agency and request a postponement of the hearing if he was unable to appear.” *Id.* at n. 11. He did neither. As well, “the default order clearly outlined the deadlines and procedure [he] should follow if he chose to file for reconsideration.” *Id.* Again, the claimant did not meet those deadlines. *Id.* Accordingly, the Court of Appeals held it was not an abuse of discretion to decline to vacate the “ALJ’s default judgment on that basis.”

Mr. Ogden, unlike the respondent in *Graves*, properly marked the date of the hearing on his calendar and was prepared to appear. Instead, his attorney confused the dates and directed Mr. Ogden that the hearing date would take place on December 19. Thus, Mr. Ogden did not make a mistake, his attorney did. Moreover, unlike the respondent in *Graves*, Mr. Ogden's attorney appeared at the hearing, had filed all necessary documents, and was fully ready to defend the case. Additionally, Mr. Ogden affirmatively requested a continuance, which was denied by the Presiding Member of the Hearing Panel. Mr. Ogden then filed a waiver of his presence and was prepared to testify the second day of the hearing. Rather than simply failing to appear at the hearing, Mr. Ogden did everything in his power to comply.

Regardless, the Commission defaulted Mr. Ogden on an erroneous reading of WAC 139-06-100, which states:

- 1) The peace officer shall appear in person at the hearing. Failure to appear in person shall constitute default and the hearing panel shall enter an order under RCW 34.05.440.

WAC 139-06-100. Thus, the regulation states the officer must appear at the hearing—something Mr. Ogden fully intended to do. Instead, the Commission ruled that the regulation means that Mr. Ogden must appear personally throughout the entire hearing, adding a requirement absent from the plain language of the regulation. As discussed above, this

reading is contrary to the Commission's assertion that Mr. Ogden's attorney may act in a representative capacity when it benefits the Commission (extending the time limitation), but not when such representation would benefit Mr. Ogden (avoiding default through appearing at the hearing).

Further, by holding Mr. Ogden to be in default, the Commission refused to undertake its primary role: providing due process. A default suggests that Mr. Ogden failed to affirmatively contest the proceedings. However, Mr. Ogden fully and vigorously participated and defended. He filed his trial brief and witness lists, and was in all respects prepared for trial. The Commission nonetheless refused to hear his case.

The paramount consideration in deciding a motion to vacate a default judgment is whether or not justice is served. *See Griggs*, 92 Wn.2d at 582. Here, the Commission's rulings frustrate justice because Mr. Ogden's default judgment does not constitute a "decision on the merits" and the default was obtained as a result of a good-faith mistaken belief as to the actual hearing date. *Id.* at 581. If Mr. Ogden had been properly informed by his attorneys that the hearing date was December 15-16, 2011, he would never have scheduled his business trip to Los Angeles to conflict with the hearing date.

The Commission committed error and this court should vacate the Order of Default and remand this case for a hearing. To do otherwise ignores substantial Washington public policy desiring to have matters heard on their merits as opposed to dictated by technicalities. A default order eliminates the due process the Commission is supposed to provide, and instead emphasizes simply *process*. That is not the intent of this state's courts or legislature, and should not have been the result here.

#### **V. CONCLUSION**

After August 26, 2011, the Commission did not have jurisdiction to hear any action relating to Mr. Ogden's then-surrendered Peace Officer Certification. Mr. Ogden's voluntary surrender rendered the proceedings moot. Nevertheless, the Presiding Member proceeded to erroneously set the hearing date without the presence of the full panel. This error was compounded when the time limitation for the hearing was illegally waived without the presence of Mr. Ogden. Finally, the Commission erred when it found Mr. Ogden in default after he followed incorrect advice of counsel and did not appear at the hearing, yet his counsel was present and fully prepared to defend him. The Commission was unable to put on their case in a single day, and Mr. Ogden would have been present on the second day and prepared to testify. This court should therefore reverse the

Comission's clearly erroneous findings, vacate the Order of Default, and either dismiss this case or remand it for reconsideration on its merits.

DATED this 30<sup>th</sup> Day of April, 2013.

VAN SICLEN, STOCKS & FIRKINS

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**CERTIFICATE OF TRANSMITTAL**

I hereby certify that the foregoing Appellant's Opening Brief was electronically sent (per prior agreement) to the following counsel:

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DATED this 30th day of April, 2013, at Auburn, Washington.

  
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Toni Miller, Paralegal