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# COURT OF APPEALS, STATE OF WASHINGTON
# DIVISION II

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STATE OF WASHINGTON
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DAVID W. WALL, D.C.,

*Appellant.*

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,

*Respondent.*

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# APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

Practicing a profession is a constitutionally protected property right (license) and liberty interest (practice ones profession). Before professionals may be sanctioned they are entitled to a hearing that is quasi-criminal in nature and comports with basic procedural due process.

Due process demands a professional misconduct hearing use the "clear and convincing" standard of proof to determine whether there has been a misconduct, and that the standard of proof be clearly articulated to the panel making such a determination.

The charges against Dr. Wall were tried in a hearing conducted without due process. The hearing did not include an instruction on the clear and convincing standard of proof, rather it instructed the panel on both the preponderance of evidence and the clear and convincing standards of proof.

The hearing did not include written instructions to the panel, and did not preserve a record of whatever instructions were given for use in a possible appeal. Thus due process was not afforded.

## B. ARGUMENT

### 1. The department fails to recognize that disciplinary hearings are quasi-criminal in nature.

Because important liberty interests and property rights are at stake,

professional misconduct matters are quasi-criminal in nature. *Nguyen v. Dep't. of Health,* 144 Wn. 2d. 516, 53 P.3d 29 (2005). *See also In re Johnston*, 99 Wn.2d 466, 663 P2d 457 (1983). The minimums of procedural due process attach to all administrative hearings affecting a professional license. *Ongom v. Dep't of Health,* 159 Wn. App. 935, 104 P.2d 1029 (2006) (nurse's aid); *Nguyen v. Dep't. of Health,* 144 Wn. 2d. 516, 53 P.3d 29 (2005) (physician); *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (lawyer).

The Department claims the hearing panel is "similar" to a panel of judges because they (the hearing panel) bring their own expertise and experience to the proceedings. Resp. Brief at 14. Indeed they do, but a panel of judges learned in the law is not the same as a panel of chiropractors learned in chiropractic. A panel of chiropractors has expertise in the art and science of chiropractic; it has no expertise whatever in the law. In this sense, the hearing panel is more akin to a court martial, where the court consists of military officers that are not lawyers. The officers of the court bring to the proceeding expertise in the profession of war, but no expertise in the law. Like a hearing panel of chiropractors, a court martial must depend upon the presiding officer for guidance on the law. *See generally Manual for Courts Martial*, 2005 ("MCM"). That guidance is preserved in the record so as to allow for a

meaningful appeal. Rule 920, MCM. No such record was preserved in this case.

**2. The Commission should have been instructed solely on the clear and convincing standard of proof.**

The Department asserts the panel "understood" and applied the appropriate standard of proof because the Health Law Judge said the panel deliberated using both the preponderance of the evidence and clear and convincing standards. This is a mere conclusion without support in the record. The Department cites no authority showing it is proper to use both standards of proof, even if accurate instructions are given. Resp. Brief at. 8.

Moreover, it cannot have been proper to use both standards in deliberations because *Nguyen* had already set the standard of proof: clear and convincing evidence. The Department suggests the standard of proof "was not clear." The standard was, in fact, crystal clear.

There is no legally meaningful distinction between a physician, a chiropractor, a nurse's aide, a professional engineer, a lawyer, or any other professional license. All are constitutionally protected and legally identical liberty interests and property rights. This court recognized this point before hearing in this matter, which the Department admits. Resp. Brief at 9:

> *Nguyen* is the law of this state, whether one agrees with it or not. *Nguyen* held that a physician is entitled to a clear, cogent, and convincing burden of persuasion. A registered professional engineer is entitled to the same ...

*Nims v. Bd. Registration,* 113 Wn. App. 499, 505; 53 P.3d 52 (2002). *Nims* merely reiterates *Nguyen* where the legal similarity of medical and legal licenses I noted: "If disbarment is quasi-criminal, so must be medical de-licensure. There is no distinction in principle." *Nguyen,* 113 Wn. App. The Department offers no meaningful distinction between a chiropractor's license to practice and that of a physician -- or a lawyer.

The panel should have been instructed to use only the clear and convincing standard because that was the law and to instruct the panel on two standards is confusing. There is no evidence in the record showing the panel knew the difference between the two standards or knew that it was possible to find a violation under the preponderance of the evidence standard but not under the clear and convincing standard. If the panel posed questions on this issue, they are not in the record.

The health law judge gave no guidance to the panel as to which standard was correct. Had the panel found a violation by a preponderance of evidence but not by clear and convincing standard evidence, the court would have been at an impasse, not having previously declared which standard was proper.

### 3. The right to engage in one's profession is a constitutionally protected property right and liberty interest that cannot be ignored or attenuated by executive fiat.

The Department cites its own regulations to defend the absence of due process. *See* Resp. Brief at 13. However, the right to engage in one's profession is both a property right and a liberty interest protected under the United States Constitution. *See generally Nguyen, 144 Wn. 2d. at 533; Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Actions to deprive or attenuate these rights demand procedural due process. *Id.* at 427. Due process includes the right to a meaningful appeal and that the law be accurately applied. *McGautha v. California,* 402 U.S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971).

The boards and commissions under the aegis of the Department of Health, including the Chiropractic Quality Assurance Commission, are creatures of the Executive Branch. Yet, they act simultaneously as a legislature (adopting regulations), an executive (administering their own regulations and prosecuting licensees who purportedly violate them), and a judiciary (adjudicating prosecutions initiated by themselves alleging violations of their own regulations.). All the principal actors, including the Health Law Judge, are subject to the direct control of the Secretary of Health and the Governor. The Department often fails to honor these

crucial constitutional distinctions. *See, e.g., Client A, et al. v. Yoshinaka,* 128 Wn. App. 833, 116 P.3d 1081 (2005) (failure to make a statutorily required determination of merit, a judicial function). Even after a board adopts a regulation, a legislative act, the Governor and the Secretary of Health can — and will — impose their will irrespective of the rights of the people affected. *See, e.g., Stormans, Inc., et al. v. Selecky, et al.* U.S. Dt. Ct., W. Dt. WA, Cause № C07-537RBL, 2007 Lexis 85534 (November 8, 2007). (Governor and Secretary's use of executive fiat to overturn a regulation adopted by the Board of Pharmacy and impose a new regulation that is in direct contravention of RCW 70.47.160(2)(a) and RCW 48.43.065).

The merger in a single agency of all legislative, executive, and judicial functions forgets the lessons of history. Such a concentration of power in the executive is a threat to liberty. *See e.g.*, Federalist № 51, *The Habeas Corpus Act of 1640*, 16 Cha I. c. 10, § I.[1]

There are serious dangers to granting the executive legislative and judicial powers. When conflicts between executive efficiency and fair judicial process arise, executive efficiency inevitably takes precedence

[1] "An Act for [the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber." *Statutes of the Realm: volume 5: 1628-80* (1819), pp. 110-112. URL: http://www.british-history.ac.uk/report.aspx?compid=47221. Date accessed: 11 January 2008.

over fairness. It is just this slow, incremental erosion of liberty that must be guarded against:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprecation of the right, as if it consisted more in sound than substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon.

*Boyd v. United States,* 116 U.S. 616, at 635, 6 S. Ct. 524, 29 L. Ed. 746 (1806).

Consider now the Department's argument: the absence of constitutionally required due process is acceptable because the procedure is in compliance with the Washington Administrative Code. The logic is circular: the Department adopted regulations that deny due process of law and justifies the absence of due process by citing compliance with its own regulations. It is also a *non sequitur*: just because the hearing procedures comply with the statute and regulations, it does not follow that the statute and regulations grant the minimums of due process. The Department's own regulations notwithstanding, due process of law is Dr. Wall's absolute right and the Department's absolute obligation. *Nguyen, supra*;

*Ruffalo, supra; Addington, supra.* Due process cannot be presumed; it must be shown from the record. *See, McGautha v. California,* 402 U.S. 183; 91 S. Ct. 1454; 28 L. Ed. 2d 711 (1971):

> "... for we cannot determine how the jury resolved these issues **and will not assume that they were reliably and properly resolved against the accused.**" (emphasis in original)(citation omitted). In other words, **due process forbids the States to adopt procedures that would defeat the institution of federal judicial review**. (emphasis added).

To hold otherwise allows the government to frustrate appeals by the subterfuge of not keeping a record. *Id.* The danger is severely magnified here, as Dr. Wall's right of appeal is greatly attenuated by the Administrative Procedure Act. RCW 34.05.574.

Washington executive agencies can and do afford due process without difficulty. Compare the due process afforded a claimant under the Industrial Insurance Act, Title 51 RCW, with that allowed a professional with a constitutional liberty interest and property right at stake:

| UNIFORM DISCIPLINARY ACT [Ch. 18.130, RCW] & ADMINISTRATIVE PROCEDURE ACT [Ch. 34.05, RCW] | INDUSTRIAL INSURANCE ACT [Title 51, RCW] & BD. IND. INS. APPEALS [CH. 263-12, WAC] |
|---|---|
| ALJ subject to the same superior as the accusing agency | ALJ not part of the agency bringing the action |
| No rules limiting evidence | Rules of Evidence apply |
| Limited scope of judicial review | Right to trial *de novo* to a jury |
| Limited scope of appeal | Full appellate rights |

| UNIFORM DISCIPLINARY ACT [Ch. 18.130, RCW] & ADMINISTRATIVE PROCEDURE ACT [Ch. 34.05, RCW] | INDUSTRIAL INSURANCE ACT [Title 51, RCW] & BD. IND. INS. APPEALS [CH. 263-12, WAC] |
|---|---|
| Instructions on the law withheld from review | Jury instructions a matter of record and subject to appeal |
| No voir dire of the panel | Voir dire of the venire allowed |
| Hearing panel drawn from the same people that promulgate and prosecute the offense | Judge and jury separate from and not subject to the executive. |
| Legislative and judicial functions subject to arbitrary and forceful executive interference | Executive has no power to interfere with the legislative and judicial aspects of the statute administered |
| Members of the hearing panel subject to arbitrary and immediate removal by the executive | Executive has no power over judicial function |
| Licensee has no resort to equity | Claimant has access to equity |

**4. In the absence of an adequate record, the sufficiency of the evidence cannot be ascertained.**

Dr. Wall has not abandoned his sufficiency of evidence argument Resp. Brief at 3. However, how the panel of **non-lawyers** was instructed on the burden of proof and applicable law has been withheld. Indeed, it is likely that no record at all was kept. Dr. Wall and this court are in no position to address the sufficiency of the evidence, as there is no standard by which the evidence can be compared.

But the sufficiency of the evidence begs the question. Unless the panel has been accurately instructed on the law and burden of proof, how the panel weighed the evidence means nothing. The Department cannot prove just how the hearing panel was instructed, still less that the

instructions were accurate and complete. Without an accurate and complete record, the meaning and import of the evidence cannot be assessed.

There are important legal principles the panel needed to know in order to fairly and constitutionally weigh the evidence. The evidence concerning Dr. Wall's conduct stem from two competing experts. There were no formal standards regulating much of the treatment rendered by Dr. Wall to the patients. The evidence is only that one expert's judgment was that it was too much and another expert's judgment was that was acceptable. AR 694, 11 20-205. In short, part of the case turns on questions of chiropractic judgment. There is no record the panel was properly instructed on the law of professional judgment. An error in judgment, of course, of itself is not negligence. *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986); *Vasquez v. Markin*, 46 Wn. App. 480 (1986). If a chiropractor selects one of several alternative courses of treatment, and exercises reasonable care and skill within the standard of care, that is not negligence or actionable. WPI 105.08. There is not the slightest inference in the record that the hearing panel was properly instructed on these important aspects of the law. In the absence of proper instructions on the law, the hearing panel was in no position to assess whether the allegations constituted misconduct, still less that misconduct

was proved by clear and convincing evidence – even if it was clear the panel had been properly instructed on the burden of proof.

## C. CONCLUSION

Due process cannot be assumed; it must be demonstrated in the record. Inherent in due process are complete, accurate instructions on the law and a record of those instructions made so that a meaningful appeal can be had. These fundamental rights were denied Dr. Wall.

Dr. Wall respectfully prays this court reverse the action of the Department of Health, remand the matter to the agency, and direct the Department to re-try the matter using procedures that afford complete due process of law, to include preservation of the entire record.

RESPECTFULLY SUBMITTED this 4th day of February, 2008.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on February 4, 2008, I caused service of the foregoing pleading on each and every attorney of record herein via electronic mail and U.S. Mail:

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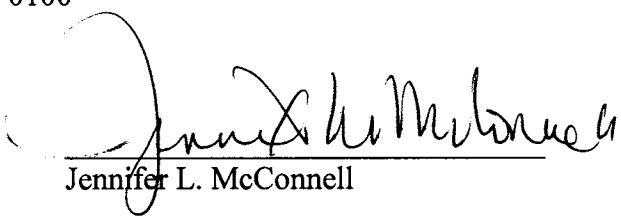

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