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NO. 36535-9-II

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**COURT OF APPEALS, DIVISION II  
OF THE 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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**BRIEF OF RESPONDENT**

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## **I. RESTATEMENT OF THE ISSUES**

1. Was it an error of law for the Chiropractic Quality Assurance Commission (Commission) to evaluate the charges against Dr. David Wall under both the preponderance of the evidence and clear and convincing evidence standards of proof given the uncertainty of the law at the time of the administrative hearing?
2. Does due process require the Commission to use “jury instructions” when it deliberates?
3. Does due process require the Commission to advise Dr. Wall of any questions they have during deliberations, so that he may participate in answering those questions?

## **II. RESTATEMENT OF THE CASE**

### **A. Procedural History**

This case arises out of a State of Washington, Department of Health (Department), Chiropractic Quality Assurance Commission decision to discipline David Wall, D.C. for unprofessional conduct in his treatment of two patients, Patient A and Patient B.<sup>1</sup>

The Commission imposed sanctions after finding that Dr. Wall had violated several sections of the Uniform Disciplinary Act (UDA), specifically: RCW 18.130.180(4) , (7) and WAC 246-808-560(1), (2), (4),

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<sup>1</sup> Patients’ names are not used in health licensing cases to protect the confidentiality of their health care information.

and (5). Dr. Wall sought judicial review, arguing his due process rights were violated in that the evidence was insufficient for the Commission to have found by clear and convincing evidence that he violated the UDA, and therefore the Commission must have been confused about the standard of proof. CP 4<sup>2</sup>. He further argued that the sanctions imposed were too severe.

The Superior Court of Thurston County heard the matter on May 4, 2007, and issued a ruling on June 15, 2007, affirming the Commission's Findings of Fact, Conclusions of Law, and Final Order (Final Order). CP 61. The superior court found that the Commission did not violate Dr. Wall's constitutional rights, nor did they engage in an unlawful procedure or decision-making process, nor fail to follow prescribed procedure. CP 61. The superior court further found that the Final Order was supported by substantial evidence in light of the whole administrative record and was not arbitrary or capricious. CP 61.

Dr. Wall has abandoned his arguments on the sufficiency of the evidence and the severity of the penalty, as he has not assigned error based on these issues. He proceeds on appeal only with a claim of procedural due process violations.

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<sup>2</sup> CP refers to Clerk Papers

**B. Factual History**

Dr. Wall assigns no error to the facts in this case, so they are verities on appeal. *State v. Yates*, \_\_ Wn.2d \_\_, 168 P.3d 359 (2007). However, for the purpose of providing background, the following undisputed factual history is provided.

Dr. Wall, a licensed chiropractor, operates Wall Chiropractic Clinic in Wenatchee, Washington. AR 426<sup>3</sup>. Patient A and Patient B were initially seen by Dr. Wall on June 5, 2002, just a couple of days following a motor vehicle accident in which they were both injured. AR 426. Dr. Wall proceeded to treat both patients approximately four to five times a week for the next year. AR 426. Patient A was seen by Dr. Wall for 212 visits from June 5, 2002, through June 20, 2003. AR 426. Patient B was seen by Dr. Wall for 196 visits from June 5, 2002, through June 23, 2003. AR 426. During this time, Dr. Wall's documentation on both patients was below the standard of care. Dr. Wall failed to document the day-to-day treatment administered, often simply noting treatments as "SPAB" or "Same Procedure as Before," without defining the treatment at reasonable intervals. AR 426. Furthermore, the Commission determined that there were unreasonable intervals between evaluations of the patients given the high volume of treatments provided. AR 426. During the whole

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<sup>3</sup> AR refers to the administrative record filed with the Court of Appeals. Each page of the record is labeled and numbered sequentially.

year of treatment, there was little documentation of any improvement on the part of Patient A or Patient B. In fact, Dr. Wall often assessed their conditions as guarded or undetermined,<sup>4</sup> yet there was never a referral for outside evaluations.

Another problem occurred in Dr. Wall's use of x-rays. Dr. Wall took X-rays of the patients at preset intervals rather than basing them on need and/or in response to treatment. AR 427. The x-rays themselves were problematic as well, as there were numerous artifacts<sup>5</sup> in them obscuring areas of interest, and the x-rays were inadequately marked with identifying marks needed for diagnostics<sup>6</sup>. AR 426.

Dr. Wall also failed to initially recognize and document a spondylolisthesis in Patient B and failed to document whether range of motion in both of the patients' records was measured as active or passive. AR 426. His testimony at hearing that the measurements were passive made his chart notes unbelievable to the Commission. AR 426.

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<sup>4</sup> AR 441, 444, 447, 448, 450, 497, 498, 501, 503, 505.

<sup>5</sup> WAC 246-808-565(4) specifies that no artifacts shall be present in chiropractic x-rays. Artifacts refer to any object or structure made by man. *Schmidt's Attorneys' Dictionary of Medicine*, (1992). In this case, the artifacts found on the x-rays were underwires from bras, metal fasteners, zippers, and snaps. AR 618, 628, 647, 648, 682, 696.

<sup>6</sup> WAC 246-808-565(1) specifies that x-ray films shall have on them the Patient's name and age; Doctor's name, facility name, and address; Date of study; Left or right marker; Other markers as indicated; adequate collimation; and gonad shielding, where applicable.

All of the above noted problems, which include poor documentation, lack of evaluations, improper use of X-rays, and inadequate diagnoses, all in the context of the unusually large number and frequency of treatments, were the basis for the Commission's findings that Dr. Wall had violated the Uniform Disciplinary Act. AR 429-31. The sanctions imposed by the Commission included placing Dr. Wall's license on probation for two years, ordering him to complete thirty (30) hours of continuing education, and a \$20,000 fine. AR 431-32.

**C. Role of the Commission and the Presiding Officer**

The Commission is part of the Washington State Department of Health that enforces medical licensing requirements. The Commission both investigates violations of the Uniform Disciplinary Act, RCW 18.130.180, and adjudicates claims. The UDA specifies that all adjudicative proceedings are governed by the Administrative Procedure Act (APA). RCW 18.130.100. RCW 18.130.010 specifies that the intent of the legislature is to "strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of law the purpose of which is to assure the public of the adequacy of professional competence and the conduct in the healing arts."

RCW 18.130.050(2) gives the disciplining authority the power to “investigate all complaints or reports of unprofessional conduct as defined in this chapter and to hold hearings as provided in this chapter.” In other words, the Chiropractic Quality Assurance Commission was created to regulate the chiropractic profession. RCW 18.25.002.

The authority and role of the presiding officer is codified in RCW 18.130.050(8), RCW 18.130.095(3), and RCW 34.05. RCW 34.05.449 specifies that the presiding officer shall regulate the course of the proceedings at hearing. Title 246-11 of the Washington Administrative Code (WAC) further sets forth the model procedural rules to be followed by the Department of Health’s disciplinary and regulatory boards. Under WAC 246-11-230, the Commission is authorized to select the presiding officer for the proceedings from either the Commission members, an individual appointed pursuant to RCW 18.130.095(3), or an administrative law judge. That same Commission designates which members are to hear a matter.

RCW 34.05.449 sets forth the procedure to be followed at administrative hearings. It specifies that “the presiding officer shall regulate the course of the proceedings, in conformity with applicable rules and the prehearing order.” RCW 34.05.449(1). It further states that “the presiding officer shall afford to all parties the opportunity to respond,

present evidence and argument, conduct cross-examination, and submit rebuttal evidence....” RCW 34.05.449(2).

### III. STANDARD OF REVIEW

All of the issues Dr. Wall now raises are legal in nature. Questions of law are reviewed under a *de novo* standard. RCW 35.05.570(3)(d); *Brown v. Dept. of Health*, 94 Wn. App. 7, 12, 972 P.2d 101, *rev. denied*, 138 Wn.2d 1010 (1999). Under the *de novo* standard, a court may substitute its judgment for that of the administrative agency on legal issues. However, the court must “accord substantial weight to the agency’s interpretation of the law it administers—especially when the issue falls within the agency’s expertise.” *Brown*, 94 Wn. App. at 12.

Judicial review of an agency order in an adjudicative proceeding is governed by RCW 34.05.570. A court may grant relief only if the party challenging the agency order proves the order is invalid for one of the specifically enumerated reasons set forth in the statute. RCW 34.05.570(1) (a) and (3).

Dr. Wall attempts to prove that the Commission engaged in unlawful procedure or decision-making process (RCW 34.05.570(3)(c)) by not making a record of the panel’s instructions and not allowing him to participate in any questions that may have arisen during deliberations. He further argues that this denied him his due process rights. Dr. Wall fails to meet his burden of proof.

#### IV. ARGUMENT

**A. The Commission Panel Correctly Evaluated The Charges Against Dr. David Wall Under Both The Preponderance Of The Evidence And Clear And Convincing Evidence Standards Of Proof Given The Uncertainty Of The Law At The Time Of The Administrative Hearing.**

The Commission panel that heard this case understood and applied the appropriate standard of proof as required by the Washington Supreme Court. They considered the case under both the preponderance of the evidence standard and the clear and convincing evidence standard and were convinced of Dr. Wall's violations of the Uniform Disciplinary Act under both standards.

The Presiding Officer, here a Health Law Judge authorized to hear disciplinary matters pursuant to the Uniform Disciplinary Act,<sup>7</sup> appropriately determined that the Commission panel would consider the proceedings against Dr. Wall under both standards of proof. AR 591. At the time the Commission panel convened its hearing against Dr. Wall, there was uncertainty among the courts as to which standard of proof applied to professions other than physicians. For the Commission to use both standards was appropriate.

Prior to the Supreme Court's decision in *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006), that all health disciplinary

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<sup>7</sup> RCW 18.130.095(3).

proceedings required clear, cogent and convincing evidence, uncertainty existed among the courts as to which burden of proof applied. The Supreme Court had held that the standard of proof in disciplinary proceedings for physicians was by clear and convincing evidence, but the lower courts had split on the proper burden in other professions. *Ngyuen v. Dep't of Health*, 144 Wn.2d 516, 534, 29 P.3d 689, 697, *cert. denied*, 535 U.S. 904, 152 L. Ed. 2d 141, 122 S. Ct. 1203 (2002); *Eidson v. Dep't of Health*, 108 Wn. App. 712, 720-21, 32 P.3d 1039 (2001) (preponderance of the evidence standard applies with real estate appraisers); *Ongom v. Dep't of Health*, 124 Wn. App. 935, 945, 104 P.3d 29 (2005), *reversed* 159 Wn.2d 132, 148 P.3d 1029 (2006) (clear and convincing evidence standard applies with nursing assistants); *Nims v. Wash. Bd. of Registration*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002) (clear and convincing standard applies with registered engineers). It was proper for the Presiding Officer to avoid making a determination regarding which of the two standards applied in this matter and proper for the Commission panel to evaluate the charges against Dr. Wall under both standards.<sup>8</sup>

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<sup>8</sup> The Supreme Court acknowledged in *Ongom* the difficult decisions administrative agencies were required to make when it found that the action taken by the Department of Health was “substantially justified in light of inconsistent decisions from the Court of Appeals.” *Ongom*, 159 Wn.2d at 143 n.8.

The Commission panel understood these instructions when it determined that Dr. Wall's actions constituted unprofessional conduct under both a preponderance of the evidence and clear and convincing standard of proof. AR 429-31. Dr. Wall cites no authority to support his argument that giving both instructions denied him due process.

Additionally, Dr. Wall knew before the hearing began that the Commission would be reviewing the case under both standards. AR 591. He argues that because the Commission panel was instructed to consider both standards of proof, it suggests that the panel did not understand the requirements of "clear and convincing." However, Dr. Wall points to nothing to support this statement. On the contrary, the Final Order issued by the Commission Panel makes it clear that they understood the standards. The order even sets out the history and current status of the law regarding the standards, and specifies that they considered each of the allegations under both standards. Dr. Wall's assertion of confusion on the part of the Commission is not supported by any facts in the record whatsoever.

Dr. Wall had the opportunity at the conclusion of his case to argue to the Commission panel. This was his opportunity to address his concerns about the standard of proof to be applied, and to define for them his understanding of the difference between the two standards. He did not

do so. In fact, he argued that the Department had not proved its case, but he never argued about the difference between the two standards or about what either standard meant. He makes no mention of the burden of proof except to say that the Department did not meet the burden. AR 771- 82. There is nothing in the record indicating that he was prohibited in any way from such an argument or from presenting his interpretation of the definition of the clear and convincing standard at that time.

It is also worth noting that while Dr. Wall argues that the application of both standards must have confused the panel, even the proposed jury instruction that he cites to (WPI 160.02) defines “clear and convincing evidence” by comparing it to “preponderance of the evidence.” If anything, applying both standards likely did more to ensure that the panel properly evaluated the evidence under both standards, compared the difference, and properly considered the evidence under the higher standard. Because the panel found all the facts proven by clear and convincing evidence, there was no error of law or prejudice to Dr. Wall and no violation of due process.

**B. Due Process Does Not Require That The Commission Panel Use “Jury Instructions” To Instruct Itself In An Administrative Proceeding.**

The Department does not contest that Dr. Wall’s license represents a property interest to which due process protections apply. *Nguyen v.*

*State*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001). Procedural due process requires notice and an opportunity to be heard prior to final agency action. *Motley-Motley, INC. v State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005), citing to *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003). To establish a procedural due process violation, Dr. Wall would need to show that he has been deprived of notice and an opportunity to be heard prior to a final, not tentative, determination. *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997). Also, to constitute a violation, the party must be prejudiced. *Motley-Motley, Inc. v. State*, 127 Wn. App 62, 81, 110 P.3d 812 (2005).

Here, it is clear that Dr. Wall had notice of the administrative procedures long before the hearing occurred. AR 590-91. He raised his objections to the process at the outset of the hearing, and was given an opportunity to argue his position. AR 589-91. He was given more opportunity to argue to the Commission at the close of his case. He does not show any way that he was denied notice and opportunity to be heard. He also does not show that he was prejudiced in any way.

Although Dr. Wall argues that “jury instructions” are required, he cites no procedure and no legal authority that instructions must be given to a panel of Commission members, who are not members of a jury, but the

decision making body on both the law and the facts. Dr. Wall constantly refers to the Commission members as a jury, seeking to compare them to a jury panel one might find in a typical criminal case. Alternatively, he seeks to analogize the panel to a military tribunal. None of these are accurate comparisons to the true nature of the administrative panel and its function as the disciplinary and regulatory agency for the chiropractic profession. As previously indicated, they are a disciplinary board made up of Commission members who are appointed by the Governor pursuant to RCW 18.25.0151 to “regulate the competency and quality of professional health care providers under its jurisdiction.” RCW 18.25.002(4). There are different rules and procedures for administrative hearings than there are for criminal proceedings (or for military tribunals), as set forth in the Administrative Procedure Act, RCW 34.05. If administrative hearings were intended to be treated the same as criminal proceedings, there would be no need for different rules, and the Rules of Criminal Procedure would apply. They do not. For example, WAC 246-11-480 gives the Commission the authority to ask questions of the witnesses and even to call additional witnesses, procedures a criminal jury does not have the authority to do.

A criminal jury is composed of citizens who are randomly selected to appear and hear a case. They bring to the process little or no knowledge

of the process or the law. Therefore, it is important that a jury receive instructions on the laws they are to apply in deciding a case, as they are likely dealing with legal issues they have never encountered before. The Commission panel is an entirely different entity.

In addition, it is important for a criminal jury not to apply their own expertise in a trial, but rather to rely solely on the evidence and opinions provided to them in the course of the trial. In an administrative hearing such as this one, the Commission panel's role is much different. They bring their expertise and experience to the hearing in many ways and are permitted to ask questions of the witnesses and permitted to use their experience, technical competency, and specialized knowledge in the evaluation of the evidence. RCW 34.05.461(5).

When comparing the Commission to a comparable body in the judicial system, it would be far more accurate to compare them to a judge (or panel of judges) than to a jury. In fact, when considering issues of disqualification of an administrative body, the courts have regularly compared the administrative body to a judge, not to a jury. *See Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1*, 96 Wn.2d 503, 513, 637 P.2d 940 (1981); *Hill v. Department of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978); *Chicago, Milwaukee, St.*

*Paul, & Pac. R.R. Co. v. State Human Rights Comm'n*, 87 Wn.2d 802, 807, 557 P.2d 307 (1976).

There was no error in the way the Commission deliberated. They were not instructed in the same way that a criminal jury would be because they are not a jury. They conducted their deliberations in the manner set forth in the Administrative Procedure Act, following the law without the need for written jury instructions. The Commission set forth in its ruling that they had considered the case under both standards of proof. There is no mention anywhere, either in the record or the Commission's decision, of there being any difficulty on the part of the Commission to understand the standard of proof or of any need for written instruction on it. The Final Order makes it clear that they had no trouble whatsoever in applying the law to the facts. AR 428- 31.

Dr. Wall has shown no legal authority permitting or requiring "jury instructions" in an administrative hearing. He has shown no prejudice from a failure to use jury instructions. No legal authority supports his argument that due process requires such instructions. There was no error of law; therefore, the Commission's Final Order should be affirmed.

**C. Due Process Does Not Require That Dr. Wall Be Consulted During Deliberations If Questions Arise Among The Deliberating Commission Panel Members.**

In an administrative hearing, the Commission panel members' role is to hear the evidence, deliberate and rule on the case. AR 586. The presiding officer's job is to conduct the hearings "with the greatest degree of informality consistent with fairness and the nature of the proceeding." RCW 34.12.010. The presiding officer is there to "conduct the proceedings and issue the legal rulings in the case, including any evidentiary rulings." AR 585. The presiding officer also drafts the final order for the Commission members to sign based on their ruling in the case. AR 586. In order to accurately draft that order, the presiding officer sits in on the deliberations. At the outset of the hearing, the presiding officer explained this process, clarifying that she does not make the decision in the case, but rather that she makes legal rulings and then writes up the Findings of Fact and Conclusions of Law. AR 585-86.

Dr. Wall argues that his due process rights were violated when his counsel "was not allowed to participate in the answering" of questions that may or may not have arisen when the panel was deliberating. He seeks a procedure more in line with a criminal jury trial, where the procedure for answering jury questions gives the parties an opportunity to comment to

the court on the appropriate response.<sup>9</sup> However, this is not a criminal trial, and the panel is not a jury. There is no equivalent rule for administrative hearings like Dr. Wall's. Unless Dr. Wall is arguing that the Constitution gives him the right to sit in on the deliberations (and can support this argument with some authority), he has not shown any way that he was denied his due process rights in this hearing. He also has not provided any legal authority for the hearing to be conducted in a different manner.

#### V. CONCLUSION

Dr. Wall has failed to show any way in which his due process rights were violated or that an error of law occurred. The State of Washington, Department of Health, respectfully requests that the Final Order of the Commission be affirmed.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December, 2007.

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<sup>9</sup> See Superior Court Criminal Rules, CrR 6.15(f).

NO. 36535-9

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

DAVID W. WALL, D.C.,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF HEALTH,

Respondent.

DECLARATION OF  
SERVICE

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DIVISION II  
TACOMA, WA  
DEC 12 2007

I, Kristen Tolbert, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.
2. On December 12, 2007, I deposited via U.S. mail, postage prepaid, the original and one copy of the Respondent's Brief and this

Declaration of Service to:

David C. Ponzoha, Court Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

3. On December 12, 2007, I deposited via U.S. mail, postage prepaid,

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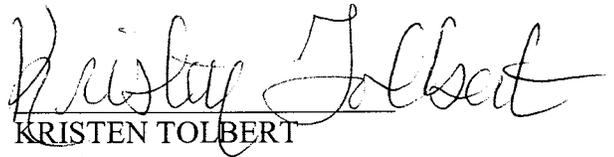
a true and correct copy of the Respondent's Brief and this Declaration of

Service to:

John W. Schedler  
Carrie Bixel  
Lee, Smart, Cook, Martin & Patterson, PC  
701 Pike Street, Suite 1800  
Seattle, WA 98101-3929  
Attorneys for Appellant

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

DATED this 12<sup>th</sup> day of December, 2007.

  
KRISTEN TOLBERT  
Legal Assistant