

Court of Appeals No. 39042-6-II  
Thurston County Superior Court 08-2-01147-7

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOSEPH R. AMEDSON, individually and with respect  
to his licensure as a Pharmacist, No. PH00011607,

APPELLANT,

v.

WASHINGTON STATE BOARD OF PHARMACY, a Board as  
established by law under RCW 18.64.001;  
WASHINGTON STATE DEPARTMENT OF HEALTH, an admin-  
istrative agency of the State of Washington;  
ADJUDICATIVE SERVICE UNIT, a unit of the Wash-  
ington State Department of Health; and  
ARTHUR E. DeBUSSCHERE, Health Law Judge, Presid-  
ing Officer, Ajudicative Service Unit, Department  
of Health,

RESPONDENTS.

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BRIEF OF APPELLANT

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ORIGINAL

STATE OF WASHINGTON  
BY [Signature]  
COURT OF APPEALS  
DIVISION II

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## I. INTRODUCTION

Joseph R. Amedson respectfully appeals and seeks judicial review of the Board of Pharmacy's final decision to revoke his Pharmacist license/credential and the Prehearing Orders rendered by Presiding Officer DeBusschere. The focus of judicial review is the Prehearing Orders which set the table for the subsequent Board proceedings. Amedson had his Pharmacist license revoked by the Board based on tainted evidence, as to which Amedson was not allowed to suppress or refute as punishment for invoking his constitutional rights and privileges. Although Amedson is not entitled to a perfect process, he is nevertheless legally entitled to an adjudicative process that does not bend or break his constitutional rights and privileges.<sup>1</sup>

## II. ASSIGNMENTS OF ERROR

Amedson filed his Petition for Judicial Review raising certain issues on claimed errors made by the Presiding Officer and the Board of Pharmacy, uncorrected *in toto* by the trial court. CP at 3.

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<sup>1</sup> Gilland v. Commonwealth, 35 S.E.2d 130, 134 (Va. 1945).

**A. TRIAL COURT ERRORS**

1. The trial court erred by issuing its Order On Judicial Review dated March 4, 2009 affirming the Findings of Fact, Conclusions of Law and Final Order entered by the Board of Pharmacy. CP at 29.

**B. BOARD OF PHARMACY/PRESIDING OFFICER ERRORS**

2. The Presiding Officer, Arthur E. DeBusschere, erred by issuing Prehearing Order Nos. 2, 4, 5, 6, 7, 8, 9, and 10 entered on various dates, as contested with particularity in Motions for Reconsideration filed as to each of these Orders.

3. The Board of Pharmacy erred by issuing its Findings of Fact, Conclusions of Law and Final Order dated April 26, 2008.

4. Amedson assigns error to each of the following Board Findings of Fact in their entirety: Paragraphs 1.2; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.9; 1.10; and 1.11.

5. Amedson assigns error to each of the following Board Conclusions of Law in their entirety: Paragraphs 2.1; 2.3; 2.5; 2.6; 2.7; and 2.8 (all parts through the end of this section).

6. Amedson assigns error to each of the following parts of the Board Order in their entirety: Paragraphs 3.1; 3.2; and 3.3.

**C. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

The issues presented to this Court for judicial review are as follows:

1. Whether Amedson as the named Defendant in a quasi-criminal professional license disciplinary action has the same Fifth Amendment and Wash. Const. art. I, § 9 protections as accorded a named Defendant in a criminal action; to wit, the privilege against self-incrimination and right to remain silent as to any type or form of compulsory oral interrogation by the prosecution? (Assignments of Error Nos. 1 - 6, inclusive.)

2. Whether the sanctions imposed against Amedson for invoking his Fifth Amendment and Wash. Const. art. I, § 9 rights and privileges were unconstitutional and denied him the right to present his defense and due process in an adjudicative quasi-criminal proceeding? (Assignments of Error Nos. 1 - 6, inclusive.)

3. Whether the March 21, 2006 "Statement" shall be suppressed, including all evidence related thereto because (1) such was obtained in violation of a grant of immunity, and (2) of the failure of Stan Jeppesen, Board Investigator, to in writing as mandated under RCW 18.130.095(2)(a) inform Amedson as to the nature of the Complaint against him that was being investigated in secret? (Assignments of Error Nos. 1 - 6, inclusive.)

4. Whether Amedson is accorded Whistleblower status and rights under RCW 4.24.510, including statutory immunity from Board disciplinary action? (Assignments of Error Nos. 1 - 6, inclusive.)

### III. STATEMENT OF THE CASE

#### A. FACTUAL BACKGROUND

Amedson was licensed as a Pharmacist by the Board in 1983. Commencing in about July 2003 he was employed as a contract pharmacist at A-Z Pharmacy in its Bellevue, Washington, location for periods of what averaged 3 days each week.<sup>2</sup> ARBN 114. After about 3 months of this part-time employment, Amedson noticed an increase in prescription volume primarily from transfer business from Pharmacy Plus, another Russian owned/operated Pharmacy. During the routine course of his employment, certain former Pharmacy Plus prescriptions were being rejected for Medicaid payment by the State DSHS for the stated reason that such prescription was refilled too soon.<sup>3</sup> Because of the number of transfers

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<sup>2</sup> Because he was the only non-Russian speaking person employed at A-Z Pharmacy, Amedson's job was limited to checking and filling prescriptions; not regarding any other business aspect of the Pharmacy operations. ARBN 114 (reference to the Certified Administrative Record Bates Number is noted by "ARBN"). Reference to Clerk's Papers is denoted by "CP".

<sup>3</sup> When Amedson explained this problem to the affected customers through translators he was told that the customer never received the medication through Pharmacy Plus. ARBN 114-15.

and the number of complaints from customers that they never received their medications from Pharmacy Plus, Amedson suspected possible fraud by Pharmacy Plus as it appeared that DSHS was being billed for medications not provided. ARBN 115. Amedson then telephoned the State DSHS on or about December 16, 2003 and again on or about December 23<sup>rd</sup> and spoke with DSHS staff Troy Parks and Scott Kibler. A meeting was then set up for Seattle which Amedson attended to discuss the Pharmacy Plus matter and met with DSHS' Troy Parks and a number of federal officials (HHS, OIG and AUSA). At that meeting Amedson was asked if he was aware of any possible wrongdoing by Amedson's current employer, A-Z Pharmacy. Amedson replied that there may be some signs of possible fraud, but that he was not absolutely certain. ARBN 115. Amedson thereafter paid more attention to the A-Z Pharmacy operations and in January 2004 he became aware of certain practices that could constitute Medicare and/or Medicaid fraud. On or about February 4, 2004 Amedson, as a Whistleblower informant, telephoned DSHS and spoke

again with Scott Kibler and explained to them his observations of possible fraudulent operations at A-Z Pharmacy. By e-mail dated February 8, 2004 Amedson contacted DSHS' Teresa Wiggerhaus regarding concerns as to his personal safety stemming from his being an informant in the A-Z matter. Responding to Amedson's concerns, DSHS' Troy Parks by e-mail dated February 9, 2004 assured Amedson that "everything you have shared with us is not disclosable to the public, therefore, your anonymity will be maintained."<sup>4</sup> ARBN 115-16. Several follow-up meetings were held; however, a telephone call to Troy Parks on or about August 24, 2004, led Amedson to believe that the DSHS investigation of A-Z was going nowhere. Amedson thereupon telephoned Dick Morrison with the Board of Pharmacy on or about September 2, 2004. ARBN 116. Thereafter, another investigator with the Board, Kelly Mc Lean, contacted Amedson. In October 2004 Amedson met with Board Investigators McLean and Stan Jeppesen

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<sup>4</sup> Parks also promised to contact Ms. Johnson [with HHS/OIG] regarding Amedson's concerns. Amedson met with DSHS staff in about March 2004. ARBN 116.

in Bellevue at the Doubletree Hotel and discussed at length with them the misconduct he had observed with the A-Z operations. At that meeting Amedson informed Investigators McLean and Jeppesen of his original contact with DSHS and its lack of action. After discussing the A-Z Pharmacy matter for about 90 minutes, Amedson was specifically told by Stan Jeppesen, as a Board Investigator, that such information was the first they had heard of such problems with A-Z, that they were very appreciative of Amedson's information and cooperation, promised that they would investigate the case, and made the express oral promise and assurance that (1) Amedson would remain anonymous, and (2) Amedson would be immune from any Board action for anything uncovered during their investigation.<sup>5</sup> ARBN 116.

A-Z Pharmacy was raided and closed by federal agents on or about November 10, 2004. Amedson

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<sup>5</sup> Amedson in good faith understood and believed that this meant he was protected and safe from any possible Board action, including any disciplinary proceedings, based on any of his acts or conduct in exchange for his continued assistance and cooperation in the A-Z Pharmacy investigation. ARBN 116.

thereafter met and spoke with Stan Jeppesen and also with J. Timothy Hinckley, HHS/OIG Special Agent, many times over the ensuing months to review and identify A-Z Pharmacy records and educate them as to the operations of A-Z. Amedson met with these investigators in Olympia, Bellevue, and in Seattle to go over the many documents the government had seized from A-Z Pharmacy.<sup>6</sup> ARBN 116-17.

During the lengthy investigation of A-Z and with the full assistance and cooperation of Amedson throughout, in about March or April of 2005 certain documents were reviewed that allegedly burdened Amedson with a possible monetary indebtedness to Eli Lilly and Company, and further led to the commencement of a specific separate Board investigation targeting Amedson.<sup>7</sup> ARBN 117. This special

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<sup>6</sup> In exchange for his continued cooperation in the A-Z Pharmacy investigation, J. Timothy Hinckley, as HHS/OIG Special Agent, expressly orally promised Amedson that he would be immune from federal prosecution for any matter in which he may have been involved that may be discovered. ARBN 117.

<sup>7</sup> "Description of Complaint -- 18/Drug Law. While investigating Case 05-10184, Prescription #11415 was found that appeared to have been forged for Zyprexa, by RPh, in order to receive manufacturer reimbursement of a patient coupon, that was split between the store owner and Rph.  
(continued...)

investigation was approved on February 10, 2006 with the notation "Initiate investigation and obtain records, including patient records" and the Case Number assigned to this specific investigation targeting Amedson was 06-10400.<sup>8</sup> In fact, the special targeted investigation of Amedson actually commenced in December 2005 by Jeppesen, more than a year after he expressly promised Amedson immunity from anything uncovered during the investigation of A-Z Pharmacy and during which period Amedson, in reliance on such promise, continued his full assistance and cooperation with State and federal officials as to the A-Z Pharmacy case, including Stan Jeppesen. ARBN 118.

In his **May 10, 2006** Special Investigation Report in Case # 06-10400 of Amedson, Board Inves-

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<sup>7</sup>(...continued)

Occurred at both Kent & Bellevue locations." DOH/HPS4 Complaint Form - Confidential, dated February 1, 2006 (and noted as Assign To: "Stan"). ARBN 118. Amedson provided many of these documents to investigators and explained what they were. ARBN 118-19.

<sup>8</sup> Note also that the specific Case that was being investigated at the time that this other evidence was allegedly discovered was the A-Z Pharmacy Case #05-10184. ARBN 118.

tigator Jeppesen alleged that "the investigation [of Amedson] began on 12/14/2005 when this Investigator . . . discovered documents that indicated that Pharmacist Joseph Raise [sic] Amedson was suspected of making forged prescriptions at the pharmacy where Amedson was employed. . . . The investigation was a product of an earlier . . . investigation involving prescription fraud and durable medical equipment fraud involving Amedson's Pharmacist Employer and spouse. . . . [Amedson] has provided supporting evidence and testimony in the initial investigation involving AZ Pharmacy." ARBN 118-19.<sup>9</sup> Jeppesen further alleged that "Amedson confessed to filling a prescription known to be falsified, and for participating in fraudulent activity to receive reimbursement for fraudulent prescriptions submitted to PCS insurance for fourteen (14) Zyprexa prescriptions." ARBN 119. However, the alleged "con-

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<sup>9</sup> The last sentence of the foregoing allegations by Jeppesen is most telling of the circumstances and context under which Amedson believed he was operating within when he allegedly gave any such purported oral and/or written "evidence and testimony" that were then used against him in the quasi-criminal professional license disciplinary action as an alleged confession. ARBN 119.

fession" including any purported "supporting evidence and testimony" were given, if at all, by Amedson in the context of providing his full assistance and cooperation in the A-Z Pharmacy case in exchange for immunity from Board action for anything uncovered during the investigation. ARBN 119. It was during the secret overlapping of the A-Z Pharmacy case and the special investigation of Amedson that two significant events occurred; and both events occurred without the knowledge of or notice given to him that he was the specific target of a Board-sanctioned investigation. ARBN 119.

First, after 4 hours of going over documents and assisting both Jeppesen and Hinckley in the A-Z Pharmacy case at a location in Bellevue, and well into the conduct of the secret investigation targeting Amedson, at about 9:30 PM on March 16, 2006, Jeppesen and Hinckley gave Amedson a prepared document simply entitled "Respondent's Written Statement Notice". ARBN 120; ARBN 801-02. This "Notice" when signed by Amedson purportedly waived his right to consult with an attorney "prior to

providing a written statement." The "Notice" simply stated that "Your statement may be used in a hearing if disciplinary action is deemed necessary regarding this matter." ARBN 120. The only words spoken to Amedson by Jeppesen as he handed Amedson this piece of paper were "You need to sign this." ARBN 376. This "Notice" was signed by both Jeppesen and Hinckley each as a "witness". What is significant by omission are the facts that (1) neither Jeppesen nor Hinckley in any way or manner, **and especially not in writing**, advised Amedson that he was personally a target of the investigation denoted by WSBP Case Number 06-10400, and (2) that any written statement that may be provided by Amedson would be used against him personally in a disciplinary action against him. ARBN 120. At the end of this session, in the presence of both a State and federal investigator, and under the belief that he was required to sign this piece of paper thrust in front of him to continue his cooperation for immunity, Amedson in good faith signed this "Notice" as a mere formality believing as he had from the

very beginning of the A-Z Pharmacy case that (1) this "Notice" related solely to a written statement that he may provide in the A-Z Pharmacy investigation, and (2) the "disciplinary action" referenced in the "Notice" was solely in regard and related to disciplinary actions that may be undertaken by the Board against A-Z Pharmacy and its licensed principals, and not him personally as he was given immunity from any Board action for anything discovered relating to him during the A-Z Pharmacy investigation.<sup>10</sup> ARBN 120-21.

Second, 5 days following Amedson's signing of the "Notice" referenced above, on March 21, 2006 at another meeting with Jeppesen and Hinckley, Am-

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<sup>10</sup> Having worked with these individuals for such a long period of time in the A-Z Pharmacy case, Amedson trusted Jeppesen and Hinckley that they would not take advantage of him and give him something to sign that would put him in jeopardy as to his license and livelihood and he was not led to believe otherwise. Had Amedson been apprised of the material fact that he was the specific target of a special investigation that would result in a quasi-criminal disciplinary action being taken against him personally, and significantly and adversely affecting his professional license and livelihood, he never would have signed such "Notice" and would have promptly consulted with legal counsel and invoked his constitutional rights and privileges -- as was his right. This "Notice" is not the product of Amedson's knowing, intelligent, and voluntary free will. ARBN 121; ARBN 376.

edson was presented with a lengthy written prepared document simply entitled "Statement". ARBN 121; ARBN 803-14. Amedson was simply apprised that this document was the previously referenced "written statement" that he was to sign. There was in fact no opportunity given to Amedson to change anything and no changes were made to this "Statement" (as he was instructed to sign and initial each page as prepared). ARBN 123. Again, Amedson was not apprised that such written statement could and would be used against him personally in a quasi-criminal disciplinary action as the only matter expressly noted in **bold lettering** on the face of this "Statement" was the following heading on Page 1:

I, Joseph Raise Amedson, R.Ph., make the following statement to Stan Jeppesen, Investigator, an authorized representative of the Washington State Department of Health, Board of Pharmacy, and Special Agent Tim Hinckley, Health and Human Services, **regarding AZ Pharmacy and business practices.**

ARBN 121-22 (**bold** also in original). In good faith and not being otherwise advised, Amedson believed and understood that this pre-typed "Statement" was nothing more than a mere formality as part of his

ongoing assistance and cooperation in the A-Z Pharmacy case.<sup>11</sup> Amedson did exactly as he was told to do by Jeppesen and Hinckley, totally unaware that this "Statement" was in fact part of a special investigation conducted by Jeppesen targeting Amedson personally and that such "Statement" would subsequently be used by the Department against Amedson in the quasi-criminal professional license disciplinary action as his alleged "confession".<sup>12</sup> ARBN 122-23. All evidence of whatever form provided by

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<sup>11</sup> Absolutely nothing was said to Amedson by either Jeppesen or Hinckley that by signing such pre-typed prepared "Statement" that Amedson was in some manner waiving, relinquishing, or renouncing his immunity from Board action as to any of his personal acts and conduct discovered as part of the A-Z Pharmacy investigation and case; and such was absolutely not his intent. Again, at this meeting with the two official investigators present, Amedson believed that he was required to sign each page of the "Statement" as prepared and presented to him and in all the places he was told to initial and sign as instructed by the investigators. ARBN 123; ARBN 376-77.

<sup>12</sup> Had Amedson been made aware of such material facts he never would have signed the "Statement" and would have asserted his constitutional rights and privileges as was his entitlement. This "Statement" is not the product of Amedson's knowing, intelligent, and voluntary free will. What the "Notice" and "Statement" are in fact is the product of Amedson's free will and trust being overborne, abused and misused by the force and presence of the State and federal investigators, Stan Jeppesen and J. Timothy Hinckley, and the constant requirement for Amedson to fully assist and cooperate with them in the A-Z Pharmacy investigation in exchange for his express immunity from Board disciplinary action and federal prosecution. ARBN 123; ARBN 376.

Amedson was done involuntarily under promise of immunity from both the State Board and federal government. ARBN 377.

**B. PROCEDURAL BACKGROUND**

In light of the foregoing background and upon the Board breaching its promised immunity, Amedson asserted his Fifth Amendment and Wash. Const. art. I, § 9 right to remain silent and privilege against self-incrimination in the underlying quasi-criminal professional license disciplinary action brought against him. ARBN 373-74. It was within this context that Amedson filed a series of prehearing motions and for reconsideration all of which are included within the scope of and essential to this judicial review pursuant to WAC 246-11-590(2)(c); including motions to dismiss, suppress certain documentary and oral statements, and quash a Notice of Deposition issued by the Department to Amedson. It is also within this context that the Department filed its motion for sanctions against Amedson for asserting his constitutional rights and privileges and declining to honor the Department's Notice and

be compelled to submit to an oral deposition by the Prosecuting Attorney in the quasi-criminal action against him. It is also within this context that the Presiding Officer made certain pre-hearing decisions and issued Prehearing Orders (challenged PHOs start at ARBN 199; 380; 429; 586; 622; 660; 732; 736) that molded the framework within which the hearing was to be conducted and in which Amedson would be severely hamstrung; including:

1. The Presiding Officer correctly found and concluded that (a) "Washington courts have continued to hold that a disciplinary proceeding is quasi criminal in nature";<sup>13</sup> and (b) "Washington law acknowledges that the Fifth Amendment privilege against self-incrimination applies to a quasi-criminal proceeding."<sup>14</sup>

2. The Presiding Officer found and concluded that the issue of immunity for Amedson presented a genuine issue of material fact for the Board to de-

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<sup>13</sup> ARBN 205 (Prehearing Order No. 2, Conclusion 2.9).

<sup>14</sup> ARBN 204 (Prehearing Order No. 2, Conclusion 2.7). Included therein read also Wash. Const. art. I, § 9.

cide at and from the hearing.<sup>15</sup>

3. The Presiding Officer erroneously concluded that the scope of one's Fifth Amendment privilege against self-incrimination and right to remain silent in a **quasi-criminal** action was coextensive only with the application of such right and privilege as is available in a purely civil lawsuit context. ARBN 204.

4. On the erroneous legal basis that Amedson's Fifth Amendment rights as the Defendant in a quasi-criminal action against him were limited as applied to the parties in a civil action for damages, the Presiding Officer denied Amedson's motion to quash the Department's Notice of Deposition. ARBN 208.

5. The Presiding Officer erroneously found and concluded that Amedson's continued assertion of his Fifth Amendment rights and refusal to submit to compulsory interrogation by oral deposition constituted "a willful interference with the progress of

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<sup>15</sup> ARBN 627 (Prehearing Order No. 7; Findings of Fact ¶ 3.6).

this proceeding<sup>16</sup> and thus was subject to sanctions.

6. The Presiding Officer erroneously found and concluded that Amedson could be compelled to be called and testify in the Department's case-in-chief at the hearing and "that the Board shall be entitled to draw an adverse inference when [Amedson] refuses to answer a question on the grounds that it might incriminate him." ARBN 744.

7. The Presiding Officer unlawfully sanctioned Amedson by (a) on the one hand Ordering that at the hearing "[Amedson] has the burden to prove the affirmative defense that an oral immunity agreement was granted to him by the Board of Pharmacy," ARBN 742, while (b) on the other hand, Ordering that "[Amedson] shall not be allowed to testify on his behalf in order to present evidence . . . regarding his claims of immunity or testimony regarding alleged illegally obtained information and evidence" (given under promised immunity and involuntarily by Amedson), ARBN 744, and also that Amedson was

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<sup>16</sup> ARBN 590 (Prehearing Order No. 6, at Page 5, ¶ 3.7 (Conclusions of Law), re: WAC 246-11-170(2)(b)). Such term is, however, nowhere defined in regulations.

precluded from asserting he was accorded Whistle-blower status and rights. ARBN 742.

8. The Presiding Officer unlawfully limited the issues for the Board's consideration at the hearing and excluded Amedson's issues raised. ARBN 741.

Based on these prehearing rulings made by the Presiding Officer, and the conclusiveness of Prehearing Order No. 10: Order On Motions And Order On Conduct At Hearing,<sup>17</sup> ARBN 736-51, Amedson gave the Board written notice that he would respectfully decline to attend the hearing unless the imposed sanctions against him were removed. ARBN 757. The Presiding Officer did not remove/modify any of the imposed sanctions; Amedson did not attend the hearing instead relying on the record of the prehearing motions and decisions as to the severe unconstitutional sanctions imposed against him; and the Board

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<sup>17</sup> Prehearing Order No. 10 concretely set and established the rules for the hearing as to which Amedson was compelled to strictly follow. WAC 246-11-390(3). In light of the severe and unconstitutional sanctions Ordered against him in PHO No. 10, Amedson's constitutional rights were decimated and the hearing would be, and was, but a sham.

entered a Final Order revoking Amedson's Pharmacist license. ARBN 785-800; CP at 27; CP at 29.

#### IV. STANDARD OF REVIEW

The Court of Appeals finds itself in the exact position as was the trial court in considering Amedson's Petition for Judicial Review of the Orders entered by the Presiding Office and the Final Order entered by the Board of Pharmacy. The Court reviews the agency Orders under the Administrative Procedures Act (APA). RCW 34.05.570(3); Clausing v. State Board of Osteopathic Medicine & Surgery, 90 Wn. App. 863, 870, 955 P.2d 394 (1998).

A professional license disciplinary proceeding is a quasi-criminal action, Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983);<sup>18</sup> and as observed by the Washington Supreme Court "[a professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely

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<sup>18</sup> Citing In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968) (attorney disbarment); In re Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958) (physician discipline). See Clausing, 90 Wn. App. at 874. Quasi-criminal actions impose penalties; i.e., punishment for wrongful conduct.

for that purpose." In re Revocation of License of Kindschi, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958). "Johnston and Kindschi are unquestionably the law of this jurisdiction."<sup>19</sup> The Court reviews the findings and conclusions of the agency and must grant relief if the agency's order "violates the constitution, exceeds statutory authority, is the result of faulty procedure, involves an error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualification issues, is inconsistent with an agency rule, or is arbitrary or capricious." RCW 34.05.570(3)(a) - (i); Clausing, 90 Wn. App. at 870. The standard of proof applied is that the conclusions of law must be based on findings of fact that are in turn based on evidence that is clear, cogent and convincing. Ongom v. Department of Health, 159 Wn.2d 132, 142-43, 148 P.3d 1029 (2006). Where the evidentiary standard is clear, cogent and convincing, the Court

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<sup>19</sup> Nguyen v. Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 528, 29 P.3d 689 (2001).

must determine that the competent evidence is substantial enough to allow it to conclude that the ultimate facts in issue have been shown to be "highly probable." In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).<sup>20</sup> Although the Board is the trier of fact in the proceeding,<sup>21</sup> the application of law to the facts is an issue of law that the Court reviews *de novo*.<sup>22</sup> Although the Court accords substantial weight to the Board's interpretation of law as may specially fall within its area of expertise, the agency is not the final arbiter of the law and the Court may substitute its judgment for that of the Board. Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

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<sup>20</sup> Substantial evidence is "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

<sup>21</sup> Deatherage v. State Examining Board of Psychology, 85 Wn. App. 434, 445, 932 P.2d 1267 (1997); Chicago, Milwaukee, St. Paul and Pacific R.R. Co. v. Washington State Human Rights Commission, 87 Wn.2d 802, 806-807, 557 P.2d 307 (1976).

<sup>22</sup> Tapper v. Employment Security Department, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (the Board's contested conclusions of law are reviewed *de novo* under the error of law standard, Bond v. Department of Social & Health Services, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002)).

## **V. ARGUMENT**

### **SUMMARY**

Amedson's full range of 5<sup>th</sup> and 6<sup>th</sup> Amendment rights and privileges arise and stem solely from the Board's professional license disciplinary action commenced against him seeking the revocation of his Washington State Pharmacist license. Amedson's 5<sup>th</sup> Amendment rights and privileges are not ancillary or derivative to any other pending or threatened action in any forum other than that before the State Board of Pharmacy. Amedson's Amended Answer<sup>23</sup> in the Board action clearly made these legal points and his assertion of all of his 5<sup>th</sup> Amendment rights and privileges, including Wash. Const. art. I § 9, unwavering and undiminished as to each stage of the proceeding. The crucible in which the Board, by and through its Presiding Officer, destroyed Amedson's 5<sup>th</sup> Amendment rights and privileges is the

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<sup>23</sup> An amended Answer supersedes the original pleading. Herr v. Herr, 35 Wn.2d 164, 166, 211 P.2d 710 (1949) (amended pleading constitutes the abandonment of original); High v. High, 41 Wn.2d 811, 816-17, 252 P.2d 272 (1953). Amedson's Amended Answer in the adjudicative proceeding is at ARBN 103-112.

case of King v. Olympic Pipe Line Company, 104 Wn. App. 338, 16 P.3d 45 (2000).<sup>24</sup> Although correctly concluding that a professional license disciplinary proceeding under Washington law is a quasi-criminal action as to which the Fifth Amendment and Wash. Const. art. I, § 9 apply, the Presiding Officer then took a very wrong and clearly erroneous turn and held that the Fifth Amendment was to be applied to the named Defendant in a quasi-criminal action in the same manner and to the same extent as to any party in a civil lawsuit for damages; to wit, there is no blanket protection from being compelled to testify and one's constitutional rights must be invoked on a question-by-question basis. However, the Olympic Pipe Line case analysis applies only in the context of a trial court's determination whether to grant a stay of the civil proceeding in order to protect a litigant's 5th Amendment rights

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<sup>24</sup> King is a purely and solely civil action for monetary damages. In stark and controlling contrast, our case is a quasi-criminal action that sought and in fact imposed the administrative death penalty against Amedson as the named **Defendant**; namely, the revocation of his professional license and the termination of his livelihood.

when parallel civil and criminal proceedings are pending. Olympic Pipe Line, 104 Wn. App. at 352. The prescribed balancing test does not, obviously, apply to those quasi-criminal actions where the accused/defendant's 5<sup>th</sup> Amendment rights and privileges arise as a matter of law because as is so well-established, accepted and applied over time, quasi-criminal actions are subject to the same Fifth Amendment protections and privileges against self-incrimination and right to remain silent as are accorded defendants in criminal proceedings. Boyd v. United States, 116 U.S. 616, 634-35, 29 L. Ed. 746, 6 S. Ct. 524 (1886). Because the Presiding Officer is legally obligated to apply the best legal authority and reasoning available, WAC 246-11-480(3)(b), including application of the U.S. Constitution by court decisions in quasi-criminal actions, Boyd and its progeny in federal and State courts, and in particular those jurisdictions like Washington that recognize professional license disciplinary proceedings as quasi-criminal actions, provide ample and persuasive legal authority and

reasoning that must be followed. After being forced to defend himself subsequent to the Board's breach of its promised immunity,<sup>25</sup> this legally erroneous and patently unconstitutional decision is the key turning point in the underlying action taken by the Board against Amedson.

**A. THE FIFTH AMENDMENT AND WASH. CONST. ART. I, § 9 RIGHTS AND PRIVILEGES AGAINST SELF-INCRIMINATION AND RIGHT TO REMAIN SILENT FULLY APPLY AS A BLANKET PROTECTION TO AMEDSON AS THE DEFENDANT IN A QUASI-CRIMINAL PROFESSIONAL LICENSE DISCIPLINARY ACTION BY THE BOARD**

As correctly found and concluded by the Presiding Officer, the Board's disciplinary proceeding against Amedson is a quasi-criminal action, Washington Medical Disciplinary Board v. Johnston,

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<sup>25</sup> Immunity and involuntariness of confessions are types of affirmative defenses that would be argued at the hearing (trial) for determination by the Board (sitting as a jury). Hall v. State of Wyoming, 851 P.2d 1262 (Wyo. 1993) (citing Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). Questions of credibility and assessment of testimony related to immunity is the province of the Board, not the Presiding Officer. United States v. Parrado, 911 F.2d 1567, 1571 (11th Cir. 1990); United States v. Hewitt, 663 F.2d 1381, 1385 (11th Cir. 1981). However, the sanctions imposed by the Presiding Officer upon Amedson for asserting his Fifth Amendment and Wash. Const. art. I, § 9 rights denied him the ability and right to present evidence in his defense to the Board as to these issues. U.S. Const. Amend. VI.

99 Wn.2d 466, 474, 663 P.2d 457 (1983);<sup>26</sup> and as observed by the Washington Supreme Court “[a professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose.” In re Revocation of License of Kindschi, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958). For we are here, under the clear pronouncement and holdings of Washington State law, dealing with no less than the imposition of an administrative death sentence as punishment of Amedson by the State for his alleged transgressions.

[R]evocation of a [professional] license is much like the death penalty in criminal law - it is not imposed to reform the particular person involved.

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<sup>26</sup> Citing, e.g., In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968) (attorney disbarment); In re Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958) (physician discipline). The U.S. Supreme Court has held that the essentials of due process and fair treatment include in its “protections” the privilege against self-incrimination. In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (referring to the adjudicatory stage of a juvenile delinquency proceeding that is penal in nature but not strictly a criminal proceeding). This holding has been referenced by the Washington Supreme Court in State v. Escoto, 108 Wn.2d 1, 735 P.2d 1310 (1987) (“[D]ue process guaranties includ[e] the privilege against self-incrimination”. Id. at 8, Durham, J., concurring).

In re Revocation of the License to Practice Dentistry of Flynn, 52 Wn.2d 589, 596, 328 P.2d 150 (1958). As a quasi-criminal penal action against Amedson, Washington jurisprudence is also very clear as to the rights and protections accorded the Defendant in such proceeding.

[The] Fifth Amendment privilege against compulsory self-incrimination applies "in any criminal case", U.S. Const. amend. 5, as well as in quasi-criminal cases, Boyd v. United States, 116 U.S. 616, 633-34, 29 L. Ed. 746, 6 S. Ct. 524 (1886), but not in civil enforcement proceedings.

Washington v. Ankney, 53 Wn. App. 393, 397, 766 P.2d 1131 (1989).<sup>27</sup> The Fifth Amendment must be accorded liberal construction in favor of the right it is intended to secure. Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S. Ct. 195, 35 L. Ed. 1110 (1892).

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<sup>27</sup> A case from Division I regarding the penalty scheme for violations of the King County animal control regulations; in line with those cases which focus on the penal or punitive effect of the sanctions, including whether any rights are subject to forfeiture as a result of the proceeding. See also State ex rel. Dailey v. Dailey, 164 Wash. 140, 144-46, 2 P.2d 79 (1931). Washington courts have long held that professional licenses are a very valuable property right accorded an individual by the State and subject to constitutional protections. Nguyen v. Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001).

We take our initial legal direction from the U.S. Supreme Court as to the manner in which the 5<sup>th</sup> Amendment<sup>28</sup> is applied in quasi-criminal actions:

[Q]uasi-criminal [actions] are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . .

Boyd v. United States, 116 U.S. 616, 634-35, 29 L. Ed. 746, 6 S. Ct. 524 (1886). Because the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations," Murphy v. Waterfront Commission, 378 U.S. 52, 55, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964), and because it is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of com-

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<sup>28</sup> Washington courts have held that the protection afforded under Wash. Const. art. I, § 9 is at a minimum coextensive with that of the self-incrimination provision of the U.S. Const. amend. V. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991); Mead School District No. 354 v. Mead Education Association, 85 Wn.2d 278, 285, 534 P.2d 561 (1975).

elling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).<sup>29</sup> It is in clear recognition and honor to these fundamental principles that the Washington Legislature established a mini-Miranda Rule applicable to Board investigations.<sup>30</sup>

The fundamental constitutional principles applicable to quasi-criminal actions such as the underlying professional license revocation proceeding

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<sup>29</sup> We must be ever vigilant that we are here dealing with issues of substantial and fundamental personal rights and privileges that are never lightly presumed waived or relinquished. "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Boyd, 116 U.S. at 631-32.

<sup>30</sup> "The uniform procedures for conducting investigations shall provide that prior to taking a written statement . . . for violation of this chapter, the investigator shall inform such person, in writing of: (i) the nature of the complaint; (ii) that the person may consult with legal counsel at his or her expense prior to making a statement; and (iii) that any statement that the person makes may be used in an adjudicative proceeding conducted under this chapter." RCW 18.130.095(2) (a). It is clear and undisputed that the Board's Investigator Stan Jeppesen did not advise Amedson in writing as to the nature of the complaint against him for which the March 21, 2006 "Statement" would be used in a quasi-criminal action seeking to revoke his Pharmacist license.

as derived from Boyd and its progeny over the years, including Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (the 5<sup>th</sup> Amendment secures an individual's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence," 385 U.S. at 514), are summarized as follows:

[T]he right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature [i.e., quasi-criminal] in that they tend to degrade the individual's professional standing, professional reputation or livelihood.

State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487, 491 (Fla. 1973);

[In a] quasi-criminal proceeding . . .; that the privilege against self-incrimination does apply to such a proceeding . . .; and that comments made to a fact-finding body by a prosecutor concerning an accused's silence, are prohibited by the self-incrimination clause of the US Const, Am V . . . .

State Bar of Michigan v. Woll, 194 N.W.2d 835, 838 (Mich. 1972); and

[In] quasi-criminal cases, the Fifth Amendment privilege is fully applicable; the defendant may refuse to testify altogether and no adverse inference may be drawn from such refusal.

City of Philadelphia v. Kenny, 369 A.2d 1343, 1348-49 (Pa. Commw. Ct. 1977) (citing other authorities).<sup>31</sup>

To rebut any assertions of the Department to the contrary, according Amedson his 5th Amendment rights and privileges, including the right to remain silent and privilege against self-incrimination, at all stages of an adjudicative proceeding will not "effectively eviscerate the Board's ability to ever issue sanctions against [a licensee] for any conduct." Quasi-criminal cases, just like criminal cases, must be grounded on the efforts of the government other than by compelling testimonial confessions or other evidence from the accused.<sup>32</sup> The Board cannot take shortcuts and deny the individual statutory and constitutional rights and privileges, and then expect to reap and apply the

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<sup>31</sup> Citing as authority United States v. United States Coin & Currency, 401 U.S. 715 (1971); Lees v. United States, 150 U.S. 476 (1893); Boyd, 116 U.S. 616; Osborne v. First National Bank, 26 A. 289 (Pa. 1893); Boyle v. Smithman, 23 A. 397 (Pa. 1892). Cf. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988) (privilege applies to all stages of the case).

<sup>32</sup> The Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda, 384 U.S. at 460.

tainted rewards by claiming mere "procedural defect" and thus harmless error. The Board's error was not harmless as Amedson would clearly not have signed any purported written statement, would not have cooperated with government investigators, and would have asserted his full 5<sup>th</sup> Amendment rights and privileges had he in fact been given the mandated written notice and actually informed that he himself was the target of Board disciplinary action. ARBN 121-123; ARBN 376.

The full application of the Fifth Amendment and the rule of non-inference are constitutional mandates that cannot be ignored or misapplied and are essential to protect the fundamental rights and privileges Amedson is afforded by law in this quasi-criminal action against him as the Defendant seeking to end his professional life and livelihood.<sup>33</sup>

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<sup>33</sup> As a government agency is not the final arbiter of constitutional rights, courts review constitutional claims under the *de novo* standard. Lund v. State Department of Ecology, 93 Wn. App. 329, 334, 969 P.2d 1072 (1998). "As constitutional issues are outside the realm of agency expertise, [courts] do not defer to the agency's application (continued...)"

**B. SANCTIONS IMPOSED BY THE PRESIDING OFFICER WERE UNCONSTITUTIONAL, EXCESSIVE AND EXTREMELY PREJUDICIAL TO THE PRESENTMENT OF A DEFENSE IN THIS QUASI-CRIMINAL ACTION**

Applicable to quasi-criminal actions is included the 6<sup>th</sup> Amendment constitutional rights and privileges.<sup>34</sup> Embedded in such 6<sup>th</sup> Amendment privileges is the constitutional right of a defendant to testify on his or her own behalf.<sup>35</sup>

[T]he defendant's right to testify [on his/her own behalf] is grounded in the Fifth, Sixth, and Fourteenth Amendments. [Rock, 483 U.S. at 51-52]. In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution [in art. I, § 22]. This right is fundamental, and cannot be abrogated by defense counsel or by the court.

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<sup>33</sup>(...continued)  
of constitutional principles." Longview Fibre Company v. Department of Ecology, 89 Wn. App. 627, 633, 949 P.2d 851 (1998) (citing Crescent Convalescent Center v. Department of Social and Health Services, 87 Wn. App. 353, 357, 942 P.2d 981 (1997)). "[I]t is [the judicial] branch of our system of government that is the final arbiter of our constitution." Carter v. University of Washington, 85 Wn.2d 391, 399, 536 P.2d 618 (1975).

<sup>34</sup> In Interest of Long, 313 N.W.2d 473, 478 (Iowa 1981).

<sup>35</sup> Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); City of Kansas City v. Howe, 416 S.W.2d 683 (Mo. App. 1967); State v. Holden, 554 So.2d 121 (La. 1989). "The right to testify in one's own behalf if exercised, of course, amounts to a waiver of the right to remain silent, and the free and voluntary election so to do, or not to do, should be unfettered and unhindered by any form of compulsion." State v. Hill, 83 Wn.2d 558, 564, 520 P.2d 618 (1974).

State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). It is thus both fundamental and axiomatic that Amedson's due process rights as embedded in the fair hearing protocol include his absolute and unfettered right to present the evidence in his defense in person.<sup>36</sup>

Nevertheless and in total disregard of Amedson's clear constitutional rights and privileges under the 5<sup>th</sup> Amendment and Wash. Const. art. I, § 9,<sup>37</sup> the Presiding Officer imposed severe evidentiary and testimonial sanctions on him, concluding that his invocation of his 5<sup>th</sup> Amendment rights and privileges and refusal to submit himself to compulsory interrogation by oral deposition by the Prosecuting Attorney constituted "a willful inter-

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<sup>36</sup> Fundamental constitutional rights may be raised at any time in the judicial review process because "they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Courts review *de novo* the question of whether a defendant was denied his constitutional right to testify or to present a defense. People v. Solomon, 560 N.W.2d 651 (Mich. App. 1996).

<sup>37</sup> And also including the mandate of RCW 34.05.020 that "nothing in this chapter may be held to diminish the constitutional rights of any person." See also WAC 10-08-220; WAC 246-11-001(6).

ference with the progress of this proceeding."<sup>38</sup> As a matter of law, however, such is not the case.

"Willful" connotes an intentional act. Black's Law Dictionary, at Page 1434 (5th ed. 1979). However, "intentional interference requires an improper objective . . . [and] exercising in good faith one's legal interests is not improper interference," Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997), and a failure or refusal to comply with an order is "willful" only where there exists no "reasonable excuse or justification". Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Amedson at all times asserted the fullness of his constitutional rights and privileges under the 5<sup>th</sup> Amendment and Wash. Const. art. I, § 9 in utmost good faith and reliance on the well-established jurisprudence of the U.S. Supreme Court and Washington courts, with the assistance of other State high courts that also

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<sup>38</sup> See ARBN 590 (Prehearing Order No. 6, at Page 5, ¶ 3.7 (Conclusions of Law), re: WAC 246-11-170(2)(b)).

recognize professional license revocation proceedings as quasi-criminal actions to which the Fifth Amendment fully applies. Furthermore, in good faith and without waiving his constitutional rights and privileges Amedson offered to answer written interrogatories posited by the Prosecuting Attorney in lieu of oral deposition. This was summarily rejected.<sup>39</sup> And, moreover, the Department failed to exhaust its statutory remedy applicable to the enforcement of subpoenas in adjudicative proceedings; as here there is a specific statutory remedy applicable to the issue of failure to comply with a Subpoena.<sup>40</sup> The sole lawful remedy to enforce a

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<sup>39</sup> And based on the law as to controlled, limited discovery of written materials even in criminal proceedings, in good faith and without waiving his constitutional rights and privileges Amedson did answer the Department's subpoena duces tecum and provide copies of any written documents discoverable and that he intended to offer as Exhibits at the hearing. ARBN 213-39; ARBN 765-66. The Presiding Officer refused to admit several of these documents and Amedson has preserved his objections to such rulings. ARBN 771-75.

<sup>40</sup> "If a person fails to obey an agency subpoena issued in an adjudicative proceeding, . . . the agency or attorney issuing the subpoena may petition the superior court of any county where the hearing is being conducted, where the subpoenaed person resides or is found, or where subpoenaed documents are located, for enforcement of the subpoena." RCW 34.05.588(1). Or as in the instance where the named Defendant is subpoenaed, a Notice of Deposition is served in lieu of a formal Subpoena (continued...)

Subpoena in the underlying action was by and through the courts. The Department failed without excuse to exhaust its judicial remedy prior to the Presiding Officer imposing Draconian evidence and testimonial sanctions. Such unilateral administratively imposed sanctions are invalid, unlawful, and unconstitutional where the statutory remedy has not in any way been sought and exhausted where the 5<sup>th</sup> Amendment has been invoked.<sup>41</sup> Accordingly, sanctions against Amedson of any kind, degree, or mea-

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<sup>40</sup>(...continued)

such as that issued by the Department to Amedson. A Subpoena is simply "a command to appear at a certain time and place to give testimony upon a certain matter." Black's Law Dictionary at p. 1279 (5th ed. 1979).

<sup>41</sup> The failure to seek enforcement of a subpoena with the appropriate judicial authority waives any subsequent argument related to a party's noncompliance with the subpoena. In re Mark A., 68 Cal.Rptr.3d 106 (Cal. App. 2007) (evidence and testimonial sanctions improper means of enforcing subpoena where Fifth Amendment invoked); Browne v. Commonwealth, 843 A.2d 429, 436 (Pa. Cmwlth. 2004) (a party has the responsibility to seek enforcement of a subpoena through the Commonwealth Court and waives any subsequent argument as to sanctions related to a party's noncompliance with the subpoena if application is not first made; see, e.g., 63 P.S. § 390-6(m)). In our case, the proper subpoena enforcing authority is the Superior Court and without first seeking judicial enforcement it is unlawful and an abuse of the administrative process for the Presiding Officer to make an end run around RCW 34.05.588(1) and unilaterally impose severe evidence and/or testimonial prohibitions against Amedson as a sanction for refusing to honor a subpoena/notice of deposition in a quasi-criminal action.

sure were improper and unlawful in violation of his constitutional rights and privileges.<sup>42</sup>

**C. WASHINGTON'S MINI-MIRANDA STATUTE WAS VIOLATED BY THE BOARD'S INVESTIGATORS AND SUCH OMISSION WAS EXTREMELY PREJUDICIAL AND WAS NOT HARMLESS ERROR**

Washington State's mini-Miranda statute applicable to agency investigations is codified as RCW 18.130.095(2)(a). All three elements must be satisfied; complying with only 2 of 3 does not pass muster. The focus of this inquiry is the March 16, 2006 "Written Statement Notice". This Notice includes only 2 of the 3 mandatory elements. As for the essential third element, Board Investigator Stan Jeppesen claims to have orally told Amedson that he was under investigation and gave him a "packet" of information which Amedson purportedly kept prior to his signing the "Notice".<sup>43</sup> However,

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<sup>42</sup> RCW 34.05.020. Including and not limited to any kind of sanction such as a gag order on Amedson and inability to present witnesses and/or exclusion of evidence. WAC 246-11-170(3).

<sup>43</sup> Jeppesen Declaration dated November 21, 2007. ARBN 906. And in a December 4, 2007 Brief the Prosecuting Attorney baldly asserted that at the March 16, 2006 meeting Jeppesen provided Amedson with a "written packet that explained the investigation and informed Respondent of his rights". ARBN (continued...)

Amedson categorically denies such assertions and states that he was never informed by anyone, orally or in writing, that he was the target of a Board investigation prior to his being served with the Board's Statement of Charges. ARBN 120. This is a classic case of a "he said -- she said" disagreement as to who said what, when and how. Thus the cogent reasoning for the Legislature to enact the mini-Miranda mandate under which the Board Investigator was required to inform the person under investigation in writing as to the nature of the Complaint against him prior to obtaining a statement from such targeted individual. RCW 18.130.095(2)(a) ("investigator shall inform such person in writing").<sup>44</sup> The Department characterizes the abject failure of the Board's Investigator to give Amedson the mandatory written notice as but a mere form of harmless "*minor procedural error*":

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<sup>43</sup>(...continued)

258. A copy of such packet, although included in the scope of a subpoena duces tecum was never produced by the Department.

<sup>44</sup> Especially where such purported "statement" will then be used against the targeted individual as a 'confession'. Without such 'confession' there is here no substantial evidence.

While the Department does not concede that any procedural defects occurred in this investigation, the Washington State Supreme Court has held that while an agency must adhere to its own rules and regulations, in the absence of actual prejudice, minor procedural errors will not necessarily violate procedural due process, nor preclude prosecution.

ARBN 720 (but note that here the mandate is by statute, not by agency rule).

To find an error affecting a constitutional right harmless, especially a "confession" that is like no other evidence, the Court must find it harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302 (1991). Washington courts have adopted the "overwhelming untainted evidence" standard in harmless error analysis; namely, consider only the untainted evidence and determine whether it is so overwhelming it necessarily by itself leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).<sup>45</sup> Here,

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<sup>45</sup> Here, all the evidence is tainted as a fruit of the poisonous tree stemming from the Board's breach of its promised immunity in exchange for Amedson's cooperation during the A-Z Pharmacy investigation. In the absence of such  
(continued...)

based on the hearing transcript and the Final Order the principal and overwhelming evidence of Amedson's alleged unprofessional conduct was found in and came directly from the March 21, 2006 "Statement". The Department has not and cannot meet its burden of proof that the admission of this "confession" did not contribute to Amedson's conviction or that there is overwhelming clear, cogent and convincing competent and untainted evidence in the record other than the "Statement" which substantially and sufficiently supports the Board's finding and conclusion of unprofessional conduct.

**D. AS A WHISTLEBLOWER, AMEDSON IS ENTITLED TO STATUTORY PROTECTION FROM BOARD ACTION**

As a Whistleblower, ARBN 115-16, Amedson is entitled to invoke and avail himself of the safe harbor protection of the statutory grant of immunity conferred in RCW 4.24.510,<sup>46</sup> as although the Board's disciplinary action against Amedson and his

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<sup>45</sup>(...continued)

tainted evidence, there is no substantial competent evidence to support the Board's Final Order revoking Amedson's license.

<sup>46</sup> See also WAC 246-11-150 and WAC 246-15-020(1)(a).

professional Pharmacist license is quasi-criminal in nature, it is nonetheless civil in character so as to mark the punishment imposed in such action as a form of penal civil liability.<sup>47</sup>

[A professional license] disciplinary proceeding . . . is characterized as civil, not criminal in nature; yet it is quasi criminal in that it is for the protection of the public . . . . Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose.

Nguyen v. Department of Health, 144 Wn.2d 516, 528, 29 P.3d 689 (2001) (quoting from In re Kindschi, 52 Wn.2d at 10-11).<sup>48</sup> Under this statutory grant of immunity there is no limitation or restriction imposed upon its scope to an action for monetary damages only, nor was any such restrictive application envisioned by the legislators in the debate on

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<sup>47</sup> Quasi-criminal liability has been characterized as essentially a form of civil liability imposed by a civil court or an administrative tribunal rather than by a criminal court. Ukrainiec v. Batz, 493 N.E.2d 1368 (Ohio App. 1982) (a proceeding is deemed quasi-criminal because although sufficiently punitive in nature to call into play constitutional rights and privileges, the liability sought to be imposed is nonetheless of civil character short of imprisonment).

<sup>48</sup> Professional license disciplinary proceedings "(1) involve much more than a mere money judgment, (2) are quasi-criminal, and (3) also potentially tarnish one's reputation." Nguyen, 144 Wn.2d at 525.

this statute that "provides immunity from civil liability law".<sup>49</sup> Furthermore, there is no "good faith" prerequisite to Whistleblower protection as RCW 4.24.510 was amended in 2002 by Laws of Washington, Chapter 232, § 1, to remove therefrom the previous "good faith" criterion.<sup>50</sup>

What this statute legally creates is a safe harbor within which a Whistleblower is absolutely immune from any civil liability, including disciplinary actions taken against an individual and his professional license.<sup>51</sup> In re Disciplinary Proceed-

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<sup>49</sup> Journal of the House, Vol. II, 1989 Regular Session, First & Second Special Session of the Fifty-First Legislature, at Page 2452 (April 20, 1989). "Senator Talmadge: . . . 'I believe it is important that we clarify the legislative intent on this bill. As you know, this bill establishes Whistleblower immunity for individuals who provide important information to government agencies'." Journal of the Senate, Vol 1, 1989 Regular Session of the Fifty-First Legislature, at Page 1040 (April 3, 1989). Civil liability includes that punishment which may be imposed by other than a criminal court. Commonwealth v. Shimpeno, 50 A.2d 39 (Pa. Super. 1946).

<sup>50</sup> "Laws of 2002 amends Washington law to bring it in line with these court decisions which recognize that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." Notes, appended to RCW 4.24.510.

<sup>51</sup> A "claim" generally means a "cause of action". Systems Amusement, Inc. v. State, 7 Wn. App. 516, 500 P.2d 1253 (1972). And a "cause of action" does not consist of facts, (continued...)

ing Against Schafer, 149 Wn.2d 148, 167-68, 66 P.3d 1036 (2003). A "safe harbor" creates a zone in which one is "free of adverse consequences" for his actions. State v. Bostrom, 127 Wn.2d 580, 591, 902 P.2d 157 (1995). Here, Amedson was the first person to bring the A-Z Pharmacy operation and misconduct to the attention of State officials in both DSHS and DOH. ARBN 115-16; ARBN 373-375. Amedson is, therefore, a Whistleblower entitled to the protection of RCW 4.24.510. This statute is broad enough in its coverage to include Amedson's alleged unprofessional conduct uncovered during the government investigation of A-Z Pharmacy.

#### VI. CONCLUSIONS

After correctly finding and concluding (1) that the Board's professional license disciplinary proceeding against Amedson was a quasi-criminal

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<sup>51</sup>(...continued)

but of the alleged unlawful violation of a right which the facts show. Patten v. Dennis, 134 F.2d 137 (9th Cir. 1943). It is the alleged failure to perform legal obligation to do, or refrain from performance of, some act as to which a legal action may be maintained. Black's Law Dictionary, at Page 201 (5th ed. 1979). The scope of "claims" included within the purview of RCW 4.24.510 was not limited by the Legislature.

action, and (2) by citing to Ankney & Boyd that the Fifth Amendment applied to such an action, ARBN 204, the Presiding Officer strayed from this path and erroneously concluded that the scope of the accused's 5<sup>th</sup> Amendment privilege against self-incrimination and right to remain silent in a quasi-criminal action was coextensive only with how such privileges and rights are available to a mere witness or a party in a purely civil lawsuit context citing Olympic Pipe Line as authority. ARBN 204-207.

Simply stated, this excursion was unconstitutional, clearly erroneous, and extremely prejudicial and harmful to Amedson's absolute and unfettered right to assert his 5<sup>th</sup> Amendment rights and privileges and to nevertheless present evidence in his defense in person.<sup>52</sup> In sum, Boyd and its progeny apply and are the best legal authority as to the issue of Amedson's 5<sup>th</sup> Amendment privileges and rights in the underlying Board action. The Olympic Pipe Line case and analysis are wholly

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<sup>52</sup> U.S. Const. Amend. VI. See, e.g., Spevack, 385 U.S. 511; Vining, 281 So.2d 487; Woll, 194 N.W.2d 835.

inapposite under our circumstances and the Presiding Officer erred as a matter of law in applying such to the Board's quasi-criminal action against Amedson. Amedson's 5<sup>th</sup> Amendment rights and privileges arise and stem solely from this quasi-criminal action and fully apply at all stages as a matter of law.<sup>53</sup> Amedson was summarily denied his constitutional rights, was erroneously punished for asserting his 5<sup>th</sup> Amendment rights and privileges, was wrongly denied his right to present testimony and evidence at any Board hearing in violation of the 6<sup>th</sup> Amendment, and as a result was illegally and prejudicially deprived to his extreme risk and detriment of any meaningful opportunity to present his intended issues and defenses to the Board.<sup>54</sup>

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<sup>53</sup> Amedson's Answer to the Board's Statement of Charges was made under protest and without waiving his 5<sup>th</sup> Amendment rights and privileges, ARBN 103-112, as in Vining, 281 So.2d 487, the Florida Supreme Court held that a statute authorizing entry of default in a real estate license revocation proceeding because of a failure of the accused to respond to the statement of charges is unconstitutional and a violation of the Fifth Amendment privilege against self-incrimination and right to remain silent. See WAC 246-11-280(1); RCW 34.05.440(1).

<sup>54</sup> ARBN 590; ARBN 741-744. Notwithstanding substantial competent evidence as to the existence of the immunity agreement, Amedson was unlawfully denied the right to present his  
(continued...)

For the foregoing reasons, Amedson respectfully asks this Court to reverse and vacate Pre-hearing Order Nos. 2, 4, 5, 6, 7, 8, 9, and 10 and the Board's Final Order and (A) Order the Statement of Charges dismissed with prejudice on grounds of statutory Whistleblower immunity; or as appropriate (B) declare the full scope and breadth of Amedson's 5<sup>th</sup> Amendment and Wash. Const. art. I, § 9 privilege against self-incrimination and right to remain silent in a quasi-criminal professional license disciplinary action and (i) Order certain evidence suppressed including the March 21, 2006 "Statement" as obtained in violation of Amedson's constitutional rights and the State mini-Miranda statute,

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<sup>54</sup>(...continued)

testimony and evidence of such grant at the hearing. Immunity agreements are considered contractual. State v. Bryant, 146 Wn.2d 90, 42 P.3d 1278 (2002). Agreements for immunity may be oral and never reduced to a writing. United States v. Nersesian, 824 F.2d 1294, 1320 (2d Cir. 1987). Principles of "fundamental fairness" require that the government perform a promise even if made by an agent who exceeded his actual authority. "Fundamental fairness has been applied to informal immunity agreements. . . . [T]he government must scrupulously perform its end of the bargain." Bryant, 146 Wn.2d at 104-105. There exists substantial competent evidence as to the existence and terms of the grants of immunity given Amedson by both HHS/OIG Special Agent Hinckley (from federal prosecution) and Board Investigator Jeppesen (from Board disciplinary action) in exchange for his cooperation in the A-Z Pharmacy investigation. ARBN 373-378.

(ii) vacate the evidence and testimonial sanctions imposed on Amedson by the Presiding Officer in Pre-hearing Order No. 10, (iii) remand this matter to the Board to conduct further proceedings, if deemed appropriate, in light of and consistent with this Court's decision, and (iv) any other and further relief deemed just and appropriate.

Amedson is entitled to an adjudicative process that acknowledges and respects the full breadth of all of his constitutional rights and privileges in this quasi-criminal action, and a hearing conducted without unfair limitation or unlawful restriction imposed upon him. Then, and only then, can there be a fair and just outcome in this matter.

DATED this 22<sup>nd</sup> day of April, 2009.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



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Amedson

Court of Appeals No. 39042-6-II  
Thurston County Superior Court 08-2-01147-7

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

JOSEPH R. AMEDSON, individually and with respect  
to his licensure as a Pharmacist, No. PH00011607,

APPELLANT,

v.

WASHINGTON STATE BOARD OF PHARMACY, a Board as  
established by law under RCW 18.64.001;  
WASHINGTON STATE DEPARTMENT OF HEALTH, an admin-  
istrative agency of the State of Washington;  
ADJUDICATIVE SERVICE UNIT, a unit of the Wash-  
ington State Department of Health; and  
ARTHUR E. DeBUSSCHERE, Health Law Judge, Presid-  
ing Officer, Ajudicative Service Unit, Department  
of Health,

RESPONDENTS.

DECLARATION OF SERVICE

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DIVISION II



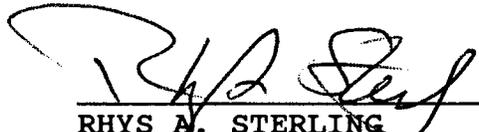
4. By first class mail postage prepaid on April 22, 2009 I served on the other parties in this action, through their respective counsel, a copy of the BRIEF OF APPELLANT and DECLARATION OF SERVICE by their delivery to the Hobart Post Office and addressed to:

Cindy Carra Gideon, AAG  
Office of the Attorney General  
Gov't Comp & Enforce Division  
P.O. Box 40100  
Olympia, Washington 98504-0100

Attorney for Respondents.

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

April 22, 2009  
DATE

  
RHYS A. STERLING  
(WRITTEN) WSBA # 13846

Hobart WA  
PLACE OF SIGNATURE

  
RHYS A. STERLING  
(PRINTED)