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**SUPREME COURT OF THE STATE OF WASHINGTON**

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SHIRLEY O. DANIELS, D.D.S.,

Appellant,

v.

DENTAL QUALITY ASSURANCE COMMISSION,  
DEPARTMENT OF HEALTH,

Respondent.

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**BRIEF OF RESPONDENT**

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**ORIGINAL**

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## I. INTRODUCTION

In two separate cases involving multiple patients and multiple aspects of dental practice, the Dental Quality Assurance Commission (“Commission”) concluded that Appellant, Shirley Daniels, DDS, committed unprofessional conduct by practicing below the standard of care. The Commission also found that Dr. Daniels was dishonest in her billing practices. Based upon these two cases, the Commission revoked Dr. Daniels’ license. These two cases are now before this court on judicial review. All of the factual findings are based upon substantial evidence in the administrative record. Furthermore, none of the issues that Dr. Daniels raises constitutes either constitutional or legal error, and she has shown no basis for reversing either of the Commission’s orders. The petitions for judicial review should be denied<sup>1</sup>.

## II. RESTATEMENT OF THE ISSUES

1. Are the Commission’s Final Orders in the 2006 and 2007 hearings supported by substantial evidence in the administrative record?
2. Does the administrative record support Dr. Daniels’ allegations of bias or misconduct by the hearing panel members, the presiding officers, or the Assistant Attorney General prosecutors?
3. Did Dr. Daniels receive proper notice of the charges against her?

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<sup>1</sup> Please see the Commission’s Answer to Statement of Grounds filed with this Court on June 16, 2009 for reasons why this Court should not grant direct review.

4. Do any of Dr. Daniels' other arguments establish that her rights to due process were violated or establish a basis for relief under the Administrative Procedure Act?

### **III. STATEMENT OF FACTS**

#### **A. The Commission's Authority**

The Dental Quality Assurance Commission is created and governed by chapter 18.32 RCW. The Legislature created the Commission through the state police power "to protect the public health, to promote the welfare of the state, and to provide a commission to act as a disciplinary and regulatory body for the members of the dental profession licensed to practice dentistry in this state." RCW 18.32.002. The Commission is charged to "regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensure, continuing education, consistent standards of practice, continuing competency mechanisms, and discipline." *Id.*

The Commission includes 14 members appointed by the Governor. Twelve members of the Commission must be dentists and two members must be public members. RCW 18.32.0351. The Commission has statutory authority to adopt rules. RCW 18.32.0365. The Uniform Disciplinary Act, chapter 18.130 RCW, governs the discipline of licensees under the Commission's authority. RCW 18.32.039.

**B. The 2006 Disciplinary Hearing**

At the 2006 hearing,<sup>2</sup> Dental Case Number 04-10-A-1053DE, the Commission considered charges relating to five patients. 2006 Hearing, AR 175-81.<sup>3</sup> The Commission determined that Dr. Daniels' treatment of Patient 1 fell below the standard of care because she extracted the wrong tooth, and either Dr. Daniels or her staff altered the patient's consent form to line out the tooth Patient 1 had agreed should be extracted and added two other teeth without Patient 1's consent. 2006 Hearing, AR 815. In addition, the Commission found that Dr. Daniels left root tips in Patient 1's extraction site, did not inform the patient of this fact, did not refer him to an oral surgeon to complete the extraction, and did not document that she had done so in her patient chart. 2006 Hearing, AR 816. It also found that Patient 1 suffered severe pain and loss of sleep for a week until he returned to Dr. Daniels, who informed him of the remaining root tip and referred him to an oral surgeon to remove the root tip, which resolved Patient 1's pain complaint. *Id.*

The Commission found that Dr. Daniels fell below the standard of care in her treatment of Patient 2 because she failed to properly test the teeth to determine which needed treatment and failed to properly

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<sup>2</sup> Dr. Daniels is petitioning for judicial review of two separate Dental Commission Final Orders, one resulting from a hearing in 2006 and another from a hearing held in 2007. These cases were consolidated by the Thurston County Superior Court for hearing on judicial review. Clerk's Papers (CP) at 813.

<sup>3</sup> When the administrative record is cited, the 2006 administrative record is cited using the Bates stamped number in the lower right corner. For the 2007 record, the record is cited using the typed number in the lower right corner.

diagnose irreversible pulpitis.<sup>4</sup> 2006 Hearing, AR 820. The Commission dismissed an additional charge that Dr. Daniels failed to report to the Commission that Patient 2 required hospitalization following her treatment. 2006 hearing, AR 817-19. The Commission dismissed the charge because Patient 2 was treated at an urgent care clinic, was not hospitalized, and because it was not clear that Dr. Daniels' treatment caused Patient 2 to seek additional care. 2006 Hearing, AR 817-19.

The Commission found that Dr. Daniels fell below the standard of care in treating Patient 3 because she attempted to extract a tooth, which fractured during the extraction. 2006 Hearing, AR 813-14. During the rest of the day, and in between providing treatment to other patients, Dr. Daniels made repeated attempts to complete the tooth's extraction. 2006 Hearing, AR 814. Although Patient 3 told Dr. Daniels and her staff that he had suffered a recent herniated disc and that sitting in one position for long periods would be painful, they kept Patient 3 in the dental chair in Dr. Daniels' office from 10:30 a.m. until approximately 4:30 p.m. when the staff informed him Dr. Daniels had left for Christmas vacation. 2006 Hearing, AR 813-14, 1256. Dr. Daniels did not refer Patient 3 to an oral surgeon to complete the extraction or document in the Patient's chart that she had made such a referral. *Id.*

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<sup>4</sup> Pulpitis: "inflammation of the pulp of the tooth." Merriam Webster's Online Medical Dictionary, available at [www.merriam-webster.com/medical/pulpitis](http://www.merriam-webster.com/medical/pulpitis) (last accessed April 13, 2010).

The 2006 hearing Commission panel also considered charges that Dr. Daniels had failed to provide patient records to Patients 4 and 5 within the required time periods. 2006 Hearing, AR 820-21. The Commission determined that the charges related to Patients 4 and 5 had not been proven and dismissed them. 2006 Hearing, AR 826.

As a result of the findings it made, the Commission ordered Dr. Daniels not to perform surgical extractions until she had successfully completed 14 hours of pre-approved continuing education in surgical extractions. The Commission also required her to complete seven hours of continuing education in risk management/recordkeeping and to take and pass the jurisprudence examination. The Commission imposed a \$10,000 fine. 2006 Hearing, AR 826-27.

**C. The 2007 Disciplinary Hearing**

During the 2007 hearing, Dental Case Number 06-11-A-1052DE, the Commission considered charges related to Patients A and B. 2007 Hearing, AR 6-12. The Commission had previously summarily suspended Dr. Daniels' license based upon these charges and the disciplinary order from the 2006 hearing. 2007 Hearing, AR 305. Given the summary suspension, Dr Daniels was provided the option of requesting a prompt hearing to expeditiously adjudicate the matter. 2007 Hearing, AR 3-5, 792. The hearing was held on May 3 and 8, 2007. 2007 Hearing, AR 471.

The Commission hearing panel found that Dr. Daniels fell below the standard of care in her treatment of Patient A in several ways. One of Dr. Daniels' assistants dropped a dental tool on the floor while treating Patient A and placed it back on the dental tray where it could have contaminated other tools being used to treat the patient creating a serious risk of infection. 2007 Hearing, AR 478-79. Dr. Daniels also placed a crown on Patient A's tooth that a subsequent dentist observed to have a large opening or defect showing that Dr. Daniels did not check the crown margins when she placed it or when she saw the patient afterwards. 2007 Hearing, AR 479-80.

The Commission hearing panel found that Dr. Daniels fell below the standard of care in her treatment of Patient B because she billed the Department of Social and Health Services for six restorations. However, Dr. Daniels did not complete four of these restorations and the other two that she did do fell out of the patient's mouth less than two weeks later. 2007 Hearing, AR 474-77. Less than a month later, a subsequent treating dentist observed obvious decay on the surfaces Dr. Daniels had restored. *Id.*

The Commission also found that Dr. Daniels failed to cooperate with a Department of Health investigation of an additional complaint involving Patient C. 2007 Hearing, AR 481-82. The Commission also found that Dr. Daniels' core provider agreement with the Department of Social and Health Services (DSHS) had been terminated because of an audit of her billing practices. 2007 Hearing, AR 482-83.

Based upon the unprofessional conduct established in the 2007 hearing and the previous discipline imposed following the 2006 hearing, the Commission revoked Dr. Daniels' license to practice dentistry with no right to reapply for ten years. 2007 Hearing, AR 491. The Commission explained that the pattern of negligent treatment, dishonesty and lack of remorse justified the sanction they imposed. *Id.*

Dr. Daniels petitioned for judicial review to Thurston County Superior Court, and Judge Tabor affirmed the Commission's Orders on September 19, 2008. CP at 475-76. Dr. Daniels now seeks direct review of the Commission's Final Orders by this Court.

#### **IV. STANDARD OF REVIEW**

Administrative orders in this case are before the court for judicial review under the Washington Administrative Procedure Act, Chapter 34.05 RCW. The burden of demonstrating the invalidity of an agency action is on Dr. Daniels. RCW 34.05.570(1). In reviewing an agency order in an adjudicative proceeding such as this one, the court may grant relief only if it determines that the agency's order is deficient in one of the ways stated in the statute. RCW 34.05.570(3). The appellate court reviews the agency's order and record, not the superior court's decision. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005).

The "substantial evidence" test is the standard of review applied to an agency's factual determinations. *Olmstead v. Dep't of Health*, 61 Wn.

App. 888, 893, 812 P.2d 527 (1991). That test is very deferential to the administrative fact finder, and the same deference is afforded to the Commission's factual findings as an appellate court would afford to a superior court's factual findings. *Motley-Motley, Inc.*, 127 Wn. App. at 72, citing *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000), and *Snohomish County v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

The arbitrary and capricious standard is similarly deferential to the Commission's decision. Action taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, is not arbitrary or capricious. *Washington Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983). Arbitrary and capricious action is "willful or unreasoning, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious even though one may believe an erroneous conclusion has been reached." *Heinmiller*, 127 Wn.2d at 609-610, citing *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). The Court may not substitute

its judgment for that of the Commission, even if the Court sees the evidence differently from the Commission. *Johnston*, 99 Wn.2d at 483.

A challenge to the appropriateness of the sanction the Commission chose is subject to the highest standard of review, and its sanction decision is accorded the most deference of any administrative determination. *Brown v. Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 17, 972 P.2d 101 (1999). An agency's determination of sanction is accorded considerable judicial deference because "it is peculiarly a matter of administrative competence." *In Re Case E-368*, 65 Wn.2d 22, 29, 395 P.2d 503 (1964). The perceived harshness of that penalty is not a basis for reversing the order. *Brown*, 94 Wn. App. at 17. As long as the agency is within its statutory authority, the choice of a penalty is a matter of discretion that the court will not disturb unless the agency has abused its discretion. *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992); *Arnett v. Seattle Gen. Hosp.*, 65 Wn.2d 22, 27-29, 395 P.2d 503 (1964).

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## V. ARGUMENT<sup>5</sup>

### A. The Commission Made All Findings Under The Correct Legal Standard, The Findings Are Supported By Substantial Evidence In The Record, And The Evidence Was Properly Admitted.

#### 1. The Commission made all findings under the clear and convincing standard of proof.

By the explicit terms of both Final Orders issued in this case, the Commission found each of its factual findings by clear and convincing evidence. 2006 Hearing, AR 822-23; 2007 Hearing, AR 487. Dr. Daniels is incorrect when she argues on pages 11-12 of her brief that the Commission's Final Orders do not reflect the use of the correct legal standard of proof.

The Presiding Officer<sup>6</sup> in the 2006 case explained that while the *Nguyen* case had determined that clear and convincing evidence was required in disciplinary cases involving physicians, the Courts of Appeals were in conflict as to whether that standard was required for other professions.<sup>7</sup> AR 822. Because of that legal uncertainty, the Presiding

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<sup>5</sup> The Respondent's brief is organized in such a manner so as to respond to the claims that can be identified in Dr. Daniels' brief. The claims are construed as best as can be gleaned from the brief, and are grouped to try to address similar claims together. Only those claims related to the two administrative cases before this Court for review are addressed.

<sup>6</sup> A presiding officer issues all rulings on evidentiary, procedural and policy matters prior to and during the disciplinary hearing. A Commission panel issues the ultimate findings of facts and conclusions of law. RCW 18.130.050(10); RCW 18.130.095(3); *see also* WAC 246-11.

<sup>7</sup> Compare *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001); *Eidson v. Dep't of Licensing*, 108 Wn. App. 712, 720-21, 32 P.3d 1039 (2001) (preponderance of the evidence standard applies to real estate appraisers); *Nims v. Wash.*

Officer explained at the hearing that the facts would be considered under both the clear and convincing standard and the preponderance of the evidence standard. AR 822-23. The Commission found that the facts it concluded constituted unprofessional conduct were proven by both a preponderance of the evidence and by clear and convincing evidence. AR 823.

By the time of the 2007 hearing, there was no longer uncertainty about the required standard of proof because the Supreme Court had resolved the confusion by requiring that all health care disciplinary cases be proven by clear and convincing evidence. *See Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). The 2007 Final Order confirms that all factual findings were proven by clear and convincing evidence. 2007 Hearing, AR 487-90.

In both Final Orders, the Commission dismissed charges where they found the evidence was not sufficient to meet the clear and convincing standard of proof. 2006 Hearing, AR 824-26; 2007 Hearing, AR 490. Each of the findings of fact upon which the Commission relied was found to be true by clear and convincing evidence, and there is nothing in the record to support an argument that the Commission did not apply the correct standard of proof.

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*Bd. of Registration*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002) (clear and convincing standard applies to registered engineers); *Ongom v. Dep't of Health*, 124 Wn. App. 935, 945, 104 P.3d 29 (2005) (preponderance of the evidence standard applies to nursing assistants).

**2. The record contains substantial evidence to support the findings regarding Patient 2, and the Department was not required to call the patient to testify.**

The evidence the Commission considered in finding Dr. Daniels committed unprofessional conduct in treating Patient 2 was properly admitted, and the record contains substantial evidence to support the Commission's findings. Dr. Daniels primarily argues that the charges relating to Patient 2 should have been dismissed because she had no opportunity to depose Patient 2, and because Patient 2 did not testify at the hearing, Dr. Daniels' rights under the Confrontation Clause were violated. Br. Appellant at 35. The Confrontation Clause of the U.S. Constitution, however, applies only in criminal proceedings, and it does not require patients or complainants to testify at administrative licensing hearings if, as the Department did in this case, the charges can be proven through patient records and expert testimony. *State v. Lui*, 153 Wn. App. 304, 314-15, 221 P.3d 948 (2009). The Department was not required to produce the patient as long as it produced sufficient evidence to sustain the charges alleged, which the record shows was done.

Dr. Daniels also argues that Patient 2 was not "reliable" and that her complaint should not have been used as the basis for findings of violation. Br. Appellant at 35. Dr. Daniels does not explain why she claims Patient 2 was not reliable or why Patient 2's complaint was not admissible. Furthermore, Dr. Daniels waived the right to challenge the evidence supporting the Patient 2 allegations by first objecting and then abandoning those objections prior to the hearing. Dr. Daniels' counsel

raised objections to proposed Department exhibits because Patient 2 would not be available to testify at the hearing. 2006 Hearing, AR 744-45. The Presiding Officer ruled that both parties had made reasonable efforts to locate Patient 2 but had been unsuccessful. *Id.* The Presiding Officer ruled on this issue in Prehearing Order Number 8, and he refused to either dismiss the charges or exclude evidence in support of the charges because Patient 2 was unavailable. 2006 Hearing, AR 744-45, 804-08. As that order confirms, Dr. Daniels' counsel withdrew her objections to the exhibits relating to Patient 2, so Dr. Daniels waived this issue prior to the hearing. *Id.* By abandoning her evidentiary objections prior to the hearing, Dr. Daniels has waived her right to raise them on review.

Patient 2's complaint was not the only evidence or even the most important evidence presented to prove the allegations against Dr. Daniels. The Department introduced both expert testimony and several exhibits in support of its allegations regarding Patient 2. The Department introduced patient records from Dr. Daniels as well as from a subsequent treating dentist. 2006 Hearing, AR 874-79, 881, 883-89, 891. The Department also introduced records from the Group Health Urgent Care Clinic where Patient 2 sought treatment after Dr. Daniels treated her. 2006 Hearing, AR 894-915. Dr. Benner testified about his treatment of Patient 2 and his observations of the treatment Dr. Daniels had provided. 2006 Hearing, AR 1280-90. The Department's expert witness, Dr. Richard T. Grubb, also testified about Dr. Daniels' treatment of Patient 2 and the

requirement to report Patient 2's subsequent medical treatment to the Commission. 2006 Hearing, AR 1387-96. Dr. John O'Neill testified about the medical treatment Patient 2 required following Dr. Daniels' treatment of her. 2006 Hearing, AR 1312-36. The Department put on substantial evidence to prove the allegations related to Patient 2, not just the complaint Dr. Daniels challenges.

**3. The findings regarding Patient A are supported by substantial evidence.**

The Commission concluded that Dr. Daniels fell below the standard of care in treating Patient A by failing to properly seat a crown on one tooth and because her dental assistant dropped a dental instrument and then put it back onto the tray with the other instruments used to treat Patient A causing a risk of serious infection. 2007 Hearing, AR 478-81. The evidence the Commission relied upon to find that Dr. Daniels committed unprofessional conduct in Patient A's treatment was properly admitted, and there is substantial evidence in the administrative record to support the Commission's findings.

Dr. Daniels alleges that her right to confront her accusers was violated at the 2007 hearing because the Department failed to call Dr. Hackney to testify and be cross examined about his criticisms of the treatment Dr. Daniels provided Patient A. Br. Appellant at 55. Dr. Hackney treated Patient A after Dr. Daniels had treated her. 2007 Hearing, AR 883-84. His patient records and a letter he wrote regarding

his observations of Patient A were admitted as exhibits at the hearing, but he was not available to testify. 2007 Hearing, AR 507-10.

The Department named Dr. Hackney as a witness during the prehearing conference held just prior to the 2007 hearing. 2007 Hearing, AR 1249. At that time, counsel for the Department stated that she was trying to locate Dr. Hackney and was not sure he could be located in time for the hearing. *Id.* Dr. Hackney was in no sense an “accuser”, and this administrative proceeding is not a criminal matter where the constitutional right to confrontation legally applies. *State v. Lui*, 153 Wn. App. at 314-15. Dr. Daniels cites no applicable legal authority that the failure to call the subsequent treating dentist to testify violates her constitutional rights. As such there is no basis for the relief that Dr. Daniels is seeking on this point.

Dr. Daniels also argues that the record does not contain substantial evidence to support the Commission findings that her placement of the crown for Patient A fell below the standard of care. Br. Appellant at 55. She points to testimony from her expert witnesses who testified they did not see a defect in the crown or a violation of the standard of care. *Id.* As shown, there is substantial evidence in the record to support the Commission’s findings. Simply disagreeing with the findings or pointing out other evidence does not establish a lack of substantial evidence or a basis for relief.

At the 2007 hearing, Patient A testified about receiving a crown from Dr. Daniels. 2007 Hearing, AR 881-82. Patient A testified that

Dr. Hackney examined the crown Dr. Daniels had put in his mouth and told him there was a hole on the back side of it where it was not sealing. 2007 Hearing, AR 884. This is also supported by Dr. Hackney's records and his letter. 2007 Hearing, AR 507-10 (Exhibits D-2 and D-3). The Commission's finding is amply supported by the administrative record.

Dr. Daniels also argues that the findings of fact regarding the dropped dental instrument were not adequately supported by the record. Br. Appellant at 44-45. Without legal citation, Dr. Daniels contends that because the Commission did not accept Patient A's testimony that he recognized the dental instrument dropped as the one the dental assistant then used in his mouth, his testimony cannot constitute clear and convincing evidence of other facts the Commission did find. Br. Appellant at 45. The Commission may consider all the testimony and accept parts of it while rejecting others. Because they determined that dental instruments often look similar enough that a layperson might not be able to distinguish between them, does not mean that the Commission, therefore, must reject all of the patient's testimony.

In this case, the Commission accepted that the incident happened as Patient A testified. 2007 Hearing, AR 478. They simply disagreed that Patient A knew that the dropped instrument was the one used in his mouth rather than another similar-appearing instrument that would have been on the tray. *Id.* Patient A testified that one of Dr. Daniels' dental assistants dropped a dental instrument on the floor, picked it up, and then used it to continue working in his mouth. 2007 Hearing, AR 880-81.

The hearing panel members clearly found Patient A to be credible because they concluded the facts that he testified to had been proven by clear and convincing evidence. 2007 Hearing, AR 478-79. Dr. Daniels argues that Patient A should not have been found credible, but provides no evidence or explanation in support. Br. Appellant at 44-45. Again, simply disagreeing with the Commission's decision does not establish grounds for relief or a lack of substantial evidence in the record.

**4. The findings as to Patient B were supported by substantial evidence which was properly admitted.**

The Commission found that Dr. Daniels did not perform four of the six restorations (dental fillings) she claimed to have performed on Patient B's teeth on November 15 and 23, 2005. 2007 Hearing, AR 474. The Commission found that the two restorations that Dr. Daniels did perform fell out of Patient B's mouth in less than two weeks. 2007 Hearing, AR 474. Each of these findings is supported by substantial evidence in the administrative record.

Patient B testified that Dr. Daniels performed restorations on her teeth on November 15, 2005, including one between her two front teeth. 2007 Hearing, AR 911-12. Patient B testified that the restorations Dr. Daniels performed fell out on November 28, 2005. 2007 Hearing, AR 913. Patient B testified that after the filling fell out, she went to see another dentist, Dr. Busacca. 2007 Hearing, AR 914. Dr. Busacca told her that Dr. Daniels had not done the restorations properly because the

decay had not all been removed and that the work would need to be redone. 2007 Hearing, AR 914-15.

Dr. Busacca testified that he saw Patient B after she had seen Dr. Daniels. 2007 Hearing, AR 933. Dr. Busacca described that when he examined Patient B, he saw the fillings falling out, and he illustrated his observations with photographs he had taken during that examination. 2007 Hearing, AR 933-34. Dr. Busacca testified that not only were fillings falling out, but he saw decay that had not been removed when other restorations were done. *Id.*

Dr. Busacca also testified that some of the fillings Dr. Daniels had billed for appeared to have been in Patient B's mouth for a long period of time because they were discolored and worn down. *Id.* Dr. Busacca testified that, when he received Dr. Daniels' treatment records and compared them to what he saw in Patient B's mouth, the restorations did not appear to have been placed and that some had unremoved decay under the restorations. 2007 Hearing, AR 936-38, 940-43. The Department's expert witness, Dr. Grubb, also testified that while Dr. Daniels' records claimed she had performed multiple-surface restorations on teeth numbers 8, 9, 10, and 11, the photographs taken by Dr. Busacca's office showed that no restorations had been done. 2007 Hearing, AR 994-99.

Dr. Daniels next argues that, because x-rays are the standard of care in dentistry, Dr. Busacca should not have been allowed to use photographs to illustrate his testimony about his observations of the

treatment Dr. Daniels provided to Patient B. Br. Appellant at 58. She cites nothing to support her argument, and there is no legal rule requiring x-rays or precluding photographs from being admitted as exhibits. Dr. Busacca authenticated the photographs during his testimony by stating he took them himself while examining Patient B's teeth after Dr. Daniels had treated her. 2007 Hearing, AR 933-34.

Dr. Daniels also argues that Dr. Busacca did not bring his entire patient record for Patient B to the hearing in violation of a ruling by the Presiding Officer. She argues that this failure requires that all of his testimony be stricken. Br. Appellant at 58-59. The Department of Health investigator had obtained the parts of Dr. Busacca's records that related to the charges raised by Patient B's complaint. 2007 Hearing, AR 1047-48. During a prehearing discussion of which exhibits were being admitted, the Presiding Officer ruled that Dr. Busacca's x-rays and photographs could be admitted based upon an expectation that when he testified, he would confirm their authenticity and that he would bring his patient file for Patient B. 2007 Hearing, AR 863-64. The argument Dr. Daniels' counsel made about the need for Dr. Busacca's whole patient file had to do with information she believed Dr. Busacca had obtained or recorded **before** Dr. Daniels treated Patient B. 2007 Hearing, AR 795-96. Dr. Busacca testified that he did bring his entire patient record, except for entries for treatment he provided to Patient B more than a year **after** the events at issue at the hearing. 2007 Hearing, AR 932. Nothing in Dr. Busacca's treatment records for visits more than

a year later was relevant to the issues at the hearing or Dr. Daniels' defense. Dr. Daniels has not shown any basis for excluding Dr. Busacca's testimony.

**5. The reference to the termination of Dr. Daniels' DSHS Preferred Provider Agreement in the 2007 Order reflects Dr. Daniels' admission in her Answer and the stipulation of the parties.**

Dr. Daniels argues that the Presiding Officer ruled that the DSHS decision to terminate her preferred provider agreement would be presented to the Commission without any further discussion of the underlying facts. She argues that the Commission violated that order by including additional facts in its 2007 Order. Br. Appellant at 13, 49-50.

What the administrative record shows is that the Presiding Officer ruled that even though Dr. Daniels had not objected to it, the letter ruling describing in detail the basis for the DSHS determination should not be admitted as Exhibit 10 because it included extensive discussion of facts not relevant to the hearing and which were under appeal. 2007 Hearing, AR 813-15. The parties then stipulated that the Department would withdraw Exhibit 10, but the fact of the termination of the DSHS agreement would be presented to the hearing panel along with the fact that Dr. Daniels was appealing that determination. 2007 Hearing, AR 814-15.

The Statement of Charges in the case, which was not objected to, states that Dr. Daniels' preferred provider agreement had been terminated because of a DSHS audit of her billing practices. 2007 Hearing, AR 8.

Dr. Daniels admitted the truth of that allegation in her answer. 2007 Hearing, AR 102. The finding the Commission made is supported by substantial evidence in the administrative record, and it does not violate the judge's ruling.

**6. The Commission was entitled to consider the 2006 discipline in determining the appropriate sanction at the 2007 Hearing, and it was not error to admit the 2006 Order.**

Dr. Daniels appears to allege that the inclusion of a discussion of the 2006 Final Order within the 2007 Order constitutes double jeopardy and an impermissible re-litigation of the issues from the 2006 hearing. Br. Appellant at 11, 34, 46. She cites two pages of the 2007 order that she seems to argue constitute double jeopardy. 2007 Hearing, AR 486-87. It is not clear what she is actually arguing in this section of her brief. If she is arguing that it was error to admit the order from the 2006 case as an exhibit at the 2007 hearing, she cannot now claim error as she herself introduced it as an exhibit. 2007 Hearing, AR 473.

If she is arguing that the 2007 hearing panel could not base its sanctions determinations partly upon the fact that she had prior discipline, then she is in error. There is no legal authority for an argument that hearing panel members cannot consider past discipline or a pattern of practice in imposing sanctions, particularly when Dr. Daniels herself put the prior order before them.

**7. The Order of Summary Suspension was supported by substantial evidence.**

In 2007, the Commission ordered a summary suspension of Dr. Daniels' license prior to the full hearing on the charges. 2007 Hearing, AR 3-5. This order is based upon the Commission's statutory authority to take emergency action when there is an immediate danger to the public health and safety. RCW 18.130.050(7), 34.05.479.

Dr. Daniels argues that the Commission issued this Order without sufficient supporting evidence. Br. Appellant at 53. She argues that the summary order must be supported by findings proven by clear and convincing evidence and that it was not.

Dr. Daniels elected not to challenge the summary suspension order but to move immediately to a full hearing on all of the charges. 2007 Hearing, AR 761. Once the full hearing on the charges had been held and the Final Order entered, the Order of Summary Suspension was no longer in effect. This issue is moot because no relief from the summary suspension order could be granted at this point. *See Hockley v. Hargitt*, 82 Wn.2d 337, 345, 510 P.2d 1123 (1973).

Even if it is not moot, however, the record shows there was substantial evidence to support the summary order. The Commission summarily suspended Dr. Daniels' license based upon a declaration from Dr. Grubb, the Department's expert witness, and upon the patients' complaints and their patient records. 2007 Hearing, AR 3-5. Dr. Grubb's declaration in particular explains the severity of the treatment errors, the

danger to patients created by the lack of correct infection control procedures, and the risks to both patients. 2007 Hearing, AR 23-25. The administrative record contains substantial evidence to support the Commission's decision to summarily suspend Dr. Daniels' license pending further disciplinary action.

**B. Dr. Daniels Has Not Established Misconduct Requiring Reversal.**

Many of Dr. Daniels' arguments appear to claim that misconduct by various participants in the proceedings against her should result in reversal of the Commission's 2006 and 2007 Final Orders. She has not established any misconduct, and she certainly has not established misconduct requiring reversal of either order under RCW 34.05.570.

**1. The Department did not commit misconduct by failing to produce Patient 2 to testify at the hearing.**

Dr. Daniels cites no legal authority in support of her argument that the Department committed misconduct in failing to produce Patient 2 at the 2006 hearing. As discussed above, admitting the evidence regarding these allegations even though Patient 2 did not testify did not violate the Confrontation Clause or any other evidence rule. Similarly, Dr. Daniels has not shown misconduct by the Department for either failing to call Patient 2 or concealing her.

Dr. Daniels had the opportunity to subpoena witnesses to appear at the hearing, and she could have called Patient 2 if she wished to do so. Both parties had the opportunity to locate and call Patient 2. The

Presiding Officer stated that both parties had made good faith efforts and failed to locate Patient 2. 2006 Hearing, AR 744-45. There is nothing in this administrative record to support any claim of intentional neglect by the Department in locating or producing Patient 2 at the hearing.

**2. The prehearing ruling dismissing two parts of the charges related to Patient 3 was correctly implemented.**

During the prehearing proceedings for the 2006 hearing, the Presiding Officer granted one part of Dr. Daniels' motion for summary judgment, dismissing two of the allegations regarding Patient 3. 2006 hearing, AR 293, 304. He dismissed Paragraphs 1.8.1 and part of paragraph 1.8.3 because he found that Patient 3 knew that part of the extracted tooth remained in his mouth and that Dr. Daniels' chart reflected that she had not extracted all of the tooth. 2006 Hearing, AR 304. Dr. Daniels argues that this ruling was not followed at the hearing or in the Commission's Final Order and that other charges not in the statement of charges were added. Br. Appellant at 3-7, 10, 17, 34. She also argues that the failure to follow the summary judgment ruling constitutes double jeopardy or prosecutorial misconduct. Br. Appellant at 4, 7. The Presiding Officer properly implemented his ruling, and Dr. Daniels has not established any constitutional violation.

There is nothing in the language of the Final Order that is not in compliance with the summary judgment ruling. The Commission's Final Order describes its findings regarding Patient 3 in paragraphs 1.2 through

1.4. 2006 Hearing, AR 813-14. While those paragraphs contain additional background information, the facts were necessary to support the violations of failing to refer Patient 3 to an oral surgeon or to record that she had done so in her chart. There is nothing in the administrative record or the final order supporting an argument that the prehearing ruling was not followed. 2006 Hearing, AR 1246.

The Presiding Officer explained to the hearing panel members the ruling that he had made dismissing allegations that Dr. Daniels had failed to inform Patient 3 of the remaining root tip or to record that in her patient chart. 2006 Hearing, AR 1399-1404. The Presiding Officer ruled that the Department could present some background information about Dr. Daniels' treatment of Patient 3 in order for the Commission to decide the allegations remaining in the charges. Both the administrative record and the Commission's order show that the prehearing ruling was correctly implemented. 2006 Hearing, AR 1403.

**3. The Commission was entitled to find Patient 3 credible, and the Presiding Officer was not obligated to instruct that Patient 3 was not credible.**

Dr. Daniels argues that Patient 3 was not credible and/or committed perjury because he testified at the hearing that Dr. Daniels failed to extract his entire tooth and failed to refer him to an oral surgeon. She also argues that the Presiding Officer had an obligation to advise the hearing panel that Patient 3 was not credible. Br. Appellant at 8-10. She

further argues that the Department's counsel was obliged to dismiss the charges following Patient 3's deposition when he demonstrated that he was not credible. Br. Appellant at 8-9.

Patient 3 testified at his deposition and at the hearing that Dr. Daniels never told him she had left a root tip in his mouth following her attempt to extract his tooth. He also testified that he knew part of the tooth remained in his mouth because he could feel it and could hear the dental instruments scraping against it. 2006 Hearing, AR 1254, 1264-65, 1174-80. At times, he also testified that he was not 100 percent sure how he knew part of the tooth remained in his mouth. 2006 Hearing, AR 1177, 1278. Patient 3's testimony was not inconsistent, and it certainly did not amount to perjury or any basis to attack his credibility. There is no legal basis for arguing that the Presiding Officer could have or should have instructed the hearing panel regarding Patient 3's credibility.

Even if she could successfully attack Patient 3's credibility, the charge on which this testimony bears was dismissed on summary judgment prior to hearing. 2006 Hearing, AR 293, 304. As Dr. Daniels argues elsewhere in her brief, the issue of whether she had informed Patient 3 about leaving root tips after her incomplete extraction of his tooth was decided by the Presiding Officer on summary judgment. That issue, therefore, was not the basis of any of the Commission's findings. Br. Appellant at 4. 2006 Hearing, AR 814.

If Dr. Daniels is arguing that his deposition testimony or any attempt to impeach Patient 3 proves that he was not credible, she is in

error. Neither the impeachment nor the patient's deposition testimony compelled the hearing panel to find Patient 3 not credible. The Commission determined that Patient 3 was credible on that issue when it adopted Finding of Fact 1.4, which states that Dr. Daniels did not refer Patient 3 to an oral surgeon. 2006 Hearing, AR 814. The hearing panel members are entitled to draw their own conclusions as to witness credibility. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

**4. Neither the Presiding Officer nor Department counsel removed or concealed an x-ray.**

Dr. Daniels argues that, during the 2006 hearing, the Presiding Officer and Department counsel conspired to remove or hide her post-operative x-ray of Patient 3's tooth. Br. Appellant at 14. The administrative record establishes that there was a reference to an x-ray of Patient 3's tooth dated December 23 during the testimony of Dr. Jurich, Dr. Daniels' expert. 2006 Hearing, AR 1459-60. There is no identification in the record of who took that x-ray or which exhibit it is from. *Id.* There is no testimony stating whether this x-ray is post-operative. *Id.* Patient 3 testified that there was no real completion of his extraction appointment with Dr. Daniels on December 23 because she simply did not come back after the last time she left him, and the staff told him she had left. 2006 Hearing, AR 1256. That testimony would indicate that there was no opportunity for Dr. Daniels to take a post-operative x-ray.

The record later establishes that none of the participants, including the Presiding Officer and Department counsel, knew where that x-ray was when Dr. Daniels was on the stand later that same day. 2006 Hearing, AR 1578-80. The Presiding Officer stated that the parties believed Dr. Jurich might have taken the x-ray with him when he left the hearing after testifying. 2006 Hearing, AR 1579. The record provides no support at all for Dr. Daniels' claim at pages 15-16 of her brief that the Presiding Officer and Department's counsel concealed evidence by hiding this x-ray or that they conspired or manufactured false evidence. There is no basis from the record to conclude that the finding Dr. Daniels did not take a post operative x-ray is incorrect. Patient 3's testimony contradicts Dr. Daniels' claim that she did take such an x-ray. The x-ray that appears to have been described in Dr. Jurich's testimony is no longer with the record, and it appears that he took it with him when he left the hearing. Nothing in the record establishes this was a post-operative x-ray, and certainly there is nothing to support a claim that the judge or prosecutor removed or concealed it.

**5. The Department was entitled to allege that Dr. Daniels did not timely provide patient records to Patients 4 and 5 and the Presiding Officer's ruling on questioning Patient 4 was correct.**

Dr. Daniels alleges but fails to establish prosecutorial misconduct in charging that she failed to provide patient records to Patients 4 and 5 within 15 days of their request. Br. Appellant at 16. Because the

Commission dismissed these charges in the Final Order, this argument cannot be the basis of relief on review.

Dr. Daniels argues that it was prosecutorial misconduct to allege that she failed to timely provide patient records to Patients 4 and 5 because Department counsel knew in advance of hearing that she had already provided the patient records. Br. Appellant at 18-21. She also alleges that Department counsel should not have opposed her motion to dismiss these charges. *Id.* Patient 4 testified that she requested her patient records in January 2005, and that she received the records “around February or March.” 2006 Hearing, AR 1588. It was not prosecutorial misconduct to allege Dr. Daniels violated the requirement to provide patient records within 15 days. RCW 70.02.080(1). Even though at the time of hearing the Department staff was aware that Dr. Daniels had eventually provided the patient records, such information had no bearing on the allegation that she had not done so in the required timeframe. 2006 Hearing, AR 1248.

Dr. Daniels argues that the Presiding Officer erred in excluding a declaration from Patient 4 and inappropriately limited her counsel’s questioning of Patient 4. Br. Appellant at 21-24, 34, 39. Patient 4’s declaration is not in the administrative record, and the Final Order states it was withdrawn. 2006 Hearing, AR 813. If the declaration was withdrawn, then Dr. Daniels cannot now claim it was inappropriately excluded.

Although the declaration is not in the record, Dr. Daniels' counsel described it in her motion requesting that it be admitted. Patient 4 apparently declared that she obtained the requested patient records, but the declaration does not state how long after she made the request she received the documents. 2006 Hearing, AR 792-93. The declaration adds nothing to Patient 4's testimony at hearing that she received the records and thought she had received them in February or March, but could not specifically remember when she received them. 2006 Hearing, AR 1588.

Dr. Daniels' counsel attempted to establish that Department's counsel knew prior to the hearing that Patient 4 had received her patient records. That would not establish that Dr. Daniels timely provided the records, and the Presiding Officer ruled questions regarding counsel's knowledge irrelevant. 2006 Hearing, AR 1589-91. Dr. Daniels' counsel did not object to the ruling or attempt to ask additional questions. *Id.* These arguments all go to Dr. Daniels' claim that she timely provided patient records to Patient 4 and that the allegations she did not should not have been made. Even if Dr. Daniels' arguments were correct, which is not conceded, they would provide no basis for relief on judicial review because the Commission already dismissed all charges related to Patients 4 and 5. 2006 Hearing, AR 826.

**6. Department counsel did not present false testimony.**

Dr. Daniels alleges that the Department's counsel suborned perjury during the 2006 hearing and that he altered Department of Health Investigator Mary Creeley's activity report. Br. Appellant at 22, 24-26. This issue relates to Dr. Daniels' belief that Department counsel and Ms. Creeley knew prior to the 2006 hearing that she had provided the patient records Patients 4 and 5. As discussed above, it was the failure to provide the records within 15 days that was alleged as misconduct, not her failure to provide them at all. The Department had a good faith belief Patient 4 did not receive her records within 15 days.

Ms. Creeley testified about her activity report and her contacts with Dr. Daniels during her investigation of the complaints from Patients 3, 4, and 5. 2006 Hearing, AR 1360-76. Dr. Daniels claims that Ms. Creeley did not ask her about Patient 4 when she came to her office on March 31, 2005. Br. Appellant at 25. However, Ms. Creeley testified that she went to Dr. Daniels' office on March 31, 2005. She also testified that she spoke with Patient 4 on that date, and that Patient 4 told her she had received the requested patient records by that date. 2006 Hearing, AR 1361, 1370.

Ms. Creeley later testified in response to panel members' questions that she believed she had also contacted Patient 4 earlier, perhaps in February of 2005. 2006 Hearing, AR 1372. She was not sure when and believed the date would be in her activity report. 2006 Hearing, AR 1373. Assistant Attorney General Carpenter then used her activity report to

refresh her recollection, and she testified that she had not contacted Patient 4 until March 31, 2005. 2006 Hearing, AR 1373-77. There is nothing in this record to support Dr. Daniels' allegations of misconduct by Department counsel. As a result of this testimony, the hearing panel dismissed all of the charges related to Patients 4 and 5, so no relief would be appropriate anyway.

**7. The charges regarding Patient A were within the Commission's jurisdiction, and Dr. Daniels has not proven that photographs were removed or concealed.**

Dr. Daniels argues on pages 49-50 of her brief that the billing issues related to Patient A in the 2007 hearing should not have been brought as they were outside the Commission's jurisdiction. She offers no support for her argument that billing issues cannot be charged. Regardless, the Commission dismissed this charge, as Dr. Daniels recognizes in her argument. 2007 Hearing, AR 479 n.14. The Commission did not find a violation based upon this charge, and no relief can be based upon this argument.

Dr. Daniels also argues that the failure to produce photographs to show the defect in the patient's crown was improper. Br. Appellant at 54-55. Dr. Hackney's patient records contain his statement that when he treated Patient A, he saw a "huge void" on the lingual margin of the crown on tooth number 30. 2007 Hearing, AR 507-10 (Exs. D-2, D-3). Dr. Hackney's letter describing what he observed when he treated Patient A was admitted as Exhibit D-2. 2007 Hearing, AR 507. The same

statement was contained in Dr. Hackney's patient records, which were admitted as Exhibit D-3 at the hearing. 2007 Hearing, AR 508-09. This evidence is sufficient to support the Commission findings, and the lack of photographic evidence does not provide a basis for relief.

Dr. Daniels argues that the Commission removed the photographs showing the defect in the crown she placed on Patient A's tooth. Br. Appellant at 48, 54. Then she argues that Department counsel removed these photographs. Br. Appellant at 49. She has not cited anything in the record that establishes that there were photographs that were not produced or that they were removed. Even if she established such photographs were not produced, it would go only to the weight of the evidence that is in the record. As long as the administrative record contains substantial evidence supporting the Commission's findings, there is no basis to grant Dr. Daniels' requested relief.

**8. Dr. Daniels has not established any alteration in the record.**

Dr. Daniels argues at several points in her brief that the administrative record has been altered or that documents have been added to or deleted from it. *See, e.g.*, Br. Appellant at 7, 22-23. She cites nothing in the record to support these claims and gives no explanation of any impact to her argument on appeal. She has not established any alteration of the record or any misconduct based upon this argument.

**9. There was no legal basis for disqualifying or excluding Dr. Grubb as an expert witness.**

Dr. Daniels argues on pages 26-34, and 53 of her brief that it was error to permit Dr. Grubb to testify as the Department's expert witness because he is the chairman of the board of directors of the insurance company, Nordic, that provides her malpractice insurance. This issue was raised at the 2006 hearing, and Dr. Daniels' counsel argued that Dr. Grubb should not be permitted to testify because of bias. 2006 Hearing, AR 1337. Both counsel were permitted to conduct voir dire of Dr. Grubb. 2006 Hearing, AR 1338-55.

Dr. Grubb testified that he had served on the board of directors and on committees of Nordic for about ten years. 2006 Hearing, AR 1342. He testified that the only involvement he had ever had with anything regarding Dr. Daniels was one case where the company wanted to settle over Dr. Daniels' objections, and the board considered a request to permit that settlement. 2006 Hearing, AR 1344-47. Dr. Grubb did not vote on that issue or provide his views. 2006 Hearing, AR 1343, 1345. He learned later that Dr. Daniels had filed a complaint with the Insurance Commissioner about Nordic's actions in the case. 2006 Hearing, AR 1346-47.

Dr. Grubb stated repeatedly that his involvement with Nordic had no impact upon his case review for the Department or his testimony in Dr. Daniels' case, and that he was not biased in any way. 2006 Hearing, AR 1351-52. Although Dr. Daniels argues that the case Nordic settled

was Patient 1's case (Br. Appellant at 28), the administrative record does not support that allegation, and it is clear from the record that Dr. Grubb had no knowledge of who the patient was in the Nordic matter or of the facts of that case. 2006 Hearing, AR 1343-44.

Based upon the testimony Dr. Grubb gave, the Presiding Officer ruled that there was no bias and that Dr. Daniels' counsel could either keep out any reference to Dr. Grubb's connection with the insurance company or she could cross-examine him about it. 2006 Hearing, AR 1357-58. Dr. Daniels' counsel elected not to question Dr. Grubb about the Nordic issue, and the panel members had no knowledge of it. 2006 Hearing, AR 1409-12.

Dr. Daniels argues now that Dr. Grubb should not have been permitted to testify at the 2006 hearing because he revealed confidential information he obtained through his work with her malpractice insurance carrier. Br. Appellant at 27. She appears to be arguing some kind of conflict or appearance of fairness violation. Br. Appellant at 30. That was not the basis of her objection at the time of the hearing, and she cites nothing in the record to support her claim that Dr. Grubb had access to confidential information about her or that he used or revealed any such information. Dr. Grubb's testimony under oath was that he knew nothing about Dr. Daniels' treatment of any of the patients other than what he received from the Department to testify as an expert at the hearing. Dr. Grubb testified that his case review and testimony was not affected in any way by the limited contact he had through Nordic with the one issue

involving Dr. Daniels. Dr. Daniels has not shown any misconduct, bias or appearance of fairness issue.

Dr. Daniels also argues that it was misconduct for the Department to contact Dr. Grubb because he was connected with her insurer and that Department counsel withheld that information from her. Br. Appellant at 26, 28, and 30. The record provides no support for any suggestion that the Department or Department's counsel knew of Dr. Grubb's connection with Nordic at the time of contacting him or had any reason to know that Nordic was Dr. Daniels' insurer. The issue came up for the first time at Dr. Grubb's deposition, which was conducted the day before the hearing. 2006 Hearing, AR 1336-37. Dr. Grubb testified that the Department's counsel would have had his CV from an earlier 2002 case, and that his connection with Nordic was on the CV. 2006 Hearing, AR 1348. There is nothing in the record, however, to show that the Department or Department's counsel knew Nordic was Dr. Daniels' insurer. Dr. Grubb testified that his connection with Dr. Daniels and Nordic was discussed with Department's counsel for the first time the day of the deposition. 2006 Hearing, AR 1350-51.

Dr. Daniels also challenges Dr. Grubb's testimony at the 2007 hearing, without arguing any specific legal basis. Br. Appellant at 30-32. During prehearing proceedings for the 2007 hearing, Dr. Daniels' counsel objected to Dr. Grubb's testimony alleging bias and a violation of his fiduciary duty. 2007 Hearing, AR 776-77. The Presiding Officer ruled that Dr. Daniels had not shown bias and that any violation of a fiduciary

duty would not preclude Dr. Grubb from testifying as an expert at the hearing. 2007 Hearing, AR 779. Dr. Daniels has not shown any legal basis for disqualifying Dr. Grubb from testifying as an expert at the 2007 hearing or for concluding that the Presiding Officer abused her discretion in permitting Dr. Grubb to testify.

**10. The Presiding Officer was not required to recuse himself from the Summary Suspension Hearing.**

Dr. Daniels argues that the Presiding Officer should have disqualified himself from participating in the 2007 summary suspension hearing. Br. Appellant at 33-34, 39-40, 52. Dr. Daniels has not supported this argument with citations to the record or legal authority. There is no support in the record or in the law for any argument that the Presiding Officer was required to or should have disqualified himself from the summary suspension hearing. Nothing about the Presiding Officer having presided at the 2006 hearing would disqualify him from presiding at the summary suspension hearing in 2007. Dr. Daniels has established neither bias nor any other basis for requiring recusal.

**11. Dr. Daniels has not proven that the superior court judge should have recused himself.**

Dr. Daniels also argues that Thurston County Superior Court Judge Gary Tabor should have recused himself from hearing the case on judicial review or that he was biased. Br. Appellant at 34, 50-52. Other than the fact that he ruled against her petition for judicial review, Dr. Daniels gives no explanation or justification for recusal. She states that her requests for

a stay should have been granted but does not explain the factual or legal justification for her claim. Br. Appellant at 51. She alleges that Judge Tabor had a personal, pecuniary interest in her case, but cites nothing to support her argument. Br. Appellant at 52. She also suggests that Judge Tabor's re-election campaign had some impact on his decision in her case, but again cites nothing in support. *Id.* There is nothing in the administrative record to support any claim that Judge Tabor was required to recuse himself.

**C. Dr. Daniels Received Proper Notice of the Charges Against Her.**

**1. The Statement of Charges gave sufficient notice of the charges regarding Patient 2.**

Dr. Daniels suggests on pages 34-35 of her brief that the Commission concluded she had failed to perform diagnostic tests for pulpitis on Patient 2's tooth, but that this charge was not contained in the statement of charges. She appears to be arguing a violation of due process for failing to give appropriate notice of this charge. However, the amended statement of charges clearly alleged that Dr. Daniels had failed to diagnose irreversible pulpitis in Patient 2's tooth by failing to perform diagnostic tests for that condition. 2006 Hearing, AR 176. There was no lack of notice, and the Commission's findings in paragraph 1.12 that Dr. Daniels failed to perform diagnostic tests for pulpitis is well within the allegations contained in the amended statement of charges. 2006 Hearing, AR 817-18.

Dr. Daniels also appears to argue on pages 35-36 of her brief that she did not have notice of the charge that she was required to report to the Commission that Patient 2 sought treatment at an urgent care clinic as a result of her treatment with Dr. Daniels. That charge was alleged in the second amended statement of charges, providing Dr. Daniels with notice. 2006 Hearing, AR 176.

Dr. Daniels also argues that this charge should never have been brought because the Department knew the patient had never been hospitalized and therefore that the regulation did not require Dr. Daniels to report. Br. Appellant at 36. Patient 2 did seek treatment for a dental infection or abscess repeatedly at the Group Health urgent care clinic as a result of Dr. Daniels' treatment. 2006 Hearing, AR 1314-16. There was a good faith basis for arguing that Dr. Daniels was required to report this need for medical care as a result of her dental treatment, but the Commission dismissed the charge, finding the Department did not establish by clear and convincing evidence that Dr. Daniels had violated the charged regulation. 2006 Hearing, AR 823-24. Because the Commission dismissed the charge, this argument cannot be the basis for any relief.

Dr. Daniels argues that a reference in the Commission's Final Order to her failure to take a post-operative x-ray of Patient 3's tooth after completing her efforts to extract that tooth was incorrect. Br. Appellant at 14. She argues that this allegation was not part of the statement of charges and should not have been included in the order.

Paragraph 1.4 of the 2006 Final Order does state that Dr. Daniels did not take a post-operative x-ray to determine whether she had extracted the entire tooth. 2006 Hearing, AR 814 ¶1.4.

Even if the statement in the Final Order is in error, it is not part of the charges, and is not the basis for the finding that Dr. Daniels violated the standard of care. That paragraph of the final order also includes the elements of the standard of care that the Commission concluded Dr. Daniels violated. It is to those elements that the final sentence of paragraph 1.4 refers when it concludes that Dr. Daniels failed to take the required steps and therefore fell below the standard of care. Those elements include the failure to refer Patient 3 to an oral surgeon, and to document that she had done so. 2006 Hearing, AR 814.

**D. None of Dr. Daniels' Other Allegations of Error Establish a Violation of Due Process or a Basis for Relief.**

**1. The Commission's sanctions were not an abuse of discretion, and were well within its statutory authority.**

Dr. Daniels argues that the Commission's sanctions are too harsh or that the Commission exceeded its statutory authority in imposing the sanctions in the 2007 Order. Br. Appellant at 60. She bears a particularly heavy burden to obtain relief on that basis. The harshness of an agency's chosen sanction is not the test for arbitrary or capricious action. *Heinmiller*, 127 Wn.2d at 609; *Brown*, 94 Wn. App. at 17. The relation of remedy to policy is peculiarly a matter for administrative competence and

agencies have considerable latitude to shape remedies within the scope of their statutory authority. *In Re Case E-368*, 65 Wn.2d at 29. An agency's chosen remedy need not be the most fair and reasonable, just among those permissible under the statute. *ARCO v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 814, 888 P.2d 728 (1995). The sanction imposed in the Commission's final order is within its statutory discretion. RCW 18.130.160.

Dr. Daniels argues through several unrelated dental cases, that the sanction imposed upon her in the 2007 order was unjustified and disproportionate. Br. Appellant at 42-44, 60. The cases cited by Dr. Daniels are in no way similar to the kinds of unprofessional conduct Dr. Daniels committed, and the sanctions imposed in those cases have no bearing upon this case.

There is no legal authority requiring the hearing panel considering Dr. Daniels' conduct to consider or even be aware of completely unrelated cases involving completely different allegations. Dr. Daniels did not argue these cases at the hearing, and the facts she alleges about them are not in the administrative record before this Court. Of the cases she discusses, only the *Lang v. Department of Health*, 138 Wn. App. 235, 156 P.3d 919 (2007), case is published and citable.

The Commission was well within its statutory discretion in imposing the sanctions in the 2007 order, and Dr. Daniels has not shown any legal authority supporting her argument that the sanctions were inappropriately harsh. RCW 18.130.160. Dr. Daniels has not shown an abuse of discretion or any other basis upon which the sanctions determination could be challenged.

**2. The Department complied with its regulatory authority when taking summary action against Dr. Daniels.**

Dr. Daniels argues that the Commission violated its regulations by not assessing imminent danger within two days of receiving the complaints from Patients A and B. Br. Appellant at 48, 43-54. She claims that the Department violated its regulations when it summarily suspended her license based upon these complaints more than two days after receiving them. *Id.*

The regulation regarding summary action states that complaints will be assessed for imminent danger within two working days. WAC 246-14-040(3). The rule, however, does not say that no emergency action can be taken if imminent danger is not found within the first two days after receipt of a complaint. Neither the Department's statutes nor regulations governing summary action prohibit later consideration of immediate danger during or following the completion of an investigation.

RCW 18.130.050(7), 34.05.479. The Commission can fully investigate complaints, determine that emergency action is necessary and order summary action as long as the legal standard of imminent danger to the public health and safety is met. RCW 34.05.479, 18.130.050(7), WAC 246-11-300 *et seq.* The Commission did not violate regulations in its summary action against Dr. Daniels.

**3. It was not error for a public member of the Commission to consider Dr. Daniels case.**

Dr. Daniels argues that it was error to include a public member on the hearing panels because the public member has no knowledge of dental practice. Br. Appellant at 55-56. By statute, the Commission is required to have two public members. RCW 18.32.0351. By regulation, the Commission may designate any of its members to hear adjudicative proceedings. WAC 246-11-230. Although public members may not have the same level of professional expertise as Commission members who are practicing dentists, they do gain knowledge and expertise by their service on the Commission doing its regulatory work. Their perspective as members of the public is valued sufficiently such that the Legislature required that they be included as members of these professional regulatory bodies. There is no legal authority to support an argument that it is unlawful for public members to serve as members of hearing panels.

Dr. Daniels also alleges that the public member, Dr. Alkezweeny, had a language “problem”. Br. Appellant at 55-56. She cites to page 1575 of the 2006 administrative record as support for this argument. The discussion on that page shows that Dr. Alkezweeny misunderstood the patient’s testimony about being in the dental chair all day while Dr. Daniels tried six times to complete the extraction of the tooth. Dr. Alkezweeny apparently understood the patient to have said he returned to Dr. Daniels on six separate occasions, which the Presiding Officer clarified. 2006 Hearing, AR 1575-76. There is nothing about this exchange to support an allegation that Dr. Alkezweeny had an ongoing language barrier that interfered with his ability to sit as a panel member. The two different Presiding Officers who presided at the hearings and sat with the panel members during deliberations saw no issue or reason to take action. There is no basis in the record for Dr. Daniels’ allegation of any language problem that prevented Dr. Alkezweeny from carrying out his responsibilities as a member of these hearing panels.

Dr. Daniels raised a similar, though less detailed, objection to Dr. Alkezweeny at the prehearing conference for the 2007 hearing. 2007 Hearing, AR 783-85. She stated that at one point (which was not identified) in the 2006 hearing something had to be explained to Dr. Alkezweeny. The Presiding Officer ruled that was not an appropriate

objection to Dr. Alkezweeny as a member of the hearing panel and confirmed that he would be part of the hearing panel. 2007 Hearing, AR 784. There is nothing in the administrative record to support any concern by the Presiding Officer regarding Dr. Alkezweeny's participation as a hearing panel member.

Dr. Daniels also objected to Dr. Alkezweeny sitting as a member of the hearing panel at the 2007 hearing because he had ruled on the Department's motion for summary suspension in that case. Br. Appellant at 56. The Presiding Officer ruled that there was no legal basis for disqualifying Dr. Alkezweeny simply because he had participated in the summary suspension hearing unless Dr. Daniels could show cause for disqualifications, such as bias. 2007 Hearing, AR 751-52. Washington case law specifically states that it is appropriate for hearing panel members to participate in earlier proceedings in the case, such as proceedings regarding a summary suspension. *Johnston*, 99 Wn.2d at 475-76. There is no basis for arguing that Dr. Alkezweeny's participation in the hearing was improper.

**4. Many of Dr. Daniels' arguments are not supported by the administrative record.**

Dr. Daniels argues that no judge would have written the findings of fact that are in the Final Order describing Patient A's testimony about the

dropped dental instrument. Br. Appellant at 45. Nothing in her brief or the administrative record supports that argument.

Dr. Daniels also argues that part of Patient 2's original complaint relating to infection control concerns was refuted by a Department of Health inspection report dated August 18, 2004. Br. Appellant at 41. While that may be accurate, it is not supported by anything in this administrative record, and no charges were filed based upon that part of Patient 2's complaint. No violation was based upon this issue, so no relief can be based upon this argument

On page 37 of her brief, Dr. Daniels claims that the Commission, Dr. Davis and/or other dentists were conspiring to steal her dental practice. There is no support in this administrative record for her allegation that any dentist was conspiring to steal her practice.

Dr. Daniels argues on page 48 of her brief that the administrative record of the 2007 case as certified to the Thurston County Superior Court was incomplete and that two e-mails and 18 other pages were left out. This issue was the subject of motions during the judicial review of the 2007 case. CP at 791-811. Judge Tabor ordered the disputed pages added to the record, and the Department filed a supplemental certification including those pages. CP at 813; CP at 23-24.

The pages added to the administrative record through this process are at 2007 Hearing, AR 1302-19. None of these documents, most of which are fax cover sheets or other similar documents, establish any basis for relief in this case. Dr. Daniels argues that pages that show the date the Department assigned docket numbers to two of the complaints against Dr. Daniels demonstrate an impermissible delay in processing those cases. Br. Appellant at 54. The date when docket numbers were assigned does not establish any violation of regulations, and Dr. Daniels does not explain the basis for her claim.

Dr. Daniels appears to argue on page 55 of her brief that the age of the Patient A complaint also violated WAC 246-14. These regulations do not state that age alone constitutes a violation.

Dr. Daniels argues on pages 53-54 of her brief that the Commission never provided the complaint from Patient C. It is not clear what the purpose of this argument is. If she is arguing she had no notice of what Patient C complained about, there is no basis for this argument in the administrative record. The only issue regarding the Patient C case at the hearing was whether Dr. Daniels had provided the requested records during the investigation. The Commission found she had not, and the administrative record supports that finding. 2007 Hearing, AR 272-74, 553-57.

## VI. CONCLUSION

The Commission's findings and conclusions in both the 2006 order and the 2007 order are fully supported by substantial evidence in the respective administrative records. Dr. Daniels has not established that any of the other legal challenges raised constitutes either a constitutional or legal error. The Commission respectfully requests this Court affirm its 2006 and 2007 Final Orders.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of April, 2010.

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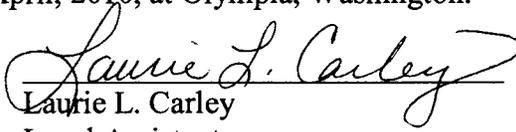
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DATED this 28<sup>th</sup> day of April, 2010, at Olympia, Washington.

  
Laurie L. Carley  
Legal Assistant