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**SUPREME COURT OF THE STATE OF WASHINGTON**

GEOFFREY S. AMES, M.D.,

Petitioner,

v.

WASHINGTON STATE HEALTH DEPARTMENT AND MEDICAL  
QUALITY ASSURANCE COMMISSION,

Respondent.

**RESPONDENTS' ANSWER TO PETITION FOR  
DISCRETIONARY REVIEW**

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ORIGINAL

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OCT 29 2007  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
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## **I. IDENTITY OF RESPONDENTS**

The Respondent is the Washington State Health Department (“Department”) and Medical Quality Assurance Commission (“Commission”).

## **II. OPINION OF THE COURT OF APPEALS**

Division Three of the Court of Appeals affirmed the Final Order of the Medical Quality Assurance Commission in this matter in its opinion No. 24897-III dated May 17, 2007, and denied Dr. Ames’ motion for reconsideration on August 2, 2007. Those opinions are contained in the Appendix to Dr. Ames’ Petition for Discretionary Review.

## **III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Under settled Washington law, are Commission members entitled to use their expertise to consider the evidence and draw inferences from facts presented in the record when deciding whether a physician has provided treatment below the standard of care?

2. Where the charging document notified Dr. Ames of the patient, the two specific dates of treatment, and the statutes allegedly violated, did the charges meet the statutory and constitutional due process requirements for notice?

3. Is there substantial evidence in the record to support the Commission's Final Order, including the finding the device used by Dr. Ames to diagnose allergies was inefficacious?

The issues presented by this case, which are set forth below, do not meet the requirements in RAP 13.4(b) for discretionary review by this Court.

#### **IV. COUNTER STATEMENT OF THE CASE**

##### **A. Procedural Background**

On July 9, 2002, the Department charged Dr. Ames with using the LISTEN device to diagnose and treat Patient One in violation of 21 U.S.C. §§ 321, 351, 360 and RCW 69.04.040. Administrative Record ("AR") 3-6.<sup>1</sup> The Department issued an Amended Statement of Charges on February 5, 2003, which added allegations that Dr. Ames' treatment of Patient One violated the Uniform Disciplinary Act ("UDA"), chapter 18.130 RCW. AR 60. Specifically, the Department charged that Dr. Ames was not acting within the required standard of care for his profession, that his actions constituted moral turpitude, and that he had promoted an inefficacious device for personal gain in violation of RCW 18.130.180(1)(4)(7) and (16). AR 60-64.

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<sup>1</sup> Any reference to the administrative record as certified to the court is hereafter referred to as "AR". Any reference to the Clerk's Papers in this matter will be referred to as "CP".

The Commission held a five day adjudicative hearing and issued a Final Order on May 30, 2004, concluding that Dr. Ames had been negligent under RCW 18.130.180(4) and had promoted an inefficacious device for personal gain under RCW 18.130.180(16). AR 1850-68. The Commission dismissed the other charges. The Benton County Superior Court affirmed the Commission's order. *See* opinion of Benton County Superior Court Judge Carrie Runge in the Appendix to this brief. The Court of Appeals affirmed the Commission's Order and denied Dr. Ames' motion for reconsideration.

**B. Factual Background**

Both Patient One and Dr. Ames testified at the hearing. AR 2077-2183, 2184-2275, 3026-3189. They were the only witnesses with personal knowledge of the interaction, diagnosis, and treatment at Patient One's two visits with Dr. Ames. Dr. Ames' accounts of the visits varied significantly from those of Patient One. The Commission explicitly found that Patient One was credible as to his account of the visits and that Dr. Ames was not, based upon their observations of the testimony at the hearing. AR 1854. The Commission rejected Dr. Ames' testimony as to what occurred during the visits when it conflicted with Patient One's testimony. *Id.*

Patient One saw Dr. Ames on June 6, 2001 and July 10, 2001. The significant interaction took place at the second visit during which Dr. Ames reviewed laboratory tests with Patient One. AR 2197. Dr. Ames told Patient One that foods like eggs and mustard could be weakening his body. AR 2204. Patient One testified that Dr. Ames told him he had a machine that could be used to find out what was going on with his body. AR 2209. Ames told Patient One that the LISTEN device helped him make a diagnosis and that he could cure the egg allergy so that eggs would not bother him again. <sup>2</sup>AR 2208, 2214. Patient One had never been diagnosed as allergic to eggs or any other food and had never had a reaction to eating eggs. AR 2204, 2269.

Patient One described how Dr. Ames used the LISTEN device during the second visit. AR 2209-11. Patient One laid on his back, held the probe attached to the LISTEN device in his right hand, and held his right arm out at a 90-degree angle. AR 2209-10. Dr. Ames told Patient One to resist, and Dr. Ames tried to pull on Patient One's arm. AR 2210. Dr. Ames was unable to pull Patient One's arm down. AR 2210. Dr. Ames then typed the word "eggs" into the LISTEN device using the

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<sup>2</sup> Dr. Ames described the LISTEN device as a standard computer monitor, a standard computer keyboard, a foot mouse, a computer hard drive, a black box to create a circuit so that an ohmmeter will work and a metal probe that the patient holds in their hand. AR 2090, 2093-94. An ohmmeter measures the resistance of an electrical conductor.

keyboard. AR 2210. Dr. Ames again asked Patient One to resist and tried to pull his arm down. AR 2214. This time Dr. Ames could pull Patient One's arm down. AR 2210.

Patient One described that Dr. Ames treated him for the supposed egg allergy by rolling him onto his stomach and thumping on his back with an acupressure device that had rubber tips on it. AR 2211. Dr. Ames then rolled Patient One over onto his back again and used the probe and the LISTEN device as he had before. AR 2211. This time Dr. Ames could not pull Patient One's arm down. AR 2211. Dr. Ames told Patient One, "See, it's gone." AR 2211. Dr. Ames then performed the test again wrapping the probe in tissue paper and having Patient One hold the probe. AR 2215-16. When Patient One asked why Dr. Ames was doing this, Dr. Ames answered that he had done it for so long that he could do what the machine could do, and he did not need the machine anymore. AR 2215.

After this series of treatments and assessments, Dr. Ames advised Patient One that he should not eat any eggs for 24 or perhaps 48 hours or the treatment would not take. AR 2211. Patient One understood that Dr. Ames had diagnosed that he was allergic to eggs, had provided treatment, and had cured him of his egg allergy. AR 2211-12, 2215, 2255, 2268. Patient One understood that he would be able to eat eggs and would

have no allergic reaction. AR 2205, 2211-13, 2220. Dr. Ames told Patient One that he could only cure one allergy at a time and that he would need to return for additional visits to treat each allergy. AR 2212-13.

James Clark, the creator of the LISTEN device, testified at the hearing. He stated that he is not a medical doctor and that the LISTEN device does not have capabilities to provide a medical diagnosis or the capability to cure allergies. AR 2893. He testified that the LISTEN device cannot diagnose, cure, or prevent any disease. AR 2906-07.

## V. ARGUMENT

### A. **Dr. Ames Has Not Met The Standards Required For Granting A Petition For Review Under RAP 13.4(b).**

Under RAP 13.4(b) a petition for discretionary review will be accepted only (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Dr. Ames has not based his request for review upon any of the four standards required by RAP 13.4(b) nor provided argument showing that

review is appropriate under any of them. He has made no attempt to justify why review should be granted in this case.

This case was decided under settled Washington law. In addition, the primary issues Dr. Ames presents for review are factual disputes based on the evidence; however, two reviewing courts have already determined that the record contains substantial evidence supporting the Commission's decision. This does not merit discretionary review under RAP 13.4.

**B. Under Settled Law, The Commission Is Authorized To Use Its Expertise To Evaluate, Assess, And Draw Inferences From The Facts In The Administrative Record; Therefore, This Case Does Not Merit Discretionary Review.**

The Commission correctly concluded that Dr. Ames' use of the LISTEN device to diagnose and treat Patient One for an egg allergy did not meet the standard of care in the state of Washington. The Commission relied upon specific evidence in the administrative record and cited that evidence in its order. The Commission specifically cited testimony from James Clark, the creator of the LISTEN device called by Dr. Ames. AR 1855-56. The Commission's use of its expertise to evaluate and draw inferences from evidence in the record is appropriate under existing Washington statutes and case law. Dr. Ames has shown no basis in this case for overruling either the Commission's order or longstanding Washington law.

Administrative agencies are authorized by statute to use their expertise in adjudicating matters before them. RCW 34.05.461(5): “Where it bears on the issues presented, the agency’s experience, technical competency and specialized knowledge may be used in the evaluation of evidence.” This statutory authority is not limited to the professional members of health disciplinary bodies, but is accorded to all administrative agencies. Washington case law supports the use of the Commission’s expertise and states that separate expert testimony is not necessary when determining standard of care issues. *Brown v. State Dept. of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 17, 972 P.2d 101 (1999); *Wash. State Medical Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983); *Davidson v. State, Dept. of Licensing*, 33 Wn. App. 783, 657 P.2d 810 (1983).

Dr. Ames supports his argument that Washington cases allowing agencies’ use of expertise should be overruled with cases from other states. He simply cites these cases without explaining their significance. In many of these cases, the courts were concerned that the administrative record did not contain sufficient evidence to support the agency’s action. *See, e.g., Drew v. Psychiatric Sec. Rev. Bd.*, 322 Or. 491, 909 P.2d 1211 (1996). The defect the out-of-state courts were concerned about is not present in this case. In this case, the Commission’s order cites the

evidence upon which it relied, and two reviewing courts have concluded the evidence was sufficient. The Commission considered all of the evidence in the record, including expert testimony, and relied upon evidence in the administrative record to reach its conclusion and take its action.

In the cases Dr. Ames cites, the practitioners presented strong expert testimony to support their conduct. *See, e.g., Martin v. Sizemore*, 78 S.W.3d 249 (2001); *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 418 N.E.2d 1236 (1981). In this case, Dr. Ames' witnesses did not support his use of the LISTEN device or his treatment of Patient One, and he did not present testimony or evidence that he had met the standard of care. Rather, the witnesses testified that the LISTEN device was not designed to diagnose or treat allergies, was not approved for these purposes, and that there was no evidence that Patient One had an egg allergy or was cured of one.

Even the cases Dr. Ames cites support the use of decision makers' expertise to determine the effect of conduct by drawing inferences from facts in the record. *See, e.g., Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 418 N.E.2d 1236, 1244-45 (1981). That is what the Commission did in this case in accordance with settled Washington law. Dr. Ames has identified no conflict in Washington cases or among

Washington courts. Dr. Ames has not shown a basis for discretionary review or a basis for overruling Washington case law in this case.

**C. The Charges Issued Against Dr. Ames Complied With Statutory And Constitutional Due Process Notice Requirements And There Is No Basis for Discretionary Review.**

The Commission's Statement of Charges alleged that Ames used the LISTEN device to test Patient One for food allergies in July 2001, a medical device which was not approved to be marketed under federal law. AR 3. The Amended Statement of Charges more specifically alleged that Dr. Ames saw Patient One on June 6, 2001 and on July 10, 2001, and during the July visit, he used the LISTEN device. AR 60. The amended charges allege in detail how Dr. Ames used the LISTEN device with Patient One, describing the "testing" procedure and Dr. Ames' statement to Patient One that the result showed he was allergic to eggs. AR 61. The Amended Charges added allegations that Dr. Ames was negligent under RCW 18.130.180(4) and that he promoted an inefficacious device for personal gain under RCW 18.130.180(16). AR 62.

The Statement of Charges and the Amended Statement of Charges provided Dr. Ames with notice of the specific sections of the UDA and of the state laws regulating his practice that the Department alleged he had violated. AR 3-6, 60-63. The charges notified Dr. Ames that the

violations occurred during his treatment of Patient One during two patient visits on identified dates. AR 60-63. Dr. Ames received fair notice of the conduct alleged to violate specified sections of the UDA.

The APA outlines the general notice requirements for administrative pleadings. RCW 34.05.434. The notice required is of the legal authority and jurisdiction under which the hearing will be held; a reference to the particular sections of the statutes and rules involved; and a short and plain statement of the matters asserted by the agency. RCW 34.05.434(2)(f) through (h). The charges in this case met these requirements.

To provide fair notice and meet the requirements of due process, a charging document must give reasonable notice of what the charges are and provide a fair opportunity to prepare and present a defense. *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d 115, 119, 702 P.2d 469 (1985); *Inland Foundry Co., Inc. v. Dept. of Labor and Indus.*, 106 Wn. App. 333, 338-39, 24 P.3d 424 (2001). Administrative pleadings are to be liberally construed. *Inland Foundry*, 106 Wn. App. at 338, citing *National Realty & Construction Co. Inc. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973).

Even where a statute requires that the administrative pleading describe a violation “with particularity,” due process requires only that the

pleading give the party notice of what was done wrong in order to provide an understanding of the regulations violated and an adequate opportunity to prepare and present a defense. *Inland Foundry*, 106 Wn. App. at 336-38.

Dr. Ames argues that the charging document must allege all facts that will ultimately be found after a hearing and included in the decision. Petition for Review at 11. Dr. Ames cites no legal authority for this assertion, and none exists. There is no legal requirement that every fact that will be presented at hearing to prove a charge must be pleaded in the charging document or that every fact the decision maker will find be contained in the charges. Even criminal pleadings are not required to contain all of the facts that will be found at trial, and administrative pleadings are not held to that high a standard.

The charging documents alleged both of the specific charges the Commission eventually found proven and alleged that the violations occurred during two identified visits with Patient One. The charges identified that it was through the use of the LISTEN device with Patient One that Dr. Ames had committed the violations. Dr. Ames was on notice that his use of the LISTEN with Patient One during a one-hour interaction on a specified date was alleged to be both negligent and a risk of harm to

the patient. The charging documents met both the statutory and constitutional requirements for administrative pleadings in Washington.

**D. The Commission's Order Is Supported By Substantial Evidence And Correctly Concluded That Dr. Ames' Use Of The LISTEN Device With Patient One Constituted The Promotion Of An Inefficacious Device For Personal Gain.**

The Commission correctly applied RCW 18.130.180(16) and relied upon evidence in the record to conclude that Dr. Ames' use of the LISTEN device in treating Patient One constituted promotion of an inefficacious device for personal gain. Dr. Ames alleges that the Commission and the other reviewing courts misinterpreted this statute, but he provides no explanation of what misinterpretation he alleges or how the statute should properly be interpreted. He provides no legal support for any alternative reading of the statute.

Although he does not separately argue in his petition that the Commission's Order was not supported by substantial evidence, Dr. Ames includes in his brief several attacks upon the sufficiency of the evidence. *See, e.g.*, Petition for Review at 6-8. Previous briefs of the Commission include extensive citations to the administrative record to support the Commission's Order, and both the superior court and the court of appeals rejected Dr. Ames' challenges to the sufficiency of the evidence. *See Br.*

of Respondent in the Court of Appeals at 23-31 and Response to Motion for Reconsideration at 6-7, 9-10, 33-42.

The Commission concluded based upon all of the evidence in the record that the LISTEN did not diagnose or treat an egg allergy and that Dr. Ames did not have proper clinical support for his diagnosis and treatment of Patient One. AR 1861. They noted that Dr. Ames himself testified that the muscle testing process using the LISTEN is not conclusive evidence of an allergy. AR 2175. When asked the basis for his belief that the LISTEN was efficacious for diagnosing allergies, Dr. Ames testified he had heard it from unnamed colleagues. AR 2179. Dr. Ames testified he had no scientifically based information to support his allergy testing and assessment. AR 3167. This is in contrast to Dr. Ames' testimony that before he would use a drug he would investigate peer-reviewed literature and medical tests and studies. AR 2120-21.

Dr. Ames argues that it is inappropriate to conclude the LISTEN is inefficacious based upon one occasion when it failed to function successfully. *See* Pet. for Review at 5. This statement implies that there is evidence in the record to show that the LISTEN successfully diagnosed or treated allergies on numerous other occasions but that it failed for some reason only during Dr. Ames' treatment of Patient One. There is no evidence in the record to support such an inference. No evidence

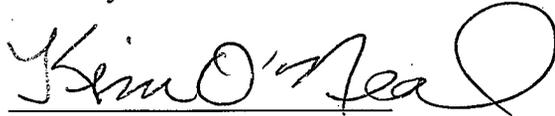
supported a claim that the LISTEN had ever successfully diagnosed or treated allergies. Its creator testified it had no such capabilities. AR 2906-07. The Commission also heard evidence from another patient Dr. Ames had treated with the device, who described Dr. Ames as “diagnosing” with the device simply by saying the word “ham” without even typing it into the keyboard. AR 2736. The Commission was entitled to consider the contradictory nature of the claims and the unsupported breadth of the claims in determining that the device as used with Patient One was inefficacious.

## VI. CONCLUSION

Dr. Ames has shown no basis for discretionary review in this case. He has neither identified nor established any of the requirements for granting review under RAP 13.4(b). The administrative record fully supports the Commission’s decision as confirmed by the previous reviewing courts. There is neither a constitutional issue nor a basis for overruling existing Washington case law. The Petition should be denied.

RESPECTFULLY SUBMITTED this 29th day of October, 2007.

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Assistant Attorney General

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GEOFFREY S. AMES, M.D.,

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WASHINGTON STATE HEALTH  
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DECLARATION OF  
SERVICE

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I, Melinda Brown, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.
2. On October 29, 2007, I deposited via U.S. mail, postage prepaid, a copy of the Respondents' Answer to Petition for Discretionary

Review to:

WILLIAM R. BISHIN  
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SEATTLE, WA 98112

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

DATED this 29th day of October, 2007 at Olympia, Washington.

  
MELINDA BROWN  
Legal Assistant