

No. 88513-3

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SUPREME COURT OF  
THE STATE OF WASHINGTON

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IN RE THE MATTER OF SUSPENSION OF PROFESSIONAL  
GUARDIAN LORI A. PETERSON CPG No. 9713

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APPEAL FROM THE DECISION OF THE CERTIFIED  
PROFESSIONAL GUARDIANSHIP BOARD  
Nos. 2010-005, 2010-007, 2010-008, 2009-013

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AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION OF  
ELDER LAW ATTORNEYS

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TABLE OF CONTENTS

A.	IDENTIFY AND INTEREST OF AMICI CURIAE.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT WHY THE CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD DECISION SHOULD BE REVERSED.....	1
	1. INTRODUCTION.....	1
	2. INVESTIGATION.....	3
	3. REVIEW PROCESS.....	7
D.	CONCLUSION.....	10

TABLE OF AUTHORITIES

TABLE OF CASES

FEDERAL CASES

*Vitarelli v. Seaton*,  
359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959).....2

WASHINGTON CASES

*Buell v. City of Bremerton*,  
80 Wn.2d 518, 523, 495 P.2d 1358 (1972).....1, 2

*Chrobuck v. Snohomish Cy.*,  
787 Wn.2d 858, 480 P.2d 489 (1971).....10

*City of Hoquiam v. Public Employment Relations Comm'n*,  
97 Wn.2d 481, 646 P.2d 129 (1982).....1, 7

*Eidson v. State Dept. of Licensing*,  
108 Wn.App. 712, 32 P.3d 1039 (2001).....7

*In re Young*,  
95 Wn.2d 216, 229-32, 622 P.2d 373 (1980).....2

*Nationscapital Mortg. Corp. v. State Dept. Of Financial Institutions*,  
133 Wn. App 723, 137 P.3d 78 (2006).....7

*Org. to Preserve Agric. Lands v. Adams County*,  
128 Wn.2d 869, 890, 913 P.2d 793 (1996).....2, 6

*Smith v. Greene*,  
86 Wn.2d 363, 373-74, 545 P.2d 550 (1976).....2

*Wash. Med. Disciplinary Bd. v. Johnston*,  
99 Wn.2d 466, 663 P.2d 457 (1983).....1, 2, 7

WASHINGTON STATUTES

RCW 34.05.514.....9

RULES AND REGULATIONS

City of Seattle Civil Service Commission Rule 2.03(a)-(e).....9

DR 506.1.....3, 5

DR 506.1.1.....4

DR 506.1.2.....4

DR 506.1.3.....4

DR 512.4.5.....8

Rules for Enforcement of Law Conduct (ELC) 2.3(b)(4).....9

A. IDENTITY AND INTEREST OF AMICI CURIAE

The interest of amici curiae Washington Association of Elder Law Attorneys (hereinafter "WAELA") is set forth in its motion for leave to submit this memorandum.

B. STATEMENT OF THE CASE

Amici curiae WAELA acknowledge the statements of the case in the Appellant's Opening and Reply briefs, and Respondent's Response brief.

C. ARGUMENT WHY THE CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD DECISION SHOULD BE REVERSED OR REMANDED FOR REVIEW

1. Introduction

The Court has long considered the Appearance of Fairness Doctrine when reviewing administrative adjudicative proceedings. *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983); *City of Hoquiam v. Public Employment Relations Comm'n*, 97 Wn.2d 481, 646 P.2d 129 (1982); *Buell v. City of Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). In such cases, the Court has established principals and procedures to maintain fairness and public confidence in administrative reviews and adjudication.

Under the Appearance of Fairness Doctrine, it is not necessary to show a decision maker's bias actually affected the outcome, only

that it could have. *Buell*, 80 Wn.2d at 523. In the context of administrative proceedings, the Appearance of Fairness Doctrine exists in tension with the presumption that public officials will properly perform their duties. *See Johnston*, 99 Wn.2d at 479. To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

In addition, it is well settled that an administrative body must follow its own rules when it conducts a proceeding which can deprive an individual of some right, benefit, or entitlement. *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *In re Young*, 95 Wn.2d 216, 229-32, 622 P.2d 373 (1980); *Smith v. Greene*, 86 Wn.2d 363, 373-74, 545 P.2d 550 (1976) (administrators may not disregard the duties imposed by their own regulations simply because it is convenient).

In the current case, however, the Certified Professional Guardianship Board's (hereinafter the "Board") disciplinary regulations, and procedures provide only minimal judicial oversight regarding fact finding, and few internal safeguards separating investigative and adjudicative functions.

More significantly, the Certified Professional Guardian Board failed to follow its own rules by allowing a biased board member to unilaterally investigate claims, while serving on the Board.

## 2. Investigation

The undisputed record demonstrates Commissioner Joseph Valente was on the Board's Standards of Practice Committee (hereinafter "SOPC"), which "delegated the task of investigating grievances and making recommendations as to whether the grievance was supported by sufficient evidence to merit an adjudicative proceeding....Commissioner Valente conducted an evidentiary hearing as part of that inquiry." Respondent's Brief at 40, Ex. 21, 36. Furthermore, in his letter dated May 26, 2010, Commissioner Valente wrote, "the matter has been referred by the board to the local court for inquiry." Ex. 36.

The SOPC's action or delegation deviated from the Board's own rules, which state in relevant part:

### **506 Standards of Practice Committee Action on Grievances**

506.1 The SOPC shall review reports prepared by AOC, if any, and take one of the following actions on each grievance: request further information from AOC, dismiss, request that the Board file a formal complaint, request that the Board enter into an Agreement Regarding Discipline, or direct that AOC contact the

professional guardian to discuss an issue of minor significance and of a nature not potentially harmful to clients of the professional guardian or other persons. The SOPC may also refer the grievance to other regulatory agencies or to law enforcement. If the SOPC requests Board action, the request shall be accompanied by a written report setting forth the reasons for the request.

506.1.1 The SOPC may direct AOC to obtain the statement of any person believed to have information relevant to the grievance, obtain opinions from expert witnesses, or any other information the SOPC determines may be relevant to the grievance.

506.1.2 Where there is reasonable cause to believe that testimony should be perpetuated, AOC may depose any witness upon reasonable notice to the professional guardian being investigated. An AOC staff attorney or an attorney appointed by the Board Chair shall conduct the deposition. The deposition shall be taken under oath before a Notary Public or other officer authorized by the law of the jurisdiction where the deposition is taken. The deposition may be transcribed by any party for use in further proceedings.

506.1.3 AOC may issue a subpoena to compel attendance of witnesses or to compel production of documents at a deposition. The subpoena shall be issued in the name of the Board and subscribed by the signature of the Board's attorney. Subpoenas shall be served in the same manner as in civil cases in superior court. Failure to attend or produce documents pursuant to a properly issued subpoena shall be considered contempt of the Supreme Court. A motion to quash or modify the subpoena, on the grounds of unreasonableness or oppression, shall be decided by the Board Chair.

[http://www.courts.wa.gov/committee/?fa=committee.child&child\\_id=56&committee\\_id=117#P103\\_7461](http://www.courts.wa.gov/committee/?fa=committee.child&child_id=56&committee_id=117#P103_7461) visited October 5, 2013.

Disciplinary Regulation 500 et seq. expressly contemplates the Administrative Office of the Courts (AOC) to conduct any additional investigation or discovery pertaining to the grievance. The Disciplinary Regulations expressly state, “the SOPC shall review reports prepared by AOC,” and “request further information from AOC.” DR 506.1. The regulations state the SOPC is to “direct AOC” to obtain statements, or obtain expert opinions. DR 506 1.1. Finally, the regulations states, “AOC may depose” witness upon reasonable notice to the professional guardian being investigated, and that if a deposition is conducted, “an AOC staff attorney or an attorney appointed by the Board Chair shall conduct the deposition.” DR 506 1.2.

The Board’s Disciplinary Rules repeatedly direct the SOPC to refer discovery or investigation duties to AOC. The rules do not permit Board members from referring the grievance to the court for further investigation. The distinction is not merely semantics. The rules expressly contemplate SOPC referrals to other agencies which could bring civil or criminal actions before the same court. The court

would be in the position of acting as both investigator and adjudicator in those actions.

The unauthorized referral is evidence of actual or potential bias on Commissioner Valentes' behalf. The record demonstrates an argumentative relationship between Ms. Peterson and Commissioner Valente involving his Guardianship Monitoring Program. TP 482-83. The disputes led to Commissioner Valente altering his program, and heightened scrutiny when he evaluated Ms. Peterson's guardianship reports. TP 482-82, 85. Thus, the argumentative relationship between Commissioner Valente, and his insistence he conduct his own investigation contrary to the Board's own rules, provides evidence of prejudgment bias. *See Org. to Preserve Agric. Lands*, 128 Wn.2d at 889-90.

But even if the Disciplinary Rules do somehow provide for referral to the court for further investigation, the constant reference to AOC indicate the rules contemplate a disinterested party conducting any investigation or discovery. The record demonstrates at least one other Commissioner was available to conduct the inquiry. Commissioner Steven N. Grovdahl had received an earlier complaint regarding Ms. Peterson's guardianship business, but concluded the court no longer had jurisdiction as the business was no longer serving

as guardian. The record does not demonstrate the Commissioner was biased based on his initial review. Nevertheless, Commissioner Valente failed to refer the matter to a disinterested colleague or staff.

### 3. Review Proceedings

While Washington law allows for an administrative body to carry out both investigative and adjudicative functions, the Court has also recognized the Appearance of Fairness Doctrine was “intended to avoid the evil of participation in the decision-making process by a person personally interested or biased.” *City of Hoquiam v. Public Employment Relations Comm'n*, 97 Wn.2d 481 at 488. In practice, administrative agencies have typically engaged in staff or outside agencies to conduct initial investigations. *See Johnston*, 99 Wn.2d at 472 (five investigators from Division of Licensing conducted investigation for Medical Disciplinary Board proceeding); *Nationscapital Mortg. Corp. v. State Dept. Of Financial Institutions*, 133 Wn. App 723, 734, 137 P.3d 78 (2006) (Agency deputy director served as investigator and agency appointed outside counsel as reviewing officer); *Eidson v. State Dept. of Licensing*, 108 Wn.App. 712, 32 P.3d 1039 (2001) (agency staff investigator).

In the current case, Commissioner Valente, a board member, took it upon himself to conduct the Board’s investigation.

Commissioner Valente sat with Board members at numerous meetings while Ms. Peterson's cases were pending before the Board, and the Board's rules do not mention limitations on Board member contact on interactions with a case investigator.

More problematic are Disciplinary Regulations which provide for minimal judicial review and define quorum as "a majority of the Board members who are not disqualified . . .," but do not provide for substitute or temporary board member. *See* DR 512.4.5.

In the current case, meeting minutes indicate seven members abstained from voting on whether to issue a complaint against Ms. Peterson. Ex. 36. Three additional board members were absent. *Id.* Thus, only three of the Board's 13 voting members supported moving forward with complaint. *Id.*

Board minutes from January 30, 2013 indicate five members were absent and one member had a conflict. Peterson Opening Brief Appendix B. Thus, only six of 12 voting Board members supported accepting the Hearing Officers Findings and Conclusions. *Id.* The Court should also note the meeting minutes inconsistently state Board member William Jaback was excused leaving six voting members, but records the motion passing "six to one" with Board member Andrew Heintz dissenting. *Id.*

Regardless whether five or six members supported adopting the Hearing Officer's Findings and Conclusions, the Board's quorum rules do not require a minimum number of votes or provide for substitution as do other administrative bodies. *See e.g., Rules for Enforcement of Law Conduct* (ELC) 2.3(b)(4) (Lawyer disciplinary action requires seven votes); City of Seattle Civil Service Commission Rule 2.03(a)-(e) (temporary commissioner may be appointed in the event of recusal or absence).

Thus, the Board allowed Ms. Peterson's disciplinary proceedings to advance on two occasions without support or review from a majority of Board members.

The Board rules also do not provide for judicial review under the Washington's Administrative Procedures Act RCW 34.05.514. Under the statute, an administrative law judge's rulings are reviewable by a Superior Court judge. A grievant is also afforded the full benefit of appellate review.

Under the Board's rules, Ms. Peterson's case is reviewable only by the Board which essentially conducted the investigation, before her appeal to the Washington Supreme Court.

If the intent of the Appearance of Fairness Doctrine is to maintain public confidence in the Board's quasi-judicial decisions, the Board's investigative and adjudicative procedures fall well short of both reasonableness, and safeguards undertaken by other administrative bodies. The Board allows members, not disinterested staff or third parties, to conduct investigations while sitting with other board members. It allows for as few as three of 13 voting members to authorize disciplinary actions. The Board's actions are not reviewed by the trial court.

The Court has stated the "evil sought to be remedied lies not only in the elimination of actual bias,...but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they are related." *Chrobuck v. Snohomish Cy.*, 787 Wn.2d 858, 480 P.2d 489 (1971). In the current case, the Board has failed to protect Ms. Peterson from such conditions.

#### D. CONCLUSION

Lori Peterson will lose her business and ability to earn a living should the Court uphold the Board's actions. Her deprivation of a significant property interest will also disrupt her client's lives. More

significantly, professional guardians like Lori Peterson are being subjected to the same questionable disciplinary proceedings with minimal judicial oversight. For all the above reasons, the Court should reverse Board's decisions.

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