

No. 63318-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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CHRISTOPHER A. WODJA DMD

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, DENTAL
QUALITY ASSURANCE COMMISSION

Respondent.

REPLY BRIEF OF APPELLANT

John C. Versnel III WSBA No. 17755
Vanessa M. Vanderbrug WSBA No. 31668
Lawrence & Versnel PLLC
4120 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-0200

Attorneys for Appellant

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A. INTRODUCTION

The Department's Brief erroneously reduces this Court's role to that of a rubber stamp for the actions of the Department of the Health, Dental Quality Assurance Commission (DQAC/the Commission); law and policy dictate that review by this Court must be fully cognizant of the record and render a meaningful determination based upon its independent review. Furthermore, the Department's briefing embellishes the evidence presented at hearing to attempt to sway this Court away from conducting appropriate review. Quite simply, review by this Court of the actions by the Commission is warranted where Appellant, Dr. Wodja, was victimized by unfairness from the commencement of this proceeding.

Initially, a brief response to the Department's exaggerated version of events is required:

- Dr. Wodja never saw Patient A "naked" as insinuated by the Department.
- Patient A's roommates were present for the majority of Patient A's treatment.
- Dr. Wodja prescribed Tylenol 3 to Patient A at Patient A's request.
- Dr. Wodja did not prescribe Vicodin to Patient A.
- At the time the Department requested a written statement, Dr. Wodja was potentially subject to criminal prosecution.

The undisputed facts simply do not warrant the Department's inflammatory language and this Court should refuse to consider such improper argument. Dr. Wodja respectfully requests the Court exercise the authority duly granted under the Administrative Procedure Act (RCW 34.05 *et. seq.*) to reverse the erroneous procedural and substantive determinations by the Commission.

In addition, the Department mischaracterizes Dr. Wodja's request for a fair hearing before an unbiased tribunal as a demand that the Washington Supreme Court decision of *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983) be overturned. The facts of the current case, where the Commission undisputedly considered inadmissible evidence prior to sitting in judgment of Dr. Wodja are simply not on point with *Johnston* and the Department's contention otherwise is not supported.

In short, the Commission suspended Dr. Wodja's license based upon his treatment of one patient. The sanction of suspension is not warranted under the undisputed facts of the instant case. Moreover, multiple procedural irregularities require, at minimum, remand to the Commission for additional findings and consideration.

B. STANDARD OF REVIEW

The Department's insistence upon claiming that this Court has limited review authority is simply inaccurate. Under the "substantial evidence" standard, findings must be supported by the record and cannot be based upon blind deference to the agency. *Olmstead v. Department of*

Health, Medical Quality Assurance Comm'n, 61 Wn.App. 888, 894, 812 P.2d 527 (1991)(findings not supported by substantial evidence).

“Mixed questions of law and fact, that is, issues that involve the propriety of inferences drawn by an agency, or the process of comparing and applying the correct law and the correct facts to determine legal consequences shall be reviewed *de novo*.” *Gibson v. Department of Employment Sec.*, 52 Wn.App. 211, 217, 758 P.2d 547 (1988). This standard of review is due to the rule that the court is the final arbiter of the law. *Id.*

The reviewing court considers decisions of law *de novo* and may substitute its judgment for that of the agency. RCW 34.05.570(3)(a),(d); *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn.App. 723, 737, 137 P.3d 78 (2006).

C. ARGUMENT IN REPLY

1. The panel which disciplined Dr. Wodja had prejudgment knowledge of inadmissible, highly prejudicial evidence.

The Presiding Office appropriately found that the following inflammatory language, contained in the Statement of Charges, was inadmissible at hearing:

Respondent [Dr. Wodja] has a history of assaultive behavior toward young women. On August 19, 1999, he pleaded guilty to assault and battery (misdemeanor) of a sixteen-year-old female in Boston, Suffolk County, Massachusetts. He served time in jail for that criminal offense and was placed on probation. The probationary requirements were

transferred to Washington when he changed his residence in 2000.¹

Despite this correct ruling, the Presiding Officer erred in failing to exercise his authority to disqualify the panel members who had prejudgment bias against Dr. Wodja through their consideration of the above, inadmissible evidence, at the summary suspension stage.²

The Department's brief misses the point. Dr. Wodja did not seek to disqualify the hearing panel because they considered the summary suspension; instead, Dr. Wodja moved for disqualification of the panel members who had considered inadmissible evidence in advance of considering the case against him.³ The Department fails to cite to any legal authority standing for the proposition that Dr. Wodja was required to be subjected to judgment by a panel who had considered inadmissible evidence when the Commission has statutory authority to appoint a non-biased panel.

2. The Uniform Disciplinary Act warranted disqualification of tainted panel members.

The Department does not dispute that the Uniform Disciplinary Act precludes the use of the same panel members in the investigative and hearing stages of the proceeding. Former RCW 18.130.050(9). As stated in Dr. Wodja's moving papers, the purpose of precluding the use of the same panel members in both the investigative and adjudicative stages is to ensure that the panel members are not tainted by inadmissible evidence

¹ AR 14

² AR 679

³ AR 695-701

obtained in an investigation. Here, the panel members considering the summary suspension considered inadmissible evidence and, as such, should have been disqualified.

As set forth in Dr. Wodja's opening brief, *Clausing v. Dept. of Health*, 90 Wn.App. 863, 955 P.2d 394 (1998) and *Washington State Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983) are not persuasive with regard to the issue presented here because neither *Clausing* nor *Johnston* considered a circumstance where the panel considering summary suspension specifically considered inadmissible evidence. *Olmstead v. Department of Health*, 61 Wn.App. 888, 812 P.2d 527 (1991) is similarly not persuasive because it did not address a circumstance where the panel issuing the summary suspension considered inadmissible evidence.

The Department's argument that Dr. Wodja's request for panel members who did not consider inadmissible evidence would somehow "open the floodgates" to permit disqualification "every time" a commission member "knew something about a respondent" is without merit. Dept. Brief at p. 21. The Department, again, mischaracterizes the facts. Dr. Wodja did not seek to disqualify panel members because they knew "something" about him; Dr. Wodja sought disqualification because the panel members had knowledge of inadmissible evidence.⁴ Moreover, the Uniform Disciplinary Act specifically provides for appointment of *pro*

⁴ *Supra* note 3.

tem commission members and Dr. Wodja's circumstance is precisely the scenario which warrants implementation of this procedure. RCW 18.130.060.

3. The Commission cannot be presumed to have disregarded Dr. Wodja's prior conviction.

It is clear that an administrative body must be regarded as more closely akin to a jury [than a Judge] on review of decisions where incompetent evidence reaches the body, because there is no presumption that the body has considered only competent evidence.

Diamond v. Bd. of Fire and Police Comm., 115 Ill.App.3d 437, 442, 450 N.E.2d 879 (1983). It is clear that, as finders of fact without legal training, there can be no presumption that the Commission was able to "unring" the bell of receiving inflammatory information about Dr. Wodja before it even began to consider the evidence against him. A limiting instruction is insufficient to remove the taint cast by the extraordinarily prejudicial nature of the Department's characterization of Dr. Wodja's criminal history.

"Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." *State v. Johnson*, 90 Wn.App. 54, 62, 950 P.2d 981 (1998) (jury's consideration of prior conviction for rape required reversal of convictions). Here, the Commission panel members were not only aware of Dr. Wodja's prior conviction when they sat in judgment of him they had been subjected to the Department of Health's editorial comments regarding the conviction (*i.e.*, "Dr. Wodja has a history

of assaultive behavior towards young women....) Accordingly, the Panel members were tainted and should have been disqualified.

The Department's citation to RCW 34.05.458(2) is not persuasive as it is applicable to Presiding Officers, not Commission panel members.

The section provides as follows:

(2) A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

(Emphasis added.) At the disciplinary proceeding, the Presiding Officer rules on evidentiary issues and assists with the procedural organization of the proceeding. WAC 246-11-480. Unlike the Commission panel members, the Presiding Officer does not serve as finder of fact.

The Department also cites to *Faghih v. Department of Health, Dental Quality Assurance Commission*, 148 Wn.App. 836, 202 P.3d 962 (2009) for the proposition that Commission panel members cannot be compared to jurors. The Department misreads the *Faghih* decision. In *Faghih*, the licensee challenged one of the panel members for bias based upon her prior, adversarial, involvement with his counsel. *Faghih* held that the panel members were like jurors to the extent they served as "finders of fact" and were appointed to "evaluate the evidence" against the licensee. *Faghih* did not address the specific delineation of functions between Presiding Officers and panel members set forth in the

administrative code. Moreover, *Faghih* did not address a circumstance, as is present here, where the panel members serving in their role as “juror”/finder of fact had specific knowledge of inadmissible evidence prior to considering the facts against the licensee. Moreover, *Faghih* does not undercut the argument that Washington law strongly disfavors permitting finders of fact who have been exposed to inadmissible evidence to render the ultimate decision.

The Department also argues that the “Commission is presumed to know the law and apply it correctly to these proceedings” Dept. Br. at p. 18 *citing Lang v. Washington State Dept. of Health*, 138 Wn.App. 235, 243, 156 P.3d 919 (2007). The Department’s argument should not be well taken by this Court. The Commission is comprised of dental practitioners and members of the public **none of whom have legal training**. RCW 18.32.0351. As such, while deference may be afforded to the Commission with regard to their determinations on **dental** matters, there is no authority for the proposition that the Commission should be presumed to understand evidentiary issues.

An issue akin to the current case was considered in *Diamond v. Board of Fire and Police*, 115 Ill.App.3d 437, 450 N.E.2d 879 (1983). There, a police officer disciplinary board, in advance of evidentiary hearing, reviewed a complaint against the accused police officer which, on multiple occasions, referenced results of a polygraph test. *Diamond*, 115 Ill.App. 3d at 881. Counsel for the police officer successfully motioned for exclusion of the polygraph results and, at hearing, no testimony was

admitted regarding the results. *Id.* However, the Board was never specifically admonished not to consider the polygraph results. *Id.* Ultimately, the Board issued a ruling affirming the police officer's discharge. *Id.* The Order made no reference to the polygraph evidence and there was no indication that the polygraph results impacted the decision. *Id.*

On appeal, the court reversed the Board's decision holding that the officer was not afforded a fair hearing because of the failure to expressly admonish the Board to disregard the polygraph results. *Diamond*, 115 Ill.App.3d at 885. The court noted that the "members of the Board are all laymen and lack the experience and training of a judge in disregarding incompetent evidence." *Id.* Here, akin to *Diamond*, the Commission rendered its decision with reference to their knowledge that, according to the Department, "Dr. Wodja has a history of assaultive behavior toward young women." This clear prejudice requires reversal.

4. The limiting instruction does not cure the prejudice to Dr. Wodja.

The schoolboy uses his sponge to rub out the pencil marks on his slate. He eventually discovers that at some time-he can never tell when-his pencil has scratched, and learns to his sorrow that the ugly evidence of the fact, however vigorously he may apply the sponge cannot be removed.

State v. Albutt, 99 Wash. 253, 258-259, 169 P. 584 (1917)(citation omitted).

Again, the determination of fairness of Dr. Wodja's hearing must be underpinned by the fact that the Commission is made up of laypersons (akin to a civil jury) and as such, "the question is not whether the court would have disregarded the offending testimony, but is it certain that the jury has done so." *State v. Albutt*, 99 Wash. 253, 258, 169 P.2d 584 (1917)(limiting instruction insufficient to cure prejudice after jury heard inadmissible evidence).

Furthermore, during the hearing, the **unredacted** Statement of Charges was maintained on the Department of Health website⁵ and as there is no opportunity for voir dire of the panel after hearing it is impossible to know whether the Commission reviewed the unredacted Statement of Charges during hearing. *See e.g., State v. St. Peter*, 63 Wn.2d 495, 495-496, 387 P.2d 937 (1963) (inflammatory charges in newspaper compelled exclusion of jurors who reviewed news coverage). These factors all compel reversal for hearing before a newly comprised panel as is authorized by the Uniform Disciplinary Act.

5. The Commission panel members' knowledge of Dr. Wodja's prior conviction is prejudgment bias which warrants disqualification.

"Prejudgment bias concerning issues of fact about parties in a particular case" renders disqualification appropriate. *Ritter v. Board of Comm. of Adams County Public Hosp. Dist. No. 1*, 96 Wn.2d 503, 512, 637 P.2d 940 (1981). The Department argues that Dr. Wodja has not

⁵https://fortress.wa.gov/doh/providercredentialsearch/ProviderDetail_1.aspx?CredentialId=147169#

alleged “facts” establishing the basis for disqualification of the panel members. Here, it is undisputed that the panel members not only were aware of the fact that Dr. Wodja had a prior conviction; they had been subjected to the Department of Health’s inflammatory language characterizing the conviction; *i.e.*, “history of assaultive behavior towards young women”. Furthermore, as the Commission panel was apprised of this allegation during *ex parte* proceedings, it is impossible to know what, in particular, was relayed to the Commission. As such, the instant scenario is far more compelling for disqualification than under the civil jury scenario (wherein, the particular review of inadmissible evidence is recorded on the record to allow for meaningful review).

6. The participation of tainted panel members violated the appearance of fairness doctrine.

The Department’s argument that bias must be shown by pointing to specific facts in the record should not be well taken. As noted by the United States Supreme Court, “objective standards may also require recusal whether or not actual bias exists or can be proved.” *Caperton v. A.T. Massey Coal Co., Inc.* 129 S.Ct. 2252, 2265 (2009). The *Caperton* court confirmed that its decision to require recusal of a judicial officer on “appearance of fairness” grounds did not break new ground and, instead, did “nothing more than the Court has done before”. *Id.*

The appearance of fairness doctrine provides that members of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and

must also give the appearance of impartiality. The doctrine applies only “as far as practical” to ensure fair and objective decision making by administrative bodies. The practicality of the appearance of fairness will largely be determined by the procedures being applied.

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 313, 197 P.3d 1153 (2008)(Emphasis added.) Here, the procedures applied at hearing did not satisfy the appearance of fairness doctrine where the Presiding Officer could have, but chose not to, appoint pro tem panel members who had not considered inadmissible evidence to sit in judgment of Dr. Wodja at the hearing. RCW 18.130.060.

7. The Presiding Officer committed an error of law in failing to hold a separate hearing on sanctions.

The Department argues that the speedy issuance of a final order due to concerns regarding the “public’s health, safety and welfare” mitigates against permitting Dr. Wodja the opportunity to be heard on sanctions. This argument is without merit. As noted in *Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 533, 29 P.3d 689 (2001) “the public is ultimately dependent upon the provision of a physician's services, not their elimination.” (holding that licensing proceedings are subject to a “clear, cogent and convincing” standard of proof). Moreover, Dr. Wodja was unable to practice while the Commission rendered their deliberations on his license because he was under suspension; as such, there was no potential for harm to the public.

The Department's citation to the civil case law addressing bifurcation of liability and damages phases of trial is not on point. Licensing proceedings are quasi-criminal proceedings and, as such, Dr. Wodja's sanctioning brief should have been considered prior to entry of the Final Order. *See, Nguyen supra.*

The Department argues that Dr. Wodja was not prejudiced by the failure to hold a separate sanctions hearing as the Commission "could use its own knowledge and expertise to determine what were aggravating and mitigating circumstances". As stated in Dr. Wodja's opening brief, the Presiding Officer *ex parte* informed the Commission of the prior conviction and the prior Stipulation to Informal Disposition (STID). As the Presiding Officer did not permit Dr. Wodja to submit his sanctioning brief the Commission would not have been informed of the mitigating circumstances surrounding the conviction. Critically, the prior conviction did not involve dental treatment, use of anesthetic, use of sedation medication, nor did it contain any element of sexual impropriety, but was instead a misdemeanor simple assault. The Presiding Officer's failure to submit Dr. Wodja's sanctioning brief to the Commission thus compounded the prejudice already caused by the Panel's tainted picture of the prior conviction arising out of the Department's improper characterization of the conviction as an assault on a young woman.

8. Dr. Wodja appropriately challenged the factual findings in his opening briefing.

The Department cites to *Green v. McAllister*, 103 Wn.App. 452, 469, 14 P.2d 795 (2000) and *State v. Lee*, 199 P.2d 445 (2008) for the proposition that Dr. Wodja's argument in support of his assignments of error to factual findings is insufficient. In both *Green* and *Lee*, the respective parties did not cite to either the record or to legal authority in support of their assignments of argument. Contrary to both cases, in his opening briefing, Dr. Wodja set forth the standard of review for factual findings and specifically identified all bases for errors by the Commission. See, Dr. Wodja's Opening Briefing. Dr. Wodja thus preserved his argument for review.

9. The Findings are not supported by substantial evidence in the record.

The Department argues that all Findings are supported by substantial evidence because the Commission is entitled to rely upon its own expertise and because the Department of Health expert, Dr. Bart Johnson, provided sufficient evidence to support the Findings. This argument misconstrues the appropriate standard.

There must be "substantial evidence" as distinguished from a "mere scintilla" of evidence, to support the verdict- i.e., evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." A verdict cannot be founded on mere theory or speculation. *Belli v. Shaw*, 98 Wn.2d 569, 574, 657 P.2d 315 (1983)(emphasis added)(reversing a jury verdict in favor of

plaintiff in civil case on grounds of insufficient evidence). In considering the evidence on record in the current case, this Court should take into account the fact that the Supreme Court has determined that medical disciplinary cases are subject to a higher standard of proof than the standard for a civil cases. *Nguyen supra*.

In the instant disciplinary matter, the Findings must be based “exclusively upon the evidence of record in the adjudicative proceeding” and upon evidence “officially noticed” in the proceeding. RCW 34.05.461. “Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.” *Id*.

The Rules of Evidence require that facts presented by experts must be “of a type reasonably relied upon” by experts in the particular field. ER 703. As such, an expert opinion that is simply a conclusion, is based on an assumption, contains conjecture or speculation, or is based on inadequate facts is insufficient. *Theonnes v. Hazen*, 37 Wn.App. 644, 648, 681 P.2d 1284 (1984).

The critical issue in the disciplinary case below was whether Dr. Wodja’s administration of oral conscious sedation medication was within the standard of care. The Department of Health expert acknowledged that perfect guidelines for administration of oral conscious sedation medication

are not available and will not likely be available for “several more years”.⁶ He further noted that the question of appropriate dosage guidelines has “not been answered”.⁷

The Department argues that Dr. Wodja’s testimony regarding his assessment and protocols for severe infection is sufficient for the Commission to find that “Dr. Wodja violated the standard of care”. Finding of Fact 1.19. However, the Finding by the Commission does not indicate why this Finding was rendered nor does the Finding set forth what “knowledge or skills” were necessary to evaluate severe decay. The Finding is simply conclusory and, as such, does not comply with RCW 34.05.461 which requires the Commission to indicate the basis for a finding and, moreover, requires the Commission to include a “concise and explicit statement of the underlying evidence of record to support the finding”.

The Department next implies that, because the manufacturer’s “maximum recommended dose” of Triazolam is .5mg, that dosage represents the standard of care. This does not reflect the testimony presented at hearing and fails to comply with ER 703 which requires that the testimony reflect facts “reasonably relied upon” in the field. Dr. Isackson testified, and this was undisputed, that dentists are taught to give up to 2 mg of Triazolam in a course accepted by the American Dental

⁶ RP 467, II 15-24

⁷ *Id.*

Association.⁸ It is undisputed that Dr. Wodja did not administer in excess of 2.0 mg of Triazolam to Patient A. Accordingly, the conclusion that administration of “over 1.0mg” is a violation of the standard of care is not supported by substantial evidence in the record.

The Department next argues that the expert testimony at hearing established that Dr. Wodja’s recordkeeping was below the standard of care because of failure to adequately document. The Department’s premise is faulty as the Uniform Disciplinary Act requires the Department to establish that treatment claimed to be below the standard of care caused a potential for harm or actual harm to the patient in question. RCW 18.130.180(4). Here, there was no evidence that the claimed insufficiencies in Dr. Wodja’s chart caused actual or potential harm to Patient A. Moreover, the only testimony on the subject, by Dr. Isackson, established that charting had nothing to do with clinical performance by the dentist and, critically, does not relate to the safety of the patient.⁹ However, the objective evidence establishes that Dr. Wodja documented all medications prescribed and administered.¹⁰ In addition, contrary to the insinuation by the Department, the testimony by Janeel Adam (who testified on behalf of the Department) established that Dr. Wodja gave her written post-operative instructions.¹¹

⁸ RP 259, ll 1-7

⁹ RP 260, ll 7-10

¹⁰ AR 757, 759

¹¹ RP 96, ll 9-13

The Department argues that the testimony of lay witnesses, Janel Adams and Stephanie Behrens, establishes that Patient A was overly sedated by Dr. Wodja. However, Dr. Johnson testified that administration of sedation medication is based upon the practitioner's interaction with the patient and that practitioner's judgment regarding the situation.¹² Objectively, Dr. Wodja's chart notes establish that he was not seeing the sedative effect he wanted and, as such, additional medication was warranted.¹³ The determination that Dr. Wodja "oversedated" Patient A is simply not supported by the evidence.

The Department improperly insinuates that staff is necessary for after hours appointments. The Department's own expert testified that trained staff was not necessary.¹⁴ It is undisputed that Patient A's roommates were present during the majority of her treatment.¹⁵ Furthermore, the Department's dramatic statements regarding Patient A's state of dress is unwarranted. Dr. Wodja was unaware that Patient A was without pants until the close of the visit.¹⁶

The objective evidence, contrary to the Department's assertions, establishes that Dr. Wodja discharged Patient A appropriately. The Department's expert testified that it was appropriate to discharge a patient when the patient's vital signs were back to normal levels.¹⁷ He then made

¹² RP 237, ll 14-19

¹³ AR 759

¹⁴ RP 243, ll 22-25

¹⁵ RP 330, ll 10-24

¹⁶ RP 352, ll 15-18

¹⁷ RP 246, ll 7-8

the brash conclusion that Patient A's vitals could not be at normal levels because of the administration of Triazolam.¹⁸ However, the undisputed evidence establishes that Patient A's vital signs were at normal levels when she presented at Harborview shortly following treatment with Dr. Wodja.¹⁹

Finally, the objective evidence established that Patient A was not sedated at the level claimed by the Department. As noted above, the Department's expert concluded that vital signs could not be at normal levels if a patient ingested large amounts of drug.²⁰ However, the objective evidence establishes that Patient A's vital signs were normal at the time she was admitted to Harborview.²¹ Moreover, the Washington State Toxicology test administered to Patient A established that there was no drug in her blood.²² The testimony by a pharmacologist, Dr. Julien is unequivocal:

Q: So, with regard, turning back to this result of no drugs detected in blood in the Washington State Toxicology Lab, is it surprising to you that this patient was potentially given between 1 and 2 milligrams of triazolam 15 hours before the test, the blood was drawn?

Yes. And especially given the behavioral presentation that was described by physicians at Harborview of somebody really out of it; that a small person taking the dose that was postulated, with that kind of behavior that -- you know, no drugs or metabolites could be picked up by a sophisticated laboratory really raises questions in my mind. I'm not able to rule out other causes of behavior.

¹⁸ *Id.*

¹⁹ RP 258, ll 15-24

²⁰ RP 246, ll 7-8

²¹ RP 258, ll 15-24

²² AR 819

And what would those other causes be?

Something other than a very large amount of drug.²³

10. The record does not support the conclusion that Dr. Wodja engaged in moral turpitude as contemplated by RCW 18.130.180(1).

Moral turpitude requires more than “technical” violations. *In re Farina*, 94 Wn.App. 441, 460, 972 P.2d 531 (1999). The case law cited by the Department illustrates that “moral turpitude” requires intentional and continuing behavior; it does not encompass one incident of patient care. In *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991) a medical doctor carried on a lengthy, sexual relationship with a teenage patient. Similarly, in *Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995), a social worker had a long term sexual relationship with a patient. In *Johnson v. Dept. of Health*, 133 Wn.App. 403, 136 P.3d 730 (2006), a registered massage therapist intentionally misrepresented her licensure for personal gain.

Unlike the licensees in the case law relied upon by the Department, here, there is no showing of any ongoing misconduct and, critically, there is no showing of any intentional behavior. The Department exaggerates the facts and, necessarily, ignores the following:

(1) The Commission found that Dr. Wodja did not sexually assault Patient A;²⁴

(2) Patient A’s roommates were present at Dr. Wodja’s dental office during the majority of her treatment²⁵;

²³ RP 450, II 1-14

²⁴ Finding of Fact 1.31

(3) The evidence was, at best, unclear as to whether Patient A was “overmedicated”²⁶ and the Department of Health’s expert acknowledged that the amount of medication to prescribe to patients was an area of controversy²⁷;

(4) The standard of care did not require Dr. Wodja to have staff present during treatment²⁸;

(5) Dr. Wodja testified that he was unaware of Patient A’s state of undress until the close of the appointment²⁹; and

(6) Patient A was covered by a blanket throughout the treatment³⁰.

In short, the evidence does not support Findings 1.24 through 1.30 and, accordingly, the conclusion that Dr. Wodja committed an act of moral turpitude is not supported.

11. The record does not support the conclusion that Dr. Wodja’s treatment of Patient A was below the standard of care.

The Department’s citation to civil authorities regarding the “standard of care” is not authoritative. The determination of whether Dr. Wodja’s acts constituted a violation of the Uniform Disciplinary Act turns upon the application of the facts surrounding his treatment of Patient A to the law governing health care practitioners. As stated in Dr. Wodja’s opening brief, the Uniform Disciplinary Act does not permit discipline to be imposed solely based upon “non traditional” treatment. Moreover, the evidence must establish that Patient A suffered actual or potential harm resulting from Dr. Wodja’s treatment. The objective evidence at hearing did not meet this legal standard.

²⁵ RP 330, ll 10-24

²⁶ RP 215, ll 14

²⁷ RP 237, ll 20-22; RP 240, ll 13-15

²⁸ RP 243, ll 22-25; RP 244, ll 1-15

²⁹ RP 352, ll 15-18

³⁰ RP 331, ll 17-25

Here, Department does not dispute the objective evidence at hearing establishing that Dr. Wodja's treatment of Patient A was, at most, "non traditional". Notably, the Department's expert testified that the amount of medication to be administered is a "grey area" and he could not definitively testify to a "normal" dose.³¹ Further, the Department's expert testified that Dr. Wodja's prescription of Triazolam was "by the book" appropriate.³² Finally, there is no showing that Patient A suffered actual or potential harm arising out of her treatment by Dr. Wodja.

12. The record does not support the conclusion that Dr. Wodja improperly maintained patient records.

The Department argues that the record does not reflect the amount of medication given to Patient A, yet, contradictorily, throughout its briefing, continually states (as claimed fact) that Patient A was "oversedated". The Department cannot have it both ways. Critically, the Department does not dispute that the chart created by Dr. Wodja contained all elements required by the charting code section, WAC 246-817-310.

Perhaps more importantly, there is no showing that the record keeping by Dr. Wodja caused any potential or actual harm to Patient A. The Commission's disciplinary role is based in the protection of the public and, here, there record is devoid of any evidence establishing that the charting in this case caused harm to the patient.³³

³¹ RP 238, II 7-16, RP 237, II 20-22

³² RP 234, II 6-20

³³ RP 259, II 2-8

13. The record does not support the conclusion that Dr. Wodja violated WAC 246-817-320 by failing to report Patient A's hospitalization.

The Department's argument regarding "failure to report" in essence admits that the violation by Dr. Wodja is merely technical and then takes the position that the Commission can punitively discipline a licensee; this is contrary to reason. The administrative code section requires a licensee to report hospitalizations resulting from a dental procedure. Here, a plain application of the law to the facts belies the Department's conclusions. First, there is no showing that Dr. Wodja knew Patient A was hospitalized. Second, the hospitalization did not arise out of anything Dr. Wodja did or did not do; instead, the hospitalization resulted from Patient A's claim of sexual assault. Moreover, the Department of Health undisputedly knew of Patient A's hospitalization throughout their investigation of Dr. Wodja and, as such, it is simply ridiculous to conclude that Dr. Wodja's failure to report impeded, in any way, the Commission's investigation.

14. The objective evidence does not support the conclusion that Dr. Wodja failed to cooperate with the Commission.

The Department's argument regarding Dr. Wodja's claimed "refusal" to cooperate creates a misleading impression of the timeline of events. It is critical that this Court understand that: (1) on October 26, 2007, when Dr. Wodja spoke with Gary Reed, he was unaware that he was being criminally investigated; and (2) at hearing, in January 2008, the criminal investigation had been placed in an inactive status and, accordingly, Dr. Wodja could testify without impacting his freedom. However, when the Department requested a written statement from Dr.

Wodja, at the advice of criminal counsel, he could not comply because, at that time, it was unclear whether criminal charges would proceed.³⁴ It is within this timeline that Dr. Wodja's actions must be evaluated.

The Department states that the Commission correctly found that Dr. Wodja "failed to cooperate with the Department's investigator"; however, there is no evidence in the record establishing this fact. Instead, the testimony at hearing by the Department of Health investigator established that Dr. Wodja was cooperating with the investigation at all times.³⁵ The investigator specifically testified that "at no time did [Dr. Wodja and his counsel] refuse to cooperate."³⁶

15. The evidence does not support the conclusion that Dr. Wodja abused Patient A.

The Department, again, misconstrues the objective facts to state, in conclusory fashion, that Dr. Wodja's treatment of Patient A constitutes abuse. Cases rendering a finding of "abuse" are uniformly prefaced upon a finding of sexual misconduct or other physical contact with a patient. *See e.g., Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995); *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991); *Ongom v. State, Dept. of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2005).

Here, unlike the case law wherein "abuse" was found, it is undisputed that Dr. Wodja had no improper physical contact with Patient

³⁴ RP 173

³⁵ RP 179, II 4-5

³⁶ *Id.*

A. Moreover, the claim of “oversedation”, as set forth previously, is not supported by the objective evidence and, in any event, there is no case law standing for the proposition that “abuse” occurs under the scenario claimed here.

D. CONCLUSION

This Court should not accept the Department’s invitation to disregard the plain, objective evidence in lieu of inflammatory allegations with no basis in fact. Deference to an administrative agency does not mean that agency action is not subject to meaningful appellate review. The agency record establishes that the panel considering evidence against Dr. Wodja was predisposed against him by consideration of highly inflammatory information regarding his past. The bias of the panel permeated the proceeding resulting in Findings that do not reflect either the objective evidence presented at hearing or the statutorily mandated mitigating factors pertinent to sanctions. Reversal is appropriate.

DATED this 28th day of October, 2009.

LAWRENCE & VERSNEL
PLLC

By: Vanessa M. Vanderbrug
John C. Versnel, III,
WSBA No. 17755
Vanessa M. Vanderbrug,
WSBA No. 31668

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

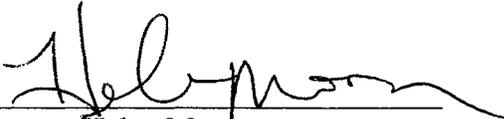
That on this day, I arranged for the service of this document to the Court of Appeals, Division One and counsel for the parties to this action as follows:

Callie Castillo
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Facsimile
 Messenger
 US Mail

Court of Appeals, Division One
Court Administrator/Clerk
600 University St.
Seattle, WA 98101-4170

Facsimile
 Messenger
 US Mail



Helen Mooney