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Nº 72495-9-I

BEFORE THE COURT OF APPEALS, DIVISION I
IN AND FOR THE STATE OF WASHINGTON

MARK L. BESOLA
Appellant,

vs.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON
Respondent.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,
CAUSE Nº 13-2-24470-5
HON. MARY ROBERTS, JUDGE

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APPELLANT'S OPENING BRIEF
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I. ASSIGNMENTS OF ERROR

The Superior Court erred in affirming the decision of the Department of Health suspending Dr. Besola's license.

II. ISSUES PRESENTED

1. Do Dr. Besola's convictions "relate to" his practice as a veterinarian under RCW 18.130.180(1) and (17)? (No)
2. Did the Board of Governors and court err when it concluded the convictions "relate to" the practice of veterinary medicine because in its opinion the convictions "lower the standing of veterinary medicine in the public's eyes?" (Yes)
3. Is there substantial evidence in the record to support the Board of Governors' Order? (No)
4. Should this court award Dr. Besola attorney's fees and expenses under RAP 18.1 and RCW 4.84.350? (Yes)

III. STATEMENT OF THE CASE

Factual and Procedural Background

In April of 2009, police executed a search warrant at the residence where Dr. Besola resided with his roommate and discovered hundreds of pornographic DVDs, including two copies of one DVD that contained a clip of an unidentified adult female engaged in sexual conduct with a German shepherd dog. CABR 1034.

On April 20, 2012, Dr. Besola was found guilty of one count of dealing in depictions of a minor engaged in sexually explicit conduct and one count of possession of depictions of a minor engaged

in sexually explicit conduct in Pierce County Superior Court Cause No. 09-1-03223-0. CABR 3. These convictions were appealed to Division 2 of the Washington State Court of Appeals. CABR 41. Dr. Besola was not charged with or found guilty of any crime related to the DVDs involving the dog. Division II of the Court of Appeals affirmed Dr. Besola's convictions, and Dr. Besola petitioned for review of his case at the Supreme Court.

On September 26, 2012, the Department of Health of the State of Washington (hereinafter "Department") issued a Statement of Charges alleging that Dr. Besola committed unprofessional conduct in violation of RCW 18.130.180(1) and (17) when Dr. Besola: (1) was convicted of dealing in depictions of a minor engaged in sexually explicit conduct; (2) was convicted of possession of depictions of a minor engaged in sexually explicit conduct; and (3) possessed a video depicting a German shepherd dog having sexual intercourse with a young woman. CABR 3-5.

As a veterinarian, Dr. Besola's practice consists of: advertising his ability and/or willingness to or, in fact, diagnosing, prognosing, or treating diseases, deformities, defects, wounds, or injuries of animals; prescribing or administering drugs, medicines, or treatments to animals; performing operations, manipulations, or applying any

apparatus or appliance for cure, amelioration, correction or reduction or modification of any animal disease, deformity, defect, wound or injury for hire, fee, compensation, or reward, promised, offered, expected, received, or accepted directly or indirectly; or performing manual procedures for the diagnosis of pregnancy, sterility, or infertility upon livestock; or implanting any electronic device for the purpose of establishing or maintaining positive identification of animals. RCW 18.92.010. CABR 79.

On January 14, 2013, Dr. Besola moved to dismiss the charges against him in this matter on the basis that his convictions related to child pornography had nothing to do with his practice as a veterinarian and therefore did not constitute “unprofessional conduct” under RCW 18.130.180(1) and (17). CABR 77-94.

On January 22, 2013, Dr. Besola filed a Motion to Strike Allegations From Statement of Charges or Other Relief requesting the presiding officer strike the language in the Statement of Charges referring to the dog video and to exclude all references to the dog video. CABR 250-268. Dr. Besola requested, in the alternative, that the presiding officer direct the government to file an Amended Statement of Charges omitting any charges referencing the video of the dog. CABR 250-251. Dr. Besola argued that any charges re-

garding the dog video would infringe upon Dr. Besola's First Amendment rights. CABR 260-268; 464-470; 482-491; 0703-0717.

The Department alleged that Dr. Besola's convictions and conduct amounted to moral turpitude and were related to the practice of Dr. Besola's profession under *Haley v. Medical Disciplinary Board*, 117 Wn.2d 729, 818 P.2d 1062 (1991) and *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 828 (1958). CABR 290.

On February 1, 2013, Dr. Besola filed a Motion for Summary Judgment in which he argued that the charges against him should be dismissed because he could not be punished for activity that is protected by the First Amendment and that there was no evidence that the conduct that was the basis of his convictions was related to his practice as a veterinarian. CABR 427-453.

On February 19, 2013, the Health Law Judge issued an order denying Dr. Besola's motions to dismiss the charges, to strike the allegations, and for summary judgment. CABR 703-717.

On June 11, 2013, a hearing was held regarding the allegations against Dr. Besola of unprofessional conduct. CABR 1032.

The Department Board of Governors found that Dr. Besola's convictions were acts of unprofessional conduct and suspended Dr.

Besola's license to practice indefinitely. CABR 1038, 1041. The Board of Governors explicitly stated that it was finding that Dr. Besola engaged in acts of unprofessional conduct based solely on Dr. Besola's alleged possession of and dealing in child pornography. CABR 1038, n. 2. The Board of Governors also explicitly stated that it did not consider the issue of Dr. Besola's alleged possession of a video of bestiality. CABR 1038, n. 2.

Relying on *Haley v. Medical Discipline Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991), the Board of Governors held that Dr. Besola's "conduct is related to the practice of his profession because it lowers the standing of the profession in the public's eyes. The public view of the professionalism of veterinarians is diminished when a veterinarian is guilty of possessing child pornography and dealing in child pornography." CABR 1038.

Dr. Besola petitioned for judicial review of the Department's holding in King County Superior Court. CP 81-108. Dr. Besola also petitioned for a stay of the final agency order during the pendency of his criminal appeal. CP 1-78.

King County Superior Court granted Dr. Besola's petition for a stay of the administrative proceedings pending the outcome of the criminal appeal (CP 109-111) but lifted the stay following the affir-

mation of Dr. Besola's convictions by the Court of Appeals. CP 115. The Superior Court ultimately denied Dr. Besola's petition for judicial review and affirmed the finding of the Board of Governors, holding that Dr. Besola "failed to demonstrate a basis for reversal of the final agency order under RCW 34.05.570(3) of the Administrative Procedure Act." CP 113-114.

Dr. Besola filed notice of appeal to this court. CP 117-121.

IV. ARGUMENT

RCW 34.05.510 *et seq.* establishes the exclusive means of judicial review of agency action.

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by RCW 34.05.510 *et seq.*, but may be supplemented by additional evidence taken pursuant RCW 34.05.510 *et seq.* RCW 34.05.558.

On judicial review of an agency action, the burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). The validity of agency action is determined in accordance with the standards of review provided RCW 34.05.510 *et seq.* as applied to the agency action at the time it was taken. RCW 34.05.570 (1)(b). In reviewing the agency action, the

court “shall make a separate and distinct ruling on each material issue on which the court's decision is based” and “the court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(c), (d).

Dr. Besola is appealing the Order entered by the Superior Court affirming the Department Board of Governors finding that he committed professional misconduct and that his criminal convictions related to his practice of veterinary medicine. When a court reviews an agency order in an adjudicative proceeding,

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record

for judicial review, supplemented by any additional evidence received by the court under this chapter;

- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Dr. Besola's argument on appeal is that the Superior Court erred in affirming the Department's Order because the Department's Order misinterprets the applicable law and is not supported by substantial evidence in the record.

- 1. The Board of Governors erred when it found Dr. Besola's convictions "related to" Dr. Besola's veterinary practice under RCW 18.130.180(1) and (17).**

The Board of Governors erred in finding that the fact of Dr. Besola's convictions established that the actions underlying the con-

victions were “related to” Dr. Besola’s practice as a veterinarian.
CABR 1036-1039.

The Department charged Dr. Besola with unprofessional conduct in violation of RCW 18.130.180(1) and (17) which provides, in pertinent part:

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter:

The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action.

Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder of the crime described in the indictment or information, and of the person's violation of the statute on which it is based ...

...

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession.

CABR 3-5.

Under RCW 18.130.180(1) the commission of any act of moral turpitude, dishonesty, or corruption relating to the practice of the

person's profession is unprofessional conduct even if the act does not constitute a crime. Under RCW 18.130.180(1) conviction of a crime for an act involving moral turpitude, dishonesty, or corruption relating to the person's practice of their profession is conclusive evidence at a disciplinary hearing of the guilt of that person of that crime. However, RCW 18.130.180(1) does **not** mandate that conviction of a crime is proof that the acts underlying the crime were ***related to the convicted person's practice.***

Similarly, under RCW 18.130.180(17) conviction of a misdemeanor or gross misdemeanor ***related to the person's practice*** constitutes unprofessional conduct for which a professional can be disciplined. Again, as with RCW 18.130.180(1), nothing in RCW 18.130.180(17) mandates that conviction of a crime is automatically proof that the conduct related to the person's profession.

The Board of Governors incorrectly interpreted RCW 18.130.180(1) and (17) when it found that the acts underlying Dr. Besola's convictions were related to his practice simply because he was convicted of them.

2. **The Board of Governors erred when it concluded the applicable legal test was whether the convictions lowered the standing of veterinary medicine in the public's eyes.**

The Board of Governors did not consider the video involving the dog in determining whether or not Dr. Besola had committed unprofessional conduct. CABR 1038, n. 2. Further, the board did not consider Dr. Besola's testimony denying he committed the crimes because it found that his testimony was "trumped by the rule found in RCW 18.130.180(1) that a 'judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder.'" CABR 1035.

Instead, to establish that Dr. Besola's convictions for possession and distribution of child pornography were convictions for acts "related to" his profession, the Board relied entirely upon the testimony of one witness who testified: "children do come to veterinarian clinics along with their families." CABR 1033. Significantly, the witness had no personal knowledge of Dr. Besola's clinic. Citing this testimony and *Haley v. Medical Disciplinary Board*, 177 Wn.2d 720, 818 P.2d 1062 (1991), the Board of Governors found that Dr. Besola's convictions were related to the practice of his profession because "it lowers the standing of the profession in the public's eyes. The public view of the professionalism of veterinarians is diminished when a veterinarian is guilty of possessing child pornography and dealing in child pornography." CABR 1037-1038.

Contrary to the testimony relied on by the Board, Dr. Amelia Besola, Dr. Besola's sister and partner in his veterinary practice, testified that her and her brother's clients are mostly aging baby boomers and that it was very rare for children to come into the office. CABR 1190-1191. Dr. Amelia Besola also testified that she saw 80% of the patients that came to their clinic. CABR 1190.

The Board of Governors did not apply the correct test to determine whether or not Dr. Besola's conduct "related to" his profession. In *Haley*, the Washington State Medical Disciplinary Board imposed sanctions against Dr. Theodore Haley after ruling that his sexual relationship with a former teenage patient constituted unprofessional conduct. Haley appealed and the Washington Supreme Court affirmed the Board's decision.

The Supreme Court agreed with the Board of Governor's determination that Haley's extended sexual conduct with an underage former patient constituted unprofessional conduct under RCW 18.130.180(1). In so agreeing, the Supreme Court held, "We construe the "related to" requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062.

In explaining this “related to” standard, the *Haley* court discussed *In re Kindschi*, 52, Wn.2d 8, 319 P.2d 824 (1958), a case where a physician had his license suspended after he was convicted of tax fraud:

The tax fraud was not related to the physician's diagnosis, care, or treatment of any patient. We nonetheless upheld the Board, and in doing so we took a broad view of the required relationship between the improper conduct and the practice of the profession. ***A medical disciplinary proceeding***, we explained, is taken for two purposes: to protect the public, and to protect the standing of the medical profession in the eyes of the public. *In re Kindschi*, at 11, 319 P.2d 824; *cf. In re McGrath*, 98 Wn.2d 337, 345, 655 P.2d 232 (1982) (identifying similar purposes in regard to disciplining attorneys). We stated that the due process and equal protection clauses of the United States Constitution apply to disciplinary proceedings, and that no person may be prevented from practicing a profession except for valid reasons. *In re Kindschi*, 52 Wn.2d at 11–12, 319 P.2d 824 (citing *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957)). Conviction for tax fraud, we explained, is a valid reason to take disciplinary action against a physician:

The public has a right to expect the highest degree of trustworthiness of the ***members of the medical profession***. We believe there is a rational connection between income tax fraud and one's fitness of character or ***trustworthiness to practice medicine***, so that the legislature can properly make fraudulent conduct in such instances a ground for revoking or suspending the

license of **a doctor**.

In re Kindschi, 52 Wn.2d at 12, 319 P.2d 824. Being convicted of tax fraud does not indicate any lack of competence in the technical skills needed to be a **physician**. Rather, it indicates a lack of the high degree of trustworthiness the public is entitled to expect from **a physician**. It raises a reasonable apprehension that **the physician** might abuse the trust inherent in professional status, and it diminishes the profession's standing in the public's eyes. Trust is essential to ensure treatment will be accepted and advice followed.

Haley, 117 Wn.2d at 731-732, 818 P.2d 1062 (emphasis added).

The *Haley* court ultimately held:

In sum, Dr. Haley's conduct indicates unfitness to practice medicine in two ways: it raises concerns about his propensity to abuse his professional position, **and it tends to harm the standing of the profession in the eyes of the public**, which both lead to reasonable apprehension about the public welfare. Therefore, the Board properly concluded that Dr. Haley engaged in acts of unprofessional conduct under RCW 18.130.180(1).

Haley, 117 Wn.2d at 736, 818 P.2d 1062 (emphasis added).

In reaching this conclusion, the *Haley* court noted it is only because physicians are responsible for maintaining the public health that the State could punish a physician for committing an act that impugns the integrity of the medical profession:

It should be emphasized that the concerns with protecting the integrity of the profession and protecting the public are not unrelated. Indeed, **constitutional**

constraints mandate that any state-imposed requirement for practicing a profession must be rationally related to a legitimate state interest The concern with protecting the medical profession, if viewed as a concern with preserving the interests of physicians themselves, is difficult to regard as a legitimate state interest or as rationally related to fitness to practice medicine. As an interest of the state, however, **preserving professionalism is not an end in itself. Rather, it is an instrumental end pursued in order to serve the state's legitimate interest in promoting and protecting the public welfare.** To perform their professional duties effectively, **physicians** must enjoy the trust and confidence of their patients. **Conduct that lowers the public's esteem for physicians erodes that trust and confidence, and so undermines a necessary condition for the profession's execution of its vital role in preserving public health through medical treatment and advice.**

Haley, 117 Wn.2d at 733-734, 818 P.2d 1062.

It can be inferred from the above quoted passage that had Haley been a practitioner of some profession other than a physician responsible for preserving the public health, the *Haley* court would have found no legitimate state interest in protecting the professionalism of the profession such that the State could interfere with Haley's practice of his profession because Haley committed some act that lowered the standing of the profession in the eyes of the public. It is only because a lessening of the public's view of the integrity of **physicians** would arguably cause harm to the public welfare that

the *Haley* court adopted the rule that any act committed by **a physician**, even if not in the course of the practice of his or her profession, could be considered unprofessional conduct related to his or her profession under RCW 18.130.180.

In finding that Haley's conduct was "related to" his profession because Haley's conduct lowered the esteem of the medical profession in the eyes of the public, the *Haley* court created a rule of determining when a **physician's** conduct could be considered "related to" his or her profession. *Haley* did not, as claimed by the Board of Director's in their decision, establish a broad rule that any conduct by any member of any profession would be considered "related to" that individual's profession simply because it lessened the view of that profession in the eyes of the public. Rather, *Haley* established a broader rule applicable **only to physicians** since physicians are critical to maintaining public health. Any action taken by a physician which might cause the public to lower its trust of physicians was "related to" that physician's practice of his or her profession. In other words, the "lower the public's opinion" test for whether or not the conduct of a professional is related to the professional's profession applies only to physicians due to the special status of physicians in our society.

As stated in *Haley*, the State has no interest in protecting the reputation of a profession simply for the sake of that profession. *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062. It was only because physicians are involved in protecting the public health that the *Haley* court found a legitimate state interest in protecting the professionalism and reputation of physicians. *Haley*, 117 Wn.2d at 733-734, 818 P.2d 1062.

This conclusion is upheld by *Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011). In *Ritter*, Ritter was a licensed professional engineer who began working for the City of Lacey in 1996 as public works director. In 2007 Ritter was convicted of three counts of child molestation involving a family member that occurred in 1998. Ritter did not commit the offenses in the workplace or otherwise in any other professional capacity. The convictions were Ritter's first criminal convictions and he was not accused of any other similar conduct.

In 2008, the Board of Registration for Professional Engineers and Land Surveyors initiated disciplinary proceedings against Ritter. The Board alleged that, based solely on his child molestation convictions, Ritter had committed unprofessional conduct under

RCW 18.235.130(1). The Board found that Ritter's crimes constituted unprofessional conduct and suspended his license.

The Court of Appeals held that the Board had misinterpreted and misapplied the law when it found that Ritter's convictions related to his profession and suspended his license on the basis of those convictions alone. The *Ritter* court discussed *Haley* and the rule established in *Haley* for physicians and then found that Ritter's conduct had no relation to his practice of his profession:

In our review of the record, we do not have reasonable concerns that based solely on his convictions, Ritter would abuse his status as a professional engineer. Unlike *Haley*, in which the professional was a physician who had child patients, the record shows that Ritter is a professional engineer whose business is done with adults. When professionals regularly interact with children, such as physicians or attorneys, **and when the evidence in the record shows that the professional used their skill or standing to take advantage of children**, courts could reasonably say that a child molestation conviction relates to the practice of that professional. *E.g.*, *Haley*, 117 Wn.2d 720, 818 P.2d 1062. **But where, as here, the record does not show that Ritter regularly interacted with children or that Ritter used his professional position to take advantage of children, we cannot say that Ritter's child molestation convictions are related to the practice of professional engineering.**

Ritter, 161 Wn.App., at 767, 255 P.3d 799 (emphasis added).

In other words, because Ritter was not a physician and because

his crimes were not committed in the course of the practice of his profession and were not facilitated by Ritter exploiting his membership in the profession, then Ritter's crimes were not "related to" Ritter's practice of his profession.

In so ruling, the *Ritter* court noted that the *Haley* court

... construed the " 'related to' requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession." *Haley*, 117 Wn.2d at 731, 818 P.2d 1062. The court held that the "conduct need not have occurred during the actual exercise of professional or occupational skills, nor need the conduct raise general doubts about the individual's grasp of those skills." *Haley*, 117 Wn.2d at 733, 818 P.2d 1062. Instead, the "conduct may indicate unfitness to practice medicine if it raises reasonable concerns that the individual may abuse the status of being a physician in such a way as to harm members of the public, or if it lowers the standing of the medical profession in the public's eyes."

Haley, 117 Wn.2d at 733, 818 P.2d 1062.

Haley and *Ritter* establish that there is one test for whether or not a professional's conduct is related to his or her profession that is applicable to all professionals, but that there is a second broader test applicable only to physicians due to their special relationship to the public. The test applicable to all professionals, including physicians, to determine whether a professional's conduct "relates to" his or her profession is whether or not the conduct raises reasonable

concerns that the individual may abuse the status of being a professional in such a way as to harm members of the public. In addition to this general test, because physicians are responsible for maintaining public health, a physician's conduct can also be found to "relate to" the practice of medicine if it lowers the standing of the medical profession in the public's eyes.

Because Dr. Besola is not a physician, the test applicable to determining whether or not his convictions "relate to" his practice as a veterinarian is whether or not his conduct raises reasonable concerns that he would abuse the status of being a veterinarian in such a way as to harm members of the public. Whether or not Dr. Besola's actions lessened the public's opinion of veterinarians as a class is irrelevant to whether or not Dr. Besola's actions were related to his practice as a veterinarian. Under *Haley*, because veterinarians are not responsible for preserving the public health, the State has no legitimate interest in preserving the professionalism and reputation of veterinarians in the eyes of the public such that it can interfere with Dr. Besola's right to practice his profession. The Board of Governors oversimplified and misstated the law when it held that the test to determine whether or not Dr. Besola's conduct "related to" the practice of his profession was simply if his conduct

lowered the standing of the profession in the eyes of the public.

3. The Board of Governors' Order is not supported by substantial evidence in the record.

As discussed above, the proper test to be applied in determining whether or not Dr. Besola's convictions "relate to" his practice as a veterinarian is whether or not his conduct raises reasonable concerns that he would abuse the status of being a veterinarian in such a way as to harm members of the public.

Dr. Besola's convictions were based on the discovery of pornographic materials inside his bedroom in his residence. There was no evidence indicating that Dr. Besola used his veterinary practice to distribute, collect, create, or in any other way utilize child pornography. The record is simply void of any connection between Dr. Besola's alleged possession and distribution of child pornography and his activities as a veterinarian.

Dr. Besola's case is like *Ritter* and unlike *Haley* in that there is absolutely no evidence that Dr. Besola used his profession in any manner to facilitate the crimes he was convicted of committing.

The Board's determination that Dr. Besola's convictions "relate to" his professional practice lacks **any** evidence in the record.

4. This court should award Dr. Besola attorney's

fees and expenses.

RAP 18.1 provides that a party may recover attorney's fees in the Court of Appeals where applicable law grants a party the right to recover reasonable attorneys fees, and where the party requests fees and provides argument in its brief regarding the fees. RAP 18.1(a),(b).

RCW 4.84.350 provides, in pertinent part,

- (1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.
- (2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.

“Substantially justified,” for purposes of equal access to justice act (EAJA), under which court must award attorney fees and other expenses to qualified party that prevails on judicial review of agency action unless court finds that agency action was substantially justified or that circumstances make an award unjust, means justified to a degree that would satisfy a reasonable person, and it requires the

agency to show that its position has reasonable basis in law and fact. (Per Alexander, C.J., with three Justices concurring, one Justice agreeing, and two Justices concurring in part and dissenting in part.) *Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007).

For purposes of statute providing for attorney fee award to prevailing party on judicial review of administrative agency action unless court finds that agency action was substantially justified or that circumstances make an award unjust, the agency has the burden of showing that fees should be denied because its action was substantially justified; to meet this burden, the agency must demonstrate that its position has a reasonable basis in law and fact. *The Language Connection, LLC v. Employment Sec. Dept. of State* 149 Wn.App. 575, 586-587, 205 P.3d 924, as modified (2009).

Thus, the Department has the burden of demonstrating that its order depriving Dr. Besola of his license to practice veterinary medicine had a reasonable basis in law and in fact. The Department has the burden of demonstrating to this court that its actions had a reasonable basis in law and fact such that a reasonable person would be satisfied that the revocation of Dr. Besola's license was justified.

A "qualified party" means (a) an individual whose net worth did

not exceed one million dollars at the time the petition for judicial review was filed or (b) a sole owner of a business or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed. RCW 4.84.340.

Dr. Besola is a “qualified party” under RCW 4.84.340 because his net worth is less than one million dollars. See Declaration of Dr. Besola, attached hereto.

As discussed above, the Board misinterpreted the applicable law in determining whether or not Dr. Besola’s criminal convictions related to his veterinary practice and the facts of this case do not support the Board’s finding that Dr. Besola’s conviction did relate to his practice. Because the Board misinterpreted that legal standard applicable to determining whether or not Dr. Besola’s criminal convictions relate to his veterinary practice, the Department can never establish that its actions were reasonable or justified.

VI. CONCLUSION

In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

RCW 34.05.574(1).

Dr. Besola respectfully requests this court set aside the agency Order suspending his license, enter a declaratory judgment that Dr. Besola's criminal convictions do not relate to his practice of veterinary medicine, and enjoin the Department from pursuing any further disciplinary actions against Dr. Besola based on his criminal convictions related to this case.

Should this court find that the Department's actions were incorrect, Dr. Besola will be the prevailing party and is entitled to and award of attorney's fees and expenses under RCW 4.84.340 and RCW 4.84.350. Under RCW 4.84.360, fees and other expenses awarded under RCW 4.84.340 and RCW 4.84.350 are deemed payable on the date the court announces the award and shall be paid by the agency within 60 days. Should this court find in Dr. Besola's favor, Dr. Besola respectfully requests this court award Dr. Besola his attorney's fees and expenses.

Dated: Tuesday, December 30, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Schedler", with a long horizontal flourish extending to the right.

John W. Schedler | WSBA No 8563
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2014, I caused to be served a true and correct copy of the foregoing document on the party listed below via:

Tracy Bahm, AAG | Colin Caywood, AAG
OFFICE OF THE ATTORNEY GENERAL
PO Box 40100
Olympia, WA 98504-0100
Email: TracyB@ATG.WA.GOV | ColinC@ATG.WA.GOV
DARLAA@ATG.WA.GOV

Via:

- U.S. Mail
- Facsimile
- King County eSvc
- Email

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

Signed at Mercer Island, Washington, Tuesday, December 30, 2014.



John W. Schedler, | WSBA No 8563

