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I. INTRODUCTION

Mark L. Besola, Appellant (Dr. Besola), is a veterinarian licensed to practice in Washington by the state Veterinary Board of Governors (Board). While he was licensed and actively practicing as a veterinarian, Dr. Besola was arrested, tried, convicted, and sentenced for two felonies: possession of depictions of a minor engaged in sexually explicit conduct, and dealing in depictions of such conduct. Based on these convictions, the Board charged Dr. Besola with unprofessional conduct and addressed the two key questions now at the heart of Dr. Besola's petition to this Court: do two felony convictions for possessing and dealing in child pornography rise to the level of moral turpitude and, if they do, do they relate to the practice of veterinary medicine?

The Board determined that Dr. Besola's criminal convictions and the conduct underlying the convictions—participating in the sexual exploitation of children—rose to the level of moral turpitude. Relying on *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 742-43, 818 P.2d 1062 (1991), and *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958), the Veterinary Board found Dr. Besola's conduct and resulting convictions related to the practice of veterinary medicine because the conduct upon which the convictions were based lowered the standing of the profession in the public's eyes. The Board based its decision upon the evidence

presented at Dr. Besola's hearing, coupled with the Board members' experience, competency, and specialized knowledge when evaluating that evidence.

This Court should affirm the Board's Final Order that Dr. Besola engaged in acts of unprofessional conduct that lower the standing of veterinary medicine in the public's eyes and thus are related to the practice of his profession.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

Pursuant to RAP 5.1(d) and 5.2(f), the Board filed for cross review, seeking review of the acts of the superior court that, if repeated on remand, would result in error prejudicial to the Board. RAP 2.4(a). Following is the assignment of error on cross-appeal:

The superior court erred in granting Dr. Besola a stay of the Board's Final Order while this matter was pending on judicial review.

III. RESTATEMENT OF THE ISSUES AND THE ISSUE ON CROSS-APPEAL

1. Did the Board of Veterinary Governors identify and apply the correct legal standard in determining that Dr. Besola's convictions for possession and distribution of child pornography and the conduct they described were related to the practice of veterinary medicine?
2. Are the Board's findings supported by substantial evidence in the administrative record?

3. RCW 34.05.550(3) requires a superior court to make specific findings, based on a sufficient evidentiary showing, before staying an order that affects the public health, safety, and welfare. May a superior court ignore those statutory requirements when staying such an order? (Issue on cross-review)
4. If Dr. Besola were to prevail on appeal, should this Court nevertheless deny his request for attorney fees and costs because the Board's action was substantially justified in law and fact?

IV. STATEMENT OF THE CASE

A. Dr. Besola's Criminal Convictions

While licensed to practice veterinary medicine, Dr. Besola was convicted of one count of possession of depictions of a minor engaged in sexually explicit conduct and one count of dealing in depictions of such conduct. CABR 1034.¹ Both crimes are class B felonies. *Id.* The Court sentenced Dr. Besola to 35 months in prison, followed by 36 months of community custody. *Id.* The Court ordered that Dr. Besola be prohibited from having any contact with minors during his term of community custody and required that he obtain a psychosexual evaluation, comply with any treatment recommendations from the evaluation, and register as a sex offender. *Id.* Dr. Besola appealed his criminal convictions. CABR 41.

¹ The Administrative Record is located at Clerk's Papers Sub. No. 20. As required by the clerk of the court in this matter, the Administrative Record will be referred to as "CABR" followed by the page in the record being referenced.

This Court affirmed Dr. Besola's two criminal convictions.² Dr. Besola petitioned for review before the Washington Supreme Court, which granted limited review as to the search warrant and "to convict" instructions. *See* Appellant's Supplemental Statement of Authorities dated November 6, 2014.

B. The Board of Veterinary Governors

Under RCW 18.92 and RCW 18.130, the Board is charged with the regulation and discipline of the veterinary profession. This grant of authority includes a directive to oversee the practice of veterinary medicine, including investigating and prosecuting acts of unprofessional conduct under the Uniform Disciplinary Act (UDA), RCW 18.130. RCW 18.92.030, .046. The UDA defines the acts that constitute unprofessional conduct by healthcare professionals, including veterinarians. RCW 18.130.040(2)(b)(xiv).

The Board is composed of seven members—five licensed veterinarians, one licensed veterinary technician, and one public member. RCW 18.92.021(1). All disciplinary and investigative actions of the Board are subject to the UDA. RCW 18.92.046; RCW 18.130.050.

² CP at 220-265. (*State v. Besola*, noted at 181 Wn. App. 1013 (2014) (unpublished)). The Clerk's Papers will be referred to as "CP" followed by the page number being referenced.

Complaints of unprofessional conduct by veterinarians are received and investigated by Board investigators. RCW 18.130.080. Complaints are reviewed and approved for investigation by a panel of the Board's members. RCW 18.130.080(2); RCW 18.130.050(2), (18). Following investigation, if the panel determines that there is reason to believe misconduct has occurred, a Statement of Charges is filed and served on the respondent veterinarian. RCW 18.130.090. The charged veterinarian is entitled to a hearing conducted pursuant to the Administrative Procedure Act (APA), RCW 34.05. RCW 18.130.100.

C. The Board's Administrative Proceedings in This Case

In September 2012, after the Board became aware of Dr. Besola's criminal convictions, it issued a Statement of Charges against Dr. Besola. CABR 3-5. The Board charged him with unprofessional conduct for alleged violations of RCW 18.130.180(1)³ and RCW 18.130.180(17).⁴ *Id.*

³ RCW 18.130.180(1) defines unprofessional conduct to include the following:

"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. . . .

⁴ RCW 18.130.180(17) defines unprofessional conduct to include "[c]onviction of any gross misdemeanor or felony relating to the practice of the person's profession. . . .

Dr. Besola requested a hearing, and the Board held a full evidentiary hearing in June 2013. CABR 1032. The panel of the Board that heard Dr. Besola's case was comprised of three licensed veterinarians. *Id.* At the hearing, the Board received and reviewed nine exhibits (CABR 1047-1102), and heard the testimony of Detective Kevin Johnson, Pierce County Sheriff's Office (CABR 1139-1151), and expert witness Jerry Pospisil, a licensed veterinarian (CABR 1151-1157). Dr. Besola testified on his own behalf (CABR 1201-1209) and presented the testimony of his sister, Amelia Besola, a licensed veterinarian (CABR 1189-1201), and psychologist Christmas Covell, Ph.D. (CABR 1158-1188).

The Board subsequently concluded that Dr. Besola committed unprofessional conduct as defined in RCW 18.130.180(1) and (17). CABR 1032-43. When considering the question of whether possessing and dealing in child pornography rises to the level of moral turpitude, the Board relied on the Washington Supreme Court's decisions in *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991), and *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958), to conclude 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 professionalism of veterinarians is diminished when a veterinarian is

guilty of possessing child pornography and dealing in child pornography.” CABR 1037-38. Based on these findings and conclusions, the Board indefinitely suspended Dr. Besola’s license and required that, prior to seeking reinstatement of his license, he provide satisfactory proof that he completed all prison and community custody requirements related to his criminal convictions, as well as undergo a psychosexual evaluation. CABR 1041.

D. Judicial Review in Superior Court

Dr. Besola sought judicial review of the Board’s decision; he also moved for a stay of the Final Order, arguing the criminal convictions were likely to be overturned on appeal and his reputation would suffer irreparable damage because of the Board’s order. CP 1-78; CP 81-108.⁵ In opposition, the Board argued that Dr. Besola failed to satisfy RCW 34.05.550(3)’s requirements for a stay of a final agency order.⁶ CP 122-48. Without reference to RCW 34.05.550(3) or making any of the statutorily required findings, the superior court granted the stay and ordered Dr. Besola’s license immediately reinstated without restriction effective September 3, 2013. CP 109-11. The Board sought reconsideration of the stay, based on the superior court’s failure to comply

⁶ The text of RCW 34.05.550(3) is provided below at page 27.

with RCW 34.05.550(3). CP 164-78. The superior court denied reconsideration without applying RCW 34.05.550(3) or making any of the statutorily required findings. CP 215-16.

The case was briefed and argued to the superior court on the merits of the Board's order. While the superior court's ruling on the judicial review was pending, the Board moved to lift the stay, based on this Court's decision affirming Dr. Besola's criminal convictions. CP 266-70. On September 12, 2014, the superior court issued orders lifting the stay and upholding the Board's Final Order. CP 113-15.

E. Appeal To This Court

Dr. Besola filed a timely appeal. CP 117-21. The Board timely filed its notice of cross-appeal, seeking review of the superior court decisions that stayed the Board's decision and denied reconsideration on the stay.

1. Dr. Besola's Motion For A Stay

A few days after filing his notice of appeal, Dr. Besola asked this Court to stay the Board's Final Order, which the Board opposed. On October 28, 2014, the Commissioner denied Dr. Besola's motion for a stay, ruling that he fails to satisfy the criteria for a stay under RCW 34.05.550(3). On November 5, 2014, Dr. Besola filed a motion to modify the Commissioner's ruling, which the Board opposed. That

motion appears to have been denied by the Chief Judge on January 26, 2015.

2. Dr. Besola's Motion To Strike The Board's Cross-Appeal

On October 15, 2014, Dr. Besola filed a motion to strike the Board's cross-appeal. That motion has been referred to the Court.

V. SUMMARY OF ARGUMENT

A conviction for possessing and distributing child pornography is a proper basis for suspending a veterinarian's license because this type of conviction relates to his practice under RCW 18.130.180(1) and (17). As such, the Board properly took action against Dr. Besola's license. The Board's Final Order is supported by substantial evidence in the administrative record, which the Board properly relied upon in making its decision, along with its own experience, competency, and specialized knowledge. The Court therefore should affirm the Board's Order and deny Dr. Besola attorney fees and costs under the Equal Access to Justice Act (EAJA), RCW 4.84.350.

On the cross-appeal issue, RCW 34.05.550(3) requires both that a party requesting a stay of the Board's orders make a showing and that the reviewing court make findings addressing each of the four criteria listed in RCW 34.05.550(3). When the superior court—not just once in this case,

but again on reconsideration—fails to do so, the stay should be set aside. Because that error is capable of repetition, this Court should find that the superior court erred in ordering the stay and hold that the superior court must find each of the four criteria under RCW 34.05.550(3) before a stay is ordered.

VI. ARGUMENT

A. Standard of Review Under The Administrative Procedure Act

The Court's review of the Board's Final Order is governed by the Administrative Procedure Act (APA), RCW 34.05. RCW 18.130.140; RCW 34.05.510. This Court sits in the same position as the superior court when reviewing the Board's decision. *Slayton v. Dep't of Soc. & Health Servs.*, 159 Wn. App. 121, 128, 244 P.3d 997, 1000 (2010).⁷

A party challenging the validity of an agency action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Lang v. Dep't of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007), *rev. denied*, 162 Wn.2d 1021 (2008). A reviewing court may reverse only if the person challenging the agency order establishes that the order is invalid for one of the reasons specifically enumerated in

⁷ While Dr. Besola's argument is phrased as an appeal of the superior court's order, substantively, it is the Board's Final Order—not the superior court's order affirming the Board's findings and conclusions—for which he is seeking review.

RCW 34.05.570(3). *Brown v. State Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 11, 972 P.2d 101 (1998), *rev. denied*, 138 Wn.2d 1010 (1999). Here, Dr. Besola argues that the Board has erroneously interpreted or applied the law and that its Final Order is not supported by evidence that is substantial when viewed in light of the whole record before the court, thereby invoking RCW 34.05.570(3)(d), (e). Aplt's Br. at 8.

1. Conclusions of Law are Reviewed *De Novo*

The Court reviews the Board's legal conclusions *de novo* under an error of law standard. *Haley*, 117 Wn.2d at 728, *Lang*, 138 Wn. App. at 243. Under that standard, courts grant substantial weight to an agency's interpretations of the statutes and rules it administers. *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); *Lang*, 138 Wn. App. at 243.

2. Findings of Fact Are Reviewed Under The Substantial Evidence Standard

The Board's findings of fact must be upheld if they are supported by substantial evidence in the record. RCW 34.05.570(3)(e). This standard is satisfied if the record contains evidence in sufficient amount to

persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *amended*, 909 P.2d 1294 (1996), *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994). The substantial evidence test is highly deferential to the administrative fact-finder: the same deference is afforded to the Board's factual findings as an appellate court would afford to a superior court's factual findings. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005) (*citing King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000), and *Snohomish County v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84 (1991)). Whether conduct is unacceptable in a particular profession is a question of fact. *Heinmiller*, 127 Wn.2d at 805; *Johnson v. Dep't of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006). Unchallenged findings are treated as verities on appeal. *Fuller v. Dep't of Empl. Sec.*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988), *review denied*, 113 Wn.2d 1005 (1989).

B. The Board Applied the Correct Legal Standard From *Haley v. Medical Disciplinary Board* to Determine Whether Dr. Besola's Conduct and Convictions Are Related to the Practice of Veterinary Medicine

The Board concluded that Dr. Besola's conduct and resulting convictions were related to the practice of his profession because they lowered the standing of the profession in the eyes of the public. CABR 1038. Such conduct is related to the practice of the profession because it affects the ability of all members of the profession to discharge their duties to protect the public health. *Haley*, 117 Wn.2d 720. In *Haley*, the Supreme Court upheld discipline of a physician on grounds of moral turpitude for engaging in sex with an underage, former patient. *Id.* The *Haley* Court based its analysis in part on *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958), in which the Supreme Court upheld discipline of a physician for tax evasion, explaining that discipline is taken for two purposes: to protect the public, and to protect the standing of the medical profession in the eyes of the public. *Haley*, 117 Wn.2d at 732 (citing *Kindschi*, 52 Wn.2d at 11, and *In re McGrath*, 98 Wn.2d 337, 655 P.2d 232 (1982) (identifying similar purposes in regard to disciplining attorneys)).

Dr. Besola argues that *Haley* should be read to apply exclusively to physicians and that no other health care provider is critical to maintaining

public health. Aplt’s Br. at 16. Dr. Besola misreads *Haley*. Citing *Kindschi*, the Supreme Court explained the need to take a “broad view of the required relationship between the improper conduct and the practice of the profession” when applying RCW 18.130.180(1).⁸ *Haley*, 117 Wn.2d at 731. Acts of moral turpitude under RCW 18.130.180(1) “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.” *Id.* at 733 (citing *Kindschi* and *Standow v. Spokane*, 88 Wn.2d 624, 564 P.2d 1145 (1977) (upholding a city council’s denial of a taxicab license to an applicant because his prior convictions for larceny and burglary were sufficiently related to the profession), *appeal dismissed*, 434 U.S. 992, 98 S. Ct. 626, 54 L. Ed. 2d 487 (1977)). The Court in *Haley* held that “[i]n the context of medical disciplinary proceedings,” 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.” *Id.* But the Court’s focus

⁸ The Supreme Court’s analysis in *Kindschi* and *Haley* of conduct related to the practice of the profession under RCW 18.130.180(1) is equally applicable to an analysis of a conviction related to the practice of the profession under RCW 18.130.180(17), particularly where the conduct at issue is identical under both (1) and (17).

on construing RCW 18.130.180(1) and its reliance on cases not involving physicians demonstrate that its analysis is not limited to physicians.

Accordingly, under RCW 18.130.180(1), misconduct that lowers the standing of a particular profession is related to the practice of that profession when its members rely on the trust of the public. This is particularly true for professions where the public is placed under the control of the professional for treatment or care, or where the professional acts as a fiduciary to the public. And ultimately it is the professional disciplinary body's ability to discipline its members for the conduct it deems unprofessional that mitigates the damage to the profession's standing in the eyes of the public. *E.g., In re Little*, 40 Wn.2d 421, 431, 244 P.2d 255 (1952) (The final adjudication in attorney discipline "should provide neither more nor less than the facts fairly require to penalize the offender, deter others, and indicate to laymen and members of the bar that proper discipline will be enforced and the standards of the profession maintained.")

Public trust in health care professionals has long been seen as an essential reason for professional disciplinary proceedings. As noted above, the two principal reasons for health care disciplinary actions, to protect the public health and to protect the standing of the healthcare profession in the eyes of the public, were recognized in 1958 by the

Kindschi Court. There, the Court confronted the appeal of a physician who had been disciplined by the newly established medical disciplinary board for two felony convictions not directly connected to his treatment and care as a medical doctor—he was disciplined for willful and fraudulent tax evasion. *Kindschi*, 52 Wn.2d at 10. That board found Dr. Kindschi had committed unprofessional conduct and moral turpitude related to the practice of his profession based on his fraudulent conduct and felony convictions for tax evasion. *Id.* at 9.

The Supreme Court affirmed, concluding that Dr. Kindschi's felonies necessarily constituted moral turpitude because he engaged in fraud to commit his tax evasion. Drawing upon case law from attorney discipline, the Court determined that a medical disciplinary hearing is action taken "in order to maintain sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public." *Kindschi*, 52 Wn.2d at 11 (citing *Little*, 40 Wn.2d at 431). The Court went on to state that there was "a rational connection between income tax fraud and one's fitness of character or trustworthiness to practice medicine" such that the medical board had proper grounds to revoke his license. *Id.* at 12.

Our Supreme Court reaffirmed the principle that conduct which lowers the standing of the profession necessarily relates to the practice of

the profession in *Haley*, 117 Wn.2d 720. The Court said the primary concern regarding discipline for an act of moral turpitude, RCW 18.130.180(1), was the “relationship between the practice of the profession and the conduct alleged to be unprofessional.” *Id.* at 731. The Court construed the “related to” requirement in the provision to mean “that the conduct must indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession.” *Id.*

Because the *Haley* Court was responding to conduct by a physician, it was interpreting a statute applicable to health professions generally and did not limit its analysis to physicians. Indeed, it discussed attorneys and taxicab licensees when interpreting RCW 18.130.180’s *related to* language. *Haley*, 117 Wn.2d at 733 (citing *Schwartz v. Bd. Of Bar Examiners*, 353 U.S. 232, 239 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) (attorneys); *Lupert v. California State Bar*, 761 F.2d 1325, 1327–28 (9th Cir.), (attorneys) *appeal dismissed*, 474 U.S. 916, 106 S. Ct. 241, 88 L. Ed. 2d 251 (1985); *Standow*, 88 Wn.2d at 638 (taxicab licenses)).

Further, there is no principled basis to accept Dr. Besola’s suggestion that only physicians are “critical to maintaining public health.” *See* Aplt. Br. at 16-17. His suggestion would exclude every other health care profession governed by the very same provision in the Uniform Disciplinary Act—including psychologists, osteopathic physicians,

dentists, chiropractors, and nurses, as well as veterinarians. Not only are practitioners in each of those professions subject to the UDA, RCW 18.130.140, but Dr. Besola's suggestion rests on the unsupported and unsupportable premises that none of those health care professions are important to maintaining public health, and that only physicians require public trust and confidence to appropriately discharge their professional duties. Neither premise is consistent with the Supreme Court's analysis conducted under *Kindschi* and *Haley*. This interpretation is consistent with other jurisdictions. See *Sedivy, D.V.M. v. State of Nebraska ex rel. Don Stenberg, Attorney General*, 567 N.W.2d 784 (1997) (upholding veterinarian discipline for conviction for tax evasion); *Thorpe v. Board of Examiners*, 104 Cal. App.3d 111 (1980) (upholding veterinarian discipline for crimes of moral turpitude involving the illegal smuggling of marijuana and mail fraud).

Dr. Besola compares the facts of his case to this Court's decision concerning a professional engineer who was disciplined under a different statute and *based solely* on ten-year-old criminal convictions for first degree child molestation. Aplt's Br. at 17 (*citing Ritter v. State, Bd. of Registration for Professional Engineers & Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011), *rev. denied*, 172 Wn.2d 1016 (2011)). He argues that the practice of veterinary medicine is more like the practice of

professional engineering than it is to other healthcare professions, such as physicians, and that the facts of his case are more like the facts of *Ritter* than *Haley* or *Kindschi*. *Id.*

His argument lacks merit. *Ritter* involved a professional engineer regulated under a different set of laws unrelated to public health, safety, or welfare—the Uniform Disciplinary Act for Businesses and Professions, chapter 18.235 RCW. In addition, the *Ritter* court distinguished *Haley* on the ground that engineers do not interact with the public in a manner like those who have fiduciary relationships of trust and integrity with the public—like physicians, attorneys or veterinarians—and who often interact with children:

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.

Ritter, 161 Wn. App. at 767.

The evidence in the administrative record shows that veterinarians with practices like Dr. Besola’s regularly interact and conduct their

business in the presence of children. CABR 1154-55; 1191; *see also* Section VI.C, *infra*.

There are further factual differences. Unlike Dr. Besola, Ritter 1) was a professional engineer who committed the sex crimes ten years prior to the disciplinary proceedings against him, 2) admitted the conduct, 3) served his time, 4) sought treatment, and 5) had not reoffended during the intervening decade. In contrast, Dr. Besola sought no treatment, has not served his time, was recently convicted, and while he admitted his convictions, he denied the underlying conduct. CABR 1034-35.⁹

In his final argument, Dr. Besola wants this Court to apply *Ritter* because he asserts *Ritter* and *Haley* together articulate different “tests” for physicians versus all other professionals when determining whether a crime or conduct of moral turpitude relates to the practice of the profession at issue. Aplt. Br. at 19. Quite to the contrary, no such “test” is announced in either case. Rather, each case is based on careful reasoning concerning its respective facts and circumstances, including the profession involved and the statutory scheme that regulates the disciplined individual. *Ritter* does not stand for the proposition that lowering the standing of the

⁹ Under RCW 9.96.020(2), a person generally may not be denied a license to practice an occupation because of a felony conviction that is more than ten years old. That provision applies to licenses like Ritter’s, which are regulated under RCW 18.235.130, but it does not apply to licenses issued to health professionals regulated under RCW 18.130, like Dr. Besola. RCW 9.96.020(5).

engineering profession is an illegitimate basis for disciplining professional engineers. The *Ritter* court considered whether his conduct undermined the collective profession in the eyes of the public and simply concluded it had not. Thus, *Ritter* follows *Haley* and *Kindschi* in that discipline of professional engineers does serve to protect the public and maintain the standing of the profession. The key difference is that the *Ritter* court—unlike the Board at issue in this case—simply did not find a relationship between Ritter’s decade-old conduct and the elements necessary to protect the reputation of his profession.

In conclusion, Dr. Besola has not demonstrated that this Court should disregard the principles established in *Haley*, a case specifically interpreting RCW 18.130.180(1) and applying it to a licensed health professional, and instead apply *Ritter*, a case involving a professional engineer and a different disciplinary statute. The Board applied the proper legal standard when it relied on the Supreme Court’s decision in *Haley*.

C. Applying the Analysis in *Haley*, the Board Found That Dr. Besola’s Criminal Conduct and Convictions Are Related to the Practice of Veterinary Medicine, and the Board’s Findings Are Supported by Substantial Evidence

Dr. Besola asserts that the Board’s Final Order incorrectly concluded that he had violated RCW 18.130.180(1) and (17) without sufficiently establishing that the conduct underlying those convictions was

related to practice of his profession. Aplt. Br. at 8. His assertion, however, is undermined by the Board’s explicit application of the analysis in *Haley* to Dr. Besola’s conviction for conduct of possessing and dealing child pornography. Two findings are especially relevant. After summarizing the analysis in *Haley*, the Board explicitly found 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 (Conclusion of Law 2.8). The Board specifically disagreed with Dr. Besola’s contention that his convictions are not related to the practice of veterinary medicine: “The Board applies the same *Haley* analysis, discussed above, to the Respondent’s actual convictions and determines that both the conduct the convictions describe, and the convictions themselves, are related to the practice of the profession.” CABR 1039 (Conclusion of Law 2.11).¹⁰

¹⁰ Dr. Besola does not challenge the Board’s conclusion that his possession and distribution of child pornography constitutes moral turpitude under RCW 18.130.180(1). That conclusion is consistent with case law holding that such conduct involves and supports the sexual exploitation of children. *See, e.g., State v. Luther*, 157 Wn.2d 63, 74, 134 P.3d 205 (2006); *State v. Ehli*, 115 Wn. App. 556, 560, 62 P.3d 929 (2003). Therefore, the fact of Dr. Besola’s convictions and the evidence of the conduct they describe support the findings of the Board. The nature of the conduct—the sexual exploitation of children—is by itself supportive of the finding of moral turpitude related to the practice of veterinary medicine.

Dr. Besola argues that the Board relied entirely upon the testimony of its expert witness, Dr. Pospisil, who testified that “children do come to veterinary clinics along with their families.” CABR 1033; Aplt. Br. at 11. His argument is incorrect. The Board also used its own experience, competency, and specialized knowledge to evaluate the evidence. CABR 1036. It is expressly permitted to rely on own experience, technical competency, and specialized knowledge when evaluating the evidence presented at hearing. RCW 34.05.461(5). Accordingly, it is not insignificant that this matter was not tried to a lay jury. It was instead tried to a panel of Dr. Besola’s peers who practice the same profession and who have been charged by the Legislature with the duty to oversee and regulate the practice of veterinary medicine in this state. The Board properly concluded that Dr. Besola’s criminal convictions and the conduct they describe are related to the practice of the profession. RCW 34.05.461(5).

Substantial evidence was introduced at the hearing that Dr. Besola would, if allowed to practice, most certainly come into contact with minors. CABR 1033. The expert witness, Dr. Pospisil, a licensed veterinarian since 1966, testified about the nature of a small animal practice, like Dr. Besola’s practice with his sister, and how frequently children are present in the clinic. He testified that, in his experience,

approximately 60-70% of small animals that are treated in such clinics are from families with children. CABR 1154. He further testified that it was not unusual for the children to come to a clinic with the pet and the parents, particularly when school is out. He said that it was “very likely” that a veterinarian who works in a small animal clinic would have at least incidental contact with children. CABR 1154-55. Second, Dr. Besola’s sister, Amelia Besola, a veterinarian, testified that children sometimes come into the clinic with their parents. CABR 1191. Third, the Board panel that heard this matter included three veterinarians. As the presiding officer indicated during the hearing in response to Dr. Besola’s objection to the opinions of the expert witness, “the panel is considered to be, in essence, a panel of experts and they have their own expertise that they can decide what weight to give his opinion.” CABR 1153. The Board used “its experience, competency, and specialized knowledge to evaluate the evidence.” CABR 1036.

Dr. Besola attacks the Board’s credibility determinations, arguing that it erred by relying on the testimony of Dr. Pospisil, DVM, over that of Christmas Covell, a sex offender treatment provider, Dr. Besola’s sister, Amelia Besola, DVM, and his own testimony, to find that his unprofessional conduct was related to the practice of his profession. Aplt. Br. at 11-12. In health licensing disciplinary hearings, a Board or

Commission is “the fact-finder, entitled to weigh the credibility of each witness and determine the weight to give to each opinion, if any.” *Ancier v. Dep’t of Health*, 140 Wn. App. 564, 575, 166 P.3d 899 (2007). A reviewing court gives particularly great weight to findings when credibility and veracity of witnesses are at issue. *In re Discipline of Burtch*, 162 Wn.2d 873, 888, 175 P.3d 1070 (2008). Here, the Board is entitled to deference as it determined the truth from conflicting evidence and gave varying weight to witness testimony. As the fact-finder, the Board may give the testimony of any witness such weight and credence as it believes the evidence warrants. *Segall v. Ben’s Truck Parts, Inc.*, 5 Wn. App. 482, 488 P.2d 790 (1971). Credibility does not depend on the number of witnesses. In fact, a single witness may be sufficient to present evidence upon which a legally sufficient verdict may be entered. *Segall*, 5 Wn. App. at 483.

Dr. Besola appears to suggest that the crimes must have been committed at the site of his veterinary practice to fulfill the “related to the practice of the profession” requirement. Aplt. Br. at 19-20. Again, Dr. Besola’s argument must fail. Washington courts have long held that some criminal convictions are, by their very nature, sufficient to preclude a practitioner’s fitness to practice on the grounds of moral turpitude. See *Kindschi*, 52 Wn.2d at 13 (“[w]e hold that the issue of fraud (moral

turpitude) was determined conclusively by his plea of guilty to the crime as charged”); *Haley*, 117 Wn.2d at 733 (the acts “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.”). Consistent with *Kindschi*, *Haley*, and the Board’s findings, nothing further needed to be proved to support the finding that Dr. Besola’s convictions are related to the practice of the profession.¹¹

In sum, there was sufficient evidence to support the Board’s findings.

D. The Superior Court Erred When It Stayed the Board’s Final Order, Reinstated Dr. Besola’s License, and Denied Reconsideration

The granting of a stay of an order that affects the public health, safety, and welfare is an extraordinary remedy, governed by RCW 34.05.550(3). It is a remedy that should be granted only in rare circumstances, and only after 1) the applicant seeking the stay has made the required showing under each of the four criteria in RCW 34.05.550(3), and (2) the reviewing court has made findings that the applicant has

¹¹ In his opening brief, Dr. Besola notes that one of the videos police found at his residence displayed bestiality. The Board found it unnecessary “to consider the video of the young woman engaged in bestiality that was found in [Dr. Besola’s] bedroom. While the concept that a veterinarian might possess bestiality videos is deeply disturbing, the possession of child pornography is sufficient in and of itself for a finding of unprofessional conduct. No additional evidence is necessary to meet the ‘relatedness’ requirement of RCW 18.130.180(1).” CABR 1038 at footnote 2.

satisfied each of the four criteria. The superior court erred when it granted Dr. Besola a stay without the required showing or findings. This Court should reverse the superior court stay as of the date it was issued and further clarify the requirements to be considered when reviewing a stay application under RCW 34.05.550(3).

RCW 34.05.550(3) provides:

If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court *shall not grant such relief unless the court finds that:*

- (a) The applicant is likely to prevail when the court finally disposes of the matter;
- (b) Without relief the applicant will suffer irreparable injury;
- (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

(Emphasis added.) In his stay request, Dr. Besola failed to provide any basis on which the superior court could find that he satisfied all four of the statute's required criteria. In fact, his motion failed even to address two of the four required criteria, namely that the Board would not be harmed by a stay, and that the Board's order was not justified by danger to the public.

CP 1-6. For the same reasons articulated by this Court's Commissioner's ruling on October 28, 2014, that denied him a stay, Dr. Besola could not satisfy the statutory criteria for a stay in the superior court. However, unlike the Commissioner's ruling, the superior court did not articulate any findings supporting the decision to grant the extraordinary relief of a stay of the Board's order.

The superior court reinstated Dr. Besola's license to practice veterinary medicine, allowing him to continue to practice for over one year, between September 3, 2013, and September 12, 2014. That decision directly supplanted the Board's Final Order and, without satisfying the statutory predicate, usurped the Board's legislatively granted authority to regulate the veterinary profession under its jurisdiction—authority that includes establishing, monitoring and enforcing qualifications for licensure as a veterinarian. RCW 18.92.010-.260. "Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority," including the Board of Veterinary Governors. RCW 18.130.160. The ability of boards and commissions regulating the health care profession to protect public health, safety, and welfare is compromised if their final orders grounded in substantial evidence and reasoned conclusions are stayed without the showing and findings required in RCW 34.05.550(3).

By failing to follow the requirements of RCW 34.05.550(3), the superior court deprived the public and the veterinary profession of the benefit of the Board's decision to indefinitely suspend Dr. Besola, in essence, putting the public at risk. That the superior court eventually affirmed the Board's decision and reinstated Dr. Besola's indefinite suspension does not negate the harm caused by the improper stay.

Dr. Besola likely will argue that any issue regarding the stay is moot because the stay has been lifted. Even if he is correct, an issue that is technically moot nevertheless is appropriate for this Court to consider when, as in this case, the issue involves matters of substantial public interest and there is a high likelihood that the issue will recur. *In re Det. of R.W.*, 98 Wn. App. 140, 143, 988 P.2d 1034, 1036-37 (1999) (citing *In re Detention of McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)).¹²

Dr. Besola was required to demonstrate a likelihood he would prevail on the merits. RCW 34.05.550(3)(a). He did not prevail on the

¹² Dr. Besola argues that the Board could have appealed this issue as soon as the stay was issued. As a factual matter, the Board did not seek discretionary review of the superior court's interlocutory order because it anticipated a more rapid response from the superior court in responding to the Board's motion for reconsideration of its stay order and issuing its judgment upholding the Board's Final Order. The Board had no reason to expect more than a year to elapse before the superior court's final judgment.

Moreover, doing so would have led to a disfavored piecemeal judicial review. See *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001), *rev. granted* 145 Wn.2d 1001, 35 P.3d 381, *remanded* 146 Wn.2d 370, 46 P.3d 789, *cert. denied* 540 U.S. 1149, 124 S. Ct. 1147, 157 L. Ed. 2d 1043, *reh. denied* 124 S. Ct. 1708, 541 U.S. 957, 158 L. Ed. 2d 394 (2004). Addressing this issue at this time in a single appellate review is preferred. *Id.*

merits. The superior court made no finding that he was likely to prevail on the merits.

Dr. Besola was required to demonstrate that he would suffer irreparable injury unless a stay was ordered. RCW 34.05.550(3)(b). He alleged that the Board's Final Order deprived him of his property interest in his license and tarnished his reputation as a veterinarian. That allegation does not demonstrate irreparable injury. Dr. Besola's interest in his license was sufficiently protected by the Board's adherence to the due process protections provided in RCW 34.05 and RCW 18.130, consistent with the evidentiary standard set out in *Nguyen v. State, Dep't of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002), as limited by *Hardee v. State, Dep't of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). He asserted irreparable injury due to a projected loss of income during the time period that he could not work as a veterinarian. A loss of income, however, does not constitute an irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 952-53 (1974) (mere injury by temporary loss of income in the absence of a stay does not constitute irreparable injury). The Board's Order does not prevent him from pursuing other employment during his suspension from the practice of veterinary medicine. Additionally, at the conclusion of his suspension and

completion of all applicable conditions, he can apply for reinstatement. Dr. Besola failed to demonstrate that he would suffer irreparable injury unless a stay was ordered, and the superior court made no finding that he would suffer such an injury without a stay.

Dr. Besola was required to demonstrate that a stay would not substantially harm the other party to the proceeding—the Board. RCW 34.05.550(3)(b). Staying the Board’s order harmed the Board by frustrating its ability to carry out its core mission of protecting the public and the reputation of the profession.¹³ Arguably, it could have further harmed the public if Dr. Besola was permitted to practice, and he subsequently harmed a patient or a child with which he came into contact through his veterinary work. Dr. Besola offered no argument to the contrary, and the superior court made no finding that a stay would not substantially harm the Board.

Finally, Dr. Besola was required to show that the threat to the public health, safety, or welfare was not sufficiently serious to justify the Board’s decision. He offered no argument in support of this element. When the Board determined that Dr. Besola committed unprofessional conduct, it first considered what sanctions were necessary to protect or

¹³ “Safeguarding the public’s health and safety is the paramount responsibility of every disciplining authority.” RCW 18.130.160.

compensate the public; only after doing so did the Board consider the rehabilitation of Dr. Besola. RCW 18.130.160; CABR 1040. The Board also had discretion to stay its own Final Order from becoming effective so long as the public health and safety was not compromised. RCW 34.05.550(1), 18.130.130. Here, the Board determined in its order that an indefinite license suspension was necessary to ensure protection of the public until Dr. Besola could demonstrate to the Board that he is sufficiently rehabilitated to practice safely. CABR 1041. The Board concluded that immediate and indefinite suspension was necessary, but it did not conclude that revocation was warranted, because no evidence was presented that Dr. Besola could never be rehabilitated. CABR 1039-1040. The Board did not stay the Final Order or allow him to continue to practice while being rehabilitated, or, during his appeal of his criminal convictions.

In considering the appropriate sanctions, the Board also found that children visit Dr. Besola's practice and concluded that his conduct undermined public trust in the profession. CABR 1033 at 1.2; 1038 at 2.8; 1039 at 2.11. The Board found numerous aggravators and only one mitigating circumstance. CABR 1040. Similarly, the criminal court found his conduct serious enough to sentence him to 35 months in prison plus 36 months of community custody, during which he is forbidden to

have contact with minor children, and to register as a sex offender. CABR 1034 at 1.4. These findings and conclusions demonstrated that the threat to the public health, safety, and welfare was sufficiently serious to justify the agency's action in the circumstances. Dr. Besola made no arguments to the contrary, and the superior court made no finding that the Board's order was not justified by danger to the public.

In sum, the superior court lacked any basis to grant the stay, and failed to articulate any of the findings required under RCW 34.05.550(3) necessary to grant the stay. The plain language of the statute prohibits the superior court from granting a stay unless the court found that Dr. Besola met each of the four required criteria: “[i]f judicial relief is sought for a stay from agency action based on public health, safety, or welfare grounds the court *shall not* grant such relief unless the court finds that...” (Emphasis added.)

This Court should hold that the superior court erred in granting Dr. Besola a stay of the Board's Final Order, and that the superior court also erred in failing to correct its error in response to the Board's Motion for Reconsideration. The Court should clarify that the requirements for granting a stay under RCW 34.05.550(3) are mandatory and they require the requesting party to make a showing, and the reviewing court to make findings, under each of RCW 34.05.550(3)'s four criteria before an

agency's final order based on public health, safety, or welfare grounds can be stayed.

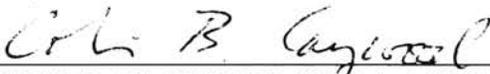
E. Costs And Attorney Fees Are Not Warranted Under RCW 4.84.350 Because The Board's Action Was Reasonable And Substantially Justified

This Court should affirm the Board's Final Order; if it does so Dr. Besola will not be entitled to any costs or fees. Even if he were to prevail on appeal, Dr. Besola is not entitled to costs and attorney fees under the Equal Access to Justice Act, RCW 4.84, because the Board's action was reasonable and substantially justified. Under the Act, an award of attorney fees and costs is not to be awarded if the court finds the agency action was substantially justified. RCW 4.84.350(1). An action is substantially justified if there is a reasonable basis in law and fact for having taken the position. *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891, 904 (2007) (quoting *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 420, 97 P.3d 17 (2004)). The agency's actions need not be perfect or correct, only reasonable. If this Court were to conclude that the Board's action was incorrect and not based upon sufficient evidence, such a conclusion is not a determination that the Commission's decision was unreasonable. Dr. Besola's request for fees and costs should be denied.

VII. CONCLUSION

Dr. Besola committed unprofessional conduct when he engaged in the conduct for which he was convicted for possessing and dealing child pornography. The Board of Veterinary Governors properly determined that his criminal conduct and subsequent convictions lowered the veterinary profession's standing in the public's eyes and therefore are related to the practice of veterinary medicine under RCW 18.130.180. For the reasons set forth above, the Board's findings of fact are supported by substantial evidence in the administrative record, and the findings support the conclusions of law. This Court should affirm the Board's Final Order, find that the Board's action was substantially justified, and deny Dr. Besola's request for attorney fees and costs under the EAJA. Finally, the Court should issue a decision holding that a superior court must enter findings, supported by adequate showings, for each of the four criteria under RCW 34.05.550(3) before granting a stay of an agency's final order that is based on public health, safety, or welfare grounds.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.


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NO. 72495-9-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MARK L. BESOLA,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF HEALTH,
VETERINARY BOARD OF
GOVERNORS,

Respondent.

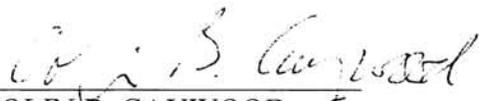
CERTIFICATE OF SERVICE

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I declare under penalty of perjury under the laws of the state of Washington that on January 30, 2015, I served a true and correct copy of the *Brief of Respondent/Cross-Appellant* and this *Certificate of Service* by placing same in the U.S. mail via state Consolidated Mail Service to:

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DATED this 30th day of January, 2015, at Seattle, Washington.


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