



Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter, and encourage your feedback. Feel free to forward our newsletter to your colleagues, and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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CLE – Federal Administrative Law

The Administrative Law Section and WSBA are co-sponsoring a continuing legal education program entitled **“Federal Administrative Law: Case Law, Current Issues, and Practice Pointers”** (approved for 6.25 general CLE credits for Washington attorneys).

When: Thursday, Sept. 15, 2011, 8:25 am - 4:30 pm
Where: WSBA CLE Conference Center
1501 Fourth Ave., Ste. 308, Seattle
Cost: \$225

The program is also available via simultaneous webcast, broadcast LIVE over the Internet.

This CLE program serves as a companion suite of presentations to last year’s Administrative Law Survey that focused on state and local administrative law issues. The common ground between these CLE programs is that neither state nor federal administrative law and procedure operate exclusive of each other. The upcoming program provides both an overview of recent developments that relate to all practitioners, and presentations that provide specific practice related information from top lawyers, educators, and judges. All presentations are intellectually engaging and will illuminate and broaden your professional perspective.

The program begins with an “Update on Federal Due Process Case Law” presented by Jeffrey Litwak, Columbia River Gorge Commission Counsel and Adjunct Professor at Lewis & Clark Law School, and is followed by a review of “Federal Case Law Developments Regarding Scope of Review Doctrines,” presented by Kathryn Watts, Associate Dean for Research and Faculty Development, and Assistant Professor of Law at University of Washington School of

Law. The morning session concludes with a compelling presentation by Seattle immigration lawyer Bonnie Stern Wasser entitled “Affirmative versus Defensive Asylum Practice and Procedures.” Asylum-seeking clients provide compelling stories and drama that are not often found in other areas of practice.

The afternoon session begins with two “nuts and bolts” presentations. Seattle attorney Dean Little and Gon-

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CLE Scholarship Available

The Administrative Law Section has one scholarship available to attend the WSBA Federal Administrative Law CLE on Sept. 15, 2011. The section will give priority to attorneys in government or non-profit practice or who are members of the Young Lawyers Division. The Section will also request that the recipient join the administrative law section (if not already a member), attend the annual meeting (which will be held immediately following the CLE program), and write a brief article about the conference for the Section’s next newsletter.

To apply, send a brief email to Jeff Litwak, Administrative Law Section Board of Trustees, *litwak@gorgecommission.org*, indicating your interest or practice in federal administrative law. **Application deadline is September 2, 2011.**

CLE – Federal Administrative Law *continued*

zaga School of Law Professor Dan Morrissey examine the “Limits on Civil Investigatory and Prosecutorial Discretion of Regulatory Agencies.” That presentation is followed by “Conflicts Between Duty to Report and Agency Access to Internal Investigations” featuring David Smith, Garvey Schubert Barer, Seattle, and Tim Crandell, Assistant Attorney General and Adjunct Professor, Seattle University and UW law schools. Those programs are followed by an overview and practice pointers related to “Individuals with Disabilities Education Act (IDEA) Proceedings” presented by Matt Wacker, Senior Administrative Law Judge, OAH. Last, but certainly not least, “A View from the Bench” features: Zulema Hinojos-Fall, ALJ – EEOC; Mattie Harvin-Woode, ALJ – SSA Office of Disability Adjudication & Review; and Mark Pouley, Chief Judge, Swinomish Tribal Court.

The Administrative Law Section will be hosting a catered reception immediately after the CLE concludes. Tuition for the program is \$225, and registration information is available online at wsbacle.org/seminars – seminar #11874.

Notice of Administrative Law Section Annual Meeting

We invite all of our members to attend our Annual Meeting on September 15, 2011, at 4:45 p.m., following the CLE at the WSBA-CLE Conference Center, 1501 4th Ave., Ste. 308, Seattle. Tasty snacks and beverages provided!

Public Service Committee – Grant Outcome

In 2009, the Public Service Committee granted \$5,000 to Access to Justice toward the drafting and publication of *Ensuring Equal Access for People with Disabilities: A Guide for Washington Administrative Proceedings*. A copy of that publication is now available online. Click ([here](#)) to take a look.

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The Administrative Law Section also welcomes other articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Merrilee Harrell (mharrell@rtwgc.com).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

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Message from the Section Chair – Kristal K. Wiitala

What Does (or Should) the Administrative Law Section Mean to You?

One thing I remember from the newsletters in the early years of my membership in the Section, back when they were scribed on stone tablets, was that there was typically one edition per year that would include a column by the incoming/outgoing Chair thanking people and vowing to send frequent communications. Then the next edition would be from the next chair, in the same vein. Well, in that noble tradition, here is my incoming and outgoing column for the year.

In July, your hard-working board members held a day-long board meeting, assiduously planned by Board Trustee Suzanne Mager. It was technically called a "retreat," but there was not much retreating or relaxing about it. We reviewed our activities and plunged forward with new plans for the upcoming year or so. One of the brilliant ideas was to have me write a column in the newsletter highlighting the benefits of membership in the Section, our accomplishments, and our plans for the future, starting with the fact that your membership remains a bargain at \$20 per year, and we do not plan to raise dues this year despite continuing increases in costs. In addition...

Keeping Up with the Law

A recent highlight is the resurgence of our awesome Section newsletter. Merrilee Harrell is the diligent editor, cracking the whip over her crew of writers to put forth professional and succinct reviews of recent administrative law cases. Merrilee is always looking for contributors, so you can volunteer and become a published author.

The Section also has a very active Legislative Committee under the leadership of Richard Potter. This past session, the committee reviewed a number of bills and provided technical input and expertise on administrative law matters. While the Section has not historically pushed forward its own legislation, the committee is on the lookout for legislative changes "for the good of the order" that can be supported as balanced or necessary technical improvements in the area of administrative law.

Providing Educational Opportunities and Resources

The Section has a long and storied history of presenting outstanding CLEs. We are fortunate to have as our new Chair Heidi Wachter, who has planned two presentations this fall, one on Federal Administrative Law (Sept. 15th) and another on public records and electronic records (Nov. 4th). Future CLEs in the works include mini-CLEs at no or low cost to members. These seminars offer our members a chance to receive high-quality training and to serve as presenters. Contact Heidi if you would like to become involved.

The Section has also produced two desk books, overseen by our Publications Committee, chaired by Marc Lampson. The *Administrative Law Practice Manual* has been published for many years and continues to be updated each year under the leadership of Larry Berg. Greg Overstreet edits the *Public Records Act Deskbook*, an unparalleled publication in this area of law, originally published in 2006 and with a significant supplement issued in late 2010.

Serving the Public

The Administrative Law Section firmly supports access to justice principles. In furtherance of that goal, we dedicate a significant part of our budget (this year \$3,000) to provide a grant that meets public-service objectives in the area of administrative law. Don Wittenberger, recently retired, led this effort for many years. Janell Stewart has since taken up the mantle. The recent grant application process resulted in seven applications, which are now being reviewed, with funds awarded in September.

The Section is also committed to promoting diversity. We have co-sponsored the Statewide Diversity Conference since its inception, and offer scholarships to this event to our members. Last year, we were also a co-sponsor of the Washington Women Lawyers annual dinner, in Spokane. Our Diversity and Outreach Committee is chaired by Melanie DeLeon. Ideas from our members for projects to support are always welcome.

Networking and Recognizing Achievements

In January, WSBA President Steve Toole and Washington State Attorney General Rob McKenna co-presented our annual Frank Homan award to the very deserving Jeff Goltz, chair of the UTC and former AAG. In June, our incomparable WYLD liaison Katy Hatfield planned a fun and well-attended networking event at The Mark in Olympia for WYLD attorneys and Section members. We were lucky to be able to spill out onto the patio at The Mark on one of the rare nice days this season.

Providing Continuity

On being persuaded to take this position, I knew I could not come close to achieving the success produced and maintained by outgoing Chair John Gray. He is a truly amazing yet gentle force, inspiring and encouraging, and continues to be an outstanding resource to the Section. The Section is also extremely fortunate to have Anthony Broadman, a renowned expert in tribal law, coming on board to serve as chair in the 2011-12 term. He has already accomplished a great deal for the Section, and has drafted

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Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and would like to contribute a summary (approx. 250 – 500 words), please contact Merrilee Harrell: mharrell@rtwgc.com.

Case Summaries – Washington Supreme Court

Procedural Due Process – Two Recent Decisions

This summer, the Washington Supreme Court decided two procedural due process cases involving administrative hearings. In *Bellevue School Dist. v. E.S.*, the Court determined that due process under the Fourteenth Amendment to the U.S. Constitution and article I, section 3 of the Washington Constitution does not require appointment of counsel to represent a child at an initial truancy hearing. In *Hardee v. DSHS*, the Court concluded that due process under the U.S. Constitution requires only a “preponderance of the evidence” to revoke a home child-care license.

***Bellevue School Dist. v. E.S.*, No. 83024-0, (June 9, 2011)**

Bellevue School Dist. essentially considered the constitutionality of RCW 28A.225.035(10), which states, “The court may permit the first (truancy) hearing to be held without requiring that either party be represented by legal counsel.” The Court started its analysis with *Mathews v. Eldridge*, that familiar U.S. Supreme Court case which requires balancing the private interests affected by the official action, the risk of erroneous deprivation, and the government’s interest. E.S. claimed a physical liberty interest, a bodily privacy interest, and a right to education (a liberty interest), but the Court concluded that the initial truancy hearing did not affect any of these interests. Regarding the next *Mathews* factor, the risk of erroneous deprivation, the court noted that the issues before the court at an initial hearing on a

Message from the Section Chair *continued*

a chapter on Administrative Law in Washington State Indian Country to be added to the practice manual.

In short, I am proud to be a member of the Administrative Law Section and have found it to be one of the most important resources available to help me survive in my career in administrative law. Whether you are an administrative adjudicator, a public records officer, a rule writer, or a practitioner involved with any of the many federal, state, and local agencies, boards, or commissions, you practice administrative law, and I encourage you to join or renew, get involved, and support the work of the Section that serves and enhances that practice.

truancy petition are “uncomplicated and straightforward” and that E.S. had been able to explain to the juvenile court why she missed school; thus the added procedure of having counsel present would not have added procedural safeguards. Finally, the Court noted that providing counsel would increase the cost to the government and require additional administrative resources, which weigh against providing counsel.

The Court then considered factors set out in *State v. Gunwall*, 106 Wn.2d 54 (1986), to determine if due process under the Washington Constitution would be more protective than the federal constitution. E.S. argued three of the six *Gunwall* factors: consideration of preexisting state law, structural differences between the Washington and U.S. constitutions, and whether the matter is one of particular state or local concern. The Court held, as it typically does, that the structural difference between the Washington Constitution as a limit on state power and the U.S. Constitution as a grant of power supports an independent analysis, but rejected an independent analysis under the other factors.

Chief Justice Madsen wrote a short concurrence agreeing with the Court of Appeals discussion that counsel could facilitate better outcomes for students, families, and school districts, and urging the legislature to enact a statute to provide for counsel at initial truancy hearings, citing American Bar Association House of Delegates Recommendation 109A (Aug 9–10, 2010). But more interesting is the dissenting opinion by Justice Chambers, who wrote that the Washington Constitution places a unique emphasis on the right to education and the *Mathews v. Eldridge* balancing test is a valuable tool when determining what is required under Washington’s due process clause. This latter point is another page in this state’s long saga about when to import federal constitutional analysis into state constitutional analysis.

***Hardee v. DSHS*, No. 83728-7 (July 7, 2011)**

In *Hardee*, the Supreme Court concluded that a court should uphold the state’s decision to revoke a home child care license if the decision is supported by a preponderance of the evidence, expressly overruling *Ongom v. Dep’t of Health*, 159 Wn.2d 132 (2006), which had held that due

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Case Summaries – Washington Supreme Court *continued*

process under the U.S. Constitution requires “clear and convincing evidence.” RCW 43.215.300(2) (enacted in 2006) provides that an ALJ must uphold a decision by the department to revoke a home child care license if a preponderance of the evidence supports the decision. Thus, if the court had concluded differently, it would have held this statute unconstitutional.

The Court started its analysis by noting that the U.S. Supreme Court has applied the clear and convincing standard to fundamental areas of human concern, such as commitment to a state mental hospital and termination of parental rights, but “rights of lesser significance” require only a preponderance of the evidence. The Court discussed several Court of Appeals decisions applying both standards. The Court next applied *Mathews v. Eldridge*, holding that the private interest in the license adheres to the facility, not the individual, and that an individual who loses a license may still work in the field under another’s supervision; there is nothing inadequate about the state’s procedures that make error readily foreseeable; and the state’s interest in protecting children is paramount. Following this, the Court addressed Hardee’s argument that *Nguyen v. Dep’t of Health Med. Quality Assurance Comm’n*, 144 Wn.2d 516 (2001), and *Ognom* both require the clear and convincing standard. In a lengthy discussion, the Court distinguished the medical license at issue in *Nguyen* from the home child care license and explained why *Ognom* misapplied the *Mathews v. Eldridge* factors.

Hardee raised her claims under both the U.S. and Washington constitutions, but she did not argue that the Washington Constitution provides greater protection or analyze the *Gunwall* factors, so this decision does not discuss due process under the Washington Constitution.

Jeffrey B. Litwak

Mellish v. Frog Mountain Pet Care, No. 84246-9 (July 28, 2011)

In a unanimous decision, the Washington State Supreme Court held that a motion for reconsideration filed with a county hearing examiner tolls the running of the 21-day time limit for filing a land use petition in superior court. Jefferson County granted Frog Mountain’s application for a conditional use permit and variance to expand its cat and dog boarding facility, over Martin Mellish’s opposition. Mellish moved for reconsideration, which the county denied. Mellish filed a land use petition under the Land Use Petition Act (LUPA) 20 days after receipt of the county’s denial of his motion for reconsideration, and 50 days after the hearing examiner’s entry of the decision granting Frog Mountain’s application. Before the Court reviewed the appellate court’s decision, the Legislature amended the LUPA to clarify that the 21-day time limit runs from the date

of entry of a local jurisdiction’s decision on a timely motion for reconsideration. The Court did not reach the issue of whether this amendment applies retroactively because it found that the pre-amendment version implicitly tolled the time limit pending a motion for reconsideration because a challenger may lack standing to petition under LUPA until he exhausts his administrative remedies by moving for reconsideration. The Court also cited the interest in judicial efficiency, which would be served by allowing a challenger to wait to file a land use petition until the local jurisdiction has entered judgment on a motion for reconsideration.

Gabriel Verdugo

Case Summaries – Washington Court of Appeals

Life Care Centers of America v. DSHS, No. 66660-6-1 (June 27, 2011)

Life Care and other nursing facilities appealed the superior court’s order affirming the DSHS Board of Appeals’ (Board) final order regarding the direct care Medicaid payment rate for Life Care, alleging that the Board erroneously interpreted or applied the law when determining the payment rate. DSHS administers the Medicaid program for Washington state. As part of that program, DSHS compensates nursing facilities for care they provide to residents who qualify for Medicaid. RCW 79.46 states the methodology by which DSHS determines how to allocate payments to the various facilities. Life Care argued that DSHS erroneously interpreted and applied the law when they calculated the “direct care component” rates that determined Life Care’s Medicaid payment rates.

DSHS determines a Medicaid payment rate for each nursing facility that is effective July 1 of the applicable year and runs through June 30 of the year specified in the statute. Medicaid payments are facility-specific and are based on a combination of seven components that are defined by statute. The “direct care component rate” is one of the seven components. It is adjusted annually for economic trends and other factors. Generally, the direct care component depends on three factors: the facility’s allowed costs, the complexity of the care required only by the facility’s Medicaid residents and the complexity of the care required by all of the facility’s residents. This latter factor was the cost disputed by Life Care.

The “complexity of care” requires an assessment of the facility’s resident’s nursing care needs. Based upon an individual assessment of need, each resident is classified into one of 44 groups. A numerical “case mix weight” is assigned to each of the groups. The case mix weights are based on an average number of nursing minutes required to meet each group’s nursing needs by registered nurses, licensed practical nurses and certified nurse aides and

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Case Summaries – Washington Court of Appeals *continued*

the average wage of these professions. RCW 74.46.496(2) (2006). Life Care challenged the wage costs in the case mix weights that DSHS used to calculate the direct care component of the Medicaid payment rate. The Court, after reviewing the calculations, held that DSHS used the correct cost data, that Life Care had failed to show that the Board erroneously interpreted or applied the law and affirmed the Board's order.

Melanie DeLeon

Franklin County Sheriff's Office v. Parmalee, No. 62938-7-1 (June 21, 2011) (published)

Parmalee v. King County Adult & Juvenile Detention, No. 62937-9 (June 27, 2011) (unpublished)

RCW 42.56.565, effective March 20, 2009, allows a court to consider whether incarcerated persons should be denied certain public records under the Public Records Act if the court finds a reasonable risk of institutional or personal damage to others exists. These decisions find injunctions proper with regard to this prisoner's requests.

Allan Parmalee was at relevant times an inmate in custody. The *King County* case describes Parmalee's history of crimes, PRA requests, threats and harassment, with examples including violating a court order not to retain personal information about jurors, threatening and harassment of correctional employees, and convictions for firebombing an auto of his ex-wife's counsel.

In *Franklin County*, the County successfully petitioned, for a permanent injunction against release of employment and personnel records, security operations records, photos, metadata, and identification numbers to Parmalee. The Superior Court set aside the ruling, granting a preliminary injunction and declining to consider Parmalee's incarceration status. The County appealed the trial court's refusal to consider Parmalee's status as an inmate in a complaint predating the law. The decision affirms the temporary injunction but allows consideration of inmate status. The Appellate Court observed that remedial and procedural statutes are often retroactive. Courts may apply amendments retroactively if the legislature acts during a controversy that the amendment is intended to cure or clarify. *West v. Thurston County*, 144 Wn.App. 573 (2008). Here, the law was intended to address this issue. Injunctive relief of the PRA (RCW 42.56.540) is inherently equitable and the status of the requestor is a unique concern that is intimately related to application of the law under §565. The Court distinguished between "agencies," to which the PRA applies, and courts, to which it does not, considered factors to apply in deciding requests for injunctive relief, and ruled that courts may consider the requestor's status in litigation on preexisting complaints.

In *King County*, Parmalee sought personal information about King County Sheriff Department employees and agency practices. The County sought an injunction against release of the data. Parmalee appealed the rejection of his counterclaim for violation of the PRA and his constitutional free speech rights. The Court granted a permanent injunction against release of certain personal information of employees. After the legislature enacted §565, the County moved in a separate docket for a permanent injunction against release of information during the remainder of Parmalee's incarceration. Parmalee filed a supplemental appeal to include the second injunction. The Court of Appeals found his constitutional and other arguments without merit and ruled that his actions fully supported an injunction under the recent statute.

Bob Wallis

Stewart v. DSHS, 252 P.3d 920 (June 7, 2011)

The Legislature carved out the functions relating to day care licensing from the Department of Social and Health Services in Laws of 2006, c. 265, and placed those functions in the new Department of Early Learning. On April 23, 2007, the Department revoked Joan Stewart's day care operator's after finding that her husband used marijuana in the family home before he received a doctor's recommendation for medical use of the marijuana. Stewart's reapplication was denied because she had earlier been revoked under WAC 170-296-0450(2)(a), which states that the agency "must" deny a license if the application has "been disqualified." The Department's decision was upheld by OAH and the Spokane County Superior Court.

Stewart argued that (1) the Department lacked the authority to enact WAC 170-296-0450, and (2) the Department's decision was arbitrary and capricious. Stewart had a two-part argument to the validity of the rule. First, the Court distinguished *Kabbae v. DSHS*, 192 P.3d 903 (2008), from the statute and rule at issue in *Stewart*. "In *Kabbae*, the court held an agency's rule conflicted with the agency's enabling statute because the rule limited the powers of a review judge that had been expressly granted by the plain language of the agency's enabling statute." In contrast, the statute here "plainly shows legislative intent for the Department to have rule-making authority over licensing procedures(.)" and WAC 170-296-0450 is a licensing procedure. Next, the Court rejected Stewart's argument that the rule prohibited the issuance of a license if a prior revocation had occurred, but the authorizing statute did not include "prior revocations" among the standards. The Court noted that RCW 43.215.205 does not set out "minimum standards," but rather "minimum requirements," including "the character, suitability, and competence of an agency and other persons associated with an agency directly responsible for the care of children." From this, the Court concluded that the rule follows legislative intent.

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Case Summaries – Washington Court of Appeals *continued*

Stewart's second argument was that the Department's actions were arbitrary and capricious because its decision was based solely on her husband's use of marijuana in the prior revocation. The Court concluded that the Department followed its background check rules and, consistent with the language in WAC 170-06-0070(7)(e), found that Stewart's license had been revoked previously because of her husband's marijuana use in the family home. The Court concluded the Department's decision was not arbitrary and capricious. In a footnote, the Court also noted that the Department also denied the application because Stewart had failed to submit an employment and education resume and three references for her new application, that she had failed to submit proof of a required health test, and had failed to submit completed background check forms.

John M. Gray

West v. Washington Association of County Officials, 252 P.3d 406 (June 1, 2011)

Arthur West filed a complaint alleging that the Washington Association of County Officials (WACO) had violated the Open Public Meeting Act, chapter 42.30 RCW (OPMA). WACO moved to dismiss, arguing in part that WACO was not a "public agency" under the OPMA. West responded that the Court of Appeals had already determined that WACO was subject to the OPMA in *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149 (1999). The trial court ruled that the *Telford* court had addressed the campaign finance portions of the Public Disclosure Act, but did not decide whether WACO was subject to the OPMA. The trial court further concluded that West's OPMA claim was unsupported by evidence given the definition of "public agency" appearing in the OPMA.

On appeal, West argued again that *Telford* was dispositive. Alternatively he asserted that even if *Telford* was not conclusive, WACO was still a "public agency" under the OPMA. The Court of Appeals concluded that the *Telford* holding was expressly limited to the issue of whether WACO was a "public agency" for purposes of the campaign financing portion of the Public Disclosure Act. The court noted in passing, however, that the factors applied in *Telford*, 1) the entity's governmental function, 2) its government funding, 3) government control over the entity, and 4) the entity's origin, all focused on the entity itself and not the specific factual circumstances of a particular case. Therefore, the court doubted a particular entity could be deemed a "public agency" under *Telford* in one case, but not the next.

In the end, the court declined to apply the *Telford* test to evaluate WACO's status under the OPMA because the question could be answered by looking at the statutory language itself. RCW 42.30.020 defines "public agency" as "(a)ny state board, commission, committee, department,

educational institution, or other state agency which is created by or pursuant to statute." (Emphasis added.) Focusing on the underlying purposes of the OPMA, open government and accountability, the court broadly interpreted "state agency" to include "an association or organization created by or pursuant to statute which serves a statewide public function." The court further explained that for an entity to have been created "pursuant to statute," an enabling statute must exist prior to or simultaneous with the creation of the entity carrying out the statewide public function.

The court recognized that WACO had actively sought legislation allowing it to receive public funds, leading to formal legislative recognition in 1959. That WACO had existed previously purely as a professional organization did not abrogate its status as an entity formally recognized by the legislature. As a result, the court did not need to apply the *Telford* analysis; under the definition of "public agency" appearing in the statute, WACO was subject to the OPMA. WACO's asserted lack of decision-making authority was immaterial where the legislature had imposed other public duties on the association. Emphasizing again that WACO's legislatively mandated activities are financed by public monies, the court concluded that such activities must be subject to the OPMA.

Rebecca Glasgow

Ritter vs. State Board of Regulation for Professional Engineers and Land Surveyors, No. 40010-3-II (May 11, 2011)

In 2007, Ritter was convicted of three counts of first degree child molestation of a family member. He was sentenced to 130 hours of community service, required to register as a sex offender and ordered not to have any contact with minor children. In 2008, the State Board of Regulation for Professional Engineers and Land Surveyors ("State Board") suspended his professional engineering license for five years based solely on his 2007 conviction, finding that he could no longer "be trusted to execute responsibilities as a professional engineer," and noting that an engineer must have good character and reputation. Ritter appealed the State Board's decision to superior court stating that his conviction did not affect his technical skills. The superior court affirmed the suspension.

The agency may discipline a professional engineer for "any act involving moral turpitude, dishonesty or corruption relating to the practice of the person's profession." RCW 18.235.130(1). The agency may also discipline a professional engineer for any act, "customarily regarded as being contrary to the accepted professional conduct or standard generally expected of those practicing professional engineers." RCW 18.43.105(10).

On appeal, the Court held that the first law relating to disciplinary action taken by the State Board against Ritter required that the proscribed act relate to the practice of professional engineering. However, the second law did not

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Case Summaries – Washington Court of Appeals *continued*

have that requirement, so the Court examined the statute as a whole to determine the legislative intent. The Court's review revealed that every provision of RCW 18.43.105 involved an affirmative action or failure to act while in the course of professional duties. Therefore, the Court held that in order for the State Board to suspend the license of a professional engineer under RCW 18.235.130(1) the Board must first find a nexus between the misconduct and the profession. Since Ritter is a professional engineer whose business is done with adults and he does not regularly interact with children as other professions do, e.g., doctors and other medical professionals, the Court could not hold that Ritter's child molestation convictions were related to the practice of professional engineering. Nor could the Court say that Ritter's convictions undermined the collective profession. Therefore, the Court held that the State Board misinterpreted and misapplied the law when it suspended Ritter's license based solely on his child molestation convictions. Reversed.

Melanie DeLeon

***Graham Neighborhood Association et al. v. F.G. Associates*, 252 P.3d 898 (May 31, 2011)**

Reverses a superior court decision by holding that a cancelled plat application could not be reinstated by a county planner. The court agreed with the appellant's argument that a cancelled plat application could only be reinstated by a Hearing Examiner after a public review period pursuant to PCC 18.160.080 (Pierce County), which gives a Hearing Examiner authority to grant a one year extension following a public hearing.

Ethan Jones

***Julian et al. v. City of Vancouver et al.*, No. 39861-3-II, (May 3, 2011)**

Affirms the finding by a property examiner that a watercourse on a one-acre property was functionally isolated. Under the Land Use Petition Act, the court rejected appellant's arguments that the examiner had used the wrong version of the law and misapplied the 'completely functionally isolated' test in reaching his/her determination. The court explained that (1) the application vested when it was submitted which made use of the 2007 version of the applicable laws proper, and (2) the examiner deserves deference concerning discretionary decisions made when determining the nature of watercourses.

Ethan Jones

Case Summaries - Federal

***Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254 (June 9, 2011)**

The case involves the deference the Court gives to an agency of its own regulations. The Federal Communications Commission (FCC) as amicus curiae, advanced a reasonable interpretation of its regulations, and the Supreme Court deferred to the FCC's views. The specific issue was whether an incumbent provider of local telephone services (in this case, AT&T) must make entrance facilities available to competitors (in this case, Talk America) at cost-based rates. AT&T argued that no law or regulation required an incumbent provider to provide access to any facilities, let alone entrance facilities, to provide interconnection. The federal district court and the Sixth Circuit Court of Appeals ruled in favor of AT&T. Talk America appealed to the Supreme Court, contending that AT&T must lease its existing entrance facilities for interconnection at cost-based rates.

As amicus curiae, the FCC advanced a novel interpretation of its longstanding interconnection regulations. The FCC argued that it interprets its own regulations to require AT&T to provide access to entrance facilities at cost-based rates for purposes of interconnection. Although the FCC's interpretation was novel, the Supreme Court deferred to its views. The Court re-affirmed a holding from earlier this term that the Court defers to an agency's interpretation, even an interpretation presented in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. Because the FCC advanced a reasonable interpretation of its regulations, the Supreme Court deferred to the FCC and reversed the Sixth Circuit Court of Appeals.

Katy A. Hatfield

***Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885 (May 16, 2011)**

The United States Supreme Court held in a 5-3 decision that a federal agency's written response to a Freedom of Information Act (FOIA) request for records is a "report" within the meaning of the disclosure bar of the False Claims Act (FCA). Thus, a plaintiff may not sue a government contractor under the FCA based on fraud which has already been disclosed in response to a FOIA request.

The FCA prohibits filing false or fraudulent claims to the United States and allows private parties to bring civil actions in the government's name. The FCA's public disclosure bar prohibits suits by private parties "based upon the public disclosure of allegations or transactions ... in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." Daniel Kirk alleged that Schindler Elevator, Kirk's former employer, violated the FCA by filing false claims under the Vietnam Era Veterans'

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Case Summaries – Federal *continued*

Readjustment Assistance Act of 1972. Kirk supported his claim with documents his wife received from the Department of Labor in response to FOIA requests. Schindler moved to dismiss on numerous grounds, including that the responses to the FOIA requests were subject to the public disclosure bar under the FCA. The Court looked to the ordinary meaning of the term “report,” which includes definitions such as “something that gives information.” The Court found this broad interpretation consistent with the broad scope of the public disclosure bar, and did not discern a textual basis for limiting the definition. Reversing the Court of Appeals for the Second Circuit, the Court held that a response to a FOIA records request is a “report” within the meaning of the FCA’s public disclosure bar.

Gabriel Verdugo

Bards on the Bench

Where we highlight some of the more literary prose of the judiciary (including ALJs). If you come across a quotable line, send it to us!

“The alleged irreparable harms are little more than an expression that ‘life finds a way.’ Michael Crichton, *Jurassic Park* 159 (Ballantine 1990). However, an invocation to chaos theory is not sufficient to justify a preliminary injunction.” *Center for Food Safety v. Vilsack*, 636 F.3d 1166 (9th Cir. 2011).

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