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Administrative Law

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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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Inside This Issue

Upcoming Annual Meeting and CLE

Please join us in Olympia on **Wednesday, September 25, 2013**, for the Administrative Law Section's annual meeting, which will occur immediately after a 1.5 hour CLE on HIPAA. The CLE tuition is FREE for members of the Administrative Law Section and law students ($25 for attorneys who are not members of the Administrative Law Section).

Registration for the CLE will start at 3 p.m., and the CLE will begin at 3:30. The annual meeting will occur immediately after the CLE at 5 p.m. Refreshments and ample time for socializing/networking will be provided at the meeting. All are welcome to attend the annual meeting, even if you are unable to attend the CLE.

The CLE, titled "Government Agencies and HIPAA: Being a Covered Entity or Business Associate – What's Up With That?," features a panel of expert speakers who have been involved with several agencies addressing the challenges of complying with HIPAA and the HI-TECH Act. Topics to be addressed in this presentation include what agencies may be covered entities or business associates, why it matters, areas of risk, and lessons learned. The panel will be moderated by Kristal Wiitala, the public records and privacy officer for the Department of Social and Health Services. Panel speakers include:

- R. Timothy Crandell, J.D., Assistant Attorney General, advises the Medicaid program on a variety of issues including HIPAA, as well as representing the program in state and federal court. In addition to working at the Attorney General's Office, Tim teaches courses on medical fraud and white collar crime at Seattle University School of Law and health care fraud and abuse at the University of Washington School of Law.
- Dina Yunker Frank, J.D., Assistant Attorney General, represents the University of Washington and is the lead attorney on HIPAA issues for that agency, which includes UW Medicine and its hospitals and medical providers.
- Howard Stone, J.D., is the Institutional Review Board (IRB) Administrator and Human Protections Administrator for the Department of Social and Health Services. Howard has previously worked on HIPAA privacy rule issues with state agencies, academic institutions, and health centers across the United States.

Location for both CLE and annual meeting: **Abigail Stuart House, 1002 Washington St. SE, Olympia, WA 98501**.

Pre-register for the upcoming CLE at
https://www.mywsba.org/OnlineStore/ProductDetail.aspx?ProductId=5313808&page=sem&mt=

Scholarship

This year, the Administrative Law Section gave one $2,000 scholarship to a law student working over the summer in an unpaid capacity in the area of administrative law. We received many phenomenal applications, but ultimately agreed to award the scholarship to upcoming 2L Jocelyn Whiteley because of her demonstrated commitment to public service through administrative law. Be sure to read Jocelyn's article below about her experience this summer as a law student working at the Unemployment Law Project.

Meet Our Scholarship Winner

Jocelyn Whiteley will be a 2L in the upcoming school year at the University of Washington School of Law. Jocelyn graduated from Boise State University summa cum laude with degrees in international business and finance with a minor in Spanish. Throughout college, she worked full-time bartending at a local pub in Boise, Idaho.

Between college and law school, Jocelyn worked as the Legal Services Coordinator for the Volunteer Legal Services Program in San Francisco. During her time in California, Jocelyn worked on a project that served 65 clients. Jocelyn assisted the supervising attorney with his caseload by drafting client declarations, contempt motions, and other documents. Concurrently, she worked with firms to locate volunteer counsel for cases referred by federal judges to the Federal Pro Bono Project.

Jocelyn's passion for advocacy has continued during law school. Among some of her activities and achievements, she serves as the Vice President of the Public Interest Law Association, is a member of the Pacific-Rim Journal of Law and Policy, participates in the Immigrant Families Advocacy Project, and was a semi-finalist in the 1L mock trial competition.

Jocelyn spent this past summer working at the Unemployment Law Project. She looks forward to an even busier and exciting 2L school year. When she has a moment to breathe, Jocelyn enjoys traveling, camping, snowboarding, and hiking.

Jocelyn always welcomes worldly advice from those who have made it through the vortex of law school. If you have any nuggets of wisdom or would just like to chat, you can reach her by email at **jocelynwhiteley89@gmail.com**.

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

Send submissions to: Katy Hatfield (katyk1@atg.wa.gov).

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Administrative Law: Oh Yeah, That Thing Called Justice

Jocelyn Whiteley

Overwhelmed by the minutia, rules and memorization, it was easy to forget that the cases I read during my first year of law school were stories about real people and not the made-up delusions of law school professors. There was no better avenue back to the real world and real purpose of my legal education than working in administrative law.

Advocacy for the unemployed is invaluable during times of economic prosperity. In a time of budget cuts, layoffs, and economic instability – it is more important than ever. The Unemployment Law Project (ULP), where I spent my 1L summer, helps thousands of people navigate the enigmatic unemployment process each year. Through ULP's efforts, individuals are able to receive assistance telling their story, receiving deserved benefits, and keeping food on the table. My role included representing clients in administrative hearings, writing petitions for review, and writing a superior court brief. The ULP makes disadvantaged voices louder when employer representatives seek to suppress them. The ULP provides more than legal knowledge – it provides hope and justice.

With each hearing, I began to view the administrative process as a whole in the same light. The process sheds arbitrary legal barriers to strive for and achieve a fair result within the confines of the law. For instance, when a seasonal fisherman originally from another country who had a third--grade education continually missed deadlines and the Employment Security Department subsequently denied benefits, the Administrative Law Judge (ALJ) listened, took notes, and asked questions. As a student, previously stuck in the emotionless bubble of first-year law courses, I was surprised to sense compassion from the ALJ. There was no legal absolutism; the hearing was an exercise in equity amid the myriad of rules and exceptions. The ALJ was not just interested in rigid procedure, he was having a conversation. Ultimately, my surprise continued as I read the Initial Order: among the reasons the ALJ found him faultlessly overpaid, a necessity in qualifying for a waiver under the overpayment statute, were his education level and language barrier. To me, this exemplified the best in legal application. It was a patient understanding of an individual's tribulations applied within the confines of the law.

Administrative law, to the inexperienced law student like me, is what law should be – a communal effort to achieve a common and fair result. Client after client I am beginning to understand the importance of the administrative process. It is not necessarily about wins and losses: clients want to be heard, recognized, and afforded an opportunity to candidly explain their situation to the person determining whether they will be able to pay rent until they can find alternative employment. From my perspective, this is the most important function of the administrative process. The preamble to the Employment Security Act states, "(t)his title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." I have felt the weight of this statement in my dealings with the administrative process and appreciate the prevalence of common-sense justice.

Administrative Law Section Listserv

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserv can send an email to the Listserv. You can request to receive the listserv messages in a daily digest format by contacting the list administrator below.

Sending Messages: To send a message to everyone currently subscribed to this list, address your message to administrative-law-section@list.wsba.org. The Listserver will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the Listserv.

Responding to Messages: Use "Reply" to respond only to the author of the email. Use "Reply All" to send your response to the sender and to all members of the Listserv.

If you have any questions, wish to unsubscribe, or change your email address, contact the WSBA List Administrator at sections@wsba.org.

Unemployment Law Update: 2012 Precedential Decisions of the Commissioner

Joy Lockerby and Therese Norton

The Commissioner's Review Office of the Washington State Employment Security Department (the Department) recently published its precedential decisions for 2012. These decisions are given authority in administrative appeals related to claims for unemployment compensation benefits under the Employment Security Act, Title 50 RCW. The following is a compilation summary of the nine cases published from last year with analysis from the authors.

In re Owens, Empl. Sec. Comm'r Dec.2d 989 (2012)

Posting negative opinions about a coworker or employer on a personal but non-private Facebook page may preclude a claimant from receiving unemployment benefits where the statements amount to public disparagement, even when made off-duty.

The claimant, a sales assistant for a camera repair store, complained to his employer that his coworker damaged his personal camera at work. The employer refused to fix the camera, in part because its insurance deductible exceeded the cost of the repair and because it was unable to substantiate the claim of damage.

After work, the frustrated claimant expressed his dissatisfaction with his employer on his personal Facebook page. He used profanity in describing his feelings, stating, "My boss is making an excuse for another employee damaging my equipment....I am f(***)ing furious about this." He vented about the work ethic of the "new guys," who he described as "slouches." Several of the claimant's Facebook "friends" chimed in and made numerous remarks including, "You should be f(***)ing furious"; "Punch him in the f'n neck"; and, "If the damage to your property happened at work then their insurance should pay for it."

Another employee saw the post and reported it to the employer. After the employer viewed the post for itself, the claimant was summarily discharged. There had been no prior discipline or warnings.

The Commissioner, in reversing the administrative law judge's (ALJ) decision to allow benefits, concluded that the "off-duty barrage of angry accusations" were work-connected, and due to their insulting and injurious nature, constituted disqualifying misconduct. There was no discussion in the case as to whether a social media policy or other employment policy prohibiting such off-duty conduct existed. However, the Commissioner noted that an employer "has the right to expect that employees will not make public disparaging comments regarding the employer or the employer's business, whether on or off duty." Here, the claimant's publically made comments willfully disregarded the employer's interest in maintaining its reputation.

The Commissioner gave particular significance to the fact that the claimant's post "sparked interest" and generated numerous negative responses from others, and that the claimant failed to restrict his privacy settings on Facebook, thus making his page accessible to the public. It was not discussed whether an employee's Section 7 Rights under the National Labor Relations Act would be triggered for otherwise valid concerted protected activity. It is also possible that future cases may be decided differently in light of Washington's new social media privacy law, which went into effect July 2013.

In re Shaw, Empl. Sec. Comm'r Dec.2d 985 (2012)

An absence from work due to incarceration is not misconduct where it arises out of circumstances outside the claimant's control and where the claimant did not act in willful disregard of the employer's interests.

The claimant, who had been working as a part-time server, was arrested following an unexpected visit to his apartment by an ex-girlfriend. The claimant was subsequently incarcerated, resulting in an unscheduled absence from work. The claimant had his landlord call the employer to apprise them of his absence. Upon release from jail, the claimant called the employer and was informed that he had been replaced. At the hearing, the claimant testified that the police report had been falsely made by the ex-girlfriend.

The Commissioner reversed the denial of benefits, concluding that the claimant's absence stemming from the incarceration was not statutory misconduct under RCW 50.04.294 because it was not foreseeable and because it arose out of circumstances outside the claimant's control. An absence due to incarceration is misconduct when the incarceration is reasonably expected as a result of the claimant's actions. Here, there was no evidence to suggest the unexpected visit from the ex-girlfriend or the events that transpired afterward could have reasonably been foreseen. Additionally, the claimant had taken reasonable measures to notify the employer about the absence.

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Employment Security Department: 2012 Precedential Decisions of the Commissioner *continued*

***In re Kost*, Empl. Sec. Comm'r Dec.2d 987 (2012)**

Harm is not an element for on-the-job misconduct under RCW 50.20.294. The claimant in this case had worked at a WinCo grocery store for three years as a part-time cashier. The claimant was discharged for violating the employer's workplace conduct policy with respect to "acts of disrespect toward…management…." The final incident involved the claimant yelling profanities and expressing displeasure to three levels of managers over the course of a work day. The claimant was upset that the store had decided to reduce her adult son's hours (he was also employed there) and took the issue up with the management. The claimant received no warnings prior to her discharge.

The Commissioner reversed the ALJ and denied benefits, concluding that a claimant can be disqualified for on-the-job misconduct even if harm to the employer is not shown. The Commissioner supported its decision by recounting the evolution of the misconduct statute and significant changes made by the legislature in 2003. The Commissioner also discussed the *Tapper* test for analyzing on-the-job misconduct. *See Tapper v. Employment Sec. Dep't,* 122 Wn.2d 397 (1993). Because the claimant's behavior "went far beyond inadvertence or ordinary negligence...or poor judgment…" the claimant was found to be ineligible for benefits.

***In re Vanravenswaay*, Empl. Sec. Comm'r Dec.2d 984 (2012)**

A claimant who accepts an employer-initiated, voluntary layoff may be precluded from receiving unemployment benefits if the claimant is not able to show the employer followed the prescribed steps in WAC 192-150-100(1). Applying this regulation was a matter of first impression for the Commissioner following a legislative amendment to the voluntary quit statute in 2009.

The claimant was a strategic account executive who had worked for Xerox Corporation for 34 years. Her sales job required frequent airplane travel and, according to her, was stressful. In the last two years of her employment, she took medical leave to undergo a heart surgery and a heart implant operation.

When the layoff program was first announced, the claimant did not sign up. After a subsequent announcement, the claimant volunteered to be laid off, and said she did so at least in part due to health and stress. The employer's agreement specified the claimant's participation was "voluntary" and provided the claimant an opportunity to revoke acceptance for up to seven days after signing.

When faced with an employer-initiated layoff program, there are three eligibility requirements that a claimant must show under subsection 1 of WAC 192-150-100. First, there must be a written announcement of an impending layoff. Second, the claimant must have voluntarily "offered" to participate in the layoff. Third, the employer must take the "final action" in ending the employment relationship. *See* WAC 192-150-100(1)(a)-(c).

Applying relevant case law, including the Washington State Supreme Court in *Verizon Northwest, Inc. v. Employment Sec. Dep't,* 164 Wn.2d 909 (2008), the Commissioner determined the claimant failed to meet all three requirements. The employer's announcement was defective because it was not in writing and so the claimant could not have validly "offered" to be included in the layoff, there was no evidence the layoff was inevitable, and the revocation clause gave the claimant the "final action."

In reversing the ALJ and denying benefits, the Commissioner found instead that the claimant quit to accept an early retirement, which is not one of the eleven "good cause" reasons under the voluntary quit statute. *See* RCW 50.20.050(2)(b)(i)-(xi). (Note: Claimant's argument that it was a medical quit failed because she did not take reasonable steps to preserve her job prior to quitting—such as request another leave of absence—and did not show it would have been futile to do so.)

***In re Taylor*, Empl. Sec. Comm'r Dec.2d 983 (2012)**

Refusing a job assignment offered by a temporary staffing agency triggers an issue regarding the claimant's *availability for work*, not a *job refusal*, when the claimant is still employed.

The claimant worked for a temporary staffing agency as a low-wage laborer. For nearly three years, the staffing agency had dispatched the claimant for long-term, short-term, and partial-day assignments. The claimant's availability for work became an issue after he refused to take a four-hour assignment in Portland, Oregon. The claimant refused the assignment because the cost of his commute exceeded the amount he would be paid for the assignment.

The Commissioner vacated the ALJ's initial order and concluded that the refusal to work statute was not applicable to the facts of this case because the claimant was still employed by the staffing agency when he refused the assignment. "We have consistently held that the provisions of RCW 50.20.080 do not apply unless a claimant has rejected an offer of work while *unemployed.*" (Emphasis retained). The Commissioner instead found that the claimant's refusal of the assignment raised a separate issue regarding his avail-

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Employment Security Department: 2012 Precedential Decisions of the Commissioner *continued*

ability for work under RCW 50.20.010(1)(c) and remanded the issue for additional fact-finding.

***In re Gallaher*, Empl. Sec. Comm'r Dec.2d 988 (2012)**

Misinformation can excuse a late-filed weekly claim for unemployment benefits. Generally, a claimant is required to file a claim for unemployment benefits each week. The Department will not pay benefits for unclaimed weeks that are deemed late unless a claimant shows there was good cause for not contacting the Department earlier to reopen the claim.

The claimant stopped filing weekly claims for extended benefits because he had been told by the Department that he had no additional benefits available. Upon learning four months later that he still had benefits available, the claimant requested to reopen his claim and file for those past weeks.

The Commissioner concluded that the claimant had good cause to file late weekly claims because he had been misinformed by the Department. The Commissioner reasoned that misinformation or erroneous advice from the Department constitutes good cause for purposes of a late filed claim, when the claimant relies on that information and otherwise acts in good faith in accordance with that information.

***In re McKinney*, Empl. Sec. Comm'r Dec.2d 981 (2012)**

One of the eligibility requirements for unemployment benefits is being available to accept suitable work and to be free from unreasonable restrictions on one's availability. A claimant may not be denied benefits without first receiving a directive from the Department outlining any deficiency in eligibility and being given a reasonable chance to comply with that directive.

The claimant limited her availability for work by requesting not to work late night shifts. The claimant preferred not to work late night hours because she had adopted a foster child. The Department initially allowed the claimant benefits and paid benefits for 50 weeks. Then, four days after the end of her benefit year, the Department re-determined her eligibility for benefits, denied them, and assessed an overpayment of $6,075. The basis for the redetermination was that the claimant had not been available for work because she had expressed a preference not to work late night hours.

The Commissioner reversed the ALJ's initial order citing previous Commissioner's decisions in which a claimant's availability was not considered sufficiently restricted by a "mere expression of preferred hours." More importantly, the Commissioner found that a directive is required before disqualifying a claimant for limiting her availability for work. Here, the claimant had not been advised by the Department that she did not meet the eligibility requirements. Benefits were allowed on the availability issue and the case was remanded to the Department for reevaluation and for a possible directive following the date of the hearing (any directive would not be retroactive).

***In re Moloney*, Empl. Sec. Comm'r Dec.2d 986 (2012)**

This case involves the special provisions in the Employment Security Act for employees of educational institutions and "reasonable assurance" of future work.

The issue was whether the claimant, a part-time community college instructor, had a "reasonable assurance" of continued employment following a school break. If she did, then she would not be eligible to receive unemployment insurance benefits under RCW 50.44.053(3). There is a presumption that community college instructors do not have reasonable assurance when an offer of employment is conditioned on enrollment, funding, or program changes. The case describes that the legislative intent behind the law is to stabilize the community college and technical school workforce by attracting and retaining workers.

The Commissioner reversed the ALJ's initial order and concluded that employers are required "to provide *compelling* and *exceptional* evidence of reasonable assurance" in order to overcome the presumption. (Emphasis retained). Here, there was not enough evidence to show that the claimant had a reasonable assurance of returning to work because her employment was contingent on adequate funding and enrollment. Benefits were allowed.

***In re Judson Enterprises, Inc.*, Empl. Sec. Comm'r Dec.2d 982 (2012) (published in part)**

This decision further defines the employment relationship for purposes of "covered employment" under Title 50 RCW in the context of independent contractors and employer tax reporting requirements.

Following a tax audit, the Department assessed the employer, a corporation, over $43k in unpaid tax contributions, penalties, and interest. It found the employer misclassified 151 sales representatives and product installers and failed to report those individuals on its quarterly tax and wage reports. The ALJ reversed in part, determining the employer failed to properly report its sales representatives as employees; however, the product installers were validly independent contractors under the Department's six-part test.

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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 you would like to contribute a summary (approx. 250 – 500 words), please contact Katy Hatfield at katyk1@atg.wa.gov.

Case Summaries – Washington Supreme Court

***Raven v. Department of Social and Health Services*, ___ P.3d ___ (July 18, 2013)**

The Department of Social and Health Services must investigate allegations of neglect against vulnerable adults. DSHS investigated an allegation and made a finding that Resa Raven had neglected her ward, Ida, when serving as Ida's guardian.

The court recited the sad story of Ida's decline while being cared for in her home. The evidence in the record showed that Ida strongly resisted nursing home care. The court explained that a guardian must make decisions for her ward's care that are consistent with what the ward would do if she were competent. Therefore, the court does not apply an objective reasonable person test. Instead, the court must apply a subjective test based on the ward's preferences. Moreover, a Washington statute prohibits a guardian from forcing a ward into nursing care against her will unless she meets the criteria for being involuntarily committed. Because Ida had expressed a strong wish not to be placed in nursing care, and she did not qualify to be involuntarily committed, Raven's good-faith determination not to place Ida in a nursing home was not neglect. And there was not substantial evidence in the record to otherwise support a finding of neglect in this difficult case.

Significantly, however, the court concluded that DSHS's pursuit of a neglect finding was substantially justified for purposes of determining whether Raven was entitled to attorney fees under the Equal Access to Justice Act (EAJA). Under that statute, if a party prevails in judicial review of an agency action, he or she can recover attorney fees unless the court finds that the agency's actions were "substantially justified." Here, while the record did not support a finding of neglect, it did show Raven exhibited several shortcomings as a guardian. Thus, while DSHS did not ultimately prevail, its actions were reasonable and attorney fees were not warranted under the EAJA.

Rebecca Glasgow

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Employment Security Department: 2012 Precedential Decisions of the Commissioner *continued*

The Commissioner affirmed the ALJ and concluded that an employer cannot form an employment relationship with a business entity, as the employment relationship is between an employer and *employee*—not an employer and an *employer.* An independent contractor, by definition, is not considered a "person in employment," and thus is properly excluded from the quarterly tax reports to the Department. There would be an absurd result were it otherwise: The employer would pay taxes on "wages" paid to a business entity, but that business entity could never claim and draw unemployment benefits.

The Commissioner highlighted the necessary balance between making sure that eligible claimants receive benefits to which they are entitled and making sure that employers properly pay their quarterly tax contributions to the Trust fund.

The full text of these recently published decisions and other precedential decisions of the Commissioner can be found at http://government.westlaw.com/wapcd/. Attorneys may cite to these decisions when arguing at hearings before the Office of Administrative Hearings, when filing or replying to petitions for review, or when seeking judicial review in superior court.

Joy Lockerby and Therese Norton are Washington attorneys. Joy practices employment law and unemployment law at her own firm. Therese practices labor, employment, and unemployment law at Cline & Associates, Inc. Please visit their websites for more detailed commentary and analysis on these unemployment law cases, or write Joy at joy@lockerbylaw.com or Therese at tnorton@clinelawfirm.com.

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Case Summaries – Washington Supreme Court *continued*

***In re Disciplinary Proceeding against Thomas Kamb*, ____ P.3d ____ (July 18, 2013)**

Thomas Kamb practiced law for over 20 years in Washington state. He represented a client facing criminal charges and revocation of her driver's license for driving under the influence. Before a hearing on the matter, the Deputy Prosecutor (Prosecutor) faxed Kamb a plea offer that would allow his client to plead guilty to a lesser charge of first-degree negligent driving. Kamb proposed an order consistent with that offer, the Prosecutor consented and District Court Judge Svaren signed it. The order did not suppress the client's breath test results and Kamb did not request such an order at that time. Later that same day, Kamb represented this same client at a Department of Licensing (DOL) telephonic hearing. During this hearing, Kamb told the DOL hearing officer that he had an exhibit he wanted to send her that was an order from the court suppressing the breath test. The hearing officer kept the record open after she adjourned the hearing to allow Kamb to submit the court order.

After the hearing, Kamb went to the district court clerk's office and requested his client's file. He took the file away from the front counter and wrote on Judge Svaren's order "BAC suppressed not a knowing & voluntary decision to take test." He went back to the counter and asked the clerk for a copy of that order. Having seen Kamb alter the order, the clerk refused to make a copy and reported the incident to the prosecutor's office.

The Prosecutor and Kamb discussed the case, with Kamb requesting that the Prosecutor stipulate to the breath test suppression. The Prosecutor did not know that the DOL hearing had already occurred or that Kamb had already altered the court order when he agreed to suppress the breath test and emailed the clerk authorizing her to give a copy of the order to Kamb. The clerk referred Kamb to Judge Svaren and Kamb told the judge that he had intended to take a copy of the altered order to the Prosecutor and then to Judge Svaren for approval.

Judge Svaren filed a grievance with the WSBA. The WSBA charged Kamb with three counts of professional misconduct: misrepresenting the existence of an order in violation of RPC 3.3(a)(1), changing Judge Svaren's order in violation of RPC 8.4(b) and (d) and failing to discuss the suppression of the breath test with the Prosecutor in violation of RPC 1.3. The WSBA Hearing Officer held that disbarment was the appropriate sanction for counts 1 and 2, found numerous aggravating factors and no mitigating factors. The disciplinary board adopted the decision by a nine-to-one vote.

The Washington State Supreme Court is the ultimate authority on attorney discipline and Kamb challenged several of the hearing officer's factual findings. The court also determines whether the board determined the correct sanctions and whether any aggravating or mitigating factors should alter the sanction. It also considers the sanction in light of its proportionality to sanctions imposed in similar cases and the degree of unanimity among members of the disciplinary board. The court found that Kamb intentionally misrepresented to a hearing officer that he had obtained a suppression order, then altered a filed court order to conceal his misrepresentation. The court found aggravating factors, including Kamb's prior disciplinary offense and his substantial experience in the practice of law and held that Kamb's deception indicated that he was not fit to practice law and ordered Kamb disbarred.

Melanie deLeon

***King County Department of Development and Environmental Services v. King County*, ____ P.3d ___ (June 27, 2013): an illustration in one of the differences between Washington and Oregon land use law**

The substance of *King County DDES v. King County*, concerned application of the non-conforming use standard of the King County Code—spoiler alert, the landowner had not established the use prior to the use becoming non-conforming. There are two remarkable aspects of this case. First, the Supreme Court reached a unanimous decision—not particularly common for non-conforming use cases. Second, and more interesting, is that King County appealed its own hearing examiner's decision. The county's LUPA petition does not elaborate and the Supreme Court gave no attention at all to this odd posture. In Oregon, this case would not have been possible.

Oregon's Land Use Board of Appeals (LUBA) concluded that Oregon's statutes specifying standing do not permit a local government to appeal a decision of its own hearings official. ORS 197.830(2) requires that a person has standing to appeal a land use decision to LUBA only when that person has appeared before the local government. In *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004), the county argued that it "appeared" when "county planning staff presented oral and written testimony on behalf of the county during the proceedings before the hearings officer." *Id.* at 370. LUBA rejected this argument, pointing to several statutes governing LUBA's review that suggest the petitioner and respondent will be different parties and "at least nominally adverse." *Id.* at 372. LUBA did, however, recognize that in a different situation, the county might be an applicant or might provide by rule for a staff member to "appear" as a party. *Id.* at 374.

In contrast, RCW 36.70C.060, which specifies standing under LUPA, does not contain a specific "appearance" requirement. It confers standing on the applicant, the owner of the property, or a "person aggrieved or adversely affected by the land use decision." RCW 36.70C.020(4) defines person broadly, specifically including, "governmental

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Case Summaries – Washington Supreme Court *continued*

entity or agency." Still RCW 36.70C.060 contains requirements that are similar to Oregon statutory requirements for LUBA review. LUBA noted that the petitioner must serve the local government. RCW 36.70C.040(3) contains that same requirement. And, LUBA noted that it may award to the prevailing party the cost of preparing the record. RCW 36.70C.110 similarly requires a petitioner to pay the cost of preparing the record prior to submittal and allows the court to equitably assess the cost of the record to the extent each party prevailed.

The case is an entertaining read, but the real interest is its reminder that the administrative law of land use practice in Oregon and Washington is quite different.

Jeff Litwak

***In re Disciplinary Proceeding against Sanai*, 302 P.3d 864 (June 6, 2013)**

The Supreme Court upheld the recommendation of disbarment of Fredric Sanai by the WSBA Disciplinary Board. Sanai undertook representation of his mother in her divorce from his father. The divorce decree ordered the sale of the family home and a vacant lot, with the proceeds divided equally. Years of acrimonious litigation followed. The hearing officer ruled that Sanai had repeatedly taken a variety of actions for the purpose of harassment and delay, willfully disobeyed court orders and rules, and brought frivolous suits against judges who ruled against him. Sanai challenged 180 of the hearing officer's 229 findings of fact and conclusions of law. The court found that Sanai failed to meet his burden to make persuasive arguments regarding contested factual findings related to specific citations to the record.

Sanai also argued that the disciplinary process violated his Sixth Amendment right to confrontation because he was not provided the opportunity to cross-examine the judges who ruled against him. The court found this argument meritless primarily because Sanai did not preserve this claim for review for the majority of the rulings at issue. Where express confrontation objections had been made, the court concluded that any confrontation rights were not violated because in those cases there was not a question as to the truth asserted.

Sanai also argued that the Rules for Enforcement of Lawyer Conduct (ELCs) violate the "clear preponderance" standard of proof because a hearing officer can allow admission of hearsay evidence. The court noted that legal precedent has established that admission of hearsay evidence in attorney discipline proceedings as permitted by the ELCs satisfies due process requirements. The court also rejected Sanai's assertion that the hearing officer failed to make independent findings, noting that the record clearly showed otherwise.

The case is an interesting factual read. Sanai was admitted to practice in 2002, the same year of the divorce decree. He spend the next two years very busily filing pleadings, and by 2004, the WSBA had initiated disciplinary proceedings against him based on his conduct related to the divorce proceedings. The disciplinary proceedings and appeals have also spanned several years. It is unclear as to the status of the real estate at issue in the divorce decree.

Merrilee Harrell

***Resident Action Council v. Seattle Housing Authority*, 177 P.3d 417 (May 9, 2013)**

Seattle Housing Authority (SHA) is a local housing authority that provides federally subsidized public housing in Seattle. SHA is subject to certain federal regulations that require it to resolve resident grievances through a hearing process that results in a written decision.

The Resident Action Council submitted a public records request asking for copies of all written grievance decisions filed on or after June 17, 2007. The Council requested that the decisions be provided in electronic format. The SHA provided redacted paper copies of the decisions without any explanation of the exemption(s) supporting the redactions. The Council sued under the Public Records Act, and the trial court ordered the SHA to produce all of the responsive grievances in electronic format and with only the names and identifying information about tenants redacted. The court ordered a $25 per day penalty and ordered the SHA to publish certain policies and procedures to ensure future compliance with the public records act.

Four justices signed a lead opinion affirming the trial court, one justice concurred in result only, and four justices concurred, but pointed out that the lead opinion's analysis went far beyond what was necessary to decide the case.

The lead opinion explained that the SHA is subject to federal regulations, but it is also subject to state laws unless they are preempted by federal law. Thus the SHA is subject to the Public Records Act. The lead opinion then engaged in a lengthy discussion of the Public Records Act's requirements for responding to requests, it categorized existing exemptions into six different categories (using an appendix), and it provided a flow chart and lengthy guidance for determining how to respond to a request, all arguably dicta. Turning to the issues presented in this case, the lead opinion explained that the SHA had a duty to explain its redactions; it could not silently withhold the redacted information. Moreover, where requested records can be released with redactions, an agency has a duty to redact rather than withhold the entire record. The lead opinion then explained that federal regulations regarding the grievance decisions do not preempt the Public Records Act, and therefore they do not prevent the disclosure of redacted decisions. Finally, it was within the trial court's discretion to require the SHA to produce the redacted responsive

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records electronically and to require the SHA to develop certain policies for responding to public records requests. As a result, the lead opinion affirmed the trial court's award of penalties and attorney fees to the requester.

Rebecca Glasgow

Case Summaries – Washington Court of Appeals

***In re Guardianship of K.B.F.*, ___ P.3d ___ (August 13, 2013)**

In a case of first impression in the new, more flexible alternative to parental termination—guardianship under RCW 13.36.040—the Court of Appeals ruled the State failed to identify the court-ordered services to the father and the State failed to show it had continued to order services until a permanency planning goal was achieved or a dependency was dismissed as statutorily required. As such, the juvenile court guardianship order was vacated and a remand for further proceedings was ordered.

The 2010 statute requires the juvenile court to establish a guardianship when it finds by a preponderance of the evidence (as opposed to clear, cogent and convincing evidence in a parental termination) that it is in the child's best interests to establish a guardianship, rather than terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of a child to the parents. Yet, before a guardianship can be established under the statute, (1) the child has to be found dependent under RCW 13.34.030, (2) a dispositional order has been entered pursuant to RCW 13.34.130, (3) at the time of the hearing the child has or will be removed from the custody of the parent for at least 6 months following a finding of dependency under RCW 13.34.030, (4) the services ordered have been offered or provided AND all necessary services capable of correcting the parental deficiencies in the foreseeable future have been offered or provided, (5) there is little likelihood that conditions will be remedied so a child can be returned to the parent, and (6) the proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child with an affirmation the guardian understands and accepts the commitment to provide care for the child until the child is 18 years old. *See* RCW 13.36.040; *see also* RCW 13.36.030.

Here, the State offered and provided many services to the father, but failed to meet the statutory requirements by failing to establish which services the court ordered for the parents. The court stated the legislature requires a "showing of court ordered services, not merely offered services" to establish a guardianship. Therefore, the lack of a record demonstrating court-ordered services led the court to conclude the State did not prove by a preponderance of the evidence what services the court ordered. The Court of Appeals found the juvenile court lacked authority to establish a guardianship under RCW 13.36.040. Second, the court found after the State decided to establish a guardianship, the State stopped offering services to the father BEFORE the guardianship was established. The discontinuation of services is contrary to RCW 13.36.136(1). There, the State is required to continue the permanency planning process, including "reasonable efforts to return the child to the parent's home," "until a permanency planning goal is achieved." The record failed to show the State met this requirement too.

Lisa Malpass

***Northshore Investors, LLC., v. City of Tacoma*, 301 P.3d 1049 (April 30, 2013).**

Northshore Investors ("Northshore") submitted an application to the City of Tacoma ("City") for permits to redevelop the North Shore Golf Associate's golf course, including approval of the development's primary plat and approval of a rezone modification. A group called "Save NE Tacoma" (SNET) opposed the application. A Tacoma hearing examiner recommended that the City Council ("Council") deny the rezone modification request and subsequently denied Northshore's other requests. Northshore filed a Land Use Petition Act (LUPA) petition and appealed the Examiner's recommendation on the rezone modification application to the City Council.

The Council denied the rezone modification at a hearing. Northshore filed their amended LUPA petition, and 23 days after the hearing, served the City and SNET. The City and SNET filed motions to dismiss the amended LUPA petition for untimely service, but the superior court denied their motions. The City and SNET appealed the superior court's denial, arguing that Northshore failed to meet the statutory requirement to serve them within the 21 days of the date that the Council issued its final land use decision.

The issue in this case was when did the 21-day clock start ticking? Under LUPA, a land use petition is barred and the court may not grant review unless the petition is timely filed with the court and served timely under RCW 36.70C.040(2). A LUPA petition is timely served if it is filed and served within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). Under RCW 36.70C.040(4)(a)–(c), a land use decision issues on one of three dates: a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial

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capacity, the date the body passes the ordinance or resolution; or

c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

Northshore contended that subsection (a) applied because the notice of appeal results constituted a written decision and the land use decision did not issue until three days after the notice was mailed. The City and SNET contended that subsection (c) applied because the Council made only an oral decision. Thus, service was untimely because the 21-day clock began ticking on the day the Council's oral decision was entered into the public record or at the latest, one day after the Council made the oral decision.

The Appeals Court held that RCW 36.70C.040(4)(c) did apply because the land use decision was issued on the date it was entered into the public record via the Council's oral vote. The Council did not need to take any further action to make the oral vote a final decision; the Council's vote properly identified the scope and terms of its decision. Therefore, the Appeals Court held that Northshore's petition and appeal were not timely served, reversed the superior court's denial of their motions and remanded for dismissal of the amended and original LUPA petitions.

Melanie deLeon