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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New Board Chair

The Administrative Law Section is pleased to welcome its new Board Chair, Heidi Wachter. The Section would like to thank out-going Chair, Anthony Broadman, for his hard work over the last year. Anthony provided a unique perspective to the Administrative Law Section with his expertise in Indian Law. Anthony's law practice focuses on company-critical business litigation and representing tribal governments in public affairs, taxation, and economic development matters.



CLE

Kristal Wiitala, Past Section and Past CLE Chair

Successful Section CLE!

If you did not attend the Administrative Law Section CLE on Oct. 24, 2012, you missed out! Titled "Advocacy in Administrative Law: Recent Developments, View from the Bench and Practice Pointers," the presentations and subjects received rave reviews. With about 80 in-person and on the Web, this CLE had the highest attendance for recent offerings. The speakers presented a wide range of topics covering the legal, practical, and tactical issues in representing parties in administrative proceedings. Of note was the variety of subject matter areas represented and discussed, from local permits to drivers' licensing, to utilities, to unemployment and social services. Speakers were involved at all levels of proceedings, including pro se matters, complex hearings with multiple parties, review proceedings at the administrative and court levels, appellate proceedings, and legislative advocacy.

The speakers and topics were well received by an enthusiastic and engaged audience. If you missed this seminar, you can purchase a CD of the recorded presentation at: http://preview.tinyurl.com/b9azwt6.

In addition, available to all members, two of the PowerPoint presentations that didn't make it into the materials can be viewed on the Section's website under the Calendar listing for this seminar, found at: http://preview.tinyurl.com/azbrjhd.

Great appreciation to the members of this outstanding faculty and the time and effort they committed to producing an excellent CLE! You were wonderful! Thanks especially to board members who added to their volunteer efforts for the section by agreeing to speak and help with this CLE. Anyone who has ideas or who would like to help with the next CLE production, let someone on the board know—we need you!

I-502 – Washington State Agency Gears Up to Regulate Marijuana

Merrilee Harrell

The Washington State Liquor Control Board has been tasked with the responsibility for developing the rules and guidelines needed to carry out I-502, the initiative that legalized marijuana in Washington. WSLCB is seeking input from experts in developing the framework for implementing the initiative, and has also noted that they have received a number of "unsolicited phone calls from those who want help."

Three new licenses will be created to cover the production, processing, and retailing of marijuana. Production is the grower side of the equation. Producers then sell to processors who process and package the product for sale to



retailers, who will sell the product at retail outlets regulated by the WSLCB. The initiative creates three new excise taxes to be collected by the WSLCB: The producer will pay a 25 percent tax on sales to processors, the processors will pay a 25 percent tax on sales to retailers, and retailers will pay a 25 percent tax on sales to consumers. This tax is in addition to any other applicable taxes. Funds from the marijuana taxes will be deposited in the Dedicated Marijuana Fund, disbursements from which will be on authorization of the WSLCB. The WSLCB must also enact rules that establish procedures and standards for monitoring and regulating the production, processing, and packaging of marijuana products, including quality standards, security requirements, advertising restrictions, and penalties.

Implementation of I-502 has raised concerns because marijuana remains illegal at the federal level. However, in an interview with ABC News' Barbara Walters, President Obama stated, "It would not make sense for us to see a top priority as going after recreational users in states that have determined that (marijuana) is legal."

The deadline for the WSLCB to establish the procedures and criteria necessary to implement I-502 is Dec.1, 2013. For more information: http://lig.wa.gov/marijuana/I-502.

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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: Merrilee Harrell (mharrell@rtwcg.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 or its officers or agents.

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Agency profile - The Employment Security Department (ESD)

John Gray

This is an agency some lawyers are familiar with because they practice in the subject area. Some lawyers are familiar with it because they have had to rely on the unemployment benefits in these bad economic times.

The ESD is the state agency that administers the unemployment benefits to unemployed workers. In 2011, the ESD paid more than \$3.2 billion in UI (unemployment insurance) benefits to more than 440,000 jobless workers. In addition, the ESD participates in the WorkSource system, which also includes partners from city and county governments, nonprofits, and others, to help people find jobs. The ESD also provides labor-market data to the public at large.

The federal government created the unemployment insurance program in 1935. It is a combined federal and state program. Unemployment benefits provide a partial income replacement during involuntary unemployment, compensate for wage loss as a matter of right, maintain purchasing power, and prevent dispersal of workers or skills sacrifice of an employers' trained work force.

The unemployment benefits are paid for by unemployment benefits taxes. The obligation to pay the unemployment benefits tax is placed on, and paid by, the employers, not the employees. Many workers are surprised to learn that they are not entitled to benefits when they argue that they have paid into the system with their taxes over all the years: they haven't. Employers pay a state unemployment benefits tax (paid to the ESD) and a federal unemployment benefits tax (paid to the IRS).

Eligibility for unemployment benefits is determined by law. A paraphrase of eligibility goes like this: you are eligible if you (1) lack work (e.g., the bad economy); (2) are fired for reasons other than misconduct connected to the employment; or (3) quit your job for good cause (and good cause is limited to the statutorily enumerated reasons). Eligibility also requires that claimants be actively seeking work, able to work, and available for work in each week in which the claimant files for benefits.

You will find more information on the ESD website is http://www.esd.wa.gov/index.php. as well as in the **Washington Administrative Law Practice Manual** § 16.03(C)8.

Public Service

Upcoming Public Service Grant Project

The members of the Administrative Law Section provide support for various programs and projects in our state through the Section's Public Service Grant Project. Recently, the Center for Justice in Spokane and the Seattle Community Law Center received grants for their programs.

The Executive Committee will once again be seeking grant proposals and applications from non profit community groups in Washington State. Applications will be accepted from any Washington state nonprofit organization operating a program that assists individuals with legal services or legal education. Beneficiaries of the offered program must be Washington residents.

Any award will not exceed \$3,000. The award amount will depend on the type of program and number of individuals served. The number of award recipients will be based on the type of programs and number of applicants. Priority will be given to programs that have demonstrated a close correlation with areas of administrative law.

Applications for our 2013 Public Service Grant Project will be available soon. Watch the website for details.

Administrative Law Section Listserve

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.

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 Merrilee Harrell: mharrell@rtwcg.com.

Case Summaries – Washington Supreme Court

Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr., 287 P.3d 516 (Oct. 25, 2012)

The Supreme Court held that the missed opportunity to rest and the additional labor nurses provide when they forgo their paid 15-minute rest periods constitute "hours worked," entitling them to overtime compensation. Sacred Heart Medical Center was obligated under a collective bargaining agreement with the Washington State Nurses Association to provide nurses a 15-minute paid rest period for every four-hour work period. When the rest period was spent working, Sacred Heart compensated the nurses with 30-minutes of regular pay—15 minutes of pay the nurses would have earned if they had rested, plus 15 minutes of pay for the time spent working instead. Relying on WAC 296-126-092(4), which requires a 10-minute rest period on the employer's time for every four hours worked, and the Minimum Wage Act, RCW 49.46.130, the nurses claimed they were entitled to overtime pay for 10 of the 15 minutes of each rest period they missed.

This case hinges on whether the time nurses spent working through their paid rest period should be added to or substituted for the number of hours worked per day. The Court framed the issue in light of *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), which held that an employer's failure to provide a legally required 10-minute rest break extended the workday by 10-minutes. Here, despite Sacred Heart's argument that nurses who missed their breaks worked harder but not longer for purposes of calculating "hours worked," the Court held that the nurses are entitled to overtime compensation for the first 10 minutes of each break they missed.

Gabe Verdugo

In re Disciplinary Proceeding Against Conteh, 284 P.3d 724 (Aug. 23, 2012)

This disciplinary case concerns an attorney who practiced law in violation of immigration laws and misrepresented his employment history on his applications to join the bar and gain asylum in the United States. In 2002, attorney Bakary Fansu Conteh traveled from The Gambia to the United States on a G-2 visa. He remained after his visa expired, obtained work as a nursing assistant, and ultimately gained admission to the Washington State Bar

Association in 2004. Conteh then began practicing immigration law, even though he did not have permission to work in the United States outside of his G-2 status. In 2008, Conteh filed an asylum application, which falsely stated that he was employed by The Gambian government through December 2007. Conteh's legal practice has been lawful since 2010, when he was granted asylum.

Conteh's unauthorized work as an attorney led to an ethical investigation by the WSBA, which charged Conteh with three counts of misconduct relating to his unauthorized practice of law as well as misrepresentations on his bar application and immigration forms. A disciplinary hearing officer found that Conteh's misrepresentation on his asylum application was knowingly false, in violation of multiple Rules of Professional Conduct. The disciplinary hearing officer recommended a 60-day suspension. The disciplinary board increased the recommended suspension to 18 months, finding that Conteh also violated the oath of attorney by failing to abide by immigration laws of the United States. The Supreme Court found that Conteh had not violated the oath of the attorney, affirming the hearing officer's finding that Conteh did not knowingly violate immigration laws by practicing law before he was granted asylum. In a unanimous decision, the Court suspended Conteh for six months.

Gabe Verdugo

Case Summaries – Washington Court of Appeals

Judicial Review of "Other Agency Action"

The decision by the Court of Appeals Division II in *Wells Fargo Bank v. Department of Revenue*, 271 P.3d 268 (Feb. 1, 2012) reminds us that many "agency actions" other than rulemakings and decisions in contested cases are subject to the Administrative Procedure Act's judicial review provisions. It also highlights the fact that agency acts that may be deceptively informal can be "final agency action" that triggers judicial review deadlines.

While a proceeding was pending before a DOR administrative law judge, Wells Fargo and the DOR settled a business and occupations tax refund dispute by executing a closing agreement authorized by RCW 82.32.350. That agreement provided that DOR would issue a refund of

(continued on next page)

\$1,997,685. No mention was made of interest accruing on that amount. DOR issued the refund check on April 1,2008. Shortly thereafter, Wells Fargo's counsel contacted the ALJ, inquiring why interest was not included in the refund check. After some back and forth communication, the Assistant Director of the DOR's Appeals Division sent Wells Fargo a letter stating that interest is not automatically included in refund settlements and that their closing agreement constituted a total settlement amount and was "final and conclusive of tax liability or immunity," and hoping that this explained why "the payment made constituted the total settlement amount," adding "please contact me ... if you require additional information." Wells Fargo's attorney understood from this letter that DOR did not intend to take any further action regarding the interest claim.

On Sept. 22 Wells Fargo's counsel sent a demand letter to DOR's Assistant Attorney General reiterating the bank's claim for interest, referring to the April 15 letter as "rejecting" that claim. The counsel requested that the AAG advise DOR of its error "so that the issue (could) be resolved short of litigation," saying the bank would file suit if a satisfactory interest payment were not arranged within 60 days. After some further interaction—extending beyond the bank's 60-day deadline—DOR's Assistant Director said DOR would like to resolve the matter short of litigation and made a settlement offer. However, no settlement was reached, and Wells Fargo filed suit in Thurston County Superior Court on Jan. 22, 2009.

Wells Fargo's suit sought a declaratory judgment that it was entitled to interest and a judgment ordering DOR to pay interest. The superior court denied DOR's motion to dismiss the suit as untimely under the APA. Wells Fargo then amended its complaint (still seeking a declaratory judgment), DOR counterclaimed for the amount it had paid under the closing agreement, and both parties moved for summary judgment. The court granted DOR's motion and denied Well Fargo's.

Wells Fargo appealed. DOR cross-appealed the superior court's denial of its motion to dismiss. The Court of Appeals held that DOR's April 15 letter was a final "other agency action" and RCW 34.04.542(3) required the petition for review to be filed no more than 30 days after that letter was sent. The Court of Appeals found that no statutory exceptions applied, and it rejected the other bases of suit asserted by the bank. It reversed and remanded the matter to the superior court for entry of an order dismissing Wells Fargo's complaint.

The Court of Appeals first held that DOR's rejection of Wells Fargo's demand for interest was an "agency action" under RCW 34.05.010(3). Specifically, it was "the implementation or enforcement of a statute," namely of RCW 82.32.350, which authorizes DOR to enter into agreements settling tax

disputes. The Court also held that none of the exclusions set forth in RCW 34.05.010(3) applied to the subject DOR action. The Court rejected the bank's claim that the APA judicial review exclusion set forth in RCW 34.05.510(1) applied. That provision excludes "litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." The Court ruled that it did not apply because the bank's suit also pled a cause of action for a declaratory judgment.

Wells Fargo claimed that the APA contains no finality requirement for judicial review of "other" agency action, so that DOR's April 15 letter did not trigger the 30-day filing deadline. The Court in effect imputed a finality requirement and held that the April 15 letter was a "final" agency action. It noted that the bank had understood it to be DOR's final position, and the Court said that the subsequent negotiations spawned by the bank's lawsuit threat did not detract from that finality.

The Court also rejected the bank's argument that even if the APA applied to the DOR's action, a common law breach of contract action could be brought under RCW 4.92.010 and RCW 2.08.010 (which implements Article IV, Section 65 of the state constitution). The Court explained that while the bank might be said to have a right to sue under one or both of those statutes, the APA's procedural prerequisites still applied, including specifically the 30-day deadline.

The Court discussed the provisions of RCW 34.05.542(3) that provide relief from a strict application of the 30-day deadline when a person "did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under (the APA)." The Court ruled that Wells Fargo clearly had the required knowledge upon receipt of the April 15 letter.

Finally, the Court considered the possible applicability of RCW 34.05.530, which provides a person standing to seek judicial review of a given agency action if the person is "aggrieved" by that action, as defined in the section. In short, the Court held that the bank was "aggrieved" by DOR's April 15 rejection of its claim for interest and its long delay in filing its court action was not in substantial compliance with the statutory deadline.

The Supreme Court denied the bank's petition for review.

Richard E. Potter

Stone v. Department of Labor & Industries, 289 P.3d 720 (Dec. 10, 2012)

The Court of Appeals held that under the Industrial Insurance Act, a worker may not receive a permanent partial disability award for an injury if the effects of that injury also contribute to a permanent total disability pension. Steven Stone filed a worker's compensation claim with the Department of Labor and Industries (DLI) after injuring his knee in 1997. In 2001, Stone filed a separate worker's compensation claim for a back injury.

Due to his knee injury, Stone requested a permanent partial disability award in 2008. DLI did not grant the award, but in 2009 it issued two orders finding Stone to be permanently and totally disabled as a result of the combined effects of his two injuries and mental health conditions. DLI placed Stone on a pension. Stone appealed DLI's orders, arguing that DLI should have granted his request for permanent partial disability regardless of whether his knee injury contributed to his permanent total disability pension.

Stone relied on RCW 51.32.060(4), which states that if a worker with a prior injury suffers a later accident that results in permanent total disability, "he or she shall receive the pension to which he or she would be entitled, not with standing the payment of a lump sum for his or her prior injury." The Court noted, however, that in light of another statute and precedent from the Supreme Court, if an injury that was originally classified to cause a partial disability is later determined to have caused a total disability, earlier payments are recouped by adjusting the pension. The rationale behind this rule is that workers who first receive permanent partial disability awards and later receive permanent total disability awards for the same injury should not receive greater benefits than workers who endure permanent total disability in the first instance. Thus, the Court found that Stone was not entitled to an award for permanent partial disability for his knee injury because the same injury was determined to be one of the combined effects for his permanent total disability award.

Gabe Verdugo

Potter v. Department of Labor and Industries, 289 P.3d 727 (Dec.10, 2012)

Jane Potter appealed a superior court decision denying her claim for workers' compensation for multiple chemical sensitivity disorder. Potter claimed she developed the disorder at her former law firm when she was exposed to chemicals off-gassed in a newly remodeled and defectively ventilated office. Because Potter failed to prove that her disorder arose "naturally" and "proximately" out of her employment so as to constitute an occupational disease, the court affirmed the denial of benefits.

Potter, a patent attorney and trained biochemist, worked for Davis Wright Tremaine from August 2002 to December 2008. In June 2007, the firm relocated to newly remodeled offices in the Washington Mutual Tower. In the first weeks of working in her new office, Potter noticed a strong chemical odor and a metallic taste in her mouth. As weeks went by, Potter noticed she had a recurring bloody nose and intensifying feelings of disorientation and fatigue. Potter first tried running a freestanding air filter in her office and then arranged to work entirely from home starting in September 2007.

In January 2008, Potter returned to the office and felt ill within minutes, felt confused, and noticed the chemical odor was still present. She left the office and decided to continue working from home. On Jan. 24, 2008, an industrial hygienist evaluated Potter's office, identifying two potential issues in Potter's office: a design flaw in the ducting and an odor coming from the window blinds. Air testing indicated however that the carbon dioxide level was not elevated and the carbon monoxide level was unremarkable.

In February 2008, Potter's physician submitted a workers' compensation claim to the Department of Labor and Industries on Potter's behalf with the diagnosis "upper respiratory tract irritation." In September 2008, Potter was diagnosed with multiple chemical sensitivity disorder.

On May 7,2009, the Department denied Potter's claim, after first sending Potter to be examined by two other physicians. Among other reasons, the Department rejected the claim because Potter's condition was "not the result of exposure alleged" and was "not an occupational disease as contemplated by section 51.08.140 RCW." Potter took an appeal to the Board of Industrial Insurance Appeals. The appeals judge issued a proposed decision in favor of Potter. The Department petitioned for review to the full Board. On Oct. 4, 2010, the Board issued a final decision rejecting Potter's claim for workers' compensation benefits. The Board declined to decide whether multiple chemical sensitivity disorder could ever be an occupational disease, and concluded only that the condition had not been established as an occupational disease as diagnosed in Potter's case.

Potter appealed the Board's decision to King County Superior Court. On Sept. 1, 2011, the court affirmed the Board's decision and found that Potter did not sustain an occupational disease within the meaning of RCW 51.08.140. Potter appealed.

The first issue the Court of Appeals reviewed was whether substantial evidence supported the court's finding that Potter's disorder did not arise proximately out of her employment. To establish an occupational disease, Potter had to show her disorder arose both (1) "naturally" and (2) "proximately" out of her employment. To meet the "proximately" prong, Potter had to establish "by competent medical testimony" that her claimed condition was "prob(continued on next page)

ably, as opposed to possibly, caused by the employment." If there was no evidence of causation beyond a possibility, it would have been an error to submit the case to the jury. Here, all Potter had established is the possibility that she was exposed to chemicals in her newly remodeled office that made her sick. The court found that her physician's testimony was not enough and that the determination that Potter's disorder did not arise proximately out of her employment was supported by the record.

The second issue is whether substantial evidence supported the finding that Potter's disorder did not arise naturally out of her employment. The "arising naturally" prong of the occupational disease test requires Potter to prove her condition came about "as a matter of course as a natural consequence or incident of distinctive conditions" of her particular employment. The focus is on the conditions giving rise to the occupational disease, not on whether the disease itself is common to that particular employment. Potter must show her "particular work conditions" more probably caused her disability than conditions in everyday life or all employments in general. Potter's "particular work conditions" must be conditions of her particular occupation as opposed to conditions coincidentally occurring in her workplace. As distinctive conditions of her employment, Potter identified defective ventilation in her office, combined with the odor emanating from the new blinds, which she attributes to off-gassing chemicals. But the Board noted, "Remodels are everywhere, and by no means limited to law offices, or to work for that matter,"

In summary, the Board's decision rested on the fact that there was no objective evidence in the record that Potter was exposed at her office to chemicals at levels that caused her to develop multiple chemical sensitivity. This rationale supported the denial of benefits under RCW 51.08.140, which defines an occupational disease as one that "arises naturally and proximately out of employment." The court affirmed the denial.

Melanie deLeon

Ryan v Department of Social and Health Services, 287 P.3d 629 (Oct. 25, 2012)

Kathryn Ryan was alleged to have verbally abused her mother. Ms. Ryan had been living in her mother's house at the time of the alleged abuse. When a Department of Social and Health Services (DSHS) investigator visited the mother's home, Ms. Ryan was no longer living at the house. The investigator unsuccessfully tried several ways to locate her.

A month later DSHS sent a notice by certified and regular mail to Ms. Ryan informing her that DSHS had made a "substantiated finding" that she had mentally abused a vulnerable adult. She was given 30 days to request an

administrative hearing to appeal the finding. DSHS sent the notice to Ms. Ryan's mother's address, where DSHS staff knew Ms. Ryan was no longer living. The certified mail was returned to DSHS after the Post Office made three unsuccessful attempts to deliver it.

When Ms. Ryan failed to file a timely appeal, the finding was permanently placed on a registry made available to the public. Because Ms. Ryan worked as a caregiver, inclusion on the registry made her ineligible for many jobs. She was fired from her job nine months later when her employer discovered her name on the registry.

Ms.Ryan then requested a hearing to challenge DSHS's finding. DSHS dismissed the administrative hearing as untimely. The Superior Court affirmed DSHS.

The Court of Appeals Division 3 reversed, finding DSHS had not complied with the notice requirements of the Adult Protective Services regulation and its enabling statute. Division 3 held that because DSHS did not have a mailing address for Ms. Ryan's actual residence and Ms. Ryan had such significant interests in the outcome, due process required DSHS to "undertake to notify (her) by delivery or personal service" before making a final finding and adding her name to the public registry. The court also held that the analysis of whether DSHS complied with its notice requirement may be based only on the information known by agency staff at the time notice was attempted, and could not be based on after-acquired information that might have been exculpatory. The court reversed and remanded for a hearing on the merits.

Suzanne L. Mager

Department of Revenue v. Bi-Mor, Inc., 286 P.3d 417 (Oct. 9, 2012)

The Court reviewed whether the Department of Revenue properly assessed retail sales tax on the gross amount of a tax-included sale under former RCW 82.08.050 (2001) and held that the department was unambiguously prohibited from using gross receipts as the basis for calculating the retail sales tax owed from a tax-included sale. The Court agreed with the superior court and affirmed the Board of Tax Appeals' dismissal of the department's additional sales tax assessment based on the statute's plain language.

Bi-Mor, Inc., doing business as "Stupid Prices" and Furniture Outlet, LLC, are affiliated business entities operating several Washington retail stores. Bi-Mor advertised that its prices include all applicable sales taxes or that it is absorbing the sales tax (i.e., "Always No Tax"). For accounting purposes, Bi-Mor manually calculates the applicable sales taxes based on the tender paid by the buyer and remits that amount to the Department. To calculate the tax owed to the Department, Bi-Mor deducts an amount for tax from the gross sale (commonly called "backing out" the sales tax) rather than adding tax to the customer's tendered sale.

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The Department audited Bi-Mor, examining sales invoices or receipts from January 2003 through March 2006, and found that some of Bi-Mor's receipts failed to separate retail sales tax from the selling price. Therefore, the department contended that Bi-Mor had to pay taxes on the gross amount received from the customer. Because Bi-Mor had paid taxes based on the "backing-out" method, the department found that Bi-Mor had underpaid taxes. The department therefore assessed Bi-Mor additional taxes.

Bi-Mor appealed the tax assessment to the department's appeals division, which affirmed. Next, Bi-Mor appealed the tax assessment to the Board of Tax Appeals (Board) and both parties moved for summary judgment. Bi-Mor did not contest that during the audit period, most of their customer receipts did not separately state the sales tax portion; rather, Bi-Mor argued that the plain language of former RCW 82.08.050 prevented the department from assessing additional tax based on gross sales receipts. On summary judgment, the Board reversed the department's appeals division and dismissed the tax assessment. The superior court affirmed the board's dismissal order. The department appealed.

The department argued that in a tax-included sale, a retailer cannot exclude the sales tax from its gross receipts unless the retailer separately states the applicable sales tax in the sales invoice. Bi-Mor responded that because former RCW 82.08.050's plain language prohibits the department from considering the advertised price to be the selling price in an advertised "tax included" sale, the department may not assess additional taxes despite Bi-Mor's failure to state the applicable sales tax separately in the sales invoice. The Court held that Bi-Mor is correct. Because Bi-Mor advertised that the price included the tax, the court concluded that former RCW 82.08.050's plain language prohibited the department from assessing Bi-Mor additional sales tax based on the gross amount paid by the customer.

Melanie deLeon

Lynn v. Department of Social and Health Services, 285 P.3d 178 (Sept. 5, 2012)

Mr. Lynn has been diagnosed with autism, a developmental disability, as well as multiple mental illnesses. His adaptive functioning is impaired, but according to the findings in this case, it is impossible to determine what, if any, functional impairments are the result of his autism alone.

Mr. Lynn sought services from DSHS's Department of Developmental Disabilities, but the Department, an ALJ, and the Board of Appeals all concluded that Mr. Lynn was not entitled to benefits. WAC 388-823-0420 provides that the Department will deny services if it cannot determine whether the applicant's adaptive functioning impairment is caused by the developmental disability or by another

related illness. Mr. Lynn argued that the department's regulation exceeded the department's statutory authority and violated both the Americans with Disabilities Act and federal Medicaid laws.

As the challenging party, Mr. Lynn bore the burden of demonstrating the invalidity of the agency action. The Court of Appeals gave substantial weight to DSHS's interpretation of its own eligibility criteria, as well as considerable deference to its expertise. The Court of Appeals determined that the department's regulation was consistent with the Legislature's definition of "developmental disability," because the statute requires that the disability be attributable to one of a specific list of conditions, including autism, before an applicant will be eligible for developmental disability benefits.RCW71A.10.020(4).Moreover, the regulation does not automatically exclude individuals with multiple diagnoses, but instead requires evaluation of the applicant's impairment and its cause. Here, there was no credible evidence that Mr. Lynn's autism was a cause in fact of the impairment to his adaptive functioning. The Court of Appeals also concluded that WAC 388-823-0420 does not discriminate or exclude applicants simply because they have a mental illness; rather, it ensures that the applicant's developmental disability is the cause of substantial impairment. As a result, the regulation does not violate the ADA, nor is it an unreasonable standard for purposes of federal Medicaid law.

Becca Glasgow

Harrell v. Dept. of Social and Health Services, 285 P.3d 159 (Aug. 28, 2012)

Garrett Harrell sued the Department of Social and Health Services (DSHS) for discrimination under state and federal law, claiming that, as a matter of law, DSHS failed to reasonably accommodate his night blindness. The trial court denied his summary judgment motion and dismissed his federal claims, but it allowed trial of his state law claims. The jury found in DSHS's favor. Harrell appealed the trial court's denial of his summary judgment and new trial motions as well as its dismissal of his federal law claims. The Court of Appeals Division II affirmed the trial court's denial because issues of material fact existed to preclude summary judgment, affirmed the dismissal because sovereign immunity bars the federal law claims, and found that substantial evidence supported the jury's verdict.

In October 2006, Harrell interviewed for an on-call counselor position at the Special Commitment Center (SCC) on McNeil Island, which is operated by DSHS. On-call counselors are not permanent staff but instead may be summoned to fill any shift when permanent staff members are unavailable. Harrell told the interview panel that although he suffered from night blindness he could work any of the three daily shifts. He was not hired at that time. He applied for the same on-call counselor position in 2007, again indicating (continued on next page)

that he had vision issues. This time, he was hired as an on-call counselor, and began work on Oct. 1, 2007. On Oct. 30, Harrell spoke with SCC and told them that although he had indicated during the job interview that his disability would allow him to work any on-call shift, he realized after working night hours that he could work only day shift. Harrell requested a reasonable accommodation—that he be assigned to the day shift or a kitchen position.

SCC told Harrell that he could not be assigned to a kitchen position because counselors and kitchen personnel were of different classifications and, to preschedule Harrell exclusively to day shift would violate the terms of the collective bargaining agreement and would be unfair to other staff seeking the popular day shift. SCC then suggested to Harrell that he switch from prescheduled to call-in status so that he could call in to the on-site administrator daily and ask if SCC had any day shift openings.

Harrell sued DSHS. The trial court denied Harrell's motion for summary judgment and dismissed Harrell's ADA and §1983 claims. The parties argued the remaining Washington's Law Against Discrimination claims to the jury, and the jury found that Harrell failed to prove that DSHS had discriminated or retaliated against him.

The Court of Appeals held that the trial court did not err in its decision to dismiss the ADA claims because DSHS enjoyed sovereign immunity from ADA claims brought in state court. The Court also determined that DSHS enjoys sovereign immunity from §1983 suits in state court. The Court further found that substantial evidence supported the jury's verdict.

Melanie deLeon

Greenhalgh v. Department of Corrections, 282 P.3d 1175 (Aug. 14, 2012)

In this case, the Court of Appeals affirmed the trial court's dismissal of a Public Records Act (PRA) lawsuit brought by a correctional center inmate. Inmate Shawn Greenhalgh submitted two PRA requests to the Department of Corrections, the first on Feb. 23, 2007, and the second on April 12, 2007. In response to the two requests, DOC denied some records in March and April 2007, informing Greenhalgh that he could appeal the decision to DOC's Public Disclosure Administrator. Greenhalgh elected to pursue this administrative remedy to DOC's Administrator. On Aug. 29, 2007, DOC's Administrator denied the appeal concluding that DOC had correctly determined that the pages were exempt from production. On May 1, 2008, eight months after the Administrator denied Greenhalgh's administrative appeal but more than one year after DOC claimed the

exemptions, Greenhalgh filed suit against DOC in superior court for alleged PRA violations.

After considering a matter of civil procedure regarding amending pleadings, the Court of Appeals determined that Greenhalgh's PRA suit was time-barred by the one-year statute of limitations. In reaching this conclusion that the suit was time-barred, the Court held that a single written request for records is a single PRA request, even if it seeks several types of records. Furthermore, the Court held that a requestor's original action claim in superior court for an alleged PRA violation is separate and distinct from any potential administrative remedy that he or she may have under the Administrative Procedure Act. The PRA's one-year statute of limitations provision is mandatory and begins the date of the denial. Any agency-level appeal process is optional and does not change the date of the agency's denial. In this case, the agency's denial was in March and April 2007, not when DOC's Administrator denied the administrative appeal in Aug. 2007. Therefore, the one-year statute of limitations began to run in March and April, not August 2007. The May 1, 2008 lawsuit was untimely.

Katy Hatfield

Rosemere Neighborhood Ass'n. v. Clark County, 290 P.3d 142 (September 25, 2012)

This is a clean water case. The decision is written in an outline format that made it easy to follow and understand.

Federal and Washington statutes give the Washington State Department of Ecology (DOE) the authority to administer the Federal Act and to monitor compliance with it. At issue in this case are statutory requirements on municipalities to adopt ordinances that reduce storm water runoff that ends up in streams and rivers.

In 2007, the DOE issued a permit (the "Permit") to Clark County, a major part of which pertained to storm water flow control. Clark County was required to reduce storm water runoff from new development to "historical" levels at the site. Clark County adopted ordinances that the DOE found to be insufficient. Clark County and the DOE negotiated an Agreed Order to bring the county into compliance with the Permit.

Rosemere Neighborhood Association challenged the Agreed Order before the Pollution Control Hearings Board ("the Board"). Clark County was the adverse party. Rosemere and Clark County filed cross-motions for summary judgment. The board denied both motions and the case went to hearing. The board ruled for Rosemere. The county and intervenor Building Industry Association of Washington petitioned for judicial review.

The Court of Appeals Division II began by acknowledging that it was reviewing the case under the judicial review provisions of the Administrative Procedure Act. The court rejected the Petitioners' arguments that the Board exceeded its jurisdiction and found that the board had (continued on next page)

jurisdiction to address the issues "because the board retains an implicit power to decide all issues necessary to effectively execute its power."

Vesting: The first substantive issue discussed by the Court was "vesting." Petitioners argued that the Permit's flow control conditions are not subject to Washington's vesting law. The Court concluded that the petitioners relied on two unfounded assumptions: (1) that upholding the board would place a more onerous burden on developers who applied during the time gap between the time of the Permit's effective date (signed in January 2010, but effective as of April 2009) and the Agreed Order's vesting date (January 2010). The difference is between the duty to mitigate to historical conditions as opposed to only the increase storm flow caused by the developer's own development, and (2) that the law in Clark County changed immediately after the board's reversal of the Agreed Order to the more onerous Permit standards. The Court said the Building Association did not challenge the Agreed Order and held, "Because the record is insufficient to determine whether the county will ultimately enact ordinances that could violate vesting principles, and the Permit itself does not have the force of law in the county, we decline to address the legal vesting issue further."

Deference: The county and the Building Association argued that the board failed to defer to the expertise of the DOE. The Court agreed that the board should defer to the DOE on technical and scientific issues. But that deference does not extend to the board's de novo review of the DOE's decisions. The board had the authority to evaluate experts' opinions against contrary expert testimony.

Challenges as to Findings of Fact: The Court rejected the Petitioners' challenges as to certain findings of fact. The Court reviews factual findings for substantial evidence.

Alternative Program: The Court agreed with the board's characterization of the Agreed Order as an alternative program. The Court found that the board's conclusion was supported by substantial evidence, as opposed to being arbitrary and capricious.

Not based on science: The Court rejected the Petitioners' challenge that the board erred in finding that the acreage metric used to calculate the county's mitigation obligation was not based on science.

Harm to surface waters: The Court rejected the county's argument that the Board erred in finding that the actual harm to the surface waters under the Agreed Order is worse than under the Permit. First, the board found that the Agreed Order did not incorporate several of the protections found in the Permit. The intent of the Permit was to improve water quality in surface waters, while the board found that the Agreed Order does not provide "equal or similar protection to surface waters as the Permit does."

Retrofit Conditions: The county argued that the board erred in ruling that the Agreed Order allowed an impermissible reduction in structural retrofit efforts and, because the Agreed Order did not change the structural retrofit conditions, the county is obligated to comply with all Permit provisions unmodified by the Agreed Order. The board found that the Agreed Order does not require the county to maintain its structural retrofit program and add to the new flow control program, and concluded that the county has engaged in an impermissible reduction in the level of effort required under the structural retrofit program, by splitting and shifting available funds to the new mitigation requirements of the Agreed Order. The Court said the board's finding was supported by substantial evidence, and that substantial evidence supported the board's finding that the county intended to "shift" projects (citing some examples).

Vesting: This argument pertained to Clark County's obligation to adopt ordinances to implement the Permit's standards. The Permit required Clark County to adopt ordinances pertaining to a storm water flow control program by Aug. 16, 2008—18 months after the DOE issued the permit in January 2007. The Board found that Clark County failed to do so. The Agreed Order was concluded in January 2010. Thus, the Board concluded that the Agreed Order failed to provide "equal or similar" protection as the Permit did for the period in between. The Court rejected the Petitioners' vesting argument because expert testimony provided that there is "no scientific justification or permit condition" supporting the lack of mitigation between August 2008 and April 2009. The board had also concluded that the petitioners assumed all developments applied for in the "gap" period would actually be built. The Court held that the board's findings were supported by substantial evidence in the record, and the conclusions reasonably flowed from those findings.

Constitutional and Statutory Issues: The Court declined to reach the Petitioners' constitutional arguments because of "ripeness." The issues were not properly presented to the Court.

John Gray

Calendar

Open Sections Night

The WSBA's Young Lawyers Committee is jointly sponsoring with WSBA sections the 3rd Annual Open Section Night. The Sections offer a wealth of experience and resources to help new and young lawyers find their footing in a new practice area. The event is an opportunity to learn about different WSBA sections (and join one if you want!), mingle with new and experienced attorneys, and learn about the Young Lawyers Committee. The event is on Jan. 23, 2013 from 5:30 p.m. until 7:30 p.m. at the WSBA-CLE Conference Center, 1501 4th Avenue, Suite 308, Seattle. Please RSVP by Jan. 16, 2013 to sections@wsba.org.

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