

ADMINISTRATIVE LAW



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Legislative Recap 2015-2016

Administrative Law Section Legislative Committee
Report on the 2015 Legislative Session
Chair Richard E. Potter

In the 2015 legislative session the Administrative Law Section's Board formally opposed **Senate Bill 6019**. The bill was not passed in that session, but it was carried over and heard in the 2016 session. As in the prior year, the bill passed the Senate, the House passed a significantly amended version, the Senate refused to concur in the House amendments, and the bill died. The Senate bill would have amended the Administrative Procedure Act to provide that (a) a presiding officer for an internal state agency administrative hearing must issue final orders and (b) an administrative law judge at the Office of Administrative Hearings must issue final orders, and (c) to prohibit ex-parte contacts include "communication with an agency employee that requires as part of an employment evaluation that a presiding officer shall decide cases according to the agency head's unwritten policies." The bill as amended by the House would have deleted the provisions concerning initial and final orders and prohibited an... (Continued on p. 3)

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Welcome to the Administrative Law Section's Newsletter!

We hope you enjoy our newsletter and we encourage your feedback.

Please 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.

- Gabe Verdugo, Chair



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Join the WSBA Administrative Law Section

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law.

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The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more.

For more information, feel free to contact the chair of any committee that interests you. We are always happy to hear from you.

Committee chairpersons are listed on the first page of this newsletter and on the Section's website.

To Learn More:

<http://www.wsba.org/Legal-Community/Sections/Administrative-Law-Section>

SCOTUS Limits Antitrust Immunity For Professional Licensing Boards

By Polly McNeill

The United States Supreme Court recently dealt a setback to an increasingly common form of regulation. According to the Supreme Court ruling in *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, state-created licensing boards made up of market participants do not enjoy automatic immunity from antitrust laws.

Since 1943, certain forms of state action have been immune from antitrust laws, allowing state legislatures to pass laws with anticompetitive effects. The state-action antitrust immunity doctrine exempts from the Sherman Act governmental entities when they are acting in their sovereign capacity. Private organizations may also be protected under state-action immunity if the conduct is: 1) consistent with clearly articulated state policy, and 2) actively supervised by the state. Whether the actions of state-created professional licensing boards composed of market participants enjoy similar immunity was the question presented in the *Dental Board* decision.

When the FTC commenced administrative adjudication alleging that forcing non-dentists out of the teeth-whitening business constituted unfair competition, the Board asserted state-action antitrust immunity. The Board claimed that sending cease-and-desist letters to non-dentists was state action exempt from antitrust. In the 6-3 decision, the Court disagreed and held that active supervision by the state is necessary if a majority of the decision-makers are "active market participants." Writing for the majority, Justice Kennedy acknowledged the balance between protecting competition and respecting state sovereignty, but "[w]hen a State empowers a group of active market participants to decide who can participate in the market, and on what terms, the need for supervision is manifest."

The opinion applies only to licensing agencies "controlled by active market participants." Boards with independent membership may not require active state supervision. Bar associations policing unlicensed practice of law are particularly within the reach of this decision, unless specific actions are actively supervised by the state. Also suspect are professional licensing boards for doctors, realtors, insurance brokers and any self-regulated agency. The opinion allows the inference that only the specific actions of a bar actively supervised by the state (e.g., a state supreme court) get antitrust immunity.

Join the WSBA Administrative Law Section Listserve

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserve can send an email to the Listserve. You can request to receive 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.

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Administrative Law Section Confers with WSBA on Pending Bills

In late July 2015 the Section's (then) Chair, Katy Hatfield, and its Legislative Committee chair, Richard Potter, had a conference call with WSBA Chief Communications Officer Debra Carnes and her recently hired Legislative Affairs Manager, Alison Grazzini.

They alerted WSBA to the Section's continuing concern with SB 6019 and the possibility of it being revived in the 2016 session. WSBA will keep alert to such developments and let the Section know of any such activity.

The Section also mentioned the Auditor's pending performance audit of the administrative appeals process. That report is due in "late 2015" and could be used by legislators as the basis for a revived (possibly amended) SB 6019 or a new bill on the subject.

— Richard Potter

Learn More:

Information on bills before the WA Legislature is available at:

<http://apps.leg.wa.gov/billinfo>.

If you would like a copy of the Section's opposition to SB 6019, contact Legislative Committee Chair Richard Potter at: potterre@frontier.com.

Legislative Recap 2015-2016

(Continued from Page 1) ...employee or consultant of the agency from coercing or improperly influencing a presiding officer of an adjudicative proceeding under the Administrative Procedure Act, but specified that an agency head's expectation that a presiding officer will consider written agency policies during his or her decision making is not coercion or improper influence. The Section's comments pointed out a number a statutory conflicts that would be created by the bill's passage and described several practical problems that would be created for the conduct of agencies' business. Testimony by several agencies made similar points. While the bill again failed to be enacted, the sponsor plans to pursue the issues during the interim between the 2016 and 2017 sessions. The Administrative Law Section will work with the WSBA lobbyist to stay involved in that process.

Bills of Interest to WSBA That Were Approved:

House Bill 2332 removed an expiration date concerning the filing and public disclosure of health care provider compensation. The bill includes an amendment of Public Records Act (RCW 42.56.400) to add an exemption for documents, materials, or information obtained by the insurance commissioner under chapter 48.05A RCW.

Senate Bill 6171 amended the Open Public Meetings Act to (a) increase the civil penalty from \$100 to \$500 for an agency governing body member attending a meeting in violation of the Act where agency action is taken and (b) create a \$1000 penalty for subsequent violations.

Senate Bill 2362 amended the Public Records Act (RCW 42.56) and added a new chapter to Title 10 RCW to (a) establishes public records provision governing requests for and disclosure of certain body worn camera recordings made by law enforcement and corrections officers while in the course of their official duties; (b) require law enforcement and corrections agencies that deploy body worn cameras to adopt policies covering the use of body worn cameras; and (c) establish a task force to review and report on the use of body worn cameras by law enforcement and corrections agencies.

Bills of Interest to WSBA That Did Not Pass:

The Administrative Law Section's Board of Trustees formally opposed **House Bill 2311** and **Senate Bill 6456**, which would have amended the Administrative Procedure Act (RCW 34.05) to provide that "No policy of any agency may be enforced" unless the agency has first embodied that policy in a rule and filed the rule with the code reviser. The Section's comments made several points, including that the bills would be a major change to the APA and would conflict with current law that provides for "interpretive and policy statements" adopted by agencies to be filed with the Code Reviser, and that provide a process for petitioning to convert policies to formal rules.

Senate Bill 6464 would have amended the Administrative Procedure Act to establish a 2 year deadline for issuing final decisions in adjudicative cases, and would have added extensive verbiage to the APA concerning "judicial review" of an agency's failure to meet the deadline. While the Section's Board did not issue a formal position statement on the bill, it worked closely with the WSBA lobbyist to explain several conceptual and drafting problems with the bill that would have created significant confusion in the statutes.

Public Employees and Garrity Warnings:

“The Overlap of Administrative and Criminal Investigations Involving Public Employees”

By Robert Rhodes, Norm Partington, Alex Savojni and Pat Kwan of the Rhodes Legal Group

The question arises of how a public employee should respond when an investigator or boss starts asking the employee questions about an incident or problem. Hey, just give a statement because the truth prevails, right?

In our experience, whether the accusations are true or false, stories and facts get filtered through the intelligence, bias, opinion, experience, skill level, attention, mood, personality, personality conflicts, anger and self interest of the listener. Part of the reason it is good to have a third party present during a conversation is that he or she can listen for misrepresentation and “selective hearing” ... an attribute my father used to accuse all children of having.

Most people know that the Fifth Amendment of the United States Constitution protects against the government coercing self-incriminating statements. It has and does happen: look at case law or a history book. What many people don't fully understand is that the constitutional requirement for *Miranda* warnings *trigger only at arrest or its functional equivalent* because the very nature of being arrested and having freedom restricted has proved to be so inherently coercive that innocent people “confess” to things they did not do. As this problem is inherent in the power imbalance of arresting and confining someone, our Supreme Court decided to come up with *Miranda* warnings. Keep in mind that voluntary statements given *before an arrest* or during an administrative investigation do not require an officer or anyone else to mention *Miranda*. *Miranda* is all about the power imbalance of arrest, confinement, and coercion. To complicate things further, statements suppressed per *Miranda* in a criminal case because of the failure to give *Miranda* warnings are generally not protected and suppressed in a civil administrative action regarding a license or job. From a false-accusation defense perspective, by the time someone is reading you your *Miranda* rights, it is already too late to stop an arrest by redirecting assumptions, clarifying statements, offering witnesses, or asking for more investigation. These are steps you should do earlier in the process with a lawyer: the ultimate independent third-party counsel who is experienced and wise.

It is our opinion, if you're ever in the situation where you are hearing *Miranda* rights, invoke them (I am going to remain silent until I speak with my lawyer) whether you did anything or not. After being involved in thousands of criminal investigations and prosecutions from a defense and prosecution perspective, we are comfortable with the opinion that even falsely accused people cannot talk themselves out of an arrest once an investigating officer has made a decision to arrest. Again, in our experience, even when accusations are false, once opinions are formed, facts get filtered through this bias and there is absolutely no guarantee that you will get a fair assessment or report.

Apply for an Administrative Law Section Homan Award

By Marjorie Gray

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member.

Nominations can be made until **July 29, 2016**, by sending an email to graymr2@dshs.wa.gov. Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

This same Fifth Amendment right to not be compelled into being a witness against oneself has found roost in the administrative law setting surrounding public employees. Why only public employees? Well, remember the Fifth Amendment only promises citizens the right to be free from being compelled to give statements against themselves *by the government*. A private employer is not the government. Law is strange.

In an administrative setting, people who work for the government, or arguably do, have a similar “right” in administrative actions involving their jobs—the right not to be threatened with the loss of employment in order to coerce a statement during an administrative investigation when that statement can later be used in a criminal case .

⁴ In the 1960s, there was a case called *Garrity v. New Jersey* in which police officers were suspected of fixing tickets.

Public Employees and Garrity Warnings

(Continued from page 4) The officers were told that their statements could be used in a criminal case against them and they were not required to answer. However, they were told that if they did not cooperate they could lose their jobs via an administrative action. This pressure resulted in them giving statements that were later used to prosecute them criminally.

The U.S. Supreme Court held that the right to due process (the Fourteenth Amendment) and the right not to be forced to self-incriminate (the Fifth Amendment) apply when a federal or state public employee (this applies to Washington public employees) is functionally coerced into giving a "voluntary" statement by an investigator during an administrative action by threatening his or her job. The convictions were overturned. Similar to the *Miranda* case: this ruling produced warnings called *Garrity* warnings.

Depending on the who is interviewing and the goal of an investigation, a *Garrity* warning will either focus on getting an "involuntary" statement to be used in a future administrative action only, or, a *Garrity* warning will focus on getting a "voluntary" statement that can be used in future criminal and administrative actions. An "involuntary statement" *Garrity* warning will focus on telling a government employee that they are being "ordered" or "compelled" to give a statement under threat of losing their job.

By ordering or compelling such a statement, this kind of *Garrity* warning assures such an "involuntary" statement cannot later be used against the employee criminally, only administratively. On the other hand, a "voluntary statement" *Garrity* warning will focus on getting a voluntary statement that can later be used both criminally and administratively by making sure an employee knows they are being asked to voluntarily answer questions, are free to leave and failing to answer will not directly result in loss of employment."

Most federal or State public employees will never read or hear

these warnings. This does not mean that if you do not hear them you should not be concerned about an investigation: remember, voluntary statements are not covered and it is here where most people get themselves in trouble by talking too much because they think they have nothing to hide or that they will talk their way out of a problem.

If you do receive a *Garrity* warning, be very concerned. *Garrity* warnings let a federal or state public employee know that the employee is now being investigated for his or her direct or indirect involvement with some unauthorized activity that involves suspected criminal activity.

Our advice: before you sign a *Garrity* warning or even participate in an interview that causes you concern, postpone the interview and chat with counsel. Tell the interviewer this and reschedule. Be smart.

Keep in mind, *Garrity* does not prohibit the use of compelled statements in a prosecution for making false statements or obstruction of official business. Thus, false statements made during an interview can be used against the employee in the prosecution of the employee for perjury or other charges if answers in subsequent interviews change from those given in the first interview. If *Garrity* warnings are being provided, then the investigating agent has likely contacted the appropriate prosecuting authority about the case already and been told there will be a criminal investigation stemming from the allegations involving the employee.

The law around this topic is in flux and can get tricky so do not rely on the general advice of this article. That said, we hope you found it more interesting and valuable than dry. In practice, these kinds of cases are very interesting.

Keep it honest out there and enjoy this spring season.

Administrative Law Section To Sponsor Mini CLE

The Administrative Law Section will sponsor a mini-CLE on "The Intersection of Administrative and Criminal Law" Friday, June 10, from 2-4pm. It will be held at the Alderbrook Resort on Hood Canal, and will be free for Section members.

Robert Rhodes, author of the related article in this newsletter, will be one of the speakers. The mini-CLE's goal will be to raise awareness of potential legal pitfalls when both criminal charges and administrative citations or actions could result from the same or related allegations. The issues addressed will include double jeopardy, fifth-amendment privilege, right of discovery, and procedural due process.

A reception (no-host bar) will follow the mini-CLE. Registrants will have the opportunity to stay overnight at Alderbrook on June 10 at a reduced rate (a limited number of rooms will be available at the discounted rate; register for the mini-CLE as soon as registration goes "live" if you want to take advantage of that offer).

Follow the link below for more information on CLEs sponsored by the Administrative Law Section:

<http://www.wsba.org/Legal-Community/Sections/Administrative-Law-Section/Calendar>

Summaries of Developments in Washington Case Law

***Klinkert v. Washington State Criminal Justice Training Commission* — 185 Wn. App. 832, 342 P.3d 1198 (2015)**

By Tania Culbertson

Division I of the Court of Appeals affirmed a Superior Court ruling dismissing as time-barred Appellant John Klinkert (“Klinkert”)’s suit against the Washington State Criminal Justice Training Commission (the “Commission”), alleging violations of the Public Records Act, chapter 42.56 RCW. The court ruled that the Commission’s exemption log furnished on November 18, 2009, in response to Klinkert’s request, was sufficient under *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), to trigger the Act’s one-year statute of limitations. RCW 42.56.550(6).

Pursuant to RCW 43.101.085(6), the Commission licenses all Washington police officers. Washington law enforcement agencies are required to notify the Commission when an officer is terminated. RCW 43.101.135. The Commission may request the agency’s investigative file documenting the misconduct leading to the termination, RCW 43.101.135, and did so in the case of a King County sheriff’s deputy terminated after an internal investigation found he had used excessive force against a juvenile arrestee in a holding cell. Under RCW 43.101.400(1)(c), investigative files of the Commission compiled in carrying out its responsibilities are exempt from public disclosure.

On October 27, 2009, Klinkert submitted a public records request to the Commission asking for documents involving the terminated sheriff’s deputy. The Commission responded on November 18, 2009, with a one-page exemption log

listing two documents withheld, one of which was described as a 713-page investigative file containing “additional documentation or information related to the personnel action report” regarding the deputy. The Commission explained “these are records that may be used by [the Commission] in an investigation of [the deputy’s] certification” and “cannot be disclosed under RCW 43.101.400(1).”

Klinkert contested the adequacy of the exemption log in subsequent emails to the Commission but did not file suit against the Commission for an alleged violation of the Public Records Act until July 24, 2013. The Commission moved to dismiss the complaint as barred by the Act’s one-year statute of limitations and the trial court granted the motion.

Relying on *Rental Housing Association*, Klinkert argued on appeal that because the Commission’s November 18, 2009 exemption log did not provide sufficient identifying information for each individual record included in the investigative file, the one-year statute of limitations to file suit under the Public Records Act did not begin to run. The court disagreed, holding that the log allowed Klinkert to evaluate the Commission’s decision to withhold the entire file and “to make a threshold determination of whether the agency ha [d] properly invoked the exemption,” WAC 44-14-04004(4) (b)(ii). Accordingly, the court ruled that the statute of limitations period began to run on November 18, 2009, and Klinkert’s July 24, 2013 suit was time barred. The Washington Supreme Court denied review. *Klinkert v. Wash. State Criminal Justice Training Comm’n*, 183 Wn.2d 1019, 355 P.3d 1153 (2015).

***Steven Klein, Inc. v. Dep’t of Revenue* — 183 Wn.2d 889, 357 P.3d 59 (2015)**

By Scott Hilgenberg

The Supreme Court held that (1) “dealer cash” was taxable under the catchall business and occupation tax provision because, by selling specific cars during specific times and complying with the car manufacturer’s terms and conditions, the dealership received a benefit (income) from the manufacturer in addition to its income from retail sales that constituted an additional taxable business activity; and that (2) the “dealer cash” payments were not bona fide discounts from the wholesale purchase price of vehicles because the dealership did not buy vehicles from the manufacturer subject to dealer cash savings.

The court affirmed the decision of the Court of Appeals.

This appeal determined whether dealer cash provided by a wholesale car manufacturer to a car dealership is subject to Washington’s Business and Occupation (B&O) tax. The Court of Appeals determined it is, affirming the decision of the Board of Tax Appeals.

For car dealerships, “dealer cash” is a motivating incentive program of wholesalers to encourage dealers to sell certain cars at certain times. As a business practice, the wholesaler offered appellant a dealer cash incentive program, which includes an incentive payment that appellant’s dealership received from the wholesale manufacturer for selling specified vehicle models at certain times. Dealerships are aware of these incentive programs through wholesaler’s marketing bulletin, which includes specifics about what cars qualify for the program, and **(Continued on next page...)**

(Continued from page 6...) when those cars need to be sold. In 2007, Washington State Department of Revenue's audit division assessed a B&O tax on appellant. At that time, appellant had received over one million dollars in dealer cash from wholesaler. Appellant filed an appeal requesting a refund, arguing that the dealer cash represented discounts in the cost of purchasing vehicles from wholesaler. Appellant considered the dealer cash to not be derived from business activities. The appeals division disagreed and upheld the assessment. Appellant appealed, and the Board of Tax Appeals affirmed, holding that under the definition of gross income on business, a "tax payer can have taxable income from business activity without providing any specific service." And accordingly appellant was required to pay tax on amounts received. The Thurston County Superior Court affirmed the board's decision, and appellant appealed to the Court of Appeals.

Under the APA, the court required the appealing party to bear the burden of demonstrating invalidity of the Board's actions. The court noted that the tax scheme is extremely broad and all-inclusive in Washington. The court determined that B&O tax applies to gross income of business, with gross income including many activities that are not services such as interest, royalties and dividends. The court

concluded that the B&O tax applies to gross revenues received in the course of doing business, and the dealer cash was taxable.

The court then rejected another argument by appellant, determining that dealer cash was not a bona fide discount on the wholesale price. Citing to WAC 458-20-108(1), the court noted that certain discounts are not taxable, and instead taxation is based on the actual gross proceeds derived from the sale. Here, the court determined that appellant did not fall within WAC 458-20-108(1) because the wholesale purchase of vehicles was not made subject to the dealer cash payment, as required under the code. The court noted that appellant neither received a discount for a particular purchase of the car from wholesaler, nor was dealer cash negotiated by appellant upon the purchase of the cars from wholesaler. Accordingly, it was not a discount, and dealer cash is taxable. One judge dissented, noting that the majority failed to properly identify the business activity being taxed. The majority identified the business activity as appellant accepting the offer to apply for dealer cash and sell specific cars at specific times. The dissent considers the dealer cash incentive program to be more about moving inventory, and therefore inherently tied to the retail sale of cars.

Nissen v. Pierce County – 183 Wn.2d 863, 357 P.3d 45 (2015)

By Stephen Manning

The plaintiff was a detective with a county sheriff's office who sought to require the county to produce (1) the call and text message logs for and (2) the text messages sent or received by a private cell phone used by the county prosecuting attorney.

The Supreme Court held that records the prosecuting attorney prepared, owned, used, or retained on his private cell phone within the scope of employment could constitute "public records" of the employing agency for purposes of the Public Records Act ("PRA"), but that the record was insufficient to determine which records qualified as "public records" and which did not. The court affirmed in part the decision of the Court of Appeals and remanded the case for further proceedings.

Nissen send in a public records requests for Pierce County records contained on the personal cellular telephone of Pierce County Prosecutor Mark Lindquist. Lindquist bought the phone, pays for its service, and sometimes uses the phone for business purposes. After receiving redacted records, Nissan filed suit in Thurston County. The County moved to dismiss under CR 12(b)(6). The Superior Court granted the motion, holding that as a matter of law, private cell phone records can never be public records. The Court of Appeals reversed. At the Supreme Court, the County

argued that the personal cell phone of an agency employee could never be a public record because the PRA's definition of "agency" did not expressly refer to individual employee's as agencies. Because Lindquist was not a "county," it argued that his cell phone records were not subject to the PRA. Further, the County argued that in order for the record to be considered public, Lindquist had to have used a cell phone owned by the County. In rejecting this argument, the court looked to the purpose of the PRA and interpreted the statutory definitions of "agency" and "public record" together. Since the request was directed at the County, the court was to decide if records that a public employee generates while working for an agency are public records. The court held that a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record "prepared, owned, or retained by [a] state or local agency". RCW 42.56.010(3). Further, regardless of who owned the cell phone, the court held that information qualifies as a public record regardless of its physical form or characteristics.

With regard to the PRA request by Nissen, the Court held that Lindquist's text messages may be public records and the County was ordered to review and produce the text messages qualifying as public records. However, the call and text message log prepared and used solely by the independent phone carrier were not. Penalties were reserved pending the County's supplemental response to the records request.