



Commissioner Recusal Procedure for Managing Conflicts of Interest

Introduction

Administrative proceedings are to be free from the impression that a participating member pre-judged the matter at hand. In *Washington Med. Disciplinary Bd. v. Johnston*, the Supreme Court of Washington opined, “Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.”¹

Similarly, the Washington State Executive Ethics Board has issued advisory opinions regarding the Ethics in Public Service Act, Chapter 42.52 of the Revised Code of Washington (RCW), and its application to Boards/Commissions. That guidance has remained grounded in the basic concept that public servants are not to be decision-makers involving matters that personally benefit them. Advisory Opinion number 96-09 includes that boards and commissions may require members to disclose their interests and abstain from voting or attempting to influence votes when there is a conflict of interest.²

In compliance with the advisory opinion, the Washington Medical Commission (Commission) Code of Conduct states that Commissioners will, “recuse themselves and proactively disclose when there is a real or potential conflict of interest, or the appearance of such a conflict.” This code of conduct aligns with the Federation of State Medical Boards (FSMB) recommendation that boards adopt a conflict-of-interest policy. Such a policy should include that no board member shall participate in the deliberation, making of any decision, or taking of any action affecting the member’s own personal, professional, or pecuniary interest, or that of a known relative or of a business or professional associate.

Purpose: The Commission is committed to preventing bias from unjustly influencing Commission activities. The purpose of this procedure is to prevent biases from unjustly impacting licensing, investigations, policy-making, and disciplinary matters.

Case Management Team Meetings

Case Management Team (CMT) meetings include at least three Commissioners who access complaints and determine whether to authorize an investigation. To further prevent bias from impacting Commission activities, staff redact the allopathic physicians (MD) or physician assistants (PA) identifying information including, but not limited to, name, gender or gender identity, and race.

¹ *Matter of Johnston*, 99 Wash. 2d 466, 478, 663 P.2d 457, 464 (1983).

² Advisory Opinion on Disclosure Requirements for Boards and Commissions, Number 96-09, approved May 20, 1996, reviewed May 5, 2021, available at <https://ethics.wa.gov/sites/default/files/public/AO%2096-09.pdf> (Accessed April 8, 2024)

Case Disposition Meetings

Case Disposition meetings involve a panel of Commissioners who hear presentations of cases that have the investigation completed. Each case is presented by a Reviewing Commission Member (RCM) who does not state the identifying details of the MD or PA, including, but not limited to, name, gender or gender identity, and race as part of their presentation. The panel then decides whether to authorize discipline or close the case for each instance.

While these redactions and exclusions are aimed at preventing bias and ensuring fairness, they may inadvertently obscure a Commissioner's immediate recognition of a conflict of interest. The redactions and limited information particularly impede the identification of reasons for recusal during both CMT and Case Disposition meetings. However, once a Commissioner or the Commission's Executive Director becomes aware of a potential conflict of interest involving a Commissioner, this recusal policy offers guidance on proceeding to uphold impartiality and fairness.

This policy is intended to provide guidance for Commissioner and Pro Tem appointees³ in mitigating conflicts of interest that could compromise the integrity of Commission proceedings.

Legal Authority

United States Constitution

The 14th Amendment of the United States Constitution,⁴ provides due process protection for individuals in the U.S., not just practitioners, to protect against biased, unjust governmental adjudications. The United States Supreme Court has clarified that due process protects against a likelihood of decision-maker bias from impacting a fair adjudication,⁵ and these protections have been further enhanced through Washington state laws.

Revised Code of Washington

In Washington, Commissioners are considered "state officers", and as such are bound by the Ethics in Public Service Act, chapter 42.52 RCW. Pertinent sections of this statute include the following:

RCW 42.52.020 Activities incompatible with public duties.

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

RCW 42.52.030 Financial interests in transactions.

(1) No state officer or state employee, except as provided in subsection (2) of this section, may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the officer or employee, in whole or in part, or accept, directly or

³ To avoid redundancy, the term "Commissioner" henceforth includes a Commissioner or a Pro Tem appointee.

⁴ Available at <https://www.archives.gov/milestone-documents/14th-amendment> (Accessed May 14, 2024)

⁵ "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.' Where there is merely a general predilection toward a given result which does not prevent the agency members from deciding the particular case fairly, however, there is no deprivation of due process." *Matter of Johnston*, 99 Wash. 2d 466, 475, 663 P.2d 457, 462 (1983) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase, or grant.

RCW [42.52.160](#) Use of persons, money, or property for private gain.

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

RCW [42.52.903](#) Serving on board, committee, or commission not prevented.

Nothing in this chapter shall be interpreted to prevent a member of a board, committee, advisory commission, or other body required or permitted by statute to be appointed from any identifiable group or interest, from serving on such body in accordance with the intent of the legislature in establishing such body.

Guidance on Transparency Involving a Conflict of Interest and Recusal

There must be transparency in the handling of conflicts of interests involving Commission matters. To prevent a conflict of interest involving public duties from compromising fairness, the Commission recognizes that specific prohibitions in chapter 42.52 RCW must be read in conjunction with the exception specified in RCW 42.52.903 and, in limited circumstances, that conflicts of interest may occasionally be unavoidable. A Commissioner's employer or affiliated health systems may not, in and of themselves, create a conflict-of-interest necessitating recusal; however, when any of these affiliations, or others, create a scenario in which that a Commissioner may financially, personally, or professionally benefit, or be harmed, that does necessitate recusal.

The Commission adopts the following guidance:

- Commissioners are responsible for handling conflicts of interest with full transparency at all times and for recusing themselves from cases as soon as reasonably possible if they recognize a conflict of interest that may compromise fairness, impartiality, or the appearance of impartiality;
- No Commissioner may be beneficially interested, directly or indirectly, in a decision in which they are involved;
- No Commissioner may participate, in their official capacity, in a transaction involving the state with a partnership, association, corporation, firm or other entity of which the Commissioner is an officer, agent, employee or member, or in which the Commissioner owns a beneficial interest;
- A Commissioner is encouraged to announce their potential conflict of interest and recuse themselves as soon as they first recognize the potential conflict, and if there is a true conflict they should leave the room or call and not participate in any discussion involving the matter to avoid impartiality or the appearance of impartiality; and
- A Commissioner must abstain from any discussion or vote taken by the Commission involving an action (including contracting, rulemaking, or policy decisions) or transaction with any entity with which the Commissioner may benefit or be harmed (financially, personally, or

professionally), and if a Commissioner abstains from voting because of such involvement, such Commissioner shall announce for the record their reason for their abstention.

Procedure for Commissioner Recusal⁶

Internal Process Among Commissioners

To ensure fundamental fairness, a Commissioner should notify the Panel Chair and the Executive Director of any concerns they have regarding any Commissioner's, including but not limited to their own, inability to be impartial. Disqualification processes and standards are addressed in the Administrative Procedure Act, specifically in [RCW 34.05.425](#)⁷, in addition to the Model Procedural Rules for Boards, specifically in [WAC 246-11-230](#)⁸.

Standards for Recusal

A Commissioner should exercise sound discretion in choosing whether to be recused from participation and voting regarding any matter. A Commissioner should choose to be recused if they:

- Have a direct financial interest or relationship with any matter, party, or witness that would give the appearance of a conflict of interest;
- Have a current or past relationship* within the third degree of affinity with any party or witness; or
- Determine that they have knowledge of information that is not in the administrative record of a contested case and that they cannot set aside that knowledge and fairly and impartially consider the matter based solely on the administrative record.

Once a Commissioner believes there may be a conflict of interest that has the potential to cause impartiality, or an appearance of impartiality, the first step is for the Commissioner who recognizes that conflict to alert the Commission Executive Director, or their designee. Then, in consultation with the Commission Executive Director, or their designee, there will be a discussion with the Commissioner with the potential conflict, if possible, to make a clear determination of the following: (1) "must" recuse, (2) "should" recuse, or (3) "unnecessary" to recuse. The determination will err on the side of recusal. If a conflict is recognized late, it will be addressed as soon as reasonably possible.

The fact that a Commissioner participated in another matter regarding a respondent, applicant, attorney, or matter may not by itself mandate the Commissioner's recusal from other matters. If a Commissioner is familiar with a respondent or applicant due to serving on a panel or serving as a

⁶ This recusal procedure was heavily influenced by Texas Administrative Code, Rule Section 187.42, with quotation marks omitted, with modifications which incorporate Washington state law and ethics board guidance to ensure impartiality and to protect the public.

⁷“(3) Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified. (4) Any party may petition for the disqualification of an individual promptly after receipt of notice indicating that the individual will preside or, if later, promptly upon discovering facts establishing grounds for disqualification. (5) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination. (6) When the presiding officer is an administrative law judge, the provisions of this section regarding disqualification for cause are in addition to the motion of prejudice available under RCW 34.12.050. (7) If a substitute is required for an individual who becomes unavailable as a result of disqualification or any other reason, the substitute must be appointed by the appropriate appointing authority. (8) Any action taken by a duly appointed substitute for an unavailable individual is as effective as if taken by the unavailable individual.” RCW 34.05.425.

⁸“(4) Any party may move to disqualify the presiding officer, or a member of the board hearing the matter, as provided in RCW 34.05.425(3).” WAC 246-11-230.

reviewing commission member, that alone is generally not sufficient to warrant recusal. However, in the event that prior involvement may potentially prejudice the rights of any party to a fair proceeding, the presiding officer (presiding Commissioner or health law judge) may cure any such prejudice by an instruction to Commissioners or members of the hearing panel to not consider the statement during the course of the proceeding or during deliberations or discussion related to the proceeding.

However, if the Commissioner has prior knowledge of a situation from having served as a hospital quality assurance reviewer or as an expert or fact witness or attorney of record on a civil case involving the respondent or applicant, recusal is warranted.

In summary, Commissioners must recuse themselves if there is a conflict of interest and should recuse if there is an appearance of a conflict of interest. Commissioners are expected to use reasonable judgment and should discuss the possible conflict of interest with the Commission's Executive Director, or their designee, and err on the side of recusal.

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