

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALICE ONGOM,)
)
 Petitioner,)
)
 v.)
)
 STATE OF WASHINGTON,)
 DEPARTMENT OF HEALTH,)
 OFFICE OF PROFESSIONAL)
 STANDARDS,)
)
 Respondent.)

No. 76618-5

En Banc

Filed December 14, 2006

SANDERS, J.—By a mere preponderance of the evidence in an administrative hearing, Alice Ongom’s nursing assistant’s registration was suspended for alleged abuse of a patient. Ongom appealed to the Superior Court which affirmed, as did the Court of Appeals. *Ongom v. Dep’t of Health*, 124 Wn. App. 935, 104 P.3d 29 (2005). We granted review and reverse, holding due process requires clear, cogent, and convincing proof.

FACTS

Fleeing Africa as a refugee, Alice Ongom escaped to the United States with

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her family making her new home in Washington. The State then registered her to practice as a nursing assistant in July 2000. By February 2001 Ms. Ongom was employed in that capacity at the Woodmark Retirement Home in Federal Way.

On the evening of February 22, 2001, an incident transpired between Ms. Ongom and an Alzheimer's resident. As a result the nursing assistant program of the Department of Health issued a statement of charges against Ms. Ongom, alleging that she engaged in unprofessional conduct in violation of RCW 18.130.180(24). She was also criminally charged with fourth degree assault.¹

Thereafter, on April 4, 2002, the Department conducted an administrative hearing to consider allegations of unprofessional conduct. Three witnesses testified: coworker Rebecca Bristlin; Woodmark program director Jocelyn Umagat, LPN; and respondent Ongom. The State was represented by the attorney general; however, Ms. Ongom, who speaks English only as her second language, represented herself pro se. Besides considering the testimony of these three witnesses, the health law judge also considered various documents including a prior written statement by Ms. Ongom and an affidavit of Franciska Chmielewski, another coworker who witnessed the incident. Chmielewski was unable to attend the hearing but generally supported Ms. Ongom's version of the events. As

¹ The court ultimately dismissed the assault charge sua sponte.

acknowledged by the hearing officer, the evidence was in serious conflict.

Bristlin claimed she observed respondent Ongom pick up a cup or dish from the floor and throw it at an Alzheimer's resident, slap the resident on the hands several times, and kick her on the left ankle or lower leg. However, Ms. Bristlin admitted she did not report the incident to management until the following day, contrary to a policy which required immediate reporting of such events.

Respondent Ongom testified that this particular resident had been aggressively violent toward her since the very first day of her employment and that she had frequently accosted her with racist remarks on various occasions, including the evening in question.² Nonetheless respondent testified that she held no ill will toward the resident as she understood the resident to be sick and not responsible for her actions. Respondent testified that the resident threw silverware and/or dishes at her that evening and that she (Ongom) suffered an injury to her shoulder as a result of being hit by a dish thrown by the resident. Ms. Ongom denied ever picking up the dish although she testified that she did take a plate from the resident to prevent further injury to herself or others, receiving no help from other caregivers in the room.

Ms. Chmielewski supported Ongom's version of the events, stating under oath

² "You black bastard, why don't you leave me alone; all my properties have been stolen by black people." Clerk's Papers at 88 (Statement of Alice Ongom).

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that she saw the resident throw a glass, that she did not see Ms. Ongom throw anything at the resident, and that the resident “was well-known to staff for her aggressive behavior toward both staff and other residents. She sometimes kicked [] staff, and I have learned she assaulted another resident.” Clerk’s Papers (CP) at 173.

Finding that the program proved its case by no more than a mere preponderance, the hearing officer concluded the State had *not* proved its case by clear and convincing evidence. He found:

The Presiding Officer concludes the Program did not prove its case by clear and convincing evidence. The Presiding Officer concludes this is so because there are conflicting witness statements whether the Respondent touched Resident A or threw anything at Resident A. Additionally, there was a period of time between the time the incident in question, and when Resident A’s injury was diagnosed or assessed. Finally, the[re] was evidence to show that Resident A was combative and known to kick out on her own. While the evidence provided by the Program is of the type that “reasonably prudent persons are accustomed to rely upon in the conduct of their affairs,” (see WAC 246-10-606), it is not of the type that is “highly probable” (see *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454 (1998)), following a review and consideration of all of the evidence in the record.

CP at 112 (Findings of Fact, Conclusions of Law and Final Order). Nevertheless, the presiding officer suspended Ongom’s license because WAC 246-10-606 requires only proof by a preponderance of the evidence and WAC 246-10-602(3)(c) provides, “The presiding officer shall: . . . (c) [n]ot declare any statute or rule

invalid.”

After concluding a preponderance of the evidence supported the charge of unprofessional conduct and further concluding the violation was “moderate in nature,” CP at 111, the presiding officer suspended Ms. Ongom’s license for 24 months. The presiding officer also ordered her to complete the Healthcare Integrity and Protection Data Bank Reporting Form (section 1128E of the Social Security Act, 42 U.S.C. § 1320a-7e), *id.*, and promptly return the form to the Nursing Assistant Program, thereby establishing a permanent public record of the disciplinary measure.

The nursing home fired Ongom immediately after the incident in question. Ongom testified that “since that time I did go to school, I’ve been suffering without job, I can’t get a job. I got one one place and I work for a day and then they stop me.” CP at 242 (hearing transcript, docket no. 01-07-B-1031 NA (4/4/02)). “And the job I don’t get, I came here as a refugee and I am being put this kind of thing, it really made me very, feel very bad.” *Id.*

ANALYSIS

We review this administrative decision pursuant to the Administrative Procedure Act, chapter 34.05 RCW, and apply the “error of law” standard of RCW 34.05.570(3)(d) to the agency’s legal conclusions. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

We must determine whether proof by a preponderance of the evidence in a professional license disciplinary proceeding satisfies due process. For the reasons expressed in *Bang Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001),³ we conclude that due process requires clear and convincing proof. *Accord Miss. State Bd. of Nursing v. Wilson*, 624 So. 2d 485, 493 (Miss. 1993) (“The standard of proof required for a decision of the Board of Nursing in cases involving fraud or conduct deemed quasi-criminal in nature is clear and convincing evidence.”); *Hogan v. Miss. Bd. of Nursing*, 457 So. 2d 931, 934 (Miss. 1984). Accordingly, we reverse and dismiss.

³ The dissent suggests we overrule *Nguyen* and adopt a preponderance of the evidence standard for all professional disciplinary proceedings. As a rule, we decide only issues properly raised by the parties in the petition for review or answer. *See* RAP 13.7(b) (“If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review”); RAP 13.4(d) (“If the party wants to seek review of any issue which is not raised in the petition for review, that party must raise that new issue in an answer.”). In the event we raise an issue sua sponte, we generally request additional briefing from the parties. RAP 12.1(b). *And see, e.g., State v. Aho*, 137 Wn.2d 736, 741, 975 P.2d 512 (1999). The State failed to argue we overrule *Nguyen* in its answer to the petition for review, but first raised the issue in an unsolicited supplemental brief. This is a wholly adequate and sufficient ground to deny review. *See In re Custody of Brown*, 153 Wn.2d 646, 651, 105 P.3d 991 (2005); *State v. Collins*, 121 Wn.2d 168, 179, 847 P.2d 919 (1993); *Clam Shacks of Am., Inc. v. Skagit County*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) (declining to review issue because raised only in supplemental brief). Furthermore, the issue “is precluded under RAP 2.5(a) as one raised for the first time on appeal” as the state “has not established its entitlement to an exception under the rule.” *Hoflin v. Ocean Shores*, 121 Wn.2d 113, 130-31, 847 P.2d 428 (1993) (footnote omitted). Because “the ends of justice” do not demand waiver or alteration of our rules of appellate procedure, RAP 1.2(c), reconsideration of *Nguyen* is inappropriate.

As stated, the identical issue was resolved in our recent *Nguyen* decision.⁴ Dr. Nguyen was disciplined under the same statute (RCW 18.130.180) as was Ms. Ongom. As is always the case, there are certain factual and technical differences between the proceedings; however, we conclude the differences do not constitute a distinction justifying disparate treatment for Ms. Ongom under the generalized considerations set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).⁵

We noted in *Nguyen* that “[a] professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor.” *Nguyen*, 144 Wn.2d at 521. Although undoubtedly a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a lawful entitlement

⁴ The dissent does not argue *Nguyen* can be distinguished.

⁵ More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35.

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to practice one's chosen profession. We cannot say Ms. Ongom's interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor. *See Nims v. Bd. of Prof'l Eng'rs & Land Surveyors*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002) (“[T]he time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion.”). We reject the Court of Appeals conclusion that “the property interest in a nursing assistant's license, while not insignificant, is considerably more limited than the property interest in a license to practice medicine.” *Ongom*, 124 Wn. App. at 944. The licenses may be different, but nurses and medical doctors have an identical property interest in licenses that authorize them to practice their respective professions.

We also recognized Dr. Nguyen has a liberty interest in his license to preserve his professional reputation. *Nguyen*, 144 Wn.2d at 527. So too does Ms. Ongom. True, Ms. Ongom's employment is probably much less financially rewarding than that of a medical doctor, but it is nevertheless all she has, and she is at least equally dependent upon her professional reputation for employment. Here a notice of her discipline for allegedly abusing a patient was posted in a national register by order of the hearing examiner, accessible by all the public as well as future prospective employers. There is no reason to believe that the damage to her

professional reputation in the context of her life to be any less damaging than Dr. Nguyen's. We therefore disagree with the comment of the Court of Appeals that "[a] nursing assistant who loses her license may suffer some slight damage to her reputation, but any such damage does not approach the significant stigma attached to loss of the right to practice medicine." *Ongom*, 124 Wn. App. at 944. To the contrary, loss of reputation to one marginally qualified for a modest occupation is potentially *more damaging* than the loss of reputation for a highly qualified medical specialist, such as Dr. Nguyen, who may have many more alternate career opportunities. In either case, professional discipline is stigmatizing. It is more than mere money and is thus entitled to a higher standard of proof.⁶ *Nguyen*, 144 Wn.2d at 524-25; *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The Court of Appeals also attempted to distinguish *Nguyen* by claiming "Ongom's license was suspended for only 24 months, whereas Bang Nguyen's license was indefinitely revoked and he was prohibited from seeking from

⁶ The dissent cites *Steadman v. Security & Exchange Commission*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) for the proposition that "upholding the preponderance standard in a disciplinary proceeding against a stockbroker" sheds light on the constitutional burden of proof standard set forth in *Addington*. Dissent at 8. To the contrary, *Steadman* was decided on statutory grounds wherein "[p]etitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing-evidence standard." *Steadman*, 450 U.S. at 97 n.15.

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relicensure for five years.” *Ongom*, 124 Wn. App. at 945-46. We do not believe, however, that the constitutional standard of proof in a proceeding can be determined only after its outcome is known. “[T]he burden of persuasion should not vary according to the nature of the charges in the particular case.” *Nims*, 113 Wn. App. at 505. For example in this proceeding the State had urged the presiding officer to suspend Ms. Ongom’s license not for 2 years but 10. The burden of proof does not differ based on result of a particular proceeding or the nature of the charges.

Further, the Court of Appeals claims the risk of error in Nguyen’s proceeding before a commission which applied a somewhat subjective criteria was greater than the risk of error in the instant proceeding conducted under the Administrative Procedure Act where “objective facts” are at issue. The Court of Appeals suggests, “[t]he use of an objective standard lessens the need for a more stringent standard of proof.” *Ongom*, 124 Wn. App. at 947.

While there are certainly some differences in the facts and procedures at issue, we think the facts of this case, as found by the hearing officer, illustrate these differences do not justify a distinction in the eyes of the law and that the potential risk of error is not appreciably different. Here, the presiding officer explained his inability to determine the facts by clear and convincing evidence where two versions of diametrically opposed testimony were presented. Under the Administrative

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Procedure Act judicial review defers to the factual findings of the administrative hearing officer and, as was the case with Dr. Nguyen, provides no greater assurance against error.

Finally the Court of Appeals attempts to distinguish *Nguyen* based upon the nature of the governmental interest, claiming that the inquiry is not about the additional fiscal burden, if any, on the State to employ a higher burden of proof but rather the ultimate governmental interest which justifies the licensing scheme in the first place. We rejected a similar argument in *Nguyen*:

The last factor called to our attention by *Mathews* is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. As one can quickly discern from a simple reading of the text, this requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed. As the Supreme Judicial Court of Massachusetts phrased it, the last factor examines “the government’s interest in the efficient and economic administration of its affairs.” *Thompson v. Commonwealth*, 386 Mass. 811, 438 N.E.2d 33, 37 (1982). This requirement does not relate to the interest which the government attempts to vindicate through the procedure itself.

Nguyen, 144 Wn.2d at 532.

Unlike the court in *Mathews*, we cannot say the “additional cost in terms of money and administrative burden”⁷ would be substantial were a higher burden of proof required. As we pointed out in *Nguyen*, “[a]n increased burden of proof

⁷ *Mathews*, 424 U.S. at 347.

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would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se.” *Nguyen*, 144 Wn.2d at 532. The same is true here.

Even if the interest to be considered was, as the Court of Appeals put it, that “interest in protecting the public from incompetent or abusive nursing assistants,” *Ongom*, 124 Wn. App. at 948, we cannot see how that interest is any greater than the State’s interest to protect the public from incompetent or abusive medical doctors—who are subject to discipline under the same statute—or, for that matter, the criminal law which requires proof beyond a reasonable doubt. As the Court of Appeals observed in *Nims*, it makes no sense to say that doctors who present the “greater risk [] should receive the benefits of a *higher* . . . burden of persuasion” to prompt discipline than a lower-risk vocation. 113 Wn. App. at 505.

More fundamentally as we noted in *Nguyen*, the ultimate government interest is best furthered by medical disciplinary proceedings which reach an accurate and reliable result. *Cf. Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (“Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state’s interests are furthered by using a preponderance standard in such commitment proceedings.”); *Santoski v. Kramer*, 455 U.S. 745, 766-68, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (a standard of proof more strict than preponderance

of the evidence is consistent with promoting the State's interest in a parental rights termination proceeding). Accuracy in disciplinary proceedings involving those registered to practice as nursing assistants is not less important than those involving medical doctors.

CONCLUSION

In sum, this case is on all fours with *Nguyen*: The minimum constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence. WAC 246-10-606 is invalid because it requires only a preponderance. Accordingly we reverse the Court of Appeals, dismiss the statement of charges, and direct that Ms. Ongom recover her statutory costs at trial and on appeal.⁸

⁸ We, however, deny Ms. Ongom's request for reasonable attorney fees under Washington's equal access to justice act, RCW 4.84.350(1), because we find the agency action was substantially justified in light of inconsistent decisions from the Court of Appeals: *compare Nims*, 113 Wn. App. 499 *with Eidson v. Department of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001).

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Charles W. Johnson

Justice James M. Johnson
