NO. 101733-2

SUPREME COURT OF THE STATE OF WASHINGTON

JULIA A. BARNETT, M.D.,

Appelant,

v.

WASHINGTON STATE PERSONNEL RESOURCES BOARD,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Regulations

I. INTRODUCTION

Petitioner, Julia A. Barnett, M.D. (Barnett) cannot meet any of the considerations governing acceptance of discretionary review under RAP 13.4(b). The Court of Appeals applied settled law to the Superior Court's decision and properly confirmed the administrative review of her dismissal from state employment before the Personnel Resources Board (PRB). There is no basis for providing further review of the PRB's administrative actions.

Barnett argues the PRB acted in a judicial capacity, the record before the superior court was inadequate, and the criteria for issuing both a statutory writ and a constitutional writ of certiorari have been met. Contrary to her argument, the Court of Appeals correctly held that the PRB was "not exercising a judicial function," that "there is no authority holding that the superior court must receive and review the entire administrative record…," and that the trial court has "significant discretion" when reviewing the issuance of a writ. Pet. App. A at 2.

The Washington Supreme Court has long held the PRB's actions are "essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government." *Gogerty v. Dep't of Insts.*, 71 Wn.2d 1, 5, 426 P.2d 476 (1967). Rather than applying facts to law, the PRB applies the facts of each employment matter before it to agency policies and procedures to ensure those administrative actions conform to state civil service rules.

To provide finality to civil service employment disputes in an efficient and timely manner, PRB decisions are final. RCW 41.06.170(2). However, the PRB's administrative orders may be reviewed by superior court if a petitioner meets the criteria for the issuance of a statutory writ pursuant to Chapter 7.16 RCW or can make a preliminary showing that a constitutional writ of certiorari should be issued. Only after the petitioner meets these preliminary requirements does the court issue a writ for the production of the full administrative record.

For the first time on appeal Barnett also claims this matter must be treated as a breach-of-contract case. To the contrary, there was never a written contract between the parties and the analogy is unhelpful and unsupported by legal authority. This case is simply an administrative dispute about whether the Department of Corrections (DOC) properly dismissed Barnett according to its policies and procedures due to her failure to meet a minimum standard of care resulting in serious injury, suffering, and physical harm to her patients.

There is no further clarity needed to interpret the holdings of this or any other court, no constitutional questions requiring an answer, and no issue of substantial public interest to resolve. Barnett has failed to meet any of the criteria for review under RAP 13.4(b) and her petition should be denied.

II. STATEMENT OF THE ISSUES

1. Does the PRB act in a non-judicial capacity when it administratively reviews state civil service employment disputes

by determining whether state agency policies and procedures were properly followed?

2. Did the superior court properly exercise its discretion when it found the record before it was adequate to determine that a writ should not issue and producing the full administrative record is only required after a successful preliminary showing of improper agency action?

3. Did the court properly deny the Petition for a statutory writ when Barnett failed to make a preliminary showing that all the factors in RCW 7.16.040 were present?

4. Did the court properly deny the Petition for a constitutional writ of certiorari when Barnett failed to make a preliminary showing of illegal or arbitrary and capricious action?

III. STATEMENT OF THE CASE

A. The Facts Before the PRB and Superior Court

The PRB reviewed Barnett's dismissal from October 26 to 28, 2020. It reviewed numerous exhibits and heard testimony from multiple witnesses supporting both parties. The PRB

determined which facts it found accurate and reliable and applied them to civil service system standards. It then used that information as the basis for its decision. CP at 42-100, ¶¶ 5.7, 5.8, 5.10, 5.15.

Six patients were proven at the hearing to have received inadequate medical care from Barnett. The care received by two of these patients was particularly concerning. Patient L.J. was given an unacceptable treatment plan for his declining oxygen levels and needed hospitalization. Barnett failed to review and escalate his medical care, leaving the patient to deteriorate slowly and experience shortness of breath without adequate intervention. *Id*. ¶ 4.6.

C.P. had a self-inflicted wound from inserting a pencil into his urethra. This resulted in blood in his urine and required immediate care. After a lengthy delay, Barnett denied permission for the patient to be transported to the hospital. Barnett left the pencil inside of him for five days, obstructing his urethra. Only after the patient began passing blood was he finally sent to the

hospital, where he had a punctured bladder that required surgery. Barnett's supervising physician determined immediate hospitalization should have occurred to avoid injury and severe pain. *Id*., ¶ 4.8.

An internal investigation into Barnett's conduct, overseen by a DOC investigator and DOC medical professionals, was ongoing as of October, 2018, when the Assistant Secretary for Health Services expressed concerns about her performance to DOC. *Id*. ¶¶ 4.4, 4.11. DOC's investigative report was provided to Barnett on March 26, 2019. The report was discussed in detail with her on April 1, 2019, including the allegations of misconduct pertaining to DOC health plans, policies, and failure to meet performance expectations. *Id.* ¶ 3.3. Barnett's employment was terminated on April 18, 2019.

The PRB's Final Order was issued September 24, 2021, and Barnett petitioned for both a statutory and constitutional writ of certiorari in Snohomish County Superior Court on October 25, 2021. The superior court denied the petition on November 23,

2021, finding that the PRB did not act illegally or exceed its authority and that there were other remedies at law available to the petitioner. Pet. App. A at 1. Barnett sought direct review by the Supreme Court but review was denied and the case transferred to the Court of Appeals in May, 2022. Division I affirmed the superior court in a published opinion on December 19, 2022, and denied reconsideration on January 20, 2023.

B. The Court of Appeals Decision

The Court of Appeals, Division I, affirmed the superior court's denial of the writs because:

> (1) the PRB was not exercising a "judicial function" that would subject it to a statutory writ of review by a superior court, and (2) the trial court did not abuse its significant discretion when finding that there were other legal options available to Barnett, which defeat the need for a constitutional writ. Further, there is no authority holding that a superior court must receive and review the entire record or hold a hearing before assessing the preliminary aspects of either writ.

Pet. App. A at 2. The Court further found the record before the superior court was "substantial" and included "four briefs and

multiple declarations, totaling several hundred pages." *Id*. at 4. The Court held it was "contrary to the plain language of the statute" that the full record was required before issuing a statutory writ. *Id*. at 15. It also found the full record was not required before a court determined whether a constitutional writ should issue and held "no authority of any kind" supported such a claim. *Id.* at 17.

The Court of Appeals opinion confirmed that issuance of a statutory writ requires the petitioner to satisfy all four elements of RCW 7.16.040: (1) an inferior tribunal or officer; (2) exercising judicial functions; (3) exceeded its jurisdiction or acted illegally; and (4) there is no other avenue of review or adequate remedy at law. If any of those elements are absent, there is no basis for superior court review. Pet. App. A at 6. The court found a statutory writ could not be issued here because the PRB was not exercising a judicial function and other remedies at law were available. *Id*. at 7, 10. It explained the PRB was "not in the business of applying law to facts" but rather assessing the

employee's performance and DOC's adherence to its policies and performance development plans. *Id.* at 9.

The Court of Appeals also confirmed that there was no abuse of discretion by the superior court and issuance of a constitutional writ of certiorari was properly denied. *Id.* at 15. Finally, the Court found Barnett's claim that she had no other remedies for relief to be unavailing. *Id*. at 14.

IV. REASONS FOR DENYING REVIEW

Barnett urges review under all four prongs of RAP 13.4(b), asserting that the Court of Appeal's decision conflicts with this Court's precedent, is inconsistent with published Court of Appeals decisions, presents a significant question under the Washington Constitution, and/or involves an issue of substantial public interest. RAP 13.4(b). Because the Petition has failed to satisfy any of the four factors in RAP 13.4(b), it should be denied.

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A. The Court of Appeals Acted Consistent with the Precedent of This Court and Is Not Inconsistent with Other Court of Appeals Decisions

1. The PRB's actions were non-judicial

The Court of Appeals properly held that the PRB's decision finding DOC correctly applied its policies and procedures in a dismissal review is not "judicial." To determine whether an agency was exercising judicial functions, courts ask: (1) whether a court has been charged with making the agency's decision; (2) whether the decision is the type that courts historically have made; (3) whether the decision involved the application of law to fact; and (4) whether the decision resembled the ordinary business of courts as opposed to legislators or administrators. *Wash. Pub. Emps. Ass'n v. Pers. Res. Bd.*, 91 Wn. App. 640, 646, 959 P.2d 143 (1998).

The Washington Supreme Court has long held that "the function of the Personnel Board [PRB], in hearing and determining appeals from employees who have been dismissed for cause by their employing agency is nonjudicial in nature."

State ex rel. Hood v. Pers. Bd., 82 Wn.2d 396, 511 P.2d 52 (1973) (overruled on other grounds). *See also Jones v. Pers. Res. Bd.*, 134 Wn. App. 560, 571-572, 140 P.3d 636 (2006) (holding that Board resolution of employee grievance not judicial action). Rather, during a disciplinary appeal, the PRB steps into the shoes of the State as employer, and is free to use its personnel expertise to affirm, modify, or reverse the discipline. *Dunaway v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 112, 115, 579 P.2d 362 (1978).

Any other approach would result in an inflexibility inconsistent with the orderly, swift, and just disposition of merit system appeals. *Id.* at 115 (citing *State Pers. Comm'n v. Webb*, 18 Ariz. App. 69, 500 P.2d 329 (1972); WAC 357-52-170). Personnel policy and management, including appeals from or imposing appropriate discipline, are "essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government." *Gogerty,* 71 Wn.2d at 5. The PRB's purpose is not to apply law to fact but rather to perform a limited review by

applying the facts to state agency civil service personnel policies and procedures as guided by PRB rules. The decision here was the same as any administrative agency interpreting its enabling act when it carries out its delegated legislative power. *Wash. Fed'n of State Emps. v. Pers. Bd.*, 23 Wn. App 143, 146, 594 P.2d 1275 (1979).

Only in the context of an unfair labor complaint or collective bargaining has the PRB been found to exercise judicial functions, since those decisions are common to the court. *Wash. Pub. Emps. Ass'n v. Pers. Res. Bd.*, 91 Wn. App. 640, 649, 959 P.2d 143 (1998). That was not the case here. The PRB no longer reviews labor matters because that function is now conducted by the Public Employment Relations Commission. RCW 41.80.120. Barnett has failed to provide authority that the PRB acts in a judicial capacity for its other personnel decisions.

As Barnett notes in her brief when quoting the PRB's order, PRB determinations are based on "… applicable rules, regulations and pursuant to fair and unbiased dismissal

procedures." Pet. Brief at 14; CP 316. But Barnett's claim that the PRB determines violations of "a worker's employment rights" is unsupported. As appropriately held by the Court of Appeals, PRB decisions are not interpretations of employment law but an administrative review based on application of its own rules to the policies and procedures of the agencies involved. *See* Chapter 357-52 WAC; Chapter 10-08 WAC; *Gogerty*, 71 Wn.2d 1 at 5.

Here, the Court of Appeals aligned its ruling with this Court's decision in *Hood*. In *Hood*, this Court held that "the function of the Personnel Board [PRB], in hearing and determining appeals from employees who have been dismissed for cause by their employing agency is nonjudicial in nature." Pet. App. A at 7; *Hood*, 82 Wn.2d at 401. Barnett challenges this determination by referencing two cases that she claims limit Hood's application to the PRB. Pet. Brief at 3, 5-6. Neither case supports this contention.

Williams v. Seattle School District No. 1, 97 Wn.2d 215, 643 P.2d 426 (1982), did not involve the PRB at all and thus, unsurprisingly, did not hold that it acts in a judicial capacity. Nor does *Williams* undermine the Court's holding in *Hood* that the PRB did not perform a judicial function because courts did not historically review government personnel decisions. What Barnett misunderstands as "disapproval" of *Hood* was the discussion in *Williams* of the requirements of the *constitutional* writ – which unlike the statutory writ does not require an agency to act in a judicial capacity. For purposes of the constitutional writ, *Williams* clarified that the two-step analysis in *Hood* involving review of both arbitrary and capricious actions, as well as violations of "fundamental rights" was unnecessary. *Williams*, 97 Wn.2d 215 at 221. Even then, *Williams* did not disapprove of *Hood*, stating, "[w]hile we do not disagree with the analysis in the above cited cases [*Hood* et al.] and concur in their result, we believe it is misleading to consider our inherent review powers

[pursuant to constitutional writ] as dependent on separate determinations…" *Id*.

Pierce County Sheriff v. Civil Service Commission, 98 Wn.2d 690, 658 P.2d 648 (1983), does not support Barnett's contentions for similar reasons. With respect to statutory writs, which require an agency to act in a judicial capacity, *Pierce County Sheriff* relied on *Hood* in concluding that a statutory writ was not available to review an employee's appeal of discipline by a civil service commission. *Pierce County Sheriff*, 98 Wn.2d 690 at 693 (citing *Hood*, 82 Wn.2d 396; RCW 7.16.040). As in *Williams*, the only disapproval of *Hood* was related to its limitation of constitutional writs to violations of certain fundamental rights. *Id*. at 693-694. The holding in *Hood* that the PRB acts in a non-judicial capacity under RCW 7.16.040 when reviewing employee terminations remains good law and the Court of Appeals correctly followed this precedent.

More to the point for purposes of Barnett's petition, she has failed to show any conflict with this Court's precedent or

conflict among Court of Appeals opinions. The Court should deny review.

2. Barnett had other remedies at law

Extraordinary writs, like the writs sought here, are not available where there are other traditional remedies at law, such as damages. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); *Burg v. City of Seattle*, 32 Wn. App. 286, 295, 647 P.2d 517 (1982). A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship; instead, there must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ. *See Eugster v. City of Spokane*, 118 Wn. App. 383, 414, 76 P.3d 741 (2003) (discussing similar standard for statutory writ of mandamus pursuant to RCW 7.16.050, .280).

Here, Barnett was a public employee and had the option of filing a wrongful termination action in tort. Redress in tort for violation of public policy is available to all state employees

"notwithstanding the existence of other remedies." *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 803, 991 P.2d 1135 (2000) (*quoting Wilson v. City of Monroe*, 88 Wn App. 113, 121, 943 P.2d 1134 (1997)), *review denied*. Such an action allows consideration of "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)).

Since the PRB's personnel proceedings are non-judicial in nature, Barnett had an opportunity to file an action in tort for wrongful termination. Even if, as Barnett argues, the PRB's hearings are judicial in nature and the opportunity to act in tort may have lapsed due to collateral estoppel, that option remained available after Barnett's dismissal and during the initial administrative process as another "adequate remedy at law" RCW 7.16.040. Barnett chose not to pursue this alternate avenue

of review. While that remedy may no longer be available at this stage of the case, that does not mean it was inadequate.

Barnett further argues that her complaint about lacking a remedy at law is "premised on the breach of her 'contract' rights of employment…" Pet at 16. Her argument that administrative civil service employment reviews must be considered under breach-of-contract principles, and that these principles reflect her lack of a legal remedy, is presented for the first time in her petition, without any citations to authority, and is without merit. There is no constitutional right to public employment in Washington, *Giles v. DSHS*, 90 Wn.2d 457, 461, 583 P.2d 1213 (1978), just as there is no breach of contract in this case without a written contract.

The PRB's review here was non-judicial in nature, was conducted within its rules and jurisdiction, and other remedies at law are available. The Court of Appeals decision is fully consistent with the precedent of this Court and other decisions of

the Court of Appeals, and the petition for discretionary review should be denied.

B. Barnett Has Not Identified a Significant Question Under the Washington Constitution Warranting Review

Barnett briefly argues that her right of access to the courts is impeded by the Court of Appeals decision. Pet. Brief at 20. Like her newfound breach-of-contract argument, this issue is raised for the first time in her petition. And it is simply untrue. Her references in support of this premise to the Constitution's open court provision in article I, section 10, and to *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), and *Martin v. Department of Corrections*, 199 Wn.2d 557, 510 P.3d 321 (2022), are inapposite. *Id*. Rather than lacking access to the courts, Barnett had the opportunity to pursue her claim both in tort, and, by a thorough administrative review with full due process protection. She presented preliminary evidence before the superior court, and had that decision reviewed by the Court of Appeals.

Article I, section 10 of the State Constitution primarily protects public access to judicial records and public trial rights and is not applicable here.[1] Barnett makes no effort to apply this section or its case law to the very different matter at hand: an administrative review of state civil service employment matters.

Nor does the *Putman* case support her claim. There, it was determined that requiring medical malpractice plaintiffs to submit a certificate of merit prior to discovery was improper. *Putman*, 166 Wn.2d 974. Unlike Barnett, the injured plaintiffs in *Putman* did not already have a full administrative review hearing where they were able to perform discovery, call witnesses, and fully present their case. *Putman*, *166* Wn.2d at 982. The plaintiff in *Putman* needed to begin the process of fact-finding and the

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[1] *See State v. Parvin*, 184 Wn.2d, 731, 765, 364 P.3d 94, 106 (2015), "a court considering whether to seal a court record also must determine whether the sealing would violate Washington Constitution article I, section 10." and *In re Detention of Reyes*, 358 P.3d 394, 396, 184 Wn.2d 340, 344 (2015), "The Washington Constitution establishes a right of public access to court proceedings, mandating that "[j]ustice in all cases shall be administered openly."

certificate of merit requirement improperly impeded that process. Here, the fact finding has been completed and the writ is only requiring a preliminary showing of illegal or arbitrary and capricious action before further review.

Her citation to *Martin* is also unhelpful. Pet. at 20-21. That case relies on *Putman* to confirm that the statute requiring a certificate of merit for medical malpractice suits is invalid. *Martin*, 199 Wn.2d at 568. Neither case involves administrative law, the civil service system, or an appeal from an inferior tribunal to the superior court. As a result, the cases do not provide persuasive authority for the premise that access to the court is improperly limited by requiring a preliminary showing that a writ should issue prior to a hearing on the merits.

Issuance of a writ is not a barrier to court access. It is an appropriate first step of review akin to other procedural requirements for access to the courts such as standing, adherence to court rules, and exhaustion of administrative remedies. Here, the requirement for a preliminary review properly resulted in

dismissal of a meritless appeal prior to an extended and unnecessary hearing on the merits. Barnett has failed to meet her burden to present a significant question under the Washington State constitution and the Court should deny review.

C. The Court of Appeals Opinion Presents No Questions of Substantial Public Interest

This case involves no far reaching implications that typically mark a matter of substantial public interest under RAP 13.4(b)(4). Barnett's single-sentence argument on this factor referring to *Hood* and its application to public employment provides insufficient support under this rule. Pet. Brief at 20.

The process of petitioning for a statutory writ or constitutional writ of certiorari is well settled and supported by extensive precedent. The Court of Appeals opinion in this matter confirmed existing law in response to a meritless challenge, and does not alter or implicate the public interest. The remaining facts related to Barnett's unprofessional conduct and the circumstances of her administrative appeal only affect her

individually. This case does not warrant this Court's review under RAP 13.4(b)(4).

V. CONCLUSION

Barnett's Petition for Review fails to satisfy any of the criteria for accepting review in RAP 13.4(b). The Court of Appeals, consistent with precedent, properly found that administrative review before the PRB is non-judicial in nature. The trial court did not abuse its significant discretion when finding there were other legal options available to Barnett, and that the full administrative record is not required to make a preliminary determination of whether a writ should issue. The Respondents respectfully request this Court deny Barnett's Petition for Review.

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This document contains 3,842 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of March, 2023.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on March 30, 2023, I served a true and correct copy of the ANSWER TO PETITION FOR REVIEW by e-mail through the Court's e-filing system:

DATED this 30th day of March 2023, at Olympia, Washington.

TINA BERT
Legal Assistant

AGO/GCE

March 30, 2023 - 4:49 PM

Transmittal Information

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Appellate Court Case Title:	Julia A. Barnett v. Washington State Dept. of Corrections, et al.
Superior Court Case Number:	21-2-04973-1

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