

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Washington State Court of Appeals
Division II

Docket No. 39290-9-II

Thurston Cy. Sup. Ct. Cause No. 08-2-02789-6

KENNETH and NONNA NEWMAN,

Plaintiffs-Petitioners,

-against-

VETERINARY BOARD OF GOVERNORS, et al.,

Defendants-Respondents.

APPELLANTS' BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err refusing to grant the Newmans a statutory writ of review (**CP 197-207, Conc. Law 2-11, Order 1**)?
2. Alternatively, did the trial court err refusing to grant the Newmans a constitutional writ (**CP 197-207, Conc. Law 12-15, Order 2**)?
3. In the second alternative, did the trial court err refusing to allow the Newmans to proceed with their Washington Administrative Procedure Act (“WAPA”) appeal (**CP 197-207, Conc. Law 16-18, Order 3**)?
4. Lastly, did the trial court err in striking the supplemental evidence offered by the Newmans prior to the court’s issuance of a written order denying their petition and dismissing the case (**CP 208-09**)?

II. STATEMENT OF THE CASE

On May 12, 2006, Kenneth and Nonna Newman took their Pekingese named Trali to The Animal Emergency Clinic in Tacoma for consultation with Dr. Michael Harrington, a board-certified veterinary neurologist. After a physical examination and review of radiographs taken by Trali’s primary veterinarian, Dr. Mary Conger, Dr. Harrington recommended an MRI. Dr. Kobi Johnson, a veterinary radiologist, completed the MRI under general anesthesia. Dr. Harrington reviewed the

MRI and advised Mrs. Newman that Trali was suffering from a herniated disc, requiring surgery, to which she consented. On the same date, Dr. Harrington performed a hemilaminectomy.

Three days later, on May 15, 2006, Dr. Harrington discharged Trali with instructions that Mrs. Newman followed exceptionally. In August 2006, Trali began to walk on her own and gradually returned to normalcy. On Nov. 18, 2006, Trali suffered a temporary set-back but returned to normal. On Jan. 10, 2007, she experienced an acute episode of posterior paresis. Mrs. Newman rushed Trali to Dr. Harrington within four hours of onset. He performed a clinical neurologic exam and recommended a second MRI, to which Mrs. Newman again consented. Dr. Johnson performed the MRI as in 2006.

After reviewing the results, Dr. Johnson gave Mrs. Newman an extremely grave prognosis, noting that Trali's condition was hopeless and that Dr. Harrington recommended euthanasia. Mrs. Newman insisted on speaking to Dr. Harrington who, begrudgingly, agreed to talk to her. Both Drs. Johnson and Harrington said surgery would not prevent recurrence of disc herniation. Dr. Harrington admonished that Trali would experience severe pain and that if Mrs. Newman loved her dog enough, she would consent to euthanasia. In short, despite Mrs. Newman and close friend

Armando Hernandez's repeated entreaties for discussion of any alternative to euthanasia, the veterinarians said categorically that nothing could be done, there were no other options, and it would be inhumane to keep her alive. Trali was still anesthetized during this discussion,¹ and the veterinarians insisted she sign the euthanasia consent form immediately while still under general anesthesia. Emotionally distraught and barely able to stand, Mrs. Newman reluctantly agreed and with trepidation signed her name to the document provided.² She never saw Trali again.

Due to her distress and because neither veterinarian bothered to explain that the euthanasia authorization form also authorized cremation, a post-mortem option she did not want, it was not until the next day that

¹ Of course, it is also a more than reasonable inference that Trali was already dead when they said that nothing could be done. This is based on the Newmans' consultation with board-certified experts who opined that euthanasia was assuredly not the only option, and that surgery would, more probably than not, have resulted in a successful outcome. It is also based on the curious omission of the regulation-mandated anesthetic records during the MRI (which were generated for the May 12, 2006 MRI procedure, but not the one on Jan. 10, 2007). As noted in the *Petition for Reconsideration* to the VBOG, there was no entry in Trali's medical record on Jan. 10, 2007 for drawing blood, documentation of diagnosis, possible treatment, prognosis, and alternatives, an anesthetic log (including vital sign monitoring), preparations for surgery, Drs. Harrington and Johnson's claims that they fully apprised Mrs. Newman of options other than euthanasia, or, amazingly, that Trali was even alive when Mrs. Newman saw her for the last time. The recordkeeping violation is blatant and should be undisputed. WAC 246-933-320(7)(a)(x).

² Accompanying Mrs. Newman was Armando Hernandez, a friend of the Newmans and Trali, and Family Service Director (i.e., arranger of funerals and cremations), who was present during these conversations and joined in Mrs. Newman's pleading and begging for treatment instead of euthanasia. **CP 84-85**. He submitted an extensive statement to the DOH investigator and asked for an in-person interview.

Mrs. Newman learned that Trali was to be cremated. Despite her efforts to contact the crematory, it was too late. Of note is the Newmans' characterization of Trali in their complaint to the Veterinary Board of Governors ("VBOG") as a cherished, gifted "baby of the family." CP 90.

On or about Jun. 14, 2007, the Newmans submitted two "reports"³ to the VBOG, alleging unprofessional conduct by Drs. Harrington and Johnson. CP 9 ¶ 2; CP 80-92 (Complaint re Dr. Harrington). Core to the reports were the following allegations:

- On May 12, 2006, Dr. Harrington failed to properly interpret radiographs provided by Dr. Conger and the MRI study generated by Dr. Johnson, since both imaging modalities showed numerous calcified and/or dehydrated discs that would inevitably herniate and cause neurologic symptomology.
- On May 12, 2006, Dr. Harrington claimed to have fenestrated two discs, T13-L1 and L1-2, but the fenestration was not effectively performed because the Jan. 10, 2007 MRI confirms one of the allegedly fenestrated discs actually herniated into the spinal canal, causing the symptomology manifested that day. The MRI also suggested that the L1-2 disc was still in place and not removed as would have been the case had Dr. Harrington properly fenestrated.
- The prognosis given to Mrs. Newman by Dr. Harrington on May 15, 2006 was misleading and failed to inform her of the high risk of impending recurrence of disc herniation without proper fenestration.

³ WAC 246-14-020(1) defines a "report" as "information received by the department of health which raises concern about conduct, acts, or conditions related to a credential holder or applicant or about the credential holder or applicant's ability to practice with reasonable skill and safety. If the disciplinary authority determines the report warrants an investigation, the report becomes a 'complaint.'"

- On Jan. 10, 2007, Dr. Harrington failed to obtain informed consent for euthanasia by asserting that Trali's condition had greatly deteriorated since May 2006 to the point of hopelessness, even though independent, boarded experts confirmed that Trali was a good candidate for hemilaminectomy surgery and fenestration of most of the calcified discs on January 10, and after such surgery, the prognosis for complete recovery without any recurrence could be as high as ninety percent. They also misrepresented Trali's condition on Jan. 10, 2007 by stating that she had only one newly herniated disc, yet on Jan. 19, 2007, Dr. Harrington generated a backdated report stating Trali had two newly herniated discs, although the Jan. 10, 2007 MRI Patient Summary form showed one of the two circled discs was "previous[ly]" herniated.
- Dr. Harrington violated his standing as an honest, objective, and compassionate veterinarian by exerting unreasonable and coercive pressure on Mrs. Newman to euthanize Trali, abusing his position of trust and authority by chastising her.
- Lastly, the information provided regarding cremation was incomplete and misleading and Mrs. Newman was not made aware of cremation protocols in place at the clinic, thereby preventing her from stopping Trali's cremation, in violation of her religious beliefs.

CP 88-89. VBOG member Dr. Harmon Rogers was selected as the reviewing board member ("RBM") and the VBOG subsequently determined the reports should be submitted for investigation and become "complaints." Trish Hoyle was assigned as the Department of Health ("DOH") investigator for the case. On or about Dec. 11, 2007, Ms. Hoyle submitted her investigative report.⁴ Dr. Rogers asked Ms. Hoyle for

⁴ There is further evidence of bias by the investigator, who was subject to a complaint

additional information, and Ms. Hoyle obliged, supplementing same on Feb. 19, 2008. On Mar. 3, 2008, Dr. Rogers submitted two Case Disposition Worksheets, one for No. 2007-06-0004VT and one for No. 2007-06-0005VT, closing both cases. The VBOG concluded that Drs. Harrington and Johnson did not commit a standard of care violation or engage in unprofessional conduct.

On Mar. 3, 2008, Ms. Haenke spoke to Mr. Newman, informing him that the cases were closed. Mr. Newman specifically asked her to provide him with an appeal procedure along with the letter of decision. **CP 130.** Ms. Haenke agreed to do so. A letter dated Mar. 6, 2008, signed by VBOG Program Director Janelle Teachman, advised the Newmans that the cases were closed. **CP 34.** According to the letter, the Board determined there was no cause for disciplinary action provable by clear and convincing evidence. However, the letter invited new evidence as a basis for reconsideration of the VBOG's closure decisions. No information regarding appeal was provided in this letter.

lodged by the Newmans to Ms. Hoyle's supervisor, Chief Investigator Dave Magbey, challenging Ms. Hoyle's pro-veterinarian bias, use of leading questions when interviewing the veterinarians, and making outrageous and completely untrue statements about the Newmans. *See also Petition for Reconsideration*, at 27 fn. 29. Dave Magbey assured the Newmans that he would keep Ms. Hoyle in check and submit the Newmans' concerns to the VBOG as part of the complaint file. In public disclosure, it was learned that the Newmans' concerns about Ms. Hoyle were never submitted to the VBOG as promised. Mr. Magbey apologized for this failure.

On Mar. 12, 2008, Mr. Newman left Ms. Haenke a voicemail asking for the appeal procedure. Her voicemail response referred only to reconsideration. **CP 130**. On Mar. 13, 2008, following up on the Mar. 3, 2008 telephone call and voicemail of Mar. 12, 2008, the Newmans sent a letter to Judy Haenke, Acting Executive Director of the VBOG, asking, *inter alia*, for information about the appeal process for complainants objecting to the VBOG's decision to close a case and clarification as to the standard of proof utilized by the Board. **CP 130**. The letter clearly stated:

Please be advised that we ultimately object the decision of the Veterinary Board of Governors on closing our complaints; we are not interested in reconsideration and thereby we request an adjudicative hearing on the merits.

We request for the Department of Health to provide us with all information regarding our rights to an appeal, the appeal process/adjudicative hearing, including any deadlines.

CP 130. In this letter, Mr. Newman specifically queried whether the WAPA applied. **CP 130**.

Two days later, on Mar. 15, 2008, Mr. Newman spoke to Ms. Haenke asking if she had received his Mar. 13, 2008 letter and inquiring as to the appeal procedure. **CP 127 ¶ 2**. He specifically asked for all information regarding their rights to an appeal, including any deadlines. **CP 127-128 ¶ 2**. Ms. Haenke confirmed she received his letter but had no

answer. She said she would confer with a Staff Attorney for the VBOG and respond by letter. **CP 128 ¶ 3.**

On Mar. 20, 2008, Ms. Haenke responded that there was no administrative appeal process available. **CP 36.** She also advised that the controlling WAC establishing the standard of proof as evidentiary preponderance, WAC 246-11-520, does not apply to the VBOG, citing *Ongom v. DOH*, 159 Wn.2d 132 (2006). *Id.* After reading this letter, the Newmans relied on what she said and presumed they had no standing to appeal the VBOG's decision. **CP 128 ¶ 5.** They had no reason to doubt the accuracy of her letter since she was Acting Executive Director of the VBOG and, they believed, the "top official for the Board." Furthermore, she had consulted with the Board's Staff Attorney and, presumably, received correct information. **CP 128 ¶ 5.** At this time, the Newmans were not represented by counsel. **CP 139 ¶ 5** (representation commenced August 2008); **CP 188 ¶ 3** (Mr. Mabrey noting period of representation as Feb. 8, 2007 through Nov. 8, 2007; and again starting Aug. 9, 2008). They saw no need to consult with an attorney either, as they did not expect the VBOG to misrepresent whether they had standing to appeal. **CP 128 ¶ 6.**

Between Mar. 3 and Mar. 20, 2008, Mr. Newman and his wife spoke telephonically with Ms. Haenke on cumulatively at least four

different occasions. CP 139 ¶ 3 (Mr. Newman); CP 190-91 ¶ 2 (Mrs. Newman). On at least three of those occasions when Mr. Newman spoke to her, and on at least one occasion when Mrs. Newman spoke to her, Ms. Haenke very clearly and strongly stated that there was absolutely no appeal process for the Newmans to pursue. CP 139 ¶ 3; CP 190-91 ¶ 2. The Newmans understood Ms. Haenke's Mar. 20, 2008 letter as "a confirmation of [her] contemporaneous verbal statements to [them]." CP 139 ¶ 4.

On Jun. 6, 2008, in response to a public disclosure request, the Newmans received incomplete sets of the closed case files. A supplemental request was submitted and, upon critical review of the documentation and new evidence, the Newmans submitted a *Petition for Reconsideration* on Sept. 29, 2008. CP 38 (Table of Contents only). As part of the reconsideration, the Newmans submitted reports from board-certified experts and detailed examination of the deficiencies and biases in the VBOG's investigation of the complaints.⁵ On Nov. 10, 2008, Ms.

⁵ For instance, the Newmans noted that Dr. Harrington and Dr. Johnson misled the VBOG by claiming that they consulted with Dr. Patrick Gavin at WSU by having him evaluate the MRI images of Jan. 10, 2007 prior to euthanasia. Dr. Gavin, in a letter of Nov. 29, 2007 stated that the images were not transmitted until Jan. 16, 2009, at which time the report was done. Of note, the RBM Dr. Rogers solicited Dr. Gavin to essentially change his statements to conform to the testimony of Drs. Harrington and Johnson. Dr. Rogers is a colleague of Dr. Gavin at WSU's veterinary school. Importantly, the medical record glaringly reflects the absence of any consultation with Dr. Gavin on Jan. 10, 2007.

Teachman responded to the Petition stating the VBOG would not re-open the cases and reasserting that the veterinarians acted within the standard of practice. CP 40. The decision was only mailed to the Newmans' attorney, not to the Newmans. *Id.*; *Mabrey Decl.*, ¶ 3-4; *Newmans Decl.*, ¶ 1.

On Dec. 8, 2008, the Newmans filed a *Petition for Constitutional Writ of Certiorari or Statutory Writ of Review* in Thurston County Superior Court. CP 4-7. In it, they alleged that the VBOG disregarded its statutory mandate, acted illegally, unlawfully, and erroneously, issued a void ruling, adhered to an incorrect standard of proof, and/or acted arbitrarily and capriciously. CP 6 ¶¶ 12-14; CP 7 ¶¶ 17-18; CP 23-27. The VBOG answered on Dec. 30, 2008, alleging that the Newmans were not entitled to this relief. CP 41-67. On Jan. 29, 2009, over the Newmans' objection, the Hon. Richard Hicks granted Drs. Harrington and Johnson's motion to intervene. On Apr. 17, 2009, Judge Hicks issued *Findings of Fact and Conclusions of Law Denying the Newman's Motion and*

The Newmans also included evaluations by boarded veterinary radiologist Dr. Craig Long and boarded veterinary neurologist Dr. Craig Kortz, as well as Dr. Robert Richardson, who, in his 32 years as a veterinarian, concluded that he never had, and never will, euthanize a patient with a viable spinal cord, like Trali, particularly where it was clear from Dr. Harrington's medical records that Trali had deep pain perception and, thus, a viable spinal cord. In his opinion, "Euthanasia of Trali was not indicated or necessary." This was based on an "inappropriate and invalid prognosis ... by Dr. Harrington (and supported by Dr. Gavin after the fact)[.]" *Pet. For Recon.*, Exh. A , pgs. 3, 4.

Dismissing their Petition with Prejudice. CP 197-207. On Apr. 22, 2009, Judge Hicks granted the Defendants and Defendants in Intervention's joint motion to strike the *Supplemental Declaration of Kenneth Newman*, dated Apr. 9, 2009 and certain lines in *Plaintiffs' Submission of Findings of Fact. CP 208-211.* A timely appeal to this court followed. **CP 212-229.**

III. ARGUMENT

The Newmans challenge the trial court's refusal to issue a statutory writ of review, constitutional writ of certiorari, or, alternatively, to construe the timely-filed suit as a WAPA petition for judicial review. Further, with respect to the latter two appeal modalities, the trial court abused its discretion in refusing to consider the supplemental evidence offered by the Newmans and in prematurely advancing to the merits. Because the court's conclusions of law followed from the premise that the WAPA applied to the Newmans, the analysis begins there.

A. The Newmans Satisfied All Requirements for Mandatory Review under the WAPA.

Challenges against a credentialed health care provider for unprofessional conduct are initiated by a written complaint. RCW 18.130.080(1)(a).⁶ The VBOG is an "agency" under the WAPA.⁷ RCW

⁶ "Reports" become "complaints" upon investigation. WAC 246-12-020(1). RCW 18.130.080 uses inconsistent terminology from WAC 246-12-020 by calling the "report"

34.05.010(2). When the VBOG determines whether to take disciplinary action, it undertakes “agency action.” RCW 34.05.010(3). The VBOG must first adjudge whether the report “merits investigation.” RCW 18.130.080(2). Investigation is mandatory upon a finding by the VBOG that, even without a formal complaint, it has “reason to believe” that a licensee may have engaged in unprofessional conduct.⁸ *Id.*

The VBOG made this determination and initiated an investigation – committing to its first “agency action.” At this stage, the Newmans became aggrieved parties, having presented a complaint that satisfied the prima facie test to launch an investigation as mandated by state law. Once

a “complaint,” which is later subject to a “investigation.”

⁷ The VBOG is also a “disciplining authority” (RCW 18.130.020(6)) under the Uniform Disciplinary Act (“UDA”), Ch. 18.130 RCW; *See* Veterinary Practice Act (“VPA”) - RCW 18.92.046 (applying UDA to veterinary disciplinary matters); RCW 18.130.095(4)(noting that uniform procedural rules shall be adopted by all disciplining authorities listed in RCW 18.130.040(2)); RCW 18.130.040(2)(b)(xiv)(VBOG listed); RCW 18.130.100(adjudicative proceedings before agencies under the WAPA govern all hearings before the disciplinary authority).

⁸ Importantly, there is no similar requirement that law enforcement officers shall investigate a complaint even if probable cause to believe a crime has been committed exists. *See* Ch. 10.31 RCW (noting that officers shall arrest without a warrant only in highly restricted circumstances – RCW 10.31.100(2), but otherwise, though they have the authority to arrest, the decision remains discretionary). Search warrants are not mandatory upon reasonable cause, but remain discretionary with the magistrate. RCW 10.79.015. There is no cause of action for negligent investigation of crime, except where there is a statutory duty, as in the case of investigating child abuse. RCW 26.44.050; *Lewis v. Whatcom Cy.*, 136 Wash.App. 450 (I, 2006); *Chambers-Castanes v. King Cy.*, 100 Wn.2d 275, 284 (1983)(declining to find cause of action for failure of police to comply with broad duty to “keep and preserve the peace” and “arrest ... all persons who break the peace, or attempt to break it[.]” as stated in RCW 36.28.010).

investigated, a second statutory duty was imposed, giving the VBOG no discretion to refuse to issue a Statement of Charges (“SOC”) upon a “reason to believe” finding:

If the disciplining authority determines, upon investigation, that there is **reason to believe** a violation of RCW 18.130.180 has occurred, a statement of charge or charges **shall be prepared** and served upon the license holder or applicant at the earliest practical time.

RCW 18.130.090(1)(emphasis added).

In refusing to issue an SOC or Statement of Allegations (“SOA”),⁹ the VBOG undertook a second “agency action,” which became a “final order,” having been reduced to writing in the form of a statement (i.e., the Mar. 6, 2008 letter) that finally determined the legal interests of the Newmans in seeing Drs. Harrington and Johnson disciplined. RCW 34.05.010(11)(a). Aggrieved by this determination sat the Newmans, who, based on the Mar. 6, 2008 letter inviting what amounted to a petition for reconsideration, submitted through counsel new evidence and authority.

Upon evaluation of the “Petition for Reconsideration,” the VBOG undertook a third “agency action,” again in the form of a “final order,” as

⁹ Alternatively, prior to serving an SOC, the VBOG may furnish a Statement of Allegations (“SOA”) with a detailed summary of evidence relied upon and a proposed stipulation for informal resolution of the allegations. While there is discretion to furnish an SOA prior to serving the SOC, no discretion exists whether to prepare and serve the SOC – so long as “there is reason to believe a violation of RCW 18.130.180 has occurred.” RCW 18.130.172(1).

an informal agency letter transmitted to the Newmans' counsel on Nov. 10, 2008. In certain terms, it stated, with finality:

The two cases identified above will remain closed as the case was within the standard of practice and no new evidence was provided.

CP 40.

The trial court found that the Newmans had standing under the WAPA to seek judicial review of the second and third agency actions via RCW 34.05.542(3)(“other agency action”) but held they did not file a WAPA appeal within 30 days. **CP 221 ¶¶ C(6-7)**. Yet the UDA, WAPA, VPA, and related WACs are silent as to what steps must be taken when, after investigation, the VBOG fails to comply with its statutory duty and declines to issue an SOC or SOA.

The trial court erred with respect to rejecting the Newmans' WAPA appeal for the following reasons:

- (1) The 30-day petition for judicial review period never started running because the VBOG failed to serve the Newmans with the Nov. 10, 2008 final order, making the Newmans' *Petition* to Superior Court premature, rather than untimely;
- (2) The 30-day petition for judicial review period of the Mar. 6, 2008 order was tolled based on the VBOG's internal “reconsideration” procedure with deadlines not subject to Ch. 34.05 RCW;
- (3) The Newmans strictly complied with the filing and service requirement of RCW 34.05.542 and substantially complied

with the format requirement of RCW 34.05.546;

- (4) If held not to be in compliance, it is the fault of the VBOG in failing to fulfill its statutory obligation to give notice; and
- (5) If not held not to be a final order, then the petition for judicial review deadline was tolled due to the fact that the Newmans did not know and were under no duty to discover or could not reasonably have discovered that the VBOG had taken action with sufficient effect to confer standing.

1. **The 30-Day Judicial Review Period Has Not Commenced Running.**

The time to file a petition for judicial review is 30 days from “service of the final order” (RCW 34.05.542(2)) or from “agency action other than the adoption of a rule or the entry of an order[.]” (RCW 34.05.542(3)). “Agency action” in the form of a “final order” took place on Mar. 6, 2008 and Nov. 10, 2008. The Newmans filed their petition in superior court less than 30 days from the Nov. 10, 2008 order’s service on their attorney. The specific agency action undertaken on Nov. 10, 2008 was a “final decision” tantamount to a “final order” that needed to be served on the Newmans personally, not through their attorney. Two cases initially allow us to reach this conclusion – *Devore v. DSHS*, 80 Wash.App. 177 (1995) and *Bock v. State*, 91 Wn.2d 94 (1978).

Devore held that service of the final order on licensees Devores’ attorney, instead of the Devores themselves, was insufficient to start

running of the 30-day period for judicial review. *Id.*, at 181-82. It is undisputed that the VBOG did not serve the Nov. 10, 2008 letter on the Newmans themselves, but only on their attorney, thereby violating RCW 34.05.464(9). Defendants may argue that the Nov. 10, 2008 letter was not a “final order” subject to RCW 34.05.464(9)(requiring reviewing officer to serve copies of final orders “upon each party”).¹⁰ However, the Nov. 10, 2008 letter is such a “written statement” that “finally determine[d] the ... legal interests of [the Newmans].” Further, it is closer to a “final order” than some interlocutory “other agency action” (i.e., “other than ... entry of an order”) in that the letter transmitted to the Newmans’ attorney resembled what the Supreme Court found to constitute a “final decision” subject to judicial review in *Bock*.

Bock v. State, 91 Wn.2d 94 (1978), addressed whether a letter from the Board of Pilotage Commissioners informing the applicant it would take no further action on his application for a license was a “final decision” within the meaning of RCW 34.04.130, the former WAPA’s provision permitting judicial review. Approvingly citing to *DOE v. Kirkland*, 84 Wn.2d 25 (1974), the *Bock* court concluded that this albeit

¹⁰ RCW 34.05.464(4)(“reviewing officer” is the officer reviewing the initial order (including the agency head) – here, Janelle Teachman, the Disciplinary Program Manager). RCW 34.05.010(11)(a) defines “order” as “a written statement of particular

informal letter qualified as a “final decision” within the meaning of RCW 34.04.130. *Id.*, at 99 (noting that “absence of such procedural niceties was harmless” as “[b]oth parties understood the letter to be notice of the Board’s refusal to issue appellant a license[.]”). Years later, citing *Bock*, the Supreme Court held in *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621 (1987) that:

A **letter** from an agency will constitute a **final order** if the letter clearly “fixes a legal relationship as a consummation of the administrative process.”

Id., at 634 (emphasis added). While *Bock* and *Valley View* are old-WAPA cases (i.e., Ch. 34.04 RCW), the distinction is immaterial given the new-WAPA era (i.e., post 1988) case of *Smoke v. City of Seattle*, 132 Wn.2d 214, 222-23 (1997), citing to *Bock* and *Valley View* to hold that an informal agency letter sufficed as a “final order” for purposes of appealing under Ch. 64.40 RCW. Accordingly, the 30-day period within which to seek judicial review of the Nov. 10, 2008 letter under RCW 34.05.542(2) remains tolled.

The Defendants may argue that RCW 34.05.542(6) serves as a legislative repeal of *Bock*, since it states:

For purposes of **this section**, service upon the attorney of

applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.”

record of any agency or party of record constitutes service upon the agency or party of record.

RCW 34.05.542(6)(1998)(emphasis added). This argument fails, however, since “service” refers to service of the petition for judicial review, not service of the final order that gives rise to the obligation to file and serve the petition for review. This is justifiable given that RCW 34.05.542(6) expressly only applies to “this section” – viz., RCW 34.05.542, not RCW 34.05.464. RCW 34.05.464(9) requires that the final order “be served upon each party.” Of note in interpreting service under RCW 34.05.464(9) is the new-WAPA case *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 618-19 (1995), stating:

For final orders from an agency, the APA formerly required “[a] copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed to each party and to his attorney of record, if any.” Former RCW 34.04.120. The current version of the APA requires a reviewing officer to serve copies of final orders “upon each party.” RCW 34.05.464(9). The Legislature deleted all references to the attorneys of record.

We conclude from this amendment that the Legislature did not intend ... to include the parties' attorneys. The Legislature treated parties and parties' attorneys as separate entities, and the legislative history of the APA requires this court to distinguish between the two. Service on an attorney was appropriate under the APA only when the Legislature explicitly authorized it. Here, no such authorization exists.

The Court of Appeals in *Devore* approvingly cited to *Union Bay* in

concluding that service on the Devores' attorney, regardless of whether the Devores had actual notice through their attorney, was insufficient. *Devore*, at 182-183.

2. The 30-Day Judicial Review Period for the Mar. 6, 2008 Order was Tolloed Pending "Reconsideration."

Within ten days of service of the final order, a party may file a petition for reconsideration. WAC 246-11-580(1). Reconsideration is only permitted by parties on "final order[s]." RCW 34.05.470(1). Disposition of petitions for reconsideration require a written order. WAC 246-11-580(7). If timely filed, and other procedural rules are complied with, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration. RCW 34.05.470(3).

As noted below, the VBOG had an obligation to notify the Newmans of their right to judicial and administrative review, and any associated deadlines, including the 10-day period for reconsideration and 30-day period for judicial review. Accordingly, the Newmans did not file a "Petition for Reconsideration" within 10 days of the Mar. 6, 2008 order, because the VBOG gave no deadline. When the "Petition for Reconsideration" was submitted, the VBOG considered it, made no objection as to timeliness (thereby waiving it), and issued a second order again failing to comply with due process.

Even the VBOG admits that the Newmans' *Petition for Reconsideration* was not actually one contemplated by RCW 34.05.470 and WAC 246-11-580. **CP 43 fn. 3.**¹¹ But should this court find that the *Petition for Reconsideration* was subject to RCW 34.05.470 and WAC 246-11-580, it tolled the 30-day period within which to seek judicial review. RCW 34.05.470(3). In that the VBOG did not tell the Newmans that they only had 10 days to submit new evidence, the agency waived and modified the standard 10-day reconsideration window and is estopped from claiming that the *Petition for Reconsideration* did not toll the 30-day period for judicial review.

RCW 34.05.080 discusses variation from time limits “established in this chapter.” As a *Petition for Reconsideration* of an agency decision not to discipline has no time limit established in Ch. 34.05 RCW, the VBOG was free to waive, modify, or create that mechanism. RCW 34.05.060, tends to support this interpretation by “strongly encourag[ing]” “informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter[.]”

¹¹ “There is no statute or rule providing for reconsideration of a decision to close a complaint, although disciplinary authorities often inform complainants that closures may be reconsidered if new evidence is provided that is relevant to the matter and was not previously considered by the disciplinary authority....”

Further, RCW 34.05.050 provides that “a person may waive any right conferred upon that person by this chapter.” RCW 34.05.080(5) expressly notes that “[t]ime limits may be waived pursuant to RCW 34.05.050.” Judy Haenke and Janelle Teachman were each a “person” as defined by RCW 34.05.010(14), serving as agents (if not agency heads) of the VBOG, a “governmental subdivision or unit thereof.” While the VBOG may have had the right to not respond to any reconsideration motion made after expiration of the 10-day period, it waived it. RCW 34.05.080(7), emphasis added, notes:

In an adjudicative proceeding, any agency whose time limits vary from those set forth in this chapter **shall provide reasonable and adequate notice of the pertinent time limits to persons affected.** The notice may be given by the presiding or reviewing officer involved in the proceeding.

Thus, to the extent the VBOG was applying its own agency-specific deadlines to determining an applicant or party’s request for an adjudicative proceeding,¹² it was statutorily obligated to inform the

¹² Once the VBOG determined that the Newmans’ complaint “merited investigation,” if not before (RCW 18.130.080(2) requires investigation with “reason to believe”), they created a potentially adversarial relationship between the Newmans and the VBOG. Part of the adjudicative proceeding pertaining to action on the Newmans’ complaint involves the threshold determination of whether to provide the adjudicative hearing they requested. The “Petition for Reconsideration” was both a remedial step in that process of adjudicating the Newmans’ complaint.

It also served as a new complaint. There is nothing in the UDA or VPA that prohibits a

Newmans as “persons affected.” For the above reasons, the VBOG is estopped from claiming that the Newmans missed jurisdictional deadlines, particularly given the VBOG’s failure to abide by several due process reminders scattered throughout the WAPA and implementing regulations.

3. *The Newmans Complied with the Notice and Format Requirements of a Petition for Judicial Review.*

The court rejected the Newmans’ assertion that their within-30-day, Dec. 8, 2008 petition for writs filed with the trial court was tantamount to a WAPA appeal and concluded that they were too late and no extension would be granted. Yet, no extension of time, as provided by RCW 34.05.542(4), is needed. Though not styled as a “petition for judicial review,” the intent was clear,¹³ and denying the Newmans’ motion to amend the pleadings to conform to the evidence under CR 15(b) constituted error.¹⁴ **CP 118-119; CP 146, 147, 153, 156. VRP 3/6/09**

complainant from submitting more than one complaint against the same licensee on the same matter. Nor is there any known statute of limitations within which to file a complaint with the VBOG.

¹³ RCW 34.05.540(4)(b)(emphasis added) provides that: “A person whose rights are violated by an agency's **failure to perform a duty that is required by law to be performed** may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection **requiring performance.**” As noted throughout, the VBOG had a duty to file an SOC on “reason to believe.” RCW 18.130.090(1).

¹⁴ Whether a WAPA-certified reconsideration motion or not, CR 15(b) provides that:

[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if

20:15—21:11.

The Newmans filed and served their *Petition* 28 days after the last agency action (i.e., final order), in strict compliance with RCW 34.05.542(2) and RCW 34.05.542(3). CP 4, 8, 9 (proving filing on Dec. 8, 2008); *Mabrey Decl.*, ¶¶ 2-4 (proving service on the VBOG on Dec. 8, 2008); ¶ 5 (attorney for VBOG stipulates to no defect in sufficiency of service on Jan. 8, 2009).¹⁵ Further, the *Petition* filed in superior court was prepared in substantial compliance with the statutory format requirements

they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party, at any time, even after judgment[.]

CR 15(b).

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

CR 15(c). Thus, since the thrust of the Newmans' petition was judicial review of the VBOG's adverse decisions, whether under the WAPA, by statutory writ of review, or constitutional writ of certiorari, the "claim" arises from the identical conduct, transaction, and occurrence set forth in the original *Petition*, filed on Dec. 8, 2008, less than 30 days from the last agency action.

¹⁵ The declaration is appended as Exhibit 1 to the Newmans' *Motion to Supplement the Record*. "Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition." RCW 34.05.542(5). A "party" to agency proceedings, within meaning of the jurisdictional requirement means a person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding. *Technical Employees Ass'n v. PERC*, 105 Wash.App. 434 (2001). Because no charges were filed and the complaint was closed, Drs. Harrington and Johnson did not become parties to any VBOG proceedings, and did not need to be served.

of RCW 34.05.546. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 557 (1998)(declining to hold that strict compliance with RCW 34.05.546 is a jurisdictional requirement). Even if misnamed, CR 1 and common law endorse doing substantial justice to the spirit of the pleading.¹⁶

4. The VBOG Violated Ch. 246-11 and 246-14 WAC and RCW 34.05.416 by Failing to Give Notice of the Right to Judicial Review.

It is undisputed that the VBOG failed to advise the Newmans of their right to judicial review under RCW 34.05.542 and other “applicable time periods” pertaining to further administrative or judicial review.¹⁷ Ch. 246-14 WAC is titled “Uniform procedures for complaint resolution” and was adopted by RCW 18.130.095(1). WAC 246-14-010. Pursuant to WAC 246-14-020(1), the Newmans’ “report” of unprofessional conduct

¹⁶ As the Supreme Court noted in *Seal v. Cameron*, 24 Wash. 62, 64-65 (1901):

Courts determine the nature of a pleading by an examination of its substance, and a consideration of its object and purpose, rather than from the name the parties may choose to call it; and unless it be shown that the adverse party has been denied the right to try the actual issue presented, or has otherwise lost some substantial right, because of the misnomer, error cannot be predicated thereon.

CR 1, noting that the civil rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action[.]” and fairness dictate construing the Newmans’ petition before the trial court as a petition for judicial review of the VBOG’s adverse order.

¹⁷ Indeed, on Mar. 20, 2008, the VBOG advised that there was no further administrative

constituted an “application” for an adjudicative proceeding. Upon being vetted at the first level of agency review, the “report” was deemed sufficient enough to “warrant[] investigation,” thereby converting the Newmans’ application for discipline into a “complaint.” WAC 246-140-020(1). Time periods discussed in Ch. 246-14 WAC include time to evaluate a report, time to complete an investigation, time to resolve an SOA, time to resolve an SOC, and time to resolve a case (including “clos[ure of] the complaint without action”). WAC 246-14-040—110. WAC 246-14-120(1), emphasis added, provides that, “Affected ... complainants will be notified of **applicable time periods** as soon as possible consistent with effective case management.” The “applicable time periods” include the time to seek judicial review and to present new evidence for “reconsideration.”

The VBOG adopted the model rules for adjudicative proceedings as found in Ch. 246-11 WAC. WAC 246-933-190. WAC 246-11-600(2) provides, with emphasis added, “Notice of the opportunity for judicial review **shall be provided** in all final orders.” This rule is consistent with affording minimal due process. *See also* RCW 34.05.020.¹⁸ In *Payne v.*

review available.

¹⁸ “Nothing in this chapter may be held to diminish the constitutional rights of any person”

Mount, 41 Wash.App. 627 (I, 1985) and *State v. Storhoff*, 133 Wn.2d 523, 528 (1997), the courts held that while due process does not require express notification of the deadline for requesting a formal hearing, the letter or order must at least cite the statute that contains the applicable time limit. Where the letter or order deprives a person of notice or an opportunity to be heard, the notice will violate the person's right to procedural due process. *Storhoff*, at 528-29.

Devine v. DOL, 126 Wash.App. 941, 953 (I, 2005), distinguished *Storhoff* on the facts by finding that the DOL's error was not minor or nonprejudicial, but violated the statute by miscounting the 30-day deadline, violating due process and rendering the license revocation void. The VBOG's failure to inform the Newmans of the 30-day period for judicial review, or to even cite RCW 34.05.542, despite repeated oral and written requests for confirmation of appeal rights, constitutes a violation of due process even more flagrant than found in *Devine*. The decision to close their cases was a "final order" subject to WAC 246-11-600(2), as described above. When read in the context of WAC 246-14-120(1), it signals an abiding desire that the VBOG notify all aggrieved parties,

or to limit or repeal additional requirements imposed by statute or otherwise recognized by law."

including complainants, of the relevant time periods for further administrative and judicial review of adverse decisions – which admittedly did not occur.

Although neither Drs. Harrington nor Johnson demanded an adjudicative hearing, the Newmans did, both at the time of making a “report,” which was later upgraded to a “complaint,” but also after they were told that the case would be closed. As a formal petition to intervene would be moot following the VBOG’s decision to close the complaint, the Newmans became *de facto* intervenor-applicants. WAC 246-11-180(2)(noting that request to intervene “shall be handled as a prehearing motion”); WAC 246-11-180(3)(referring to intervenor as one who must make a “timely application”). The VBOG, acting through its “agency head” (RCW 34.05.010(4)), communicated directly and frequently with the Newmans, and made several adverse determinations in response to their requests, whether construed as:

- (1) denial of an application to intervene;
- (2) denial of a request for an adjudicative hearing, or
- (3) denial of “reconsideration.”

The process involved in evaluating the Newmans’ reports of misconduct, and then the Newmans’ complaints, and then the Newmans’ applications

for an adjudicative hearing and re-opening of the complaint was indubitably part of an *agency* proceeding, or set of proceedings. In refusing to issue an SOC or SOA based on the Newmans' original complaint and post-closure application for adjudication of their complaint, the VBOG was obligated to comply with RCW 34.05.419(1)(c), which references RCW 34.05.416, which states:

Decision not to conduct an adjudication.

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

RCW 34.05.416 (emphasis added). The fact that the VBOG did not inform the Newmans of any "administrative review" available confirms the VBOG's belief that the Newmans had exhausted any administrative remedies as a prerequisite to judicial review. RCW 34.05.534. Thus, the failure of the VBOG to disclose to the Newmans that they had a right to judicial review of the final orders of Mar. 6, 2008 and Nov. 10, 2008 amplifies the injustice of claiming that the Newmans have no "good cause" to seek and obtain an extension of the deadline under the WAPA or a constitutional writ of certiorari.

5. *If Not a Final Order Subject to RCW 34.05.542(2), then the Newmans are Still Not Time-Barred Under RCW 34.05.542(3).*

Should the court nonetheless construe the letters of Mar. 6, 2008 and Nov. 10, 2008 as “other agency actions,” not “final orders,” then the period within which to file the WAPA appeal under RCW 34.05.542(3) may be extended. RCW 34.05.542(3) provides for an extension of time:

... during any period that the **petitioner did not know and was under no duty to discover or could not reasonable 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 this chapter.**

RCW 34.05.542(3)(emphasis added). It was not until after the Newmans filed suit, and after the petition for a writ was filed, that on Feb. 27, 2009, the VBOG first asserted that the Newmans had standing to obtain judicial review under the WAPA. **CP 47:17—50:10**. The trial court agreed, finding standing under RCW 34.05.530. **CP 202, Conc. Law 1**. This conclusion is not challenged for error. As noted above, conceding standing to appeal, the VBOG then had a statutory and constitutional obligation to disclose the appeal and reconsideration deadlines, not play hide-the-ball.

In light of the evidence submitted by the Newmans concerning the effect to which they were not given a clear answer to a clear question concerning their right to appeal the VBOG’s adverse actions, it was error

for the trial court to find that the Newmans had a duty to discover or could have reasonably discovered that the VBOG's representations through Acting Executive Director Judy Haenke were sufficient to confer standing upon the Newmans to obtain judicial review under Ch. 34.05 RCW.

B. If the Court Finds that the WAPA Did Not Provide the Newmans a Right to Appeal, then the Court Erred in Not Granting the Statutory Writ.

If the WAPA provides for judicial review in the Newmans' circumstance, then the trial court correctly rejected the request for a statutory writ of review. But if the WAPA did not afford an avenue for appeal, then RCW 7.16.040 does. As noted above, the Newmans agree with the trial court that they had standing under RCW 34.05.530 and, thus, standing for issuance of a writ of review. Absent the right to appeal, there would be no remedy at law, and the writ process would be appropriate.

To obtain a statutory writ of review under Ch. 7.16 RCW, the petitioner must show (1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992). Statutory writs may issue for quasi-judicial determinations as well. *Chaussee v. Snohomish Cy. Council*, 38 Wash.App. 630, 635 (1984). Inapplicability of the WAPA would satisfy

prong (4), leaving prongs 1-3.

1. **Prongs 1 and 2.**

The VBOG is an inferior entity created by RCW 18.130.040 under the authority of the Secretary of Health and the only administrative body capable of imposing sanctions on a veterinarian alleged to have engaged in unprofessional conduct. The UDA is geared at assuring “the public of the adequacy of professional competence and conduct in the healing arts.” RCW 18.130.010. In determining whether a licensee has engaged in unprofessional conduct, the VBOG must first determine whether a “report” merits investigation and conversion into a “complaint.” As noted above, even in the absence of a formal complaint, the VBOG must investigate where there is “reason to believe” a violation has occurred. RCW 18.130.080(2). In either case, it must investigate. Once the complaint is investigated, the VBOG has to then determine whether there is “any reason to believe” that a licensing violation has occurred. If so, then it must issue an SOC. RCW 18.130.090(1). In so doing, the VBOG is making quasi-judicial decisions as an inferior tribunal.

The court in *Standow v. Spokane*, 88 Wn.2d 624, 630-631 (1977), outlined the four-part test to determine whether a particular action is a quasi-judicial function, asking the court to consider:

- (1) if the court could have been charged with the duty at issue in the first instance;
- (2) whether courts historically performed such duties;
- (3) whether the action of the municipality involved applying existing law to past or present facts in order to declare or enforce liability rather than respond to changing conditions through enactment of a new general law of prospective application; and
- (4) whether the action more clearly resembles ordinary business of the courts, as opposed to those of legislators or administrators.

The *Standow* court held that denial of a taxi license was sufficiently judicial to merit review by statutory writ. “Licensing is a hybrid activity not susceptible of rigorous classification under these tests.” *Id.*

The Newmans filed a complaint seeking action against the licenses of credentialed providers under DOH’s jurisdiction. Refusing to provide the Newmans with an adjudicative proceeding on their complaint is similar to denial of a license, in that the licensing authority (here, statutorily obligated to protect the public from wayward licensees) is making a determination that will harm the interests of the applicant and the public and inure to the economic (and noneconomic) benefit of the licensee. The refusal to discipline is tantamount to a decision to issue an ongoing permit to a polluting industrial plant in the complainant’s neighborhood, or to refuse to revoke or not renew a license of a dog

kennel that has received several noise, odor, and neglect complaints. Unlike other professions, veterinarians are regulated by the state, which is charged with adjudicating licensing violations. When the regulatory agency acts arbitrarily or capriciously, exceeds its jurisdiction, or commits errors of law, it is violating the public trust, jeopardizing public safety, and denying the victim and public the exclusive remedy of a disciplinary sanction, which cannot be obtained through a civil suit. In this respect, the complainant is acting as a relator of the State of Washington and its citizens. RCW 18.130.010 (note duty of commission and board to “both the state and the public”).

The Defendants argue that the VBOG is acting in a prosecutorial capacity when determining whether to file an SOC. This decision is arguably similar to issuing a warrant or filing a criminal complaint, but those acts are not exclusively prosecutorial in nature. For instance, in *Seymour v. DOH*, ___ Wash.App. ___, 2009 WL 2857185 (I, 2009), a matter involving a warrantless inspection of a dentist’s office by a DOH investigator, the court assumed that the disciplining authority’s determination of merit to commence an investigation on a report was an ample substitute for the warrant requirement and held that without a determination of merit, the warrantless inspection violated the dentist’s

Fourth Amendment rights:

Well before the commencement of the adjudicatory hearing herein, we made clear that an investigation under the UDA “may not proceed until the [disciplining authority] reviews the complaint and determines that there are reasonable grounds to believe unprofessional conduct occurred.” *Yoshinaka*, 128 Wn. App. at 843. We also emphasized that the UDA does not authorize DOH employees “to initiate an investigation unless the [disciplining authority] first makes a determination of merit and directs the [DOH] to investigate.” *Yoshinaka*, 128 Wn. App. at 843. Assuming that the UDA’s requirements, as construed in *Yoshinaka*, are adequate substitutes for the warrant requirement, FN 6 **the warrantless inspection herein was invalid because it was commenced before the determination of merit required by the UDA was made, indeed before the commission or a panel thereof was even aware of the complaints.** Therefore, the inspection violated Dr. Seymour’s rights under the Fourth Amendment.

Id., at *5 (emphasis added). Added support for the Newmans’ position that the VBOG acts in a quasi-judicial capacity comes by parsing the VBOG into its parts:

The reviewing commission member’s participation in the investigation is no substitute for a determination of merit by DQAC, as the UDA does not authorize a single commission member to execute the disciplining authority’s statutory duties. See RCW 18.130.050(18). DQAC may delegate functions to a panel comprised of fewer members than the entire commission, but the panel must contain at least three members, and any panel action requires a majority vote. RCW 18.32.0357, 18.130.050(18). **A single member of DQAC does not constitute such a panel.**

Id., at *6 (emphasis added). The reviewing commission (or board) member (“RCM” or “RBM” – here, Dr. Rogers) must present his or her case to the full commission or board (i.e., the “disciplining authority”: here, the rest of the VBOG), which considers the evidence and applies the law to decide whether there is “reason to believe” that a violation of RCW 18.130.180 exists. In explicitly prohibiting a single member from making this quasi-judicial decision on his own, and, indeed, having anything to do with the hearing of the case (RCW 18.130.050(11)), the UDA transforms the RBM into a prosecutor and installs the remainder of the board or panel as the court making what amounts to a *prima facie* determination. It is in this capacity that the VBOG undisputedly exercised judicial functions.

As noted in *Seymour*, the “determination of merit” or complaint-less “reason to believe” that precedes launching of an investigation is tantamount to issuance of a warrant (RCW 18.130.080(2)), as is the subsequent “reason to believe” that unprofessional conduct has taken place (RCW 18.130.090(1)). These determinations require even less of a showing than “probable cause.”¹⁹ Both actions are not prosecutorial in

¹⁹ Arguably, “reason to believe” requires less of a showing than even “probable cause.” Reasonable minds may differ, so that the *reasonable* minority position would satisfy RCW 18.130.080(2) and RCW 18.130.090(1). Thus, so long as there is a rational opinion (even one that may result in an erroneous conclusion) that misconduct occurred, a “reason to believe” has been furnished, and the VBOG must issue an SOC. This reading is closest to the definition of “arbitrary and capricious.” “[W]here there is room for two

nature, but judicial. Judges decide probable cause with respect to arrest and search warrants every day.

The determination of the quasi-judicial prong as applied to the orders issued by the VBOG turns necessarily on separation of powers analysis, with appropriate emphasis on quasi-criminal procedures. In evaluating the separation of powers challenge:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick v. Locke, 125 Wn.2d 129, 135 (1994) (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750 (1975)). The *Carrick* court expressly rejected a rigid categorical view of governmental functions for purposes of separation of powers analysis. *Id.*, at 137 (citing *Morrison v. Olson*, 487 U.S. 654, 689-91 (1988)). In evaluating investigation of crimes, *Carrick* recognized the high degree of collaboration between the judicial and executive branches and rejected respondents' urging to abandon Washington's tradition of bilateral investigation. *Id.*, at 137. As a result, "the separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a

opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *DuPont-Ft. Lewis Sch. Dist. 7 v. Bruno*, 79 Wn.2d 736, 739 (1971).

definitive boundary beyond which one branch may not tread.” *In re Juvenile Director*, 87 Wn.2d 232, 240 (1976).

The court further examined the role of the grand jury as having been described as “an institution [that] has one foot in the judicial branch and the other in the executive.” *Id.*, at fn. 3 (quoting *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1444 (11th Cir.1987)). In finding that “[t]he unique function of the grand jury necessitates a high degree of cooperation between the judicial and executive branches,” the court concluded that “[t]he constitutionality of this arrangement under both the federal constitution and Washington's constitution is unquestionable.” *Id.* Indeed, the judicially led investigation by Chief Justice Earl Warren of the United States Supreme Court into the assassination of President Kennedy bespeaks this point. *Id.*, at fn. 4. Accordingly, the VBOG’s pre-investigation and pre-SOC determinations resemble grand jury proceedings.

The court must find probable cause at stages prior to the filing of a criminal complaint, such as:

1. Authorizing a private citizen to prepare and file a criminal misdemeanor complaint (CrRLJ 2.1(c));
2. Issuing search and seizure warrants (CrR 2.3(c); CrRLJ 2.3(c));
3. Issuing arrest warrants (CrR 2.2(a)(2); CrRLJ 2.2(a)(2)); and

4. The determination of probable cause following warrantless arrest (CrR 3.2.1(a-b); CrRLJ 3.2.1(a-b)).

In determining whether the Newmans' report had sufficient merit to warrant an investigation and conversion to a complaint, and then in determining whether there was "reason to believe" that a licensing violation existed, the VBOG was engaging in virtually the same judicial functions as district and superior court judges applying the CrR and CrRLJ. Probable cause is described below:

One of the most common examples is the determination of probable cause to issue a search warrant. There the burden is on the State to recite objective facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place..

Another common Fourth Amendment example is the determination of probable cause on a warrantless arrest. One way to determine whether a warrantless arrest is "reasonable" is to consider whether the State's evidence, if believed, establishes the officer had reasonable grounds to believe a felony had been or was being committed in his presence.

Detention of Peterson, 145 Wn.2d 789, 797 (2002)(cit. om.). "Probable cause" amounts to more than the lesser "reason to believe" since a reasonable belief may still be less probable than not, setting forth allegations that, if believed, show a violation of RCW 18.130.180. Another interpretation is saying that failure to state a prima facie case is

not probable cause, and vice versa. *Id.*, at 798 (“If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a full evidentiary hearing.”) A “reason to believe” states a *prima facie* case. And not having “reason to believe” would make it arbitrary and capricious to proceed.

The only way the VBOG could have refused to issue an SOC would be if believing any violation occurred would result from “willful and unreasoning action, without consideration and in disregard of facts or circumstances.” *Bruno*, at 739 (defining what is “arbitrary and capricious”). That is, if one has “reason to believe,” then she cannot be acting “arbitrarily and capriciously,” and vice versa.

What makes the decision not to discipline the veterinarians in this case more judicial than prosecutorial in nature is the mandatory language of RCW 18.130.090(1), which compels the VBOG to file an SOC upon mustering what amounts to less than probable cause. In other words, this standard is best assessed from the standpoint of the licensee who, faced with an SOC would ask whether the VBOG acted arbitrarily and capriciously in finding a “reason to believe” that a licensing violation occurred. Indeed, such a challenge was raised (albeit, too late) as to the

RCW 18.130.080 pre-determination of merit requirement. *Lang v. DOH*, 138 Wash.App. 235, 248-251 (III, 2007); *Client A v. Yoshinaka*, 128 Wash.App. 833 (2005)(evaluating assertion that pre-determination of merit is tantamount to probable cause).

If the VBOG meets this standard, it has no discretion other than to file charges. Hence, unlike a city prosecutor who cannot be compelled by the judiciary to initiate criminal charges even if there is more than ample probable cause, the VBOG is mandated by statute to do so. In so doing, the legislature has accelerated and disposed of the judicial check on prosecutorial discretion (to seek an arrest or search warrant, or arrest without a warrant) in uniform favor of proceeding with adjudication.²⁰

This makes the act of the VBOG quasi-judicial in nature by legislative fiat. By imposing the statutory obligation to file charges, the legislature provided a right to the complainant, who initiated the disciplinary proceeding.²¹ The legislature would not provide a right without affording a remedy if violated. Indeed, the court is obligated to

²⁰ Indeed, if the VBOG has the minimal “reason to believe” but doubts it can meet the full burden of proof at hearing, there is the SOA escape valve, which allows the VBOG to attempt informal resolution first by preliminarily issuing an SOA and seeking a compromise before filing the mandatory SOC. RCW 18.130.172(1).

²¹ Discipline is complaint-driven. Absent a complaint (formal or informal), no discipline would occur.

imply such a remedy.²² Furthermore, the only way the mandatory duty to file an SOC can be compelled is by construing the complainant as the aggrieved party whose request for relief (in the form of disciplining the respondent) has been denied upon a quasi-judicial determination in favor of the respondent. Whether allowed by the WAPA or Ch. 7.16 RCW, a right to judicial review exists.

2. Prong 3.

As for prong 3, the Newmans have claimed that the VBOG committed several errors, further occasioned by arbitrary and capricious, willfully unreasoning criteria, resulting in procedural defects and constitutional injuries, thereby “acting illegally.” Illegal acts include substantive errors. *Washington Public Employees Ass’n v. Washington Personnel Resources Bd.*, 91 Wash. App. 640, 652-53 (1998). At the stage of applying for the writ of review, the petitioner need only make a slight showing, raising colorable arguments that the lower tribunal acted illegally without having meet a more substantial burden of proof as if this were a final adjudication on the merits. *See Leonard v. Seattle Civil Service Comm’n*, 25 Wn.App. 699, 703-04 (1980), *rev. den’d*, 94 Wn.2d

²² *Bennett v. Hardy*, 113 Wn.2d 912, 920-21 (1990)(“[W]hen a ‘statute ... [has] provided a right of recovery, it is incumbent upon the court to devise a remedy.[.]’”) The public and animals are protected only when complaints are investigated and discipline ensues.

1009 (1980). Where plaintiffs' petition for a writ of certiorari simply alleged arbitrary or capricious action on the part of the defendant, and the Superior Court denied the writ, the Court of Appeals reversed stating that:

The proper course would have been to order the record of the hearing before the Commission to be sent for review, and permit the employees, **before hearing the case on the merits**, to amend the petition to state more specifically how the Commission's decision was contrary to law.

Id., at 703-04 (emphasis added). The petitioner must merely state a claim upon which relief can be granted at the petition stage. *Id.*, at 702-03. *see also Kerr-Belmark v. Marysville*, at 36 Wash. App. 370 (1984), *rev. den'd* 101 Wn.2d 1018 (1984). In deciding whether to grant review, the court "looks initially to the petitioner's allegations to determine whether, if true, they clearly demonstrate such a violation." *King Cy. v. State Bd. of Tax Appeals*, 28 Wn. App. 230, 238, 622 P.2d 898 (1981).

The *Leonard* case involved a completely discretionary writ of certiorari, as did *Kerr-Belmark*. Neither *Leonard* nor *Kerr-Belmark* address the precise showing to be made for issuance of the statutory writ of review, but it arguably requires even less than that for issuance of a constitutional writ of certiorari, since the latter is purely discretionary.

The only person with standing to vindicate this legislative intent is the complainant whose request for adjudication against the license of the errant veterinarian is denied.

The Newmans did not rely on “bare assertions” absent supporting evidence. They set forth numerous errors of law, that, if true, clearly stated a claim under the *Kerr-Belmark* and *Leonard* tests. Because the test is not solely whether the inferior tribunal’s action was arbitrary or capricious, but also whether the official acted illegally or contrary to law, as described more fully herein, the statutory writ of review had to issue. Further, by peeking behind the face of the petition to advance to the merits without having the record from the VBOG before him, much less the supposed “set of experts who looked at the same facts and disagree,” the trial court erred in denying the writ:

To come full circle, then, in my thinking, I think that, in my judicial opinion, this is not a proper case for me to issue a constitutional writ of certiorari because the action wasn’t arbitrary and capricious because we already know that minds could differ. There’s one set of experts, apparently, from out of state, for what that’s worth, and another set of experts who looked at the same facts and disagree as to what the outcome should be. That by definition is not arbitrary and capricious. And secondly, it can’t be said that it’s unlawful action that’s been taken here.

VRP 3/6/09 at 53:20—54:6. And later, on a tangent, waxing philosophical on the interconnectedness and sacredness of all life (**VRP 55:1-8**), Judge Hicks added:

At the same time, I’m not prepared to say the doctors have done anything wrong here. They probably went into the practice of veterinary medicine because they already had

strong care and love for animals. I don't know any of the individuals. I only want to make the statement that we should all respect life and I hope that we all do what we can to encourage that with everybody.

Id., at 55:12-19. So ultimately, the court addressed the merits of the Newmans' petition based on his belief, without any evidence to support it, that no wrongdoing occurred because Drs. Harrington and Johnson probably love animals, experts disagree (but out-of-state expert opinions are apparently worth less), and the VBOG did not act contrary to law in applying the wrong standard of review. The errors raised in the *Petition* (CP 5, ¶ 15) include but are not limited to (1) applying the wrong burden of proof; and (2) failing to act on dispositive evidence for which there was more than sufficient "reason to believe" a licensing violation had occurred.

a. Erroneous Standard of Proof.

Failure to implement the adequate standard of proof violates due process and voids adverse determinations made by tribunals exercising quasi-judicial functions, such as when the King County Board of Appeals concluded that Mr. Mansour's dog was vicious, upholding animal control's order of removal. In noting that the Board of Appeals's use of an appellate scope of review was improper, the Court of Appeals reversed and vacated the decision upholding the vicious dog determination:

¶ 17 On this record, we cannot presume that the Board applied at least a preponderance of the evidence standard of proof. “[W]ith respect to the risk of erroneous deprivation in this proceeding, there is little solace to be found in the availability of judicial review which is high on deference but low on correction of errors.... *Appellate review cannot cure an inadequate standard of proof.*”^{FN32} Although Mansour's attorney argued to the Board that the County had the burden of proving its case by a preponderance of the evidence, the Board never indicated that it adopted that standard. It simply issued findings of fact and then stated that it “upheld” Animal Control's Removal Order. **We cannot review the Board's findings and conclusions when it may have used a fundamentally wrong standard in making those findings and reaching those conclusions.** We do not know whether the Board would have weighed the evidence differently had it applied the proper standard.^{FN33} And given that the County argued for and the trial court sanctioned an entirely inadequate standard of proof, it is probable that the Board also failed to require of Animal Control the proper quantum of proof. The lack of a clearly ascertainable adequate standard of proof violated Mansour's procedural due process rights.

Mansour v. King Cy., 131 Wash.App. 255, at 267-68 (I, 2006). Unlike *Mansour*, there is no guessing as to what standard the VBOG employed in refusing to file an SOC – clear and convincing, not the less-than-probable cause “reason to believe” standard.²³

While the Defendants may argue that the *Mansour* doctrine only serves to protect veterinarians, the legislative intent actually is geared toward protecting the public and the state from incompetence (RCW

²³ See *fn. 19, supra*.

18.130.010, ¶ 1) and imposing upon “all health care commissions and boards” the “statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care” (RCW 18.130.010, ¶ 3). The “addition of public members” to the VBOG (and other health care commissions) bespeaks this point, particularly where the VBOG has exclusive authority to discipline veterinarians. *Id.* For if the disciplining authority is held hostage to a self-imposed and erroneously excessive standard of proof before it even issues an SOC, the result will be an overly conservative and impotent entity exposing the public to higher risk and erroneously depriving them of statutory assurances. RCW 18.130.010.

In refusing to file an SOC because the VBOG determined that “the Board must be able to prove, by clear and convincing (highly likely) evidence that unprofessional conduct occurred[,]” and that “[the board] did not have sufficient evidence to discipline the practitioners,” the VBOG committed obvious error and disregarded the plain directive of RCW 18.130.090(1). **CP 34.**

The burden of proof in disciplinary hearings against the license of a veterinarian (not including suspension or revocation) is evidentiary preponderance. WAC 246-11-520(3) and WAC 246-10-606(3). True,

Ongom v. DOH, 159 Wn.2d 132 (2006) held, in a 5-3 decision, that an enhanced standard of proof is required when sanctions include revocation or suspension of license. But the plain language of WAC 246-11-520(3), WAC 246-10-606(3), and *Ongom* apply the standard of proof to adjudicative hearings after an SOC has been filed, not at the stage of assessing whether there is “reason to believe” a violation has occurred.

Second, *Ongom* only applied to hearings where the sanction of suspension or revocation of the license was at issue, not lesser sanctions such as fines, remedial education, or other acts not impacting constitutionally protected property interests on par with suspension or revocation. *See Hardee v. DSHS*, 215 P.3d 214 (I, 2009)(refusing to apply *Ongom*’s clear and convincing standard to revocation of home daycare operator’s license); *see also Kraft v. DSHS*, 146 Wash.App. 708 (III, 2008)(refusing to extend *Ongom* to DSHS determination of abuse of vulnerable adult). Further, no court has applied the *Ongom* standard of proof to disciplinary hearings of veterinarians, but only to physicians, nursing assistants, and engineers. *Brunson v. Pierce Cy.*, 149 Wash.App. 855, 866 (II, 2009)(refusing to extend *Ongom* rule to exotic dancer licenses).

b. Failing to Act on Dispositive Evidence.

In extensive detail, the Newmans presented evidence sufficient to generate a “reason to believe” that the veterinarians failed to comply with explicit medical record-keeping requirements (WAC 246-933-320(7)(a) and RCW 18.130.180(7)); failure to obtain informed consent and commit misrepresentation by not disclosing available options other than euthanasia and adequately explaining the procedure regarding euthanasia (RCW 18.130.180(13)(misrepresentation or fraud); and incompetence, negligence, and malpractice (RCW 18.130.180(4)). Importantly, the VBOG has never stated it had no “reason to believe” that a violation occurred. Rather, it claimed not to have enough evidence to meet the *Ongom* standard.

In reaching this conclusion, the VBOG relied on after-acquired, self-serving testimony that was not credible or reliable, allowing them to supplant the medical record devoid of dispositive, contemporaneously entered information. But even without contemporaneous medical records to verify the veterinarians’ testimony, the VBOG acted contrary to law and arbitrarily in not finding “reason to believe” that unprofessional conduct took place. Even Judge Hicks acknowledged that there was room for more than one reasonable opinion. In making this ruling, the court should have found obvious misconduct in declining to issue the SOC.

c. On the Disparaged Out-of-State Experts.

Judge Hicks and the Defendants attempted to discount the evidence provided by the Newmans to the VBOG – expert opinions from out-of-state veterinarians, including a boarded radiologist and neurologist. **VRP 3/6/09 53:25—54:4** (referring to value of opinions from experts out of state by saying “for what that’s worth”). The Newmans take this opportunity to note that out-of-state expert testimony is as admissible as in-state expert testimony and probably less susceptible to bias since out-of-state experts need not fear retaliation or embarrassment for breaking ranks.

Sherman v. Kissinger, 146 Wash.App. 855 (I, 2008), categorically held that Ch. 7.70 RCW, the civil claims against health care providers statute, does not apply to actions against veterinarians. Thus, while RCW 7.70.040 imposes the requirement of proving breach of a Washington-based standard of care, that requirement has no bearing here. For all other cases not brought under Ch. 7.70 RCW, a chapter admittedly enacted in abrogation of common law (both substantive and procedural), plaintiffs need only introduce an expert familiar with the standard of care in “similar communities.” RCW 7.70.010. There is no evidentiary, geographic limitation in veterinary standard of care violation cases. Veterinarians are

to be regarded no differently than in any other professional negligence claim. *See Mazon v. Krafchick*, 158 Wn.2d 440 (2006)(in noting the “familiar standard of care for professionals,” quoting *Restatement (2nd) of Torts* § 299A (1965), which states, “[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”

As to physicians, Washington abolished the locality rule in 1967. *Pederson v. Dumouchel*, 72 Wn.2d 73 (1967). *Pederson* was decided *prior* to the enactment of Ch. 7.70 RCW. Importantly, it held that physicians were subject to the standard of care in an “area co-extensive” or in the “community” of the physician. The Supreme Court refused to impose a statewide geographic restriction. *Id.*, at 78-79; *see also Stone v. Sisters of Charity of House of Providence*, 2 Wash.App. 607, 611 (1970). Thus, following viable Supreme Court precedent, there is no requirement that the VBOG only consider testimony from experts licensed in Washington or familiar with a Washington standard of care, particularly where a national standard applies. *See Hill v. Sacred Heart Med. Ctr.*, 143 Wash.App. 438 (III, 2008)(reversing order dismissing medical malpractice case on summary judgment where plaintiffs’ experts noted a national

standard of care applied); *Elber v. Larson*, 142 Wash.App. 243 (III, 2007)(accord); *Pon Kwock Eng v. Klein*, 127 Wash.App. 171 (2005)(accord).

C. Constitutional Writ of Certiorari Grounds Exist and Apply Even if Statutory Writ not Permitted.

Superior courts enjoy inherent constitutional powers to review inferior tribunal decisions for illegal or manifestly arbitrary acts. Wash. Const. Art. IV, § 6. Courts may grant discretionary review of an administrative agency decision. *Foster v. King Cy.*, 83 Wash.App. 339, 343 (1996). The constitutional writ of certiorari enables a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority. *Bridle Trails Community Club v. City of Bellevue*, 45 Wash.App. 248, 252-53, 724 P.2d 1110 (1986). Courts should accept review where the appellant alleges facts that, if verified, establish the error of the lower tribunal's decision. *Pierce Cy. Sheriff v. Civil Service Comm'n*, 98 Wn.2d 690, 693-94 (1983).

Traditionally, such writs are granted where the statutory writ of review or direct appeal routes are unavailable, unless good cause can be shown for not using those methods. *Bridle Trails*, at 253. The time period for petitioning for a writ of certiorari, while not limitless, is also not constrained by analogous times ordinarily prescribed for filing appeals.

Rather, laches appears to be the only affirmative defense. *Clark Cy. PUD No. 1. v. Wilkinson*, 139 Wn.2d 840, 847-48 (2000). Denials of petitions for a constitutional writ are reviewed for an abuse of discretion. *Klickitat Cy. v. Beck*, 104 Wash.App. 453, 458 (2001). A court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971). If the trial court abused its discretion, the remedy is to remand for issuance of the writ. *Bridle Trails*, at 251-52.

As noted in the previous section, Judge Hicks advanced to the merits, without the benefit of the record from the VBOG, in concluding that it was not arbitrary and capricious, did not act contrary to law, and that the veterinarians did nothing wrong. **VRP 3/6/09 55:12-14**. He also denied the writ based on purportedly pragmatic, public policy grounds based on a slippery slope mentality without any statistics to support the unreasonable fear that potentially 89% of all denied complainants will file constitutional writs of certiorari. Putting aside the illogic of the argument, when one considers that his basis for denying the constitutional writ was that the Newmans allegedly failed to timely comply with the WAPA, which gave them (and would give the other 16,000 denied complainants he referenced) an automatic, nondiscretionary right to appeal, Judge Hicks

improperly gave consideration to matters having no bearing on the test to be applied. **VRP 3/6/09 54:7-24**. Instead, the court should have accepted the allegations as true on the face of the complaint, akin to a CR 12(b)(6) or CR 12(c) standard, in order to determine if sufficiently tenable grounds existed to refuse the application.

The court also made an erroneous ruling as to the VBOG's insistence that it could not issue an SOC unless it had clear and convincing evidence of a licensing violation. Thus, even if this court refuses to disturb Judge Hicks's determination that the VBOG did not act arbitrarily and capriciously, by condoning application of a standard of proof that is contrary to law, Judge Hicks would be making the same error as did the King County Board of Appeals in *Mansour* (for appellate review cannot cure an inadequate standard of proof), and would not have furnished tenable grounds to deny the writ.

The court's order also appears to deny the constitutional writ of certiorari based on belief that the Newmans failed to timely seek judicial review under the WAPA, and had no good cause for the failure. While the Newmans contend that they did timely comply (**Section III(A), *supra***), if this court disagrees with the premise that the WAPA applied, then Judge Hicks denied the writ on untenable grounds, warranting reversal and

remand. If the court agrees with the premise, then the next question is whether “good cause” existed to fail to have pursued the WAPA remedy within 30 days.

The *Wilkinson* court clearly allows for certiorari where no other remedy exists. If timeliness is questioned, a good cause basis for considering a discretionary writ excuses tardiness, even though a constitutional writ need only be sought in a “reasonable” time,²⁴ not subject to rule or statutory deadlines. *See State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 241 (2004). Having established good cause, *Wilkinson* allows for reasonably timely petitions for discretionary writs of certiorari, particularly where the delay is excusable and there is no prejudice to any party by the delay. *Wilkinson*, at 848. The delay, if one describes it as such, is reasonable given the sequence of events and reliance by complainants on statements by the VBOG.

As explained above, there would be no prejudice to the defendants by granting a constitutional writ of certiorari based on a petition filed within 27 days of the Nov. 10, 2008 order when the timing of the filing

²⁴ Statutory writs, while typically bound by the rule or statute measure, may have extended deadlines, excusing lack of diligence and calling for the exercise of the court’s discretion. *See State ex rel. Alexander v. Superior Court*, 42 Wash. 684 (1906), *State ex rel. Barry v. Superior Court*, 179 Wash. 55 (1934); *Vance v. City of Seattle*, 18 Wash.App. 418, 424 (1977).

was within the 30-day limit imposed by statute for WAPA petitions for judicial review. The fact that the Newmans originally took the position, which was uncorrected by the VBOG until months after the Newmans filed their *Petition* in superior court, and which Drs. Harrington and Johnson have maintained all along, that the WAPA does not provide an appeal remedy, is strong evidence in favor of demonstrating “good cause” for not filing the WAPA petition – at least nominally.²⁵ For the reasons stated in Section III(A)(4), the VBOG had a statutory and constitutional obligation to inform the Newmans of their appeal rights and the timelines of same. Failing that, the trial court erred not finding “good cause.”

D. Striking of Declarations Error, Particularly Where Relief Turns on Making this Initial Showing.

Felsman v. Kessler, 2 Wash.App. 493, 498 (III, 1970), held:

While we do not encourage or condone plaintiff's awaiting the court's ruling on the motion and then scurrying around to get affidavits and other matters before it in an attempt to change the court's mind, the fact remains that until an order is entered formally denying the motion, this avenue is available.

Meridian Minerals Co. v. King Cy., 61 Wash.App. 195, 202-203 (III, 1991), added, “Although not encouraged, a party may submit additional

²⁵ As noted in Section III(A(1-3) above, the Newmans contend they strictly complied with the jurisdictional requirement of RCW 34.05.542 and substantially complied with the formatting requirement of RCW 34.05.546.

evidence after a decision on summary judgment has been rendered, but before a formal order has been entered.” At 203, it noted, “In the context of a summary judgment, unlike trial, there is no prejudice to any findings if additional facts are considered.”

Of course, this was not a motion for summary judgment, but a far more deferential motion for issuance of a writ of review, which, as explained above, requires the court to accept as true all allegations. It is in this context that the *Felsman* doctrine offers greater protection to the Newmans and renders Judge Hicks’s order striking the declaration an abuse of discretion. Prior to entry of the order on the petition for review, but after oral argument, the Newmans submitted a supplemental declaration to address the contention that they did not have “good cause” for allegedly failing to file a “timely” WAPA appeal. The court admittedly read the supplemental declarations (VRP 4/17/09 14:19-22) before signing the final order but decided not to make them part of the record. *Id.*

In contrast, although the court went to great length to explain why it was denying the writ of certiorari on Mar. 6, 2009, after the oral ruling but before entry of the final order, the court was led by the hand of the Attorney General to excise from its written order any reference to the considerations that plainly informed and directed the court to deny the

writ. **VRP 4/17/09 5:17—9:24.** What is remarkably lopsided in this re-writing of judicial history is that the court considered the Newmans' supplemental submissions prior to entry of the written order but after oral ruling yet refused to make them part of the record, while at the same time purportedly excising from the record specific considerations that were established in oral rulings without objection by the Defendants the date he uttered them. It thus strikes the Newmans as fundamentally unfair that the court would modify an oral ruling on a defense motion brought over a month later, orally, the day of the presentment hearing, but refuse to accept evidence that goes to the heart of a dispositive part of the oral ruling.

Of course, in the end, the court's modification of the oral ruling at the urging of the Attorney General's Office itself invited untenable grounds to deny review, for if this court disagrees that the WAPA and statutory writ processes provided for an appeal remedy, then there are no grounds to support the court's now-excised and unstated finding that there was nothing arbitrary and capricious or contrary to law. *Foster*, at 346 (requiring court to provide tenable reasons to deny writ).

E. RAP 18.1 Request for Fees.

The Newmans request attorney's fees under RAP 18.1 on the equitable basis that they are conferring a substantial benefit to an ascertainable class (i.e., the State and public, per RCW 18.130.010), as private attorneys general, protecting constitutional principles, ignored by the misguided acts of the DOH and VBOG, using public funds, that adversely impact and threaten the safety of the public and animals treated by allegedly incompetent, unethical, and unprofessional veterinarians. *Dempere v. Nelson*, 76 Wash.App. 403, 407 (1994); *Weiss v. Bruno*, 83 Wn.2d 911 (1974).

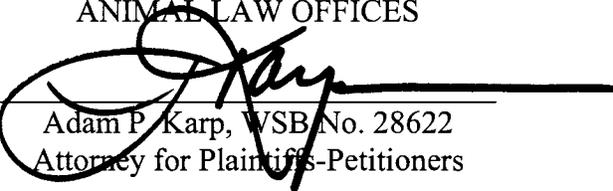
IV. CONCLUSION

The VBOG's *modus operandi* in managing citizen complaints violates its statutory mandate on several levels, jeopardizing its beneficiaries through under- and non-enforcement. When pursued by credible and passionate victims, at considerable expense, the VBOG resorts to gamesmanship, conducts biased investigations, and deprives complainants of due process. Attempting to repair the system and vindicate Trali's needless death by disciplining the culprits, by bringing their case to the Superior Court, the Newmans faced a judge who made decisions in clear abuse of his discretion. For all the reasons stated, the VBOG should be given a stern reminder that it is not a shill for the

veterinary industry, and must not shirk its statutory obligations and assurances to the public and the Newmans, as occurred here.

Dated this Oct. 2, 2009

ANIMAL LAW OFFICES



Adam P. Karp, WSB No. 28622
Attorney for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

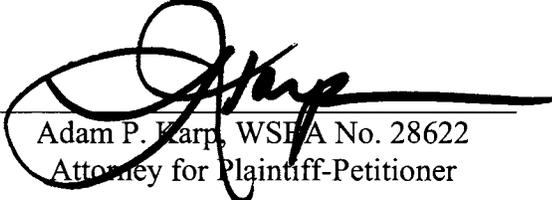
I HEREBY CERTIFY that on Oct. ⁵ 2009, I caused a true and correct copy of the foregoing APPELLANTS' BRIEF, to be served upon the following person(s) in the following manner:

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