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No. 50652-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington  
Nonprofit Corporation,  
Appellant,

v.

WASHINGTON PUBLIC DISCLOSURE COMMISSION, an agency of  
the State of Washington,  
Respondent.

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REPLY OF APPELLANT

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## I. INTRODUCTION

The Public Disclosure Commission (hereinafter “PDC”) attempts to characterize Automotive Trade Association’s (hereinafter “AUTO”) legal and factual complaints as a failure on the part of the PDC to give AUTO an administrative hearing. Brief of Respondent, p. 16. Specifically, the PDC attempts to characterize AUTO’s complaint as “a failure to comply with a statutory procedure.” *Id.* This characterization belies the problem with the underlying actions of PDC and the legal arguments made on appeal: there was no “statutory procedure” for the PDC to follow.

In doing so, PDC paints a picture wherein AUTO must have known it was harmed by not having an opportunity to be heard and having an immediate, clear right to seek judicial review. This characterization mischaracterizes both the facts of this case and the law.

To be clear, it is undisputed by both the PDC and AUTO that the PDC had absolutely no role to play regarding the AUTO’s citizen action. *See* Brief of Appellant, pp. 6-7; *See* CP 175 (deposition testimony of the executive director of the PDC that she “did not believe that the PDC had a role in the citizen action process”). The PDC could not legally issue an opinion, the PDC could not legally hold a hearing, and the PDC could not

legally conduct any other sort of administrative process. *Id.*; RCW 42.17A.765. The PDC, without legal authority, intentionally and secretly attempted to thwart AUTO's legislatively mandated right to challenge campaign contributions, and it did so knowing its actions were unlawful. To make sure AUTO did not figure out what the PDC was up to, PDC had refused to respond to a public records request for well over three months despite all relevant records held electronically and in a "pile" on the executive director's desk. CP 239-240. The PDC admits it should not have taken long to disclose the records. CP 240.

The PDC's defense, it appears, is that AUTO should have caught on to its secret plan in 30 days rather than in 57 days. Brief of Respondent, pp. 18-20.

## **II. REPLY REGARDING RESPONDENT'S STATEMENT OF THE CASE**

In February 1, 2016, AUTO requested that the PDC open a rule making process pursuant to RCW 34.05.330. CP 27. Under that process, the PDC would begin taking public input and deliberating whether or not to pass a rule. RCW 34.05.330; RCW 34.05.320. Importantly, the PDC was not asked to, and did not, investigate existing campaign contributions or produce any formal interpretive ruling as provided for in RCW 34.05.230. *See* Brief of Appellant, p. 8; *See* CP 82; *See also* CP 176-178. Instead, it declined to open a rule making process citing budgetary

constraints. CP 81. It also stated a fear of legal action by the tribes or its supporters. *Id.*

After its request to open a rule making process was denied due to budgetary constraints, AUTO attempted to proceed using the citizen's action provisions of RCW 42.17A.765. *Id.* After AUTO's petition to begin the rule making process was rejected, AUTO sent a 45-Day Notice to the Washington State Attorney General and the King County Prosecutor. *Id.* The Notice indicated that AUTO would file suit against Friends of Bob Ferguson if a suit was not filed pursuant to RCW 42.17A.765 by either the Attorney General's Office or the King County Prosecutor's Office. *Id.* At that point, the PDC no longer had a role to play. *Id.*; *See also* RCW 42.17A.765. AUTO did not involve the PDC in this process and did not expect any response from the PDC. CP 81. The PDC was aware it had no further role to play. *See e.g.*, CP 174 (deposition testimony of the executive director of the PDC that she "did not believe that the PDC had a role in the citizen action process").

### III. REPLY ARGUMENT

#### A. This Appeal Turns on Whether AUTO had Standing when it Received the June 17, 2016 Letter.

Both AUTO and the PDC, in their respective opening briefs, acknowledge that RCW 34.05.542(3) provides for an exception to the 30 day filing requirement for a challenge to an agency action under the

Administrative Procedure Act (hereinafter the “APA”). *See* Brief of Appellant, pp. 14-17; *See* Brief of Respondent, p. 13. Both acknowledge that when AUTO gained standing is dispositive. *Id.* This Court’s ruling will, therefore, be dictated by its evaluation of whether AUTO had standing when it received the June 17, 2016 letter or when AUTO learned that the letter was to be used by a third party in separate litigation as a purported adjudication of AUTO’s separate claims.

It is as important to remember what did not happen in this case as it is to remember what did happen. There was no notice of PDC addressing AUTO’s citizen action on any agenda. CP 83. There was no administrative process that AUTO was part of. *Id.* There was no formal advisory opinion issued as is routinely done by PDC. *Id.* There was no process at all followed and no action for the PDC to legally take. *Id.*; CP 176-178.

As discussed in Petitioner’s Brief, RCW 34.05.542(3) provides that while the typical deadline to file a petition under the APA is 30 days:

[T]he time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably 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). RCW 34.05.530 provides that, in order to have standing, among other things, the agency action must have prejudiced the

would-be appellant. RCW 34.05.530. This has become part of the “injury-in-fact test,” and “if the injury is merely conjectural or hypothetical, there can be no standing.” *Peterson v. Segale*, 171 Wash.App. 251, 258-259, 289 P.3d 657 (2012).

In this case, the injury to AUTO was purely speculative at the time it received the June 16, 2016 letter. While the PDC argues that AUTO must have had a “clue that was a possibility” (CP 246), it could very well have turned out that Friends of Bob Ferguson never brought up the June 16, 2016 letter. As far as AUTO knew, Friends of Bob Ferguson was fully aware that the PDC had no to role play under RCW 42.17A.765 and would simply treat the June 16, 2016 letter for what it was: a meaningless letter that the PDC had no authority to send. It was not until Friends of Bob Ferguson elected to use that letter in the separate litigation, and misrepresent it as an “official” determination by the PDC (CP 83, 153), that AUTO was harmed by the illegal sending of the June 16, 2016 letter. Until that occurred, AUTO had no standing and the filing deadline found in RCW 34.05.542 did not begin to run.

**B. The Provisions of RCW 34.05.542 Envision a Structured Administrative Process Being Followed.**

In a typical challenge to an agency action, an agency has followed some sort of structured process that clearly delineates the right to appeal. For example, the Department of Revenue has a very clear process for

reviewing reseller permits and for the appeal thereof. *See* WAC 458-20-10202. The Department of Licensing has a similarly structured appeals process for suspension of a driver's license. *See* RCW 46.20.308. RCW 34.05.542(3) gives 30 days to appeal the final order entered in similar a formal processes, all of which result in a formal decision that advises the litigant of the right to appeal.

Case law also reflects that a clear process is usually followed and that ambiguity favors the would-be appellant. In a typical APA setting, in order to trigger the statutory time limit for seeking review, an agency must file and serve a final, appealable order. *Harrington v. Spokane County*, 128 Wash.App. 202, 212 (2005). "A letter does not meet this definition unless it clearly asserts a legal relationship and makes clear that it is the final point of the administrative process." *Id.* "A decision must be clearly cognizable as a final determination of rights," and "[d]oubts as to finality are resolved against the agency." *Id.*

The cases cited by the PDC are clearly distinguishable. In *Seattle Bdlg. and Const. Trades Council v. Apprenticeship and Training Council*, 129 Wash.2d 787, 920 P.2d 58 (1996), the court specifically stated that "[w]here an agency refuses to provide a procedure required by statute...the United State Supreme Court routinely grants standing." *Seattle Bdlg. and Const. Trades Council v. Apprenticeship and Training*

*Council*, 129 Wash.2d 787, 920 P.2d 58 (1996). The Court noted that the “issue before the court does not concern the merits of the agency action,” as is the case here, but rather “whether the provisions of the APA apply.” *Id.* At 799. There is no dispute that the APA applies here.

Further, the standing issue presented in this case is very distinguishable from that in *Trades Council*. *Trades Council* turned on whether there was an injury at all. In this case, all parties acknowledge that PDC lacked authority to act and that AUTO was injured. The sole dispute concerns when the injury, and therefore standing, occurred.

In this case, there was no administrative process. The June 17, 2016 letter was not clearly cognizable as a final determination of rights (indeed, PDC had no ability to determine any rights). Simply copying the letter to Friends of Bob Ferguson did not indicate that the PDC had made any adjudication, and AUTO was not aware of what the PDC was doing. CP 83. Both AUTO and the PDC were well aware that there was nothing the PDC could legally do. Simply put, the PDC sending a letter that all parties knew it did not have the right to send did not put AUTO on notice that it had been harmed.

**C. The PDC Clearly Violated the Open Public Meetings Act (OPMA) because no Modified Agenda was Created or Published.**

The PDC’s argument relies entirely on the false premise that a modification occurred and that RCW 42.30.077 allows items to simply be

added to the agenda without notice to the party whose rights are being affected. The citations in Respondent's Brief do not show that anything was ever written or published indicating that AUTO's citizen's action was on the PDC's agenda. *See* Respondent's Brief at p. 22; CP 28-30, 46-47. As discussed in Petitioner's Brief, there was no modification of the agenda. Brief of Appellant, at p. 11. Modification, as the term is used by the PDC, appears to mean that the board members simply decided to talk about an issue and proceeded to take action. No agenda referencing AUTO's citizen's action was ever created or published, including prior to or during the PDC meeting. The executive director's report was not published.

AUTO is not arguing that an agenda cannot be modified. Clearly, pursuant to RCW 42.30.077, a modification can occur. Rather, AUTO is arguing that no modification occurred at all and the provision in RCW 42.30.077 allowing modification of an agenda therefore does not apply.

Further, the only way the members did not knowingly violate the OPMA would be if the members failed to even look at the agenda. If the members did look at the agenda, they would be aware that AUTO and its 45 day notice was not on the agenda. Clearly, not reading the agenda is not a defense.

**D. The Facts are Undisputed. Entering Summary Judgment is Appropriate.**

There is no dispute as to any material fact. The PDC acknowledges that it had no statutory authority to send the letter. CP 174, 131-134. AUTO's First Amended Petition for Review for Violation of the Administrative Procedure Act and Complaint for Violation of the Open Public Meeting Act alleges that the PDC exceeded its statutory authority and acted arbitrarily and capriciously. CP 9-10. The PDC acknowledges it did not conduct any adjudication, hearings or issue a formal interpretive ruling. CP 177-178. It acknowledges that its unauthorized act injured AUTO. *See, e.g.*, Respondent's Brief at p. 14 (stating that "AUTO was aggrieved once AUTO received the June 17th letter").

The only dispute is the time at which, based on the undisputed facts, AUTO gained standing. AUTO urges that this Court can, based on the evidence before it, find that, as a matter of law, AUTO did not gain standing until well after it received the June 17, 2016 letter based on the facts before the Court. It can also find, based on largely agreed facts, that the PDC violate the APA.

**E. Attorney Fees are Appropriate.**

The PDC correctly points out that AUTO mistakenly cited RCW 42.17A.755 in its initial request for attorney fees. However, that citation was intended to be RCW 4.84.350, which provides:

1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars....

RCW 4.84.350. AUTO, if it prevails, is clearly entitled to an award of attorney fees and costs for its APA challenge.

## V. CONCLUSION

It is clear that the PDC sent the June 16, 2016 letter knowing that it had no role in AUTO's citizen action. It is similarly clear that the PDC worked to conceal its actions, including not creating any public meeting agenda and refusing to disclose requested documents for months.

Now, PDC argues that AUTO had standing when it received the letter because AUTO should have "had a clue" that the June 16, 2016 letter would be used by a third party in separate litigation. Such speculative harm does not confer standing. *Peterson v. Segale*, 171 Wash.App. 251, 258-259, 289 P.3d 657 (2012). AUTO's petition for review was timely because it did not have standing until Friends of Bob Ferguson used the June 16, 2016 letter to AUTO's detriment.

DATED this 22nd day of March, 2018.

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