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NO. 97646-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ERIC JOHNSON AND RICHARD MANKAMYER,

Appellants,

v.

THE WASHINGTON STATE CONSERVATION COMMISSION and  
the following in their individual and official capacities: JIM KROPF,  
CHAIR; DEAN LONGRIE, VICE-CHAIR; HAROLD CROSE,  
COMMISSIONER; LARRY COCHRAN, COMMISSIONER; DARYL  
WILLIAMS, COMMISSIONER; SARAH SPAETH, COMMISSIONER;  
PERRY BEALE, COMMISSIONER; THOMAS MILLER,  
COMMISSIONER; EXECUTIVE DIRECTOR MARK CLARK;  
POLICY DIRECTOR RON SHULTZ; JOHN AND JANE DOES 1-10,

Respondents/Cross-Appellants.

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**REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS**

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TABLE OF CONTENTS

I.	Summary Reply .....	1
II.	Arguments:	
	A. RCW 89.08.200 is not a valid alternative to recall because it conflicts with Article V § 3. ....	1
	B. Recall and the alternatives cited by the Commission involve a neutral judge to protect public officials from harassment.....	7
	C. The APA covers three things: rulemaking, adjudication and “other agency action.” The Commission conflates adjudication with “other agency action.” It argues that RCW 89.08.200 is “other agency action” authorizing adjudication under the OPMA. However, adjudication proceedings are expressly governed by the APA, not the OPMA. RCW 42.30.140(3). Moreover, caselaw concerning “other agency action” does not support the Commission’s argument. ....	10
	D. Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena witnesses per the APA. ....	14
II.	Conclusion .....	16

APPENDIX

A-9: WAC 135-110-110 [excerpted definitions of “malfeasance” and “neglect of duty”].

TABLE OF AUTHORITIES

Constitutional Provisions:

U.S. Const. amend. VI ..... 16

Wash. Const. art. I § 33 (8th amendment) ..... 1

Wash. Const. art. III, § 21 ..... 15

Wash. Const. art V § 1 ..... 7

Wash. Const. art. V § 3 ..... *passim*

Statutes:

5 U.S.C. §§ 551(13) and 706(2) (2000) ..... 12

Ch. 7.56 RCW ..... 7

RCW 9.92.120 ..... 7

RCW §§ 29A.56.110 - 29A.56.270 ..... 4

RCW 29A.56.140 ..... 5

RCW 29A.68.011 ..... 7

RCW 31.12.285 ..... 2

Ch. 34.05 RCW ..... 11

RCW 34.05.010 ..... 10, 12, 17

RCW 34.05.410 et. seq..... 12, 17

RCW 34.05.446 ..... 1, 13, 14, 17

RCW 34.05.570 ..... 11, 12, 13, 14

RCW 42.23.050 ..... 7

RCW 42.30.140 .....	<i>passim</i>
RCW 74.46.431(1) .....	14
RCW 89.08.200 .....	<i>passim</i>
<u>Rules:</u>	
WAC 135-110-110 .....	4
<u>Cases:</u>	
<i>Am. Waterways Operators v. Dep't of Ecology</i> , Wn. App. 2d 808, 810 (2019).....	14
<i>Austin v. Superior Court for Whatcom Cty.</i> , 6 Wn.2d 61, 65 (1940) .....	9
<i>Brown v. Department of Commerce</i> , 184 Wn.2d 509, 544-545 (2015) ...	13
<i>Chandler v. Otto</i> , 103 Wn.2d 268, 274 (1984).....	8
<i>Children's Hosp. v. Dep't of Health</i> , 95 Wn. App. 858, 860 (1999).....	13
<i>Cole v. Webster</i> , 103 Wn.2d 280, 284 (1984) .....	4
<i>Evergreen Wash. Healthcare Frontier, LLC v. Dep't of Soc. &amp; Health Servs.</i> , 171 Wn. App. 431, 446 (2012).....	14
<i>In the Matter of the Recall of Jay Inslee, Governor of the State of Washington</i> , No. 967665-2 (October 31, 2019) .....	4, 8
<i>Kadlec Reg'l Med. Ctr. v. Dep't of Health</i> , 177 Wn. App. 171, 176-177 (2013).....	14
<i>Parker v. Wyman</i> , 176 Wn.2d 212, 217 (2012).....	1
<i>Purse Seine Vessel Owners Ass'n v. State</i> , 92 Wn. App. 381, 388 (1998). .....	13

<i>Save Columbia CU Comm. v. Columbia Cmty. Credit Union</i> , 150 Wn. App. 176, 178 (2009).....	2
<i>Simon v. Califano</i> , 593 F.2d 121, 123 (1979).....	7
<i>Squaxin Island Tribe v. Dep't of Ecology</i> , 177 Wn. App. 734, 740 (2013) ..	14
<i>State ex rel. Gill v Common Council of Watertown</i> , 9 Wis. 254, 262 (1859)	6, 7
<i>State ex rel. Howlett v Cheetham</i> , 19 Wash. 330, 331 (1898) .....	5
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888 (1998).....	8, 9
<i>Swanson Hay Co. v. Emp't Sec. Dep't</i> , 1 Wn. App. 2d 174, 219 (2017)	11
<i>Wells Fargo Bank, NA v. Dep't of Revenue</i> , 166 Wn. App. 342, 360-361 (2012).....	13
<u>Other:</u>	
BrainyQuote	
<a href="https://www.brainyquote.com/quotes/frank_robinson_140160">https://www.brainyquote.com/quotes/frank_robinson_140160</a> .....	15
William Anderson, <i>The 1988 Washington Administrative Procedure Act -- an introduction</i> , 64 Wash. L. Rev. 781, 833 (1989).....	11
Thomas J. Goger, Annotation: <i>Removal of public officers for misconduct during previous term</i> , 42 A.L.R.3d 691, 4 (2019) .....	7
Daniel W. Morton-Bentley, Annotation: <i>Construction and Application of Administrative Procedure Act, 5 U.S.C.A. §§ 500 et seq – Supreme Court Cases</i> , 24 A.L.R. Fed. 3d 5 (2019).....	13
Jonathan A. Schorr, <i>The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes</i> , 63 B.U.L. Rev. 765, 802 (1983).....	11

**I. Summary Reply:**

The Commission argues that RCW 89.08.200 is an alternative to recall citing Washington Constitution, Article V § 3.<sup>1</sup> However, Article V § 3 limits removal to “misconduct or malfeasance in office” while RCW 89.08.200 limits removal to “neglect of duty or malfeasance in office.” Neglect of duty is neither misconduct nor malfeasance.

The Commission’s decision to proceed with an adjudication under the OPMA, rather than the APA, violated RCW 42.30.140(3). It conflates adjudication with “other agency action.” Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena hostile witnesses as authorized by the APA. RCW 34.05.446.

**II. Arguments:**

**A. RCW 89.08.200 is not a valid alternative to recall because it conflicts with Article V § 3.**

A statute cannot add to the Constitution qualifications to hold office.<sup>2</sup> Article V § 3 allows for “removal for misconduct or malfeasance in office.” RCW 89.08.200 conflicts with Article V § 3 because it limits

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<sup>1</sup> Resp. Br. at 1, 14. Article V § 3 was part of the original constitution which was amended in 1912 to add the recall power. Wash. Const. art. I § 33 (8th amendment).

<sup>2</sup> See, e.g. *Parker v. Wyman*, 176 Wn.2d 212, 217 (2012).

removal of supervisors to “neglect of duty or malfeasance in office.” The Commission is not free to name other causes for removal.<sup>3</sup>

Here, the Commission removed Johnson and Mankamyer based on four out of eleven complaints:<sup>4</sup>

Complaint #2: Supervisor Johnson and Supervisor Mankamyer failed to provide a timely and accurate record of District Business.

Response #2: Meetings are taped. Minutes prepared by staff were delayed and included obvious errors. RCW 42.30.035 does not mandate written minutes. TCD meetings are taped and available for public inspection. The paid staff are responsible for creating the minutes for the board to review and approve. Paid staff held minutes back and inserted false and self-serving statements to support their personal complaints against Johnson, Mankamyer and the TCD. Specifically, minutes for February 2017 to date were only recently provided to Johnson for approval. Moreover, staff did not make corrections to the minutes as directed.<sup>5</sup>

➤ Commission Finding: Neglect of duty.

Complaint #4: Supervisor Johnson and Mankamyer delayed approval of timesheets and signing of checks.

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<sup>3</sup> Cf RCW 31.12.285. A credit union board of directors may suspend a member of the board or a member of the supervisory committee for a “cause” not specifically identified in the statute; i.e., a credit union board of directors is free to denominate another “cause” for suspension that is not listed in the statute. What constitutes “cause” is within the board’s discretion so long as the board’s reasons are rationally related to a legitimate credit union interest. See, *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 150 Wn. App. 176, 178 (2009).

<sup>4</sup> See AR 8-43; AR 1564-1595 [Commission Investigation Report]; AR 2402-2403. Johnson and Mankamyer responded and disputed each and every charge. AR 1602-1686.

<sup>5</sup> AR 1605-1606. This included erroneous self-serving comments supporting staff legal claims against the TCD and supervisors. Including a statement that the board discussed in executive session firing Ms. Moorehead for filing a complaint with the Human Rights Commission against the TCD and supervisors. AR 1606.

Response #4: Mankamyer, as Board Auditor, carefully scrutinizes checks and timesheets because he is legally responsible. Timecards were not submitted in a timely manner by staff. Back in 1999-2000, *The Olympian* reported on the state audit of TCD which found falsified time sheets. Mankamyer recently discovered that the Interim Executive Director unilaterally awarded staff retroactive pay increases to use up RCO grant money in violation of the grant award.<sup>6</sup>

➤ Commission Finding: Neglect of duty.

Complaint #5: Supervisor Johnson and Supervisor Mankamyer engaged in inappropriate conduct and making inappropriate comments when working with District staff and failed to respond to the District's insurance carrier's risk management recommendations.<sup>7</sup>

Response #5: The allegation spring from staff objections to a strong board and include isolated, trivial or casual comments that would not amount to harassment under the law.<sup>8</sup>

➤ Commission Finding: Malfeasance

Complaint #7: Supervisor Johnson failed to attend a District public hearing to consider future county funding for the District.

Response #7: The hearing at issue concerned transitioning from an assessment funding model to one based on rates and charges. Johnson and Mankamyer showed up for the Thurston County Commissioner's public hearing on

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<sup>6</sup> AP 1608-1609.

<sup>7</sup> Sarah Moorehead, acting district executive director, and Amy Franks, district treasurer, filed complaints alleging harassment and retaliation with the Human Rights Commission on March 6, 2018. Attached was Johnson's complaint for violation of the Public Records Act. AR 158-164; AR 228-234. On May 21, 2018 the HRC concluded that no action was required and took no action. AR 83-86.

<sup>8</sup> AR 1609. In addition, complaints were pending before the State Human Rights Commission which determined not to take any action. AR 83-86; AR 1796-1805; 1892.

October 17, 2017. Moorehead told them it was cancelled because she was told by the County Prosecutor that TCD needed to have a public hearing before the commissioners held one. The staff had months to hold the public meeting but screwed up. They now want to shift the blame to Johnson and Mankamyer. The next meeting was scheduled for November 6, 2017, when Moorehead knew that Johnson was attending a conference in Yakima.<sup>9</sup>

➤ Commission Finding: Malfeasance.<sup>10</sup>

An objective judge looking at the eleven complaints<sup>11</sup> would conclude that the Commission staff had broad discretion to designate actions as “neglect of duty” and/or “malfeasance”<sup>12</sup> In fact, some complaints were characterized as both.<sup>13</sup> Without a court to determine the legal and factual sufficiency of the charges (as in a recall), Johnson and Mankamyer were forced to defend against all eleven charges.<sup>14</sup>

Application of WAC 135-110-110 in this case was arbitrary, capricious and inconsistent with protection afforded elected officials facing a recall.<sup>15</sup> For example, one of the charges was that Johnson and

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<sup>9</sup> AR 1610-1611.

<sup>10</sup> Such discretionary actions cannot be the basis for a recall. See, e.g. *Cole v. Webster*, 103 Wn.2d 280, 284 (1984); See also *In re Recall of Inslee*, 2019 Wash. LEXIS 667, \*5 (2019) [finding insufficient the charge that Governor Inslee’s frequent out-of-state travels created a vacancy in his office.]; See also AR 1604.

<sup>11</sup> AR 0008-0038.

<sup>12</sup> App. A-9 [WAC 135-110-110 (excerpted definitions of “malfeasance” and “neglect of duty”]; AR 1919-1920.

<sup>13</sup> For example, “inappropriate conduct toward staff.” AR 1609; 1611.

<sup>14</sup> AR 1604-1688; 2022-2108.

<sup>15</sup> See RCW §§ 29A.56.110 -29A.56.270; This issue was raised before the Commission. AR 1604; SHRP (February 20, 2019 transcript) at 155-164.

Mankamyer failed to “comply with the laws and rules of the state.”<sup>16</sup> another was that “Supervisor Mankamyer’s complaints regarding the March election were unfounded and violated state law.”<sup>17</sup> These frivolous charges were intended to harass and retaliate against Johnson and Mankamyer. Had this been a recall, a neutral judge would have assessed the legal and factual sufficiency of the charges to protect Johnson and Mankamyer from harassment.<sup>18</sup>

Moreover, the law distinguishes neglect of duty from misconduct and malfeasance. For example, in *State ex rel. Howlett v Cheetham*,<sup>19</sup> a former land commissioner filed a writ of mandamus to compel the state auditor to issue him a warrant for his salary. The commissioner held the position under appointment by the governor. The governor found that the commission was guilty of misconduct in office and removed him from his office. The court, citing Article V § 3, held that the governor had the authority to remove the commissioner “whenever he was satisfied that the incumbent had been guilty of misconduct or malfeasance in office.”<sup>20</sup>

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<sup>16</sup> AR 1611.

<sup>17</sup> AR 1612.

<sup>18</sup> RCW 29A.56.140.

<sup>19</sup> 19 Wash. 330, 331 (1898).

<sup>20</sup> *Id.* at 332-333 (1898). Emphasis added.

*State ex rel. Gill v Common Council of Watertown*<sup>21</sup> concerned a mandamus action to reinstate a superintendent of schools who had been removed based on four charges similar to those filed against Johnson and Mankamyer:

1st. Neglect and refusal to prepare and submit to the common council a report pursuant to the provisions of law.

2d. Neglect, during the past year, to visit the schools, at least twice during each term, and to report the condition of the same to the board of education.

3d. Consenting to and causing to be paid out the contingent expenses of the board of education, during the year ending April 1, 1859, without having the same audited and allowed by the common council, as required by law.

4th. That Gill, as a member of the board of education, had voted with others to refuse to allow J. J. Enos to take his seat and act in said board, after he had been duly elected as a member thereof.

Gill answered as to the 1st charge, that it was the duty of the board of education and not of the superintendent to make the report. He denied the 2d charge and insisted that he had visited the schools during the last term where new teachers had been employed and did not deem it necessary to visit the others; and that the board of education was duly informed of the condition of all the schools. He admitted the 3d charge and claimed that it was a right belonging to that body. The 4th charge he denied; and insisted that, in his opinion, Enos was not entitled to a seat in the board, and he voted, as he thought, rightly.<sup>22</sup>

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<sup>21</sup> 9 Wis. 254 (1859).

<sup>22</sup> *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 254, 257 (1859).

The Wisconsin Supreme Court ruled in favor of the superintendent (Gill)

stating:

[T]he charges show nothing more than a mere neglect of some formal duty which the law may have required, involving no moral delinquency, and which, if violations of duty at all, must have been well known to the appointing power, we do not think where they relate entirely to acts during a prior term of office, that they constitute due cause in law for the removal of an officer.”<sup>23</sup>

In *Simon v. Califano*,<sup>24</sup> a mother and children brought claims for Social Security benefits arguing that the government should be estopped from denying those benefits due to a trainee’s negligence. The Ninth Circuit stated:

[T]he doctrine of equitable estoppel may still not be invoked against the government in its sovereign capacity unless that conduct can properly be called "affirmative misconduct." Mere neglect of duty is not enough.<sup>25</sup>

**B. Recall and the alternatives cited by the Commission<sup>26</sup> involve a neutral judge to protect public officials from harassment.**

The law allows “recall for cause” to “free public officials from the harassment of recall elections grounded on frivolous charges or mere

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<sup>23</sup> *Id.*, at 262; See, generally Thomas J. Goger, Annotation: *Removal of public officers for misconduct during previous term*, 42 A.L.R.3d 691, 4 (2019)].

<sup>24</sup> 593 F.2d 121, 123 (1979).

<sup>25</sup> Emphasis added.

<sup>26</sup> Resp. Br. at 14-17; *Quo warranto* [Ch. 7.56 RCW]; judicial contests [RCW 29A.68.011]; Municipal Code of Ethics [RCW 42.23.050]; removal from office as punishment for conviction of a felony [RCW 9.92.120]; Impeachment [Wash. Const. art. V, § 1].

insinuations.”<sup>27</sup> The process used here involves the Commission acting as the grand inquisitor, judge, jury and executioner based on charges made by its own staff.<sup>28</sup> Johnson, Mankamyer and former District supervisor James Goche,<sup>29</sup> repeatedly insisted on an independent administrative law judge and repeatedly objected to having the Commissioner judge the case.<sup>30</sup>

The Commission argues that “Recall under general election laws is not the exclusive means for removing an individual from office.”<sup>31</sup> The Commission ignores the fact that a recall had been filed against Johnson and Mankamyer.<sup>32</sup> The proponent is the same voter who filed the recall petition *In the Matter of the Recall of Jay Inslee, Governor of the State of Washington*.<sup>33</sup>

Moreover, the cases relied upon by the Commission are distinguishable. For example, the petitioner in *Quick-Ruben v. Verharen*

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<sup>27</sup> *Chandler v. Otto*, 103 Wn.2d 268, 274 (1984).

<sup>28</sup> AR 0041-0044.

<sup>29</sup> AR 87-98. Mr. Goche is also an attorney, professor, former district prosecutor and state senior hearings examiner. AR 1626-1627; 2338.

<sup>30</sup> AR 1459-1460; AR 1470-1520 [Supervisors’ Brief and Supplemental Response; Continuing Objections; and Motions to Recuse]; AR 2337-2338; SHRP (February 20, 2019 transcript) at 39.

<sup>31</sup> Resp. Br. at 14-15.

<sup>32</sup> AR 1654-1655; Appendix A-5: Request for Recall of Conservation District Commissioners Johnson and Mankamyer (7/18/18).

<sup>33</sup> 2019 Wash. LEXIS 667, \*5 (2019).

lost his private *quo warranto* action based on procedural errors.<sup>34</sup> “Quick-Ruben was advised of this problem by opposing counsel.”<sup>35</sup> Nevertheless, he persisted. Here, Johnson and Mankamyer repeatedly warned the Commission and filed motions<sup>36</sup> asserting that it was improper to proceed with an adjudication under the OPMA. Nevertheless, as in the *Quick-Ruben* case, the Commission persisted and summarily dismissed those concerns.

The Commission also cites *Austin v. Superior Court for Whatcom Cty.*,<sup>37</sup> for the proposition that “Such removal is not conditioned in any way, nor limited to removal by recall election.”<sup>38</sup> That case concerned an application for a writ of prohibition to prevent the court from taking further action in a *quo warranto* proceeding. That case does not discuss or mention recall.

Finally, the Commission does not distinguish between elected and appointed supervisors. There is a difference. Elected supervisors receive

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<sup>34</sup> Quick-Ruben failed to plead and prove a special interest in the Pierce County superior court judge position, an essential predicate to a private *quo warranto* action. Moreover, his action for *quo warranto* was prematurely filed and he was aware the action was premature. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905-906 (1998).

<sup>35</sup> “Quick-Ruben was advised of this problem by opposing counsel and given the opportunity to dismiss the action, refile it after Verharen's term commenced, and serve process on opposing counsel. He declined. In order to sustain a private *quo warranto* action he had to plead and prove a present special interest in the public office in question.” *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 901 (1998).

<sup>36</sup> AR 2337-2338.

<sup>37</sup> 6 Wn.2d 61, 65 (1940).

<sup>38</sup> Resp. Br. at 15.

their office directly from the people while appointed supervisors receive their office from the Commission. Voters should decide on removal of an elected supervisor via recall just as it does for all other elected officials, other than judges.<sup>39</sup>

- C. **The APA covers three things: rulemaking, adjudication and “other agency action.” The Commission conflates adjudication with “other agency action.” It argues that RCW 89.08.200 is “other agency action” authorizing adjudication under the OPMA. However, adjudication proceedings are expressly governed by the APA, not the OPMA. RCW 42.30.140(3). Moreover, caselaw concerning “other agency action” does not support the Commission’s argument.**

RCW 42.30.140(3) clearly states that the OPMA “shall not apply to matters governed by chapter 34.50 RCW, the Administrative Procedure Act.” The APA governs “adjudicative proceeding” which it defines as:

[A] proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.<sup>40</sup>

Johnson and Mankamyer have a right to a hearing under RCW 89.08.200 which states:

A supervisor may be removed by the state conservation commission upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason.

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<sup>39</sup> See Appellants’ Opening Br. at 13.

<sup>40</sup> RCW 34.05.010.

Normal and regular agency action assumes one of three basic forms: adjudication, rulemaking, and “other agency action.”<sup>41</sup> The APA defines rulemaking and adjudication.<sup>42</sup> Informal, discretionary action encompasses all “other agency action.” In *Swanson Hay Co. v. Emp't Sec. Dep't*,<sup>43</sup> the court stated:

The APA authorizes three types of judicial review of agency action. Under RCW 34.05.570(2), courts are authorized to review the validity of agency rules. Under RCW 34.05.570(3), they are authorized to grant relief from “an agency order in an adjudicative proceeding.” All other agency action or inaction is reviewable by courts under RCW 34.05.570(4). Relief for persons aggrieved by the performance of this last category of agency action or inaction is available if the agency's action or inaction is unconstitutional, outside the agency's statutory or other legal authority, arbitrary or capricious, or taken by persons not lawfully entitled to take the action. RCW 34.05.570(4)(c).

The Commission argues that its “choice of procedure” (i.e. adjudication under the OPMA) is authorized by RCW 89.08.200 as “other agency action” and distinguishable from “an order issued in an adjudicative proceeding”<sup>44</sup> under the APA. That argument is disingenuous

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<sup>41</sup> See, generally, William Anderson, *The 1988 Washington Administrative Procedure Act -- an introduction.*, 64 Wash. L. Rev. 781, 833 (1989); and Jonathan A. Schorr, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. Rev. 765, 802 (1983).

<sup>42</sup> Ch. 34.05 RCW.

<sup>43</sup> 1 Wn. App. 2d 174, 219 (2017).

<sup>44</sup> Resp. Br. at 10.

and ignores the fact that adjudication proceedings are expressly governed by the APA, not the OPMA.<sup>45</sup>

The APA provides extensive judicial review of agency action, findings and orders.<sup>46</sup> The APA defines “order” as “a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.”<sup>47</sup> It is undisputed that the Commission issued Findings of Fact<sup>48</sup> and ordered Johnson and Mankamyer be removed as district supervisors.

The Commission wants the court to bless their faux adjudication under the OPMA as “other agency action” under the APA.<sup>49</sup> This blurs the line between genuine APA adjudication<sup>50</sup> and “other agency action.” The Commission’s argument is essentially that Johnson and Mankamyer received *nearly* everything a genuine APA adjudication affords (albeit under the OPMA), including briefs, prehearing orders, motions, witnesses, etc.<sup>51</sup> However, as noted below, Johnson and Mankamyer were prejudiced

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<sup>45</sup> RCW 42.30.140(3).

<sup>46</sup> RCW 34.05.010; See also, 5 U.S.C. §706(2) (2000). “Agency actions” are defined broadly under the APA to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” Id. §551(13).

<sup>47</sup> RCW 34.05.010.

<sup>48</sup> Resp. Br. at 9; AR 2398-2404.

<sup>49</sup> RCW 34.05.570(4).

<sup>50</sup> See RCW 34.05.410 et seq.

<sup>51</sup> Resp. Br. at 7-9.

by their inability to engage in discovery and subpoena hostile witnesses as authorized by the APA.<sup>52</sup>

Moreover, the Commission ignores the caselaw where “other agency action” was applied.<sup>53</sup> For example:

- In *Brown v. Department of Commerce*,<sup>54</sup> the Court held that a decision by the Department to deny a request for mediation under the foreclosure fairness act constitutes “other agency action” subject to judicial review.
- In *Purse Seine Vessel Owners Ass'n v. State*<sup>55</sup> the issue was the state fish and wildlife department’s decision not to close treaty herring fisheries while closing the non-treaty fisheries. The Court held that the Department's failure to allow nontreaty spawn-on-kelp fishery is an "other agency action" subject to review under RCW 34.05.570(4).
- In *Children's Hosp. v. Dep't of Health*,<sup>56</sup> the hospital filed a petition for judicial review, challenging the DOH’s determination that another hospital could perform pediatric open heart surgeries without a Certificate of Need (CN) review. The court found the hospital was not entitled to relief under Wash. Rev. Code § 34.05.570(4) finding that the hospital in question could perform pediatric open heart surgery, only if the DOH first conducted a CN review.
- In *Wells Fargo Bank, NA v. Dep't of Revenue*,<sup>57</sup> the court held that DOR's denial of Wells Fargo's demand that DOR pay interest on the settlement amount was neither agency rulemaking nor an order

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<sup>52</sup> RCW 34.05.446.

<sup>53</sup> See, Daniel W. Morton-Bentley, Annotation: *Construction and Application of Administrative Procedure Act, 5 U.S.C.A. §§ 500 et seq – Supreme Court Cases*, 24 A.L.R. Fed. 3d 5 (2019).

<sup>54</sup> 184 Wn.2d 509, 544-545 (2015).

<sup>55</sup> 92 Wn. App. 381, 388 (1998).

<sup>56</sup> 95 Wn. App. 858, 860 (1999).

<sup>57</sup> 166 Wn. App. 342, 360-361 (2012).

entered in an adjudicative proceeding; thus, it was “other agency action” falling under RCW 34.05.570(4).

- In *Evergreen Wash. Healthcare Frontier, LLC v. Dep't of Soc. & Health Servs.*<sup>58</sup> the court held that DSHS's payment rate determinations, which were not the result of agency rule making or adjudicative procedures, were an implementation of the DSHS's duties under former RCW 74.46.431(1) to establish payment rates for participating nursing facilities. Accordingly, the rate determinations were “other” agency action subject to the APA's requirements.
- In *Squaxin Island Tribe v. Dep't of Ecology*,<sup>59</sup> the court held that DOE's decision to deny a rule making petition is subject to judicial review as “other agency action” under RCW 34.05.570(4).
- In *Kadlec Reg'l Med. Ctr. v. Dep't of Health*,<sup>60</sup> the court found that the hospital was entitled to an adjudicative hearing because the hospital's application clearly focused on a 114-bed request with two other scenarios seeking fewer beds as essentially secondary alternatives, and, thus, the DOH's grant of the 55-bed certificate of need functioned as a denial of the hospital's 114-bed request.
- In *Am. Waterways Operators v. Dep't of Ecology*,<sup>61</sup> the court affirmed the Pollution Control Hearings Board's dismissal of the operators' appeal of the State's Certificate of Need to the EPA for permission to engage in rulemaking to prohibit marine vessel sewage discharge into Puget Sound.

**D. Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena witnesses per the APA.<sup>62</sup>**

The Commission argues that “Mr. Johnson and Mr. Mankamyer were not prejudiced by the lack of procedures which were not guaranteed to be

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<sup>58</sup> 171 Wn. App. 431, 446 (2012).

<sup>59</sup> 177 Wn. App. 734, 740 (2013).

<sup>60</sup> 177 Wn. App. 171, 176-177 (2013).

<sup>61</sup> 7 Wn. App. 2d 808, 810 (2019).

<sup>62</sup> RCW 34.05.446.

available to them in the first instance.”<sup>63</sup> The Commission’s position epitomizes what baseball great Frank Robinson famously said, “Close don’t count in baseball. Close only counts in horseshoes and hand grenades.”<sup>64</sup>

The Commission chose to proceed under the OPMA for political expediency<sup>65</sup> and has since secured a stay from this court of any hearing. Without discovery or subpoenas, only those witnesses called by the Commission or who would voluntarily appear testified. Among the “hostile witnesses” who were listed by Johnson and Mankamyer in their objections to the pretrial orders<sup>66</sup> and who participated in the Commission’s investigation,<sup>67</sup> but did not appear included:

- Ron Shultz, Commission Policy Director, attorney and co-author of the Commission’s staff investigation. In addition to the protocol he used in the investigation, Mr. Shultz would have been asked about legal advice<sup>68</sup> he provided to the Commission and its Executive Director, Mark Clark.<sup>69</sup>

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<sup>63</sup> Resp. Br. at 31.

<sup>64</sup> BrainyQuote [https://www.brainyquote.com/quotes/frank\\_robinson\\_140160](https://www.brainyquote.com/quotes/frank_robinson_140160) .

<sup>65</sup> Resp. Br. at 6. “Commissioners expressed concern regarding the length of time the investigation had already taken” and wanted to conclude “the matter as soon as possible.”

<sup>66</sup> AR 2339-2340.

<sup>67</sup> AR 1-61; AR 1086-1087; 1156-1157 [Commission staff interview notes with Amy Franks].; AR 1154-1155 [Commission staff interview notes with Sarah Moorehead]; AR 1706 [Witnesses interviewed by Commission Staff].

<sup>68</sup> Mr. Shultz is not employed by the Attorney General’s Office which is the legal adviser to state officers and state agencies. Wash. Const. art. III, § 21.

<sup>69</sup> AR 2339.

- Doug Rushton, District Supervisor.<sup>70</sup> Mr. Ruston is a long time District supervisor. He would be called to testify about his history of obtaining special privileges as detailed in *The Olympian*.<sup>71</sup>
- Paul Pickett, District Supervisor. Mr. Pickett would have been called to testify regarding Neglect of Duty Charge #2 (not maintaining timely and accurate records of District business) and alleged violations of the OPMA.<sup>72</sup> This includes testimony regarding his discovery of staff inserting false and self-serving statements to support their personal complaints against Johnson, Mankamyer and the TCD.<sup>73</sup>
- Amy Hatch-Winecka, former District Deputy Director who was hired by the District's acting executive director (Moorhead) despite her being terminated from the Mason Conservation District for alleged illegal/unethical behavior, including conflicts of interests involving her husband's non-profit.<sup>74</sup> She accused Johnson and Mankamyer of harassment for continuing to question what appeared to be her on-going conflict of interest.<sup>75</sup>
- Amy Franks, District treasurer/bookkeeper Director who accused Johnson and Mankamyer of harassment;<sup>76</sup>

Surely, Johnson and Mankamyer had the right to confront their accusers.<sup>77</sup>

### **III. Conclusion:**

While the Commission "may" remove supervisors it appoints,<sup>78</sup> it may not remove elected supervisors for reasons not specified in the

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<sup>70</sup> Mr. Ruston was interviewed by Commission staff. AR 1164.

<sup>71</sup> AR 2339.

<sup>72</sup> AR 2339.

<sup>73</sup> AR 1605-1606.

<sup>74</sup> AR 2339.

<sup>75</sup> AR 0021; CP 122-128.

<sup>76</sup> AR 0021; CP 122-128.

<sup>77</sup> See, e.g. U.S. Const. amend. VI; Wash. Const. art. 1 § 22.

<sup>78</sup> RCW 89.08.200.

constitution.<sup>79</sup> The default would be a recall which provides for direct accountability to the people. The recall process protects supervisors from retaliation and harassment for demanding accountability. The charges made against Johnson and Mankamyer epitomize harassment.

The Commission's use of the OPMA for an "adjudicative proceeding"<sup>80</sup> violates the OPMA and the APA. RCW 42.30.140 states that the OPMA "shall not apply to ... (3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act." The APA governs "adjudicative proceedings."<sup>81</sup> Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena hostile witnesses.<sup>82</sup>

Finally, while the Commission argues that remand is appropriate,<sup>83</sup> it secured a stay acknowledging that remand is impractical, futile and unfair.

Date: 11/26/19

  
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<sup>79</sup> Wash. Const. art. V § 3.

<sup>80</sup> RCW 34.05.010(1).

<sup>81</sup> *Id.*, See also RCW 34.05.410 et seq.

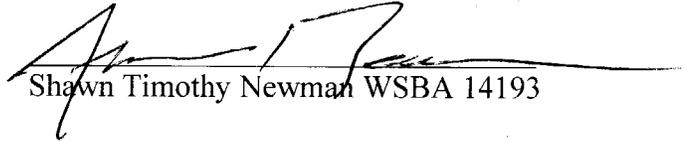
<sup>82</sup> RCW 34.05.446.

<sup>83</sup> Resp. Br. at 34.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I emailed the Reply Brief of Appellants/Cross Respondents to respondents' counsel via the Appellate Court Portal Filing system.

Date: 11/26/19  
Olympia

  
Shawn Timothy Newman WSBA 14193

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

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ERIC JOHNSON and RICHARD MANKAMYER,

Appellants/Cross Respondents,

v.

WASHINGTON STATE CONSERVATION COMMISSION,  
and the following in their individual and official capacities:  
JIM KROPF, CHAIR; DEAN LONGRIE, VICE-CHAIR;  
HAROLD CROSE, COMMISSIONER; LARRY COCHRAN,  
COMMISSIONER; DARYL WILLIAMS, COMMISSIONER;  
SARAH SPAETH, COMMISSIONER; PERRY BEALE,  
COMMISSIONER; THOMAS MILLER, COMMISSIONER;  
EXECUTIVE DIRECTOR MARK CLARK; POLICY  
DIRECTOR RON SHULTZ; JON AND JANE DOES 1-10.

Respondents/Cross Appellants

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APPENDIX A-9 to REPLY BRIEF OF  
APPELLANTS/CROSS RESPONDENTS

WAC 135-110-110

WAC § 135-110-110 [excerpted definitions of “malfeasance” and “neglect of duty”]

"Malfeasance" means wrongful conduct that affects, interrupts, or interferes with the performance of a supervisor's official duty.

"Neglect of duty" means failure by a supervisor or supervisors to perform mandatory duties. Such duties include, but are not limited to:

- (a) Compliance with laws and rules imposed by local, state, and federal government entities;
- (b) Attendance at a sufficient number of board meetings so as to not impede the work of the conservation district;
- (c) Maintaining a full and accurate record of district business;
- (d) Securing of surety bonds for board officers and employees;
- (e) Carrying out an annual financial audit;
- (f) Providing for keeping current a comprehensive long-range program;
- (g) Providing for preparation of an annual work plan;
- (h) Providing for informing the general public, agencies, and occupiers of lands within the conservation district of conservation district plans and programs;
- (i) Providing for including affected community members in regard to current and proposed plans and programs; and
- (j) Providing for the submission of the conservation district's proposed long-range program and annual work plan to the conservation commission.

**SHAWN T. NEWMAN, ATTORNEY AT LAW**

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