

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2019 2:40 PM
BY SUSAN L. CARLSON
CLERK

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

BRIEF OF APPELLANTS JOHNSON and MANKAMYER

Shawn Timothy Newman
WSBA 14193
Attorney at Law, P.S.
Attorney for Appellants Johnson and Mankamy
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
Email: shawn@newmanlawolympia.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR AND ISSUES 1-2

A. Assignment of Error #1:

The trial court erred when it granted summary judgment by finding that removal of an elected supervisor (Mankamyer) does not violate the State Constitution, specifically article I, § 33 (Recall).

Issues pertaining to Assignment of Error #1:

Does RCW 89.08.200 give the WSCC authority to remove elected district supervisors without a recall election?

Answer: *No.* The WSCC is subject to the State Constitution’s recall provision, Wash. Const. art. I, § 33, which supersedes RCW 89.08.200 in the case of elected supervisors.

B. Assignment of Error #2:

The trial court erred when it granted summary judgment by remanding the case back to the WSCC for a formal adjudication under the APA.

Issues pertaining to Assignment of Error #2:

1. Is remanding the case back to the WSCC impracticable, futile and unfair given Johnson’s term already expired and Mankamyer’s term expires in May 2020? *Yes.*
2. Is remand to the WSCC for formal adjudication under the APA the appropriate remedy for Mankamyer given he was elected and, as such, could only be removed via recall by district voters? *No.*

Answer: Remanding the case back to the WSCC is impracticable, futile and unfair. Johnson’s term has expired, and he has been replaced. Mankamyer’s term expires in May 2020 and he was

elected. As such, Mankamyer can only be removed via recall, not via a hearing before the WSCC.

III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT:	
	A. Standard of review	9
	B. The State Constitution supersedes RCW 89.08.200	9
	C. Remand is impracticable, futile and unfair	14
	D. Request for attorney’s fees and expenses [RAP 18.1]	17
V.	CONCLUSION	17

APPENDICES

A-1	RCW 89.08.200
A-2	Trial Court Transcript (8/2/19)
A-3	Trial Court Order (9/6/19)
A-4	<i>Johnson v. Washington State University (WSU) Energy</i> , Thurston County Superior Court (18-2-00943-34) Complaint and Order
A-5	Request for Recall of Conservation District Commissioners Johnson and Mankamyer (7/18/18).
A-6	Letter from WSCC Clark to Newman (9/13/18).
A-7	Letter from WSCC Clark to Johnson (10/8/18).
A-8	In the Matter of the Removal of Eric Johnson and Richard Mankamyer from their Positions as Thurston Conservation District Supervisors: WSCC Findings of Fact, Decision and Notice of Appeal Rights (3/21/19)

TABLE OF AUTHORITIES

Table of Cases:

Ameriquest Mortg. Co. v Office of Atty. Gen., 177 Wn.2d 467, 478 (2013) 9

Chandler v. Otto, 103 Wn.2d 268 (1984) 13

Chelan Cnty. Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 294 n. 6 (1987) 9

Dioxin/Organochlorine Ctr. v. Dep't of Ecology, 119 Wn.2d 761, 776 (1992) 15

In re Recall of Burnham, 2019 Wash. LEXIS 578 13

In re Recall of Carkeek, 156 Wn.2d 469, 473 (2006) 13

In re Recall of Heiberg, 171 Wn.2d 771, 776 (2011) 12

In re Recall of Pepper, 189 Wn.2d 546 (2017) 13

In re Recall of Telford, 166 Wn.2d 148 (2009) 13

In re Recall of West, 155 Wn.2d 659 (2005) 13

In re Recall of Young, 152 Wn.2d 848 (2004) 13

Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281 (2013) 9

Kitsap County v. Mattress Outlet/Gould, 153 Wn.2d 506, 509 (2005) 9

LaMon v. Butler, 112 Wn2d 193, 200-201, cert denied, 493 U.S. 814 (1989) 9

Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-795 (2003) ... 9

Newton Twp. Electors v. S. Newton Twp. Supervisor, 575 Pa. 670, 676 (2003) 10

Randy Reynolds & Assocs. v. Harmon, 193 Wn.2d 143, 162 (2019) 13

Schroeder v. Weighall, 179 Wn.2d 566, 571 (2014) 9

Raynes v. Leavenworth, 118 Wn.2d 237, 245 (1992) 15, 16

Staats v. Brown, 139 Wn.2d 757, 789 (2000) 13

State ex rel. Barnard v. Board of Education, 19 Wn. 8 (1898) 16

State ex rel. Lynch v. Fairley, 76 Wash. 332, 333 (1913) 10

Teaford v. Howard, 104 Wn.2d 580 (1985) 13

Yakima County Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 381 (1993) 13

Statutes:

Ch. 34.05 RCW 1, 18

RCW 34.05.413(2) 5

RCW 34.05.425 6, 16

RCW 34.05.455	6, 16
RCW 34.05.458	6, 16
RCW 34.05.534 (3)	14
RCW 34.05.574	8, 14, 17, 18
Ch. 42.30 RCW	1, 18
RCW 42.30.120	8, 17, 18
RCW 42.30.140 (3)	17
Ch. 89.08 RCW	2
RCW 89.08.020	3
RCW 89.08.030	1
RCW 89.08.080 et seq.	14
RCW 89.08.150	14
RCW 89.08.200	<i>passim</i>
42 U.S.C. § 1983	6

Constitutional Provisions:

Wash. Const. art. I, § 1	10, 12
Wash. Const. art. I, § 3	1, 18
Wash. Const. art. I, § 32	11
Wash. Const. art. I, § 33	<i>passim</i>
Wash. Const. art. I, § § 34	<i>passim</i>

Court Rules:

RAP 18.1	17, 18
----------------	--------

Other Authorities:

<i>Conservation Commission removes two members of Thurston Conservation District board for neglect of duty and malfeasance in office (2/22/19) https://scc.wa.gov/tcd-022119/</i>	7
<i>In the Matter of the Removal of Eric Johnson and Richard Mankamyer from their Positions as Thurston Conservation District Supervisors: WSCC Findings of Fact, Decision and Notice of Appeal Rights (3/21/19). https://scc.wa.gov/wp-content/uploads/2019/03/TCDFindingsOfFact.pdf</i>	7
<i>Johnson v. Washington State University (WSU) Energy, Thurston County Superior Court No. 18-2-00943-34 [Appendix A-4]</i>	3-4

Jay M. Zitter, Annotation, *Constitutionality of State and Local Recall Provisions*, 13 A.L.R.6th 661, 2 (2019) 10, 12

Jonathan Bechele and Michael Reitz, *To Protect and Maintain Individual Rights: A Citizen’s Guide to the Washington Constitution, Article I* (2011) at 130-131. 12, 13

Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 Or. L. Rev. 1025, 1040 (2008) 11, 12

“What are conservation districts?” WSCC <https://scc.wa.gov/about-conservation-districts/> 2

Zachary J. Siegel, Casenote and Comment: *Recall me maybe? The corrosive effect of recall elections on state legislative politics*, 86 U. Colo. L. Rev. 307, 312-313 (2015) 11-12

I. INTRODUCTION:

This case concerns removal of local conservation district supervisors by the Washington State Conservation Commission [WSCC]¹ in violation of the state Constitution,² the Administrative Procedures Act [APA]³ and the Open Public Meetings Act [OPMA].⁴

II. ASSIGNMENTS OF ERROR:

A. Assignment of Error #1:

The trial court erred when it granted summary judgment by finding that removal of an elected supervisor (Mankamyer) does not violate the State Constitution, specifically article I, § 33 (Recall).

Issues pertaining to Assignment of Error #1:

Does RCW 89.08.200⁵ give the WSCC authority to remove elected district supervisors without a recall election?

Answer: No. The WSCC is subject to the State Constitution's recall provision, Wash. Const. art. I, § 33, which supersedes RCW 89.08.200 in the case of elected supervisors.

B. Assignment of Error #2:

The trial court erred when it granted summary judgment by remanding the case back to the WSCC for a formal adjudication under the APA.

Issues pertaining to Assignment of Error #2:

¹ RCW 89.08.030

² Const. art. I § 3 (due process) and § 33 (recall).

³ Ch. 34.50 RCW.

⁴ Ch. 42.30 RCW.

⁵ Appendix A-1: RCW 89.08.200

1. Is remanding the case back to the WSCC impracticable, futile and unfair given Johnson's term already expired and Mankamyer's term expires in May 2020? *Yes*.
2. Is remand to the WSCC for formal adjudication under the APA the appropriate remedy for Mankamyer given he was elected and, as such, could only be removed via recall by district voters? *No*.

Answer: Remanding the case back to the WSCC is impracticable, futile and unfair. Johnson's term has expired, and he has been replaced. Mankamyer's term expires in May 2020 and he was elected. As such, Mankamyer can only be removed via recall, not via a hearing before the WSCC.

II. STATEMENT OF THE CASE:

Johnson and Mankamyer are small farmers who served as Supervisors on the Thurston Conservation District (TCD).⁶ Conservation Districts are local municipal corporations⁷ albeit governed by the Washington State Conservation Commission (WSCC).⁸ There are 45 Conservation Districts in Washington.⁹ Every one of Washington's 39 counties is represented by at least one conservation district.¹⁰

Each conservation district is an independent, non-regulatory local government entity governed by a local board of five supervisors, three

⁶ CP 14; 28. See also TCD website <https://www.thurstoncd.com/> last accessed 10/1/19.

⁷ RCW 89.08.020 defines "District", or "conservation district" means a governmental subdivision of this state and a public body corporate and politic" See also CP 28;

⁸ Ch. 89.08 RCW; AR [Administrative Record] 4.

⁹ WSCC website "What are conservation districts?" <https://scc.wa.gov/about-conservation-districts/> last accessed 10/1/19.

¹⁰ *Id.*

elected and two appointed by the WSCC.¹¹ Supervisors are elected or appointed¹² and serve without compensation.¹³ Johnson was appointed by the WSCC to a term beginning May 2016 and ending May 2019.¹⁴ Mankamyer was elected by “District electors” or “voters”¹⁵ for a term running May 2017 to May 2020.¹⁶

Johnson served as the TCD board chairman and Mankamyer served as the TCD board auditor.¹⁷ They discovered questionable conduct by staff, including conflicts of interest, unauthorized expenses, sweetheart contracts and other irregularities¹⁸ going back several years.¹⁹ They were whistleblowers determined to fulfill their fiduciary duties as public officials to taxpayers and bring needed accountability to the TCD. They said so publicly.²⁰

¹¹ RCW 89.08.160; RCW 89.08.210; RCW 89.08.220; AR 4.

¹² RCW 89.08.190

¹³ RCW 89.08.200; Appendix A-1.

¹⁴ AR 4; CP 14, 22, 29.

¹⁵ RCW 89.08.020 states: "District elector" or "voter" means a registered voter in the county where the district is located who resides within the district boundary or in the area affected by a petition."

¹⁶ AR 4; CP 14, 22, 29.

¹⁷ AR 993, 1441.

¹⁸ See Appendix A-4: *Johnson v. Washington State University (WSU) Energy*, Thurston County Superior Court No. 18-2-00943-34 (Complaint and Order); AR 226-234.

¹⁹ CP 52; AR 87-93; 1626-1652 [Letter from Attorney James Goche to WSCC Chair James Kropf re: Commission Staff's Investigation of Thurston Conservation Commission Board (5/31/18)]; AR 1513-1520 [Letter from Attorney James Goche to WSCC re: Mankamyer/Johnson Case (11/12/18)]; AR 1602-1617.

²⁰ AR 317-321; 479-481; 1497-1498.

As part of their investigation, Johnson made several public records requests to TCD and Washington State University [WSU Energy] for TCD staff emails. TCD contracts with WSU Energy to be the repository for TCD records. TCD and WSU did not comply. Johnson sued WSU²¹ and was awarded over \$24,000 in attorney's fees and costs.²² Over 6,800 records were produced, including an email from TCD's acting executive director [Sarah Moorhead] to WSU Energy staff not to comply with a lawfully issued subpoena.²³

The TCD acting executive director [Moorehead], current and former staff²⁴ and allies²⁵ retaliated against Johnson and Mankamyer by filing complaints with the WSCC²⁶ insisting they be removed immediately.²⁷ A recall petition was also filed with the Thurston County Auditor against both Johnson and Mankamyer.²⁸

²¹ See Appendix A-4: *Johnson v. Washington State University (WSU) Energy*, Thurston County Superior Court No. 18-2-00943-34 (Complaint and Order); AR 226-234.

²² *Id.*, AR 1450-1453;

²³ AR 1448-1449.

²⁴ AR 1085 et seq. [Witnesses interviewed by WSCC Staff in the development of the report].

²⁵ AR 1216-1350; 1384-1385; 1393-1395 [Postcards and emails sent to WSCC staff demanding Johnson and Mankamyer be "fired"].

²⁶ Staff, including TCD's acting executive director, also filed complaints with the State Human Rights Commission. AR 83-86; AR 207-304.

²⁷ RCW 89.08.200 states that "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." RCW 89.08.200 does not distinguish between elected or appointed supervisors. See Appendix A-1

²⁸ AR 1654-1655; Appendix A-5: Request for Recall of Conservation District Commissioners Johnson and Mankamyer (7/18/18).

WSSC staff issued a report on July 20, 2018 recommending they be removed.²⁹ Johnson and Mankamyer responded on August 14, 2018 contesting the charges.³⁰ WSSC held a special meeting on August 29, 2018 and voted to proceed with a public hearing under the OPMA rather than the APA.³¹

Concerned with the nature of the hearing, Johnson and Mankamyer petitioned WSSC via email on September 11, 2018 for an adjudicative proceeding per RCW 34.05.413(2). WSSC's Executive Director [Mark Clark] acknowledged the petition and responded on September 13, 2018 citing RCW 89.08.200³² and stating:

Pursuant to RCW 34.05.416, the WSSC has decided not to conduct an adjudicative proceeding under the Administrative Procedures Act (APA)³³

Executive Director Clark explained that the WSSC would hold an informal public hearing under the OPMA rather than a formal adjudication under the APA. WSSC's hearing notice states:

Outside of the submittal of the hearing briefs, there is no additional prehearing practice authorized. RCW 89.08 does not grant the WSSC power to issue subpoenas or to authorize discovery, so no such procedures are permitted.³⁴

²⁹ AR 1560-1601.

³⁰ AR 1602-1687.

³¹ AR 1688-1690.

³² Appendix A-1: RCW 89.08.200

³³ Appendix A-6: Letter from WSSC Clark to Newman (9/13/18); AR 1490-1491.

³⁴ Appendix A-7: Letter from WSSC Clark to Johnson (10/8/18); AR 1691-1692.

Consequently, Johnson and Mankamyer filed a petition for judicial review with Thurston County Superior Court on September 24, 2018 seeking declaratory and injunctive relief for violation of 42 U.S.C. § 1983, the APA and OPMA.³⁵ WSCC removed the case to the United States District Court on October 12, 2018. On March 29, 2019, the United States District Court granted, in part, Defendants' motion to summarily dismiss Plaintiffs' 42 U.S.C. § 1983 federal law claim and dismissed, without prejudice, Plaintiffs' state law claims.³⁶

In the interim between removal of the case to federal court and that court's decision, WSCC proceeded with a hearing on February 20, 2019 under the OPMA over the objections of Johnson and Mankamyer.³⁷ WSCC initially contracted with the State Office of Administrative Hearings [OAH] Chief Law Judge (Lorraine Lee) to preside over the case.³⁸ Judge Lee withdrew³⁹ after public records disclosed *ex parte* communications⁴⁰ between WSCC's counsel (AAG Barney) and Judge Lee regarding concerns raised by counsel for Johnson and Mankamyer

³⁵ CP 14-18

³⁶ CP 16:14-19.

³⁷ CP 15:28-29.

³⁸ AR 1507-1508.

³⁹ The APA contains specific provisions to address disqualification of a decision-maker for prejudice, bias, or conflict of interest. RCW 34.05.425 (disqualification); see also RCW 34.05.458 (separation of functions—investigator, prosecutor, advocate).

⁴⁰ See RCW 34.05.455 *Ex parte* communications.

(Newman) over the process (OPMA-based hearing vs APA hearing).⁴¹

WSCC ended up hiring a private contractor (Gary N. McLean) to act as the Hearing Examiner.⁴²

Johnson and Mankamyer repeatedly objected and filed motions asserting that the adjudication had to be conducted under the APA.⁴³ Mr. McLean, acting as the hearing examiner for the WSCC, denied all the motions.⁴⁴ The WSCC subsequently voted to remove Johnson and Mankamyer immediately after a one day hearing for malfeasance and neglect of duty based on 4 of the 11 charges.⁴⁵ WSCC issued its findings on March 21, 2019.⁴⁶ In light of those findings and the U.S. District Court's decision, Johnson and Mankamyer filed an amended complaint on May 10, 2019.⁴⁷

Cross motions for summary judgment were heard on August 2, 2019. The Honorable Judge James Dixon, Thurston County Superior

⁴¹ AR 1484-1487; 1510-1511.

⁴² AR 1443-1446. Mr. McLean's contract calls for the payment of \$10,000 and indemnification by the WSCC.

⁴³ AR 1459-1477; 1478-1520 [Supervisors' Brief & Supplemental Response; Continuing Objections and Motions to Recuse.]

⁴⁴ AHT (Administrative Hearing Transcript) 31-72.

⁴⁵ AHT 474-477.

⁴⁶ Appendix A-8: *In the Matter of the Removal of Eric Johnson and Richard Mankamyer from their Positions as Thurston Conservation District Supervisors: WSCC Findings of Fact, Decision and Notice of Appeal Rights (3/21/19)*. This was posted on the WSCC website at: <https://scc.wa.gov/wp-content/uploads/2019/03/TCDFindingsOfFact.pdf>; (last accessed on 10/2/19); See also, "Conservation Commission removes two members of Thurston Conservation District board for neglect of duty and malfeasance in office" (2/22/19) <https://scc.wa.gov/tcd-022119/> (last accessed on 10/2/19).

⁴⁷ CP 14-18

Court, held that this was an “adjudicative proceeding” and, as such, the WSCC erred by holding the adjudicative proceeding under the OPMA as opposed to the APA.⁴⁸ Judge Dixon also held that Mankamyer, who was elected, could be removed without a recall per Const. art. I, § 33.⁴⁹ In so finding, Judge Dixon stated that “This Court finds that state election laws do not apply to elections of Conservation District Commissioners.”⁵⁰

Finally, Judge Dixon reserved the issue of remedies citing RCW 34.05.574(3) which states:

The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law.⁵¹

Although Judge Dixon characterized this as a “verbal request for additional remedies,”⁵² the amended complaint requested “damages and ancillary relief as authorized by law.”⁵³ The plaintiffs’ Motion for Summary Judgment specifically also requested “penalties, costs and reasonable attorney’s fees per RCW 42.30.120” and “any other remedy allowed by law.”⁵⁴ Additionally, the Plaintiffs’ Reply Brief specifically

⁴⁸ Appendix A-2 (Trial Transcript) and A-3 (Order): RP (8/2/19) at 16:2-9.

⁴⁹ Id.

⁵⁰ Id., RP (8/2/19) at 16:23-25.

⁵¹ RP (8/2/19) at 17:20-23.

⁵² RP (8/2/19) at 17:6.

⁵³ CP 18.

⁵⁴ CP 60.

asks that the trial court “enter a declaratory judgment order and award costs and attorney’s fees per RCW 34.05.574 and RCW 42.30.120(4).”⁵⁵

The trial court entered an order setting aside the agency action and remanding the matter for further proceedings.⁵⁶

IV. ARGUMENT

A. Standard of review:

The appellate courts review summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial.⁵⁷ An order granting summary judgment may be affirmed on any legal basis supported by the record.⁵⁸ A trial court’s factual findings are superfluous on summary judgment and are entitled to no weight.⁵⁹ The constitutionality of a statute is an issue of law subject to *de novo* review.⁶⁰ A statute’s application to a fact pattern is “a question of law fully reviewable on appeal.”⁶¹

⁵⁵ CP 128

⁵⁶ RP (8/2/19) at 17:3-5.

⁵⁷ *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281 (2013); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-795 (2003).

⁵⁸ *LaMon v. Butler*, 112 Wn2d 193, 200-201, *cert denied*, 493 U.S. 814 (1989).

⁵⁹ *Chelan Cnty. Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 294 n. 6 (1987).

⁶⁰ *Schroeder v. Weighall*, 179 Wn.2d 566, 571 (2014); *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 509 (2005).

⁶¹ *Ameriquet Mortg. Co. v Office of Atty. Gen.*, 177 Wn.2d 467, 478 (2013).

B. The State Constitution supersedes RCW 89.08.200⁶²

The trial court erred in finding that removal of the elected supervisor (Mankamyer) by the WSCC per RCW 89.08.200 does not violate Washington Constitution article I, § 33 and § 34 (Recall). RCW 89.08.200 does not and cannot supersede the Constitution. By analogy, in *State ex rel. Lynch v. Fairley*,⁶³ this Court held that recall provisions of Spokane's city charter were superseded by the state constitutional amendments concerning recall, Wash. Const. art. I, § 33 and § 34.⁶⁴

The electorate's right to recall public officer at any time during his or her term derives from the state constitution.⁶⁵ The Washington State Constitution begins with the recognition that:

All political power is inherent in the people, and governments derive their just powers from the consent of the governed and are established to protect and maintain individual rights.⁶⁶

This fundamental principle includes recall of elected officials by the voters.⁶⁷ The Washington State Constitution, article I, § 33 states:

⁶² Appendix A-1: RCW 89.08.200

⁶³ 76 Wash. 332, 333 (1913).

⁶⁴ See, generally, Jay M. Zitter, Annotation, *Constitutionality of State and Local Recall Provisions*, 13 A.L.R.6th 661, 2 (2019) [regarding the "Scope of locality's power under constitutional enabling acts - Enactment held not authorized"]. Among the cases cited is *Newton Twp. Electors v. S. Newton Twp. Supervisor*, 575 Pa. 670, 676 (2003) (which held that "The General Assembly's failure to repeal an unconstitutional statute does not make that statute constitutionally permissible.")

⁶⁵ *Id.*, at 2.

⁶⁶ Const. art. I, § 1.

⁶⁷ Const. art. I, § 33.

Every elective public officer of the state of Washington except [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.⁶⁸

The next section, Washington State Constitution. art. I , § 33, states, in part, that:

The legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay. ... The percentages required shall be ... Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five percent.

Historically, the state Constitutional right to recall elected officials (along with initiative and referendum) was the product of the populist and progressive movement in the early part of the 20th century.⁶⁹ These tools

⁶⁸ Emphasis added.

⁶⁹ See, Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 Or. L. Rev. 1025, 1040 (2008). For a brief history of the recall power, see Zachary J. Siegel, Casenote and Comment: *Recall me maybe?*

of “direct democracy” reflect the “fundamental principle”⁷⁰ that “All political power is inherent in the people.”⁷¹ They were designed to increase “citizen involvement in the political process and reduce the influence of special interests.”⁷² Washington’s recall provision was adopted in 1912 via the initiative power.⁷³

The right to recall elected officials is guaranteed by article I, sections 33 and 34 of the Washington Constitution.⁷⁴ Those provisions also protect elected officials from harassment by requiring charges of misfeasance, malfeasance, or violation of an official’s oath of office to be both legally and factually sufficient as determined by the courts. Where the power of recall is a fundamental right under the state constitution, statutes governing the exercise of the power are to be liberally construed in favor of the ability to exercise it, and any limitations on that power must be strictly construed.⁷⁵

The corrosive effect of recall elections on state legislative politics, 86 U. Colo. L. Rev. 307, 312-313 (2015).

⁷⁰ Const. art. I, § 32 states “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”

⁷¹ Wash. Const. art. I, § 1.

⁷² Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 Or. L. Rev. 1025, 1040 (2008).

⁷³ See, generally, Jonathan Bechele and Michael Reitz, *To Protect and Maintain Individual Rights: A Citizen’s Guide to the Washington Constitution, Article I* (2011) at 130.

⁷⁴ *In re Recall of Heiberg*, 171 Wn.2d 771, 776 (2011).

⁷⁵ See, Jay M. Zitter, Annotation, *Constitutionality of State and Local Recall Provisions*, 13 A.L.R.6th 661, 2 (2019).

Virtually all Washington State elected officials (except judges) may be recalled. This includes city councilmembers,⁷⁶ mayors,⁷⁷ port commissioners,⁷⁸ school board members,⁷⁹ drainage commissioners,⁸⁰ etc. Here, a recall petition was filed with the Thurston County Auditor against both Johnson and Mankamyer.⁸¹ As noted by Bechtle and Reitz,

The courts and the auditor are merely gatekeepers who ensure the sufficiency of the recall charges and the procedures followed, leaving it up to the tribunal of the people to decide the truth of the charges.⁸²

Nevertheless, the WSCC proceeded to remove Johnson and Mankamyer based on RCW 89.08.200 which states, in part, that:

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.⁸³

The operative word is “may.” It is well established that “shall” creates a mandatory obligation and “may” indicates a permissive provision.⁸⁴

⁷⁶ *Chandler v. Otto*, 103 Wn.2d 268 (1984); *In re Recall of Pepper*, 189 Wn.2d 546 (2017).

⁷⁷ *In re Recall of West*, 155 Wn.2d 659 (2005); *In re Recall of Burnham*, 2019 Wash. LEXIS 578.

⁷⁸ *In re Recall of Telford*, 166 Wn.2d 148 (2009).

⁷⁹ *In re Recall of Young*, 152 Wn.2d 848 (2004); *Teaford v. Howard*, 104 Wn.2d 580 (1985).

⁸⁰ *In re Recall of Carkeek*, 156 Wn.2d 469, 473 (2006).

⁸¹ Appendix A-8: Request for Recall of Conservation District Commissioners Johnson and Mankamyer (7/18/18).

⁸² Jonathan Bechele and Michael Reitz, *To Protect and Maintain Individual Rights: A Citizen's Guide to the Washington Constitution, Article I* (2011) at 131.

⁸³ Appendix A-1: RCW 89.08.200 Emphasis added.

⁸⁴ See, e.g., *Yakima County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381 (1993); *Staats v. Brown*, 139 Wn.2d 757, 789 (2000); *Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d 143, 162 (2019).

While the WSCC “may” remove an appointed supervisor per a proper APA adjudication, RCW 89.08.200⁸⁵ is unconstitutional as applied to elected supervisors.⁸⁶

C. Remand is impracticable, futile and unfair.

The trial court transcript reflects Judge Dixon’s struggle with determining the “appropriate remedy.”

MS. BARNEY: You had mentioned remand to the agency?

THE COURT: I’m not confident that’s the appropriate remedy. I think in the final analysis, the matter has to be remanded to the agency. In fact, I will make that ruling, remand to the agency to conduct a hearing according to the provisions set forth in the Administrative Procedures Act RCW 34.05.⁸⁷

Remand in this case is clearly impracticable, futile and unfair. RCW 34.05.574(1) states that:

The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.⁸⁸

RCW 34.05.534 states that :

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

⁸⁵ Appendix A-1: RCW 89.08.200

⁸⁶ The laws governing the WSCC set forth the process by which voters may petition the commission to form a conservation district and how an election is conducted. RCW 89.08.080 et seq. RCW 89.08.150 states “If a majority of the votes cast at the election are against the creation of the district, the commission shall deny the petition. If a majority favor the district, the commission shall determine the practicability of the project.”

⁸⁷ Appendix A-2: Trial Court Transcript (8/2/19) (Emphasis added).

⁸⁸ Emphasis added.

- (a) The remedies would be patently inadequate;
- (b) The exhaustion of remedies would be futile; or
- (c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.⁸⁹

Here, Johnson's term had already expired and Mankamyers term is due to expire in May 2020. Moreover, Mankamyers was elected and could only be removed via recall per the Washington State Constitution, article I, § 33.

The general rule is that a court will not require a party to exhaust its remedies if to do so is shown to be futile.⁹⁰ The futility exception doctrine is premised on the idea that courts will not require vain and useless acts.⁹¹

As plaintiffs counsel (Newman) stated at the hearing on the cross-motions for summary judgment:

Let me just jump to the remedy. I understand right now that the district has an opening that and so Mr. Mankamyers, the one who is elected, could be returned to the district. Mr. Johnson, his term has expired already. They have already appointed somebody in his place, I believe, so he can't be reappointed. Mankamyers term is not up. Let me just make that clear. I think this is an appropriate case to award costs, penalties, and attorney's fees per the Open Public Meetings Act.⁹²

⁸⁹ Emphasis added.

⁹⁰ RCW 34.05.534(3)(b); *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn.2d 761, 776 (1992).

⁹¹ *Id.*, at 777.

⁹² Appendix A-2: Trial Court Transcript (8/2/19); RP (8/2/19) at 8:4-14

The trial court declined to order Mankamyer reinstated.⁹³

Moreover, the principal of impartiality, disinterestedness, and fairness in administrative hearings has long been part of the State's jurisprudence dating back to *State ex rel. Barnard v. Board of Education*, 19 Wn. 8 (1898). Quasi-judicial public hearings "must be conducted by impartial decision-makers."⁹⁴ Here, WSCC initially contracted with the State Office of Administrative Hearings (OAH) Chief Law Judge (Lorraine Lee) to preside over the case. Judge Lee withdrew⁹⁵ after public records disclosed *ex parte* communications⁹⁶ between WSCC's counsel and Judge Lee regarding concerns raised by counsel for Johnson and Mankamyer (Newman) over the process (OPMA-based hearing vs APA hearing).

Additionally, Judge Dixon was ambivalent on awarding damages referring to it as a "verbal request."⁹⁷ That was erroneous because, as

⁹³ *Id.*, at 19:1-10

⁹⁴ *Raynes v. Leavenworth*, 118 Wn.2d 237, 245 (1992).

⁹⁵ The APA contains specific provisions to address disqualification of a decision-maker for prejudice, bias, or conflict of interest. RCW 34.05.425 (disqualification); see also RCW 34.05.458 (separation of functions—investigator, prosecutor, advocate).

⁹⁶ See RCW 34.05.455 *Ex parte* communications.

⁹⁷ *Id.*, 17-18.

noted above, costs and attorneys were requested in the amended complaint,⁹⁸ motion for summary judgment⁹⁹ and reply.¹⁰⁰

D. Request for attorney's fees and expenses [RAP 18.1]

The Plaintiffs' specifically asked the trial court to "enter a declaratory judgment order and award costs and attorney's fees per RCW 34.05.574 and RCW 42.30.120(4)."¹⁰¹ The OPMA does not apply to "matters governed by chapter 34.05 RCW" (the APA).¹⁰² By proceeding with an informal hearing under the OPMA rather than a formal adjudication under the APA, the WSCC violated both the APA and OPMA. Johnson and Mankamyer request all penalties, costs and attorney's fees as authorized by law, including RCW 34.05.574 and RCW 42.30.120.

V. CONCLUSION

While the trial court was correct in finding that the WSCC erred by holding an adjudicative hearing under the OPMA vs the APA, it erred in holding that Mankamyer could be removed without a recall as mandated

⁹⁸ CP 18

⁹⁹ CP 60

¹⁰⁰ CP 128

¹⁰¹ *Id.*

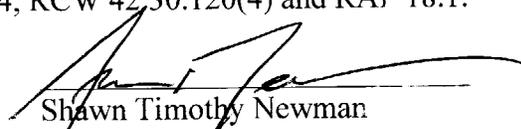
¹⁰² RCW 42.30.140(3).

by the state Constitution.¹⁰³ Therefore, RCW 89.08.200¹⁰⁴ is unconstitutional as applied to Mankamyer.

Furthermore, the trial court erred by remanding the case back to the WSCC. As noted above, remand is impracticable, futile and unfair.

While this Court should affirm the trial court's decision setting aside WSCC's decision to remove Johnson and Mankamyer, it should also direct the entry of a declaratory judgment that the WSCC violated the state Constitution,¹⁰⁵ the Administrative Procedures Act [APA]¹⁰⁶ and the Open Public Meetings Act [OPMA].¹⁰⁷ This Court should also award costs and attorney's fees per RCW 34.05.574, RCW 42.30.120(4) and RAP 18.1.

Date: 10/3/19
Olympia, WA



Shawn Timothy Newman
Attorney for Appellants #14193
Johnson & Mankamyer
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
shawn@newmanlawolympia.com

¹⁰³ Wash. Const. art. I, § 33

¹⁰⁴ Appendix A-1: RCW 89.08.200

¹⁰⁵ Wash. Const. art. I § 3 (due process) and § 33 (recall).

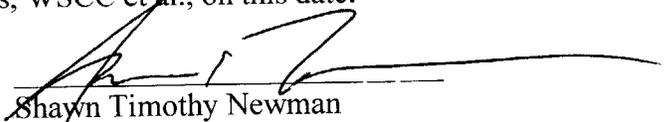
¹⁰⁶ Ch. 34.05 RCW.

¹⁰⁷ Ch. 42.30 RCW.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I delivered a copy of this opening brief to AAG Phyllis Barney, Counsel for the Respondents, WSCC et al., on this date.

Date: 10/3/19
Olympia, WA



Shawn Timothy Newman
Attorney for Appellants #14193
Johnson & Mankamyer
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
shawn@newmanlawolympia.com

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-1 to BRIEF OF APPELLANTS

RCW 89.08.200

RCW 89.08.200. Supervisors — Term, vacancies, removal, etc. — Compensation.

The term of office of each supervisor shall be three years and until his or her successor is appointed or elected and qualified, except that the supervisors first appointed shall serve for one and two years respectively from the date of their appointments, as designated in their appointments.

In the case of elected supervisors, the term of office of each supervisor shall be three years and until his or her successor is elected and qualified, except that for the first election, the one receiving the largest number of votes shall be elected for three years; the next largest two years; and the third largest one year. Successors shall be elected for three-year terms.

Vacancies in the office of appointed supervisors shall be filled by the state conservation commission. Vacancies in the office of elected supervisors shall be filled by appointment made by the remaining supervisors for the unexpired term.

A majority of the supervisors shall constitute a quorum and the concurrence of a majority is required for any official action or determination.

Supervisors shall serve without compensation, but they shall be entitled to expenses, including traveling expenses, necessarily incurred in discharge of their duties. 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.

The governing board shall designate a chair from time to time.

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-2 to BRIEF OF APPELLANTS

Trial Court Transcript (8/2/19)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

ERIC JOHNSON)	THURSTON COUNTY
AND)	CAUSE NO.
RICHARD MANKAMYER,)	18-2-04699-34
)	
Plaintiffs,)	
)	
vs.)	
)	
WASHINGTON STATE)	
CONSERVATION COMMISSION, ET)	
AL.,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on August 2, 2019, the
above-entitled matter came on for hearing before the
Honorable JAMES J. DIXON, Judge of Thurston County
Superior Court.

Reported by: Sonya Wilcox, RDR, Official Reporter,
 CCR#2112
 2000 Lakeridge Drive SW
 Olympia, WA 98502
 (360)786-5569
 wilcox@co.thurston.wa.us

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

For the Plaintiff: SHAWN TIMOTHY NEWMAN
Newman Law
2507 Crestline Drive NW
Olympia, Washington 98502

For the Defendant: PHYLLIS BARNEY
Office of the Attorney General
PO Box 40117
Olympia, Washington 98504

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Page No.

ARGUMENT BY MR. NEWMAN	4
ARGUMENT BY MS. BARNEY	8
ARGUMENT BY MR. NEWMAN	13
THE COURT'S RULING	16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

August 2, 2019, in Olympia, Washington
Before the Honorable JAMES J. DIXON, Presiding
Representing the Plaintiff, SHAWN TIMOTHY NEWMAN
Representing the Defendant, PHYLLIS BARNEY
SONYA WILCOX, RDR, Official Court Reporter

--oo0oo--

THE COURT: Come back over the cattle guard,
Mr. Newman. I will hear Johnson v. Conservation.

MR. NEWMAN: Thank you, your Honor. Shawn
Newman again. This is the matter of Eric Johnson and
Richard Mankamyer v. Washington State Conservation
Commission, et al.

THE COURT: Good morning.

MS. BARNEY: Phyllis Barney representing the
Conservation Commission.

THE COURT: Good morning, Mr. Newman.

MR. NEWMAN: Your Honor, I would like to first
begin with the fact that I represent two
self-employed small farmers, who volunteered to serve
on this district. They are, in my view,
whistleblowers, who sought to evaluate the acting
Executive Director. They received substantial blow
back and what I believe to be a coordinated smear
campaign to take them out.

1 The key question here on this administrative
2 appeal is simply this: Does the rule of law matter?
3 With respect to Mr. Mankamyer, he was elected. You
4 can only remove an elected person via recall. The
5 Washington State Conservation Commission is not
6 exempted from the constitutional mandate with respect
7 to recall. The only people that are are judges.

8 Now, I know in the State's briefing they say that
9 the districts are not subject to the general election
10 laws of the state of Washington, and that is true,
11 but certainly the State Conservation Commission is
12 subject to the state Constitution on recall. I put
13 in my briefing some analysis of the history of
14 initiative recall and those popular populace moves,
15 which were to institute direct democracy. I even
16 cited an article by Jeffrey Even on that point.

17 So bottom line for Mr. Mankamyer, no way he could
18 have been removed by a vote of unelected bureaucrats.
19 There had to be a recall, and, in fact, Mr. West,
20 ironically, had filed a recall, and that was pending,
21 and that was ignored by the State Commission.

22 Secondly, process, this was an adjudication. You
23 can dress it up, whatever you like, but it was an
24 adjudication. It was a -- I'm a sole practitioner,
25 and as you know from your experience in private

1 practice, some of these experiences are trial by
2 ordeal or trial by similar types of attrition, trial
3 by attrition. But anyway, bottom line, this is an
4 adjudication.

5 The law is very clear. Adjudications have to
6 occur under the APA, not under the Open Public
7 Meetings Act. They tried to create this process,
8 which changed as we went along. The first time was
9 when are we going to talk about the briefs; then next
10 time, you can bring in witnesses. There was no
11 discovery. So I know the State makes the point, no
12 harm no foul, you had your day in court, bottom line
13 you're done.

14 You can imagine, your Honor, based on your
15 experience in private practice, trying to litigate a
16 case where you have no discovery, no subpoenas.
17 There was ex parte contact with the original
18 Administrative Law Judge that was appointed. This
19 was the head of the Office of Administrative
20 Hearings, and that was a surprise to me. I only
21 found that out via public records request.

22 So there were eight allegations here. Many of
23 them I needed the power to subpoena. I put in my
24 briefing materials the list of hostile witnesses I
25 would have called. My clients, among the 4 of the 11

1 charges that they were found to have violated or
2 engaged in malfeasance or neglect of duty, included
3 abuse of staff. Well, I wanted to call the staff,
4 and I couldn't. I had no subpoena power.

5 So as I said, the State created its own
6 procedures, which changed over time. We ended up in
7 a marathon hearing that went over ten and a half
8 hours in one day, and I know the State relies on a
9 statement I made at the end of an exhaustive process
10 where I said, "I think I have called everybody I need
11 to call." Quite frankly, I think it's somewhat
12 disingenuous to rely on that as somehow waiving these
13 prior objections which we have had throughout this
14 whole kangaroo court process that this is the wrong
15 process, for God's sake.

16 And, again, there is no exception under the APA
17 for the State Conservation Commission when it comes
18 to adjudications. They try to thread this needle
19 where it's like we are going to give you all the due
20 process rights, but we are not going to call it
21 "adjudication," we are going to call it "other agency
22 an action," and I have briefed this.

23 The cases that talk about "other agency action"
24 are oddball cases; they are not this. This is
25 clearly an adjudication. Clearly, my clients should

1 have been entitled to all of the procedural
2 protections in the APA that would have given them a
3 fair shot.

4 Let me just jump to the remedy. I understand
5 right now that the district has an opening that and
6 so Mr. Mankamyer, the one who is elected, could be
7 returned to the district. Mr. Johnson, his term has
8 expired already. They have already appointed
9 somebody in his place, I believe, so he can't be
10 reappointed. Mankamyer's term is not up. Let me
11 just make that clear.

12 I think this is an appropriate case to award
13 costs, penalties, and attorney's fees per the Open
14 Public Meetings Act, and as you know, your Honor,
15 these type of cases are extremely time consuming.
16 This took a hell of a lot of work, but I felt in my
17 heart that an injustice had occurred, and that's why
18 I stuck with this case and gone the distance, and I
19 trust the Court understands the challenges that
20 presents to a private practitioner. Thank you.

21 THE COURT: Thank you. Good morning,
22 Ms. Barney.

23 MS. BARNEY: Good morning, your Honor. May it
24 please the Court, the public commission here was
25 required to hold a public hearing prior to removing

1 the supervisors, if that ultimately was going to be
2 their decision. The Open Public Meetings Act
3 provides that one of the actions of governing bodies
4 like the Commission is to hold public hearings and to
5 take testimony. That's something that's covered
6 under the Open Public Meetings Act, and it's
7 perfectly acceptable for agencies to take an open
8 public meeting in order to receive testimony.

9 Also under the OPMA, there are provisions for
10 executive sessions when a governing body can meet
11 behind closed doors, and one of those provisions
12 provides that, if the governing body is examining the
13 charges against an individual, that if that
14 individual requests an open public hearing that the
15 governing body has to provide that. So it doesn't
16 make any sense at all that the OPMA, itself, provides
17 for an open public hearing to examine charges against
18 an individual, but then, if you accept the
19 supervisor's version of events here, that means that
20 would kick the entire thing over to the APA and
21 require a full adjudication.

22 The definition of "adjudicative hearing" under the
23 APA talks about that it's a hearing that is required
24 whether by statute or constitutional measures before
25 or after the entry of an order. There was no order

1 here. The Commission made Findings of Fact, but
2 their action was taken as a vote of the governing
3 body, the Commission, itself, to remove the
4 supervisors, and that's the same type of vote they
5 take to make all of their administrative actions,
6 whether it's certifying elections, appointing
7 supervisors, or in this case, removing supervisors.
8 So this hearing, it was appropriate under the OPMA,
9 and the Commission did not act contra to the law when
10 they decided to hold their procedure in that way.

11 As to Mr. Mankamyer, the elected supervisor, well,
12 again, as we pointed out in our brief, the
13 Legislature has exempted conservation districts from
14 state general election laws. That's specific.
15 Mr. Mankamyer argues that they have -- that somehow
16 the fact of his election is all that's necessary to
17 result in a requirement for a recall petition. They
18 cited several cases in their brief with regard to
19 that. All but one of those cases involved positions
20 where the incumbents were elected under the general
21 election laws, prosecutors, school board members,
22 city officials. The only exception there was the
23 dyking district case they cited, and that's the
24 *Carkeek* case. That involves a case where the
25 elections were held under the dyking district

1 statutes.

2 Two things distinguish that from the conservation
3 commission statutes. The first is that the statutes
4 that run the dyking district elections actually refer
5 to the county auditor and refer the election process,
6 and it goes through the county auditor in that case.
7 And, second, there are no removal provisions in the
8 dyking district statutes. There is nothing for them
9 to rely on in order to remove a dyking district
10 official unlike the conservation commission statute,
11 which does specifically provide for removal of a
12 supervisor, including an elected supervisor.

13 Mr. Newman refers to a recall provision that had
14 been filed at the time against the two supervisors.
15 Well, that was actually returned to the proponent of
16 that from the Thurston County auditor's office. That
17 was in material and a declaration that we submitted
18 in the federal case in this matter. So there was no
19 live recall petition. In fact, Thurston County
20 determined they did not have jurisdiction to run the
21 recall of Mr. Mankamyer's election -- elected
22 position. So removal by the Conservation Commission
23 was proper.

24 The supervisors are now saying that they were
25 prejudiced by fact that the procedure changed. Well,

1 they neglect to inform the Court that that's because
2 they insisted on it changing. They wanted and
3 petitioned to the hearings examiner to be able to
4 present witnesses at the hearing.

5 So the hearing examiner wrote that in his order
6 that was governing the procedure, so that they were
7 able to present witnesses, they were able to
8 cross-examine witnesses, and they were able to
9 present additional exhibits, which originally had not
10 been contemplated. So the Commission was trying to
11 be responsive to the requests of the supervisors to
12 ensure that they had a process where, as one of the
13 Commissioners described it, "everyone would have a
14 chance to be heard."

15 And, finally, in terms of the witnesses that were
16 presented, the Commissioners or -- excuse me -- the
17 supervisors are now saying that they didn't have the
18 opportunity to present all 18 of the people that they
19 had on their witness list. They did present seven
20 witnesses, but also the Commission, the staff, the
21 investigative staff of the Commission, presented
22 three different witnesses, all of whom were listed on
23 the supervisors' hostile witness list, and the
24 supervisors were able to cross-examine them as to
25 their testimony.

1 The first one of those was Kirk Robinson, who was
2 the staff person who was one of two authors of the
3 investigative report, itself. The second was Sarah
4 Moorehead, who is the chief staff person of the
5 Thurston Conservation District. And the third person
6 was Mark Clark, who was the Chief Executive of the
7 Conservation Commission, itself, the state agency.
8 So all three of those people had been listed as
9 hostile witnesses, and the supervisors had the
10 opportunity to cross-examine them.

11 There was a fair and complete process here that
12 was appropriately held under the Open Public Meetings
13 Act, so the Conservation Commission asks this Court
14 to deny summary judgment and relief requested by the
15 supervisors and instead find in favor of the
16 Commission and dismiss this appeal. Thank you, your
17 Honor.

18 THE COURT: Thank you. Mr. Newman?

19 MR. NEWMAN: Well, your Honor, I think in
20 summary of the State's argument, they are saying
21 close is good enough. Well, it's not good enough
22 when it comes to a person's right to a hearing. The
23 definition of "adjudication," as the State's attorney
24 has just stated, talks about if you have a right by
25 statute. My clients have a right to a hearing by

1 statute. It's right there. It's in the state
2 conservation commission's statute. At the end of the
3 finding, they ordered my clients immediately off the
4 district board.

5 Let me talk about Mankamyer. I think it's
6 imperative to understand the history of the recall
7 initiative and referendum process. That was intended
8 to get the voters who elected Mr. Mankamyer the right
9 to remove that person, not an unelected board of
10 bureaucrats. He was elected. Mr. West did file a
11 recall petition with the auditor. Now, part of the
12 problem here, your Honor, is that the districts are
13 not subject to general election laws, but they are
14 certainly subject to the Constitution. That's
15 constitutional law 101. A statute cannot trump the
16 Constitution. The Constitution clearly says the only
17 people exempt from a recall are judges, period. What
18 they are trying to do is carve an exception because
19 of this crazy process the districts have in electing
20 people. Well, that's fine. But you cannot remove an
21 elected person without the voters who elected that
22 person making that decision. That is crystal clear.

23 As for the APA issue, I had petitioned Mr. Clark,
24 the Executive Director of this Commission to say,
25 hey, you're making a mistake, you need go to under

1 the APA, this is clearly an adjudication, lock up the
2 definition, my clients have a constitutional right
3 and a statutory right to a hearing, you need to do
4 that. They said, no, we are not going to do that; we
5 are going to go through this crazy process where you
6 brief it, they brief it, they argue over the brief,
7 no witnesses. Then they evolve. Still they didn't
8 meet the APA adjudication requirements.

9 I understand Phyllis' argument that we came pretty
10 damn close to that and you should be happy with that.
11 No, we are not happy with that. I had a list of
12 witnesses. There were 11 charges, and I listed the
13 people that I could not call, including people who
14 accused my clients of harassment. They weren't
15 there. I couldn't get them. This is crazy.

16 I think, your Honor, in my mind, this is a very
17 clear case. Mankamyer, can't remove him without a
18 recall. Lord knows how that's going to be done, but
19 the voters needed to do that, not the Commission.
20 Mankamyer, that's him. For both Johnson and
21 Mankamyer, the process was screwed up. Their efforts
22 to cure it along the way weren't helpful. That's why
23 you have the APA adjudicative process, so both
24 parties know what the rules are. You don't make them
25 up as you go along, and that's what happened in this

1 case. Thank you.

2 THE COURT: Two issues before the Court. The
3 first issue is: Did the Commission err by holding a
4 proceeding under the Open Public Meetings Act as
5 opposed to the Administrative Procedures Act? This
6 Court rules, yes, that was an error. This Court
7 holds that the APA applies whenever an agency is
8 required by statute to hold an adjudicative
9 proceeding. The proceeding at issue was indeed, in
10 fact, an adjudicative proceeding.

11 In the instant case, the petitioners were denied
12 procedural rights, including but not necessarily
13 limited to notice, discovery, opportunity to present
14 evidence, conduct cross-examination. The Court finds
15 that the petitioners have been substantially
16 prejudiced as a result. The Court further finds that
17 the agency engaged in unlawful procedure or
18 decision-making process and erroneously interpreted
19 or applied the law.

20 With respect to the second issue, more
21 specifically, was removal of the petitioner a
22 violation of art. I, sec. 33, in other words was a
23 recall petition required, this Court rules no. This
24 Court finds that state election laws do not apply to
25 elections of Conservation District Commissioners,

1 notwithstanding the argument made today by the
2 petitioner.

3 So pursuant to RCW 34.05.574, this Court will
4 enter an order setting aside the agency action and
5 remanding this matter for further proceedings.

6 There was a verbal request for additional remedies
7 made this morning by Mr. Newman. RCW 34.05.574
8 provides in relevant part that, "In a review pursuant
9 to the Administrative Procedures Act, the court may
10 either affirm the action, order an agency to take an
11 action required by law, set aside an emergency
12 action, enjoin or stay an agency action, remand the
13 matter for further proceedings, or enter a
14 declaratory judgment." So the Court is limiting its
15 ruling this morning to setting aside the agency
16 action, because, again, this Court finds that the
17 hearing was conducted pursuant to the Open Public
18 Meetings Act as opposed to the APA. The Court finds
19 that was error.

20 The aforementioned statute also provides in (3),
21 "The Court may award damages, compensation, or
22 ancillary relief only to the extent expressly
23 authorized by another provision of the law." This
24 Court is not confident -- I'm not saying yes or no --
25 but this Court is not confident ruling this morning

1 with respect to the request, verbal request, for
2 attorney's fees and other costs or any other remedy
3 sought by the petitioners.

4 If there is such a request, the petitioners can
5 note that matter for argument and the Court will hear
6 argument from the parties, but the ruling this
7 morning is limited to the Court setting aside the
8 agency action and finding that a recall petition is
9 not required.

10 MS. BARNEY: Thank you, your Honor.
11 Question?

12 THE COURT: Yes.

13 MS. BARNEY: You had mentioned remand to the
14 agency?

15 THE COURT: I'm not confident that's the
16 appropriate remedy. I think in the final analysis,
17 the matter has to be remanded to the agency. In
18 fact, I will make that ruling, remand to the agency
19 to conduct a hearing according to the provisions set
20 forth in the Administrative Procedures Act RCW 34.05.

21 The reason I was hesitant to do that is because
22 that would require the agency to conduct a hearing,
23 and it occurred to the Court when I was thinking
24 about this yesterday that maybe the agency doesn't
25 want to conduct a hearing. I presume they do.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. NEWMAN: Your Honor, I do have one question. Is it the Court's intent to return Mr. Mankamyer, in particular, to the status quo under the idea there is an opening on the district board now? If you are going to remand it, is he --

THE COURT: Not necessarily, no. Whatever happens as a result of the Court's ruling is going to happen, and if the parties want to seek further remedy or further relief, you can come back to the Court.

MS. BARNEY: Thank you, your Honor.

THE COURT: I will allow the parties to note this matter for presentation of an order. I understand and appreciate it will be nuanced because the Court has made some specific findings, and I will leave it at that. You can note the matter for presentation.

(PROCEEDINGS ADJOURNED)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

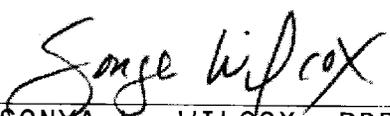
CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
COUNTY OF THURSTON)

I, SONYA L. WILCOX, RDR, Official Reporter
of the Superior Court of the State of Washington in and
for the County of Thurston hereby certify:

1. I reported the proceedings stenographically;
2. This transcript is a true and correct record of
the proceedings to the best of my ability, except for any
changes made by the trial judge reviewing the transcript;
3. I am in no way related to or employed by any
party in this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this day, September 5, 2019.



SONYA L. WILCOX, RDR
Official Court Reporter
Certificate No. 2112

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-3 to BRIEF OF APPELLANTS

Trial Court Order (9/6/19)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXPEDITE
 No Hearing Set
 Hearing is Set
Date:
Time:
Judge James J. Dixon

FILED

SEP 05 2019

CLERK OF COURT
THURSTON COUNTY SUPERIOR COURT
1000 1/2 AVENUE
TUMACACI, WA 98564

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

ERIC JOHNSON AND RICHARD
MANKAMYER,

Plaintiffs,

v.

THE WASHINGTON STATE
CONSERVATION COMMISSION and
the following in their individual and
official capacities: JIM KROPP,
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,

Defendants.

NO. 18-2-04699-34

~~(PROPOSED)~~ ORDER ON
SUMMARY JUDGMENT

EX PARTE

This matter came before the Court on judicial review under the Administrative
Procedure Act (APA), RCW 34.05. The Court considered the following documents:

Plaintiff's Motion for Summary Judgment filed June 18, 2019.

1 Washington State Conservation Commission's Response to Plaintiffs' Motion for
2 Summary Judgment filed July 8, 2019.

3 Plaintiff's Reply Brief filed July 10, 2019.

4 The record in this matter filed June 20, 2019.

5 FINDINGS AND CONCLUSIONS

6 The Court heard oral argument on behalf of the parties, and being fully apprised of the
7 circumstances of this case, the Court finds:

8 1. The APA applies whenever an agency is required by statute to hold an
9 adjudicative proceeding, and the proceeding at issue was in fact an adjudicative proceeding.

10 2. The Commission erred when it held the hearing to determine the removal of
11 Thurston Conservation District supervisors Johnson and Mankamyer under the Open Public
12 Meetings Act rather than the APA.

13 2. Petitioners were denied procedural rights, including but not necessarily limited
14 to notice, discovery, opportunity to present evidence, conduct cross examination, which resulted
15 in substantial prejudice to them.

16 3. The Commission engaged in an unlawful procedure or decision-making process
17 and erroneously interpreted or applied the law.

18 4. State election law does not apply to the elections of Conservation District
19 Supervisors.

20 5. Removal of the petitioner (Mankamyer) does not violate Washington
21 Constitution article I, section 33 (Recall). No recall petition was required for the removal of an
22 elected District supervisor.

23 Based on the foregoing, the Court hereby

24 ORDERS

25 The Commission's decision removing Mr. Johnson and Mr. Mankamyer is set aside,
26 and the matter is remanded to the Commission for further action.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Petitioners are granted leave to note a request for attorney's fees and other costs or any other remedy for argument.

DATED this 6 day of September 2019.



The Honorable James Dixon

Notice of Presentation Waived:

ROBERT W. FERGUSON
Attorney General


Phyllis J. Barney, WSBA #40678
Assistant Attorney General
Attorneys for Defendants
360-586-4616

Attorney for Plaintiffs

 for
Shawn T. Newman, WSBA # 14193
Attorney for Plaintiffs
360-866-2322
*per email
9-5-2019*

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-4 to BRIEF OF APPELLANTS

Johnson v. Washington State University (WSU) Energy,
Thurston County Superior Court (18-2-00943-34)
Complaint and Order

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
~

RECEIVED
H.L.B.

2018 FEB 16 AM 11:12

ATTORNEY GENERAL
OF WASHINGTON

FILED

FEB 16 2018

Superior Court
Linda Myhre Enlow
Thurston County Clerk

**THURSTON COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON**

Eric Johnson,

Plaintiff,

No.

18-2-00943-34

Complaint for Violation of the

vs.

Public Records Act [PRA]

Washington State University (WSU)

Energy Program Office.

Defendant.

I. INTRODUCTION:

Jeremy Bentham, jurist and philosopher, wrote that "Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government." Eric Johnson seeks review of the defendants' refusal to provide public records retained in its Olympia Office for the Thurston County Conservation District (TCD). RCW 42.56.001(2) defines "public record" to include any record "retained by any state or local agency regardless of physical form or characteristics." Johnson is Chairman of the TCD Board of Supervisors and seeks records retained by WSU Energy Program for TCD to determine if TCD staff engaged in

COMPLAINT FOR PRA VIOLATIONS

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crossline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1 wrongdoing. Rather than provide the records, WSU employees directed Johnson to work
2 thru the TCD staff acting Executive Director, Sarah Moorehead.

3 **II. JURISDICTION & VENUE:**

4 2.1 This court has jurisdiction pursuant to RCW 2.08.010 and RCW 42.56.550(1)

5 2.2 Venue is proper pursuant to RCW 4.12.020.

6 **III. PARTIES:**

7 3.1 Eric Johnson is a private citizen residing in Thurston County. He is Chairman of the
8 Thurston Conservation District Board of Supervisors.

9 3.2 Washington State University is a state agency that operates the WSU Energy
10 Program at 905 Plum Street, S.E., Olympia. The WSU Energy Program retains TCD
11 records.
12 records.

13 **IV. FACTS:**

14 4.1 Eric Johnson is a Thurston County Conservation District (TCD)¹ Supervisor and
15 Chairman. He is a farmer and was appointed by the Washington State Conservation
16 Commission.
17 Commission.

18 4.2 Johnson and another Supervisor, Richard Mankamyer, began to question the lack of
19 accountability and conflicts of interests by staff. This includes, but not limited to:
20

21 4.2.1 Payment (including pre-payment) for staff travel and use of private vehicles. For
22 example, Johnson and Mankamyer learned that former TCD Executive Director Kathleen
23 Whalen charged the District approximately \$500/month to use her own vehicle vs. driving one of
24 the District vehicles. Ms. Whalen subsequently resigned in November, 2017.
25

26 _____
27 ¹ TCD is a political subdivision of the state. RCW 89.08

1 4.2.2 In February 2016, Deputy Director Amy Hatch-Winecka was terminated from the
2 Water Resource Inventory Area [WRIA] 14 Lead Entity program by Mason Conservation
3 District for insubordination, falsifying district records and violating federal, state or local laws or
4 district policies. This included conflicts of interest, unauthorized use of the district credit card
5 and reimbursement requests for herself and subcontracts. Given this history and the fact Hatch-
6 Winecka also worked at TCD [WRIA 13], Johnson and Mankamyer were concerned with her
7 role as the TCD contact for contracts between the TCD and South Puget Sound Salmon
8 Enhancement Group [SPSSEG] where her husband, Lance Winecka, is the executive director.
9

10 4.3 The concerns expressed by Johnson and Mankamyer were met with a campaign by TCD
11 staff, including the acting director (Sarah Moorehead), and their sycophants to demonize them.
12

13 This included:

14 4.3.1 A memorandum dated February 25, 2017, from TCD staff challenging decisions
15 made by the Board of Supervisors and questioning their "responsible use of public funds." Staff
16 took issue with how the board would address the 2018 budget deficit, suggesting that any
17 reduction in compensation, staffing or hours would be illegal and discriminatory, as well as,
18 create a hostile work environment. The acting director, Sarah Moorehead, previously sent a
19 letter broadcast to "Community Members" seeking their support and noting that "the District will
20 face an entire year without nearly 1/3 of our overall budget." The proposed 2018 budget
21 included significant salary increases for staff, including Moorehead and Hatch-Winecka.
22

23 4.3.2 In a letter to the TCD Board of Supervisors dated November 1, 2017, Shana Joy,
24 Conservation Commission Puget Sound Regional Manager, complained about TCD "operations
25
26
27

28 COMPLAINT FOR PRA VIOLATIONS
--

1 and behavior". Her letter singles out two board members (presumably Johnson and Mankamyer)
2 for "openly complaining about district staff."

3 4.3.2 A memorandum dated November 29, 2017, from supervisor Samantha Fleischner
4 to the Washington State Conservation Commission Executive Director requested the "immediate
5 removal" of Johnson and Mankamyer. Based on information and belief, Fleischner used her
6 personal and/or work e-mails and computer for TCD business. This includes
7 SamanthaH@WasteConnections.com. Based on metadata, the memorandum was finalized on a
8 TCD accounting computer. Amy Franks is the TCD accountant and, like Moorehead and Hatch-
9 Winecka, anticipated a significant salary increase in 2018.
10

11 4.5 Johnson and Mankamyer learned that TCD records were stored and maintained by
12 WSU's Energy Program located at 905 Plum Street S.E., Olympia (aka "the vault"). They made
13 an appointment with Michael Pierson, WSU IT Support Specialist, for 3 pm on January 25,
14 2018.
15

16 4.6 However, when Johnson and Mankamyer went to inspect the records, they were met by
17 Mr. Pierson, his boss, James Colombo (Information Systems Department Manager) and TCD
18 acting director, Sarah Moorehead. Johnson and Mankamyer did not inform Moorehead of the
19 appointment. Colombo told Johnson and Mankamyer that they would have to make their PRA
20 requests through Moorehead based on an MOU [Memorandum of Understanding]. Johnson and
21 Mankamyer told him that they were her boss and wanted the records from WSU because they
22 were investigating wrongdoing by TCD staff.
23

24 4.7 On January 31, 2018, Johnson went back to the WSU Energy Office to ask some
25 additional questions. He met with Colombo and discussed the MOU and access to TCD
26
27

28 COMPLAINT FOR PRA VIOLATIONS

1 computers. He inspected the MOU between TCD and WSU IT and noted it ran from 2011 to
2 2014 and had been signed by the former TCD Executive Director Kathleen Whalen. There
3 apparently is no current MOU between TCD and WSU IT in place.

4 4.7.1 Johnson asked about a specific document (i.e. memorandum dated November 29,
5 2017, from supervisor Samantha Fleischner). According to metadata, it was created at the TCD
6 in the accounting department using an ID associated with the TCD accountant, Amy Franks.

7 4.7.2 Colombo asked Johnson why he did not want Moorehead involved. Johnson
8 reiterated that he was investigating her and others for possible wrongdoing. Colombo said he
9 could get Johnson the information in a couple of days. When Johnson did not hear back, he
10 emailed Colombo and received an email back with a cc to Moorehead. Colombo explained he
11 had been advised to redirect Johnson to Moorehead.

12 4.8 On January 31, Mr. Johnson submitted the following public records request to WSU's
13 Energy Office:

14 To: James L. Colombo Energy.wsu.edu

15 First Request:

16 I Eric Johnson, Chair, Thurston Conservation District (TCD), request, specify, looking at an e-
17 mail created at TCD on 11-29-17 at 3:33pm and modified on 11-30-17 at 9:47 am. What
18 computer was this created on, who created this and where was it sent? A copy of this e-mail
19 and meta data send to: ericjohnsontcd@gmail.com.

20 Second Request:

21 I Eric Johnson, Chair, Thurston Conservation District (TCD), request any and all e-mails sent
22 to and from TCD, containing the names Eric Johnson, Richard Mankamyer, Samantha
23 Fleischner, Doug Rushton, Sarah Moorehead, Shana Joy, Mark Clark, Amy Franks, Amy
24 Hatch-Winecke, between the dates 112017 to 120517, send information
25 to: ericjohnsontcd@gmail.com

26 Eric Johnson
27 [360.701.4322](tel:360.701.4322)

28 COMPLAINT FOR PRA VIOLATIONS

1 4.9 Moorehead responded on February 8 stating: "Eric, if you have a public records request,
2 please feel free to send it along and I can get you the information you'd like." She copied the
3 district's private insurance defense counsel, Michelle Fossum [michelle@sayrelaw.com],
4

5 4.10 WSU has not responded despite its positive duty to do so by specific deadlines. RCW
6 42.56.510; .520.

7 **V. CAUSE OF ACTION**

8 5.1 The PRA is to be liberally construed in favor of disclosure and production of public
9 records. RCW 42.56.030. The PRA is a strongly worded mandate for disclosure of public
10 records. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702
11 (2011). RCW 42.56.520 requires a prompt response to requests under the Public Records Act
12 (PRA) and provides in relevant part that the Agency can seek clarification from the requester if
13 the request is unclear. RCW 42.56.520(4). The PRA does not allow silent withholding of entire
14 documents or records, any more than it allows silent editing of documents or records. Here,
15 WSU did not respond, object, or seek clarification. Rather it relied on an outdated MOU to
16 direct Johnson to the work with the TCD staff he told them he was investigating.
17
18

19 **VI. CLAIM FOR RELIEF**

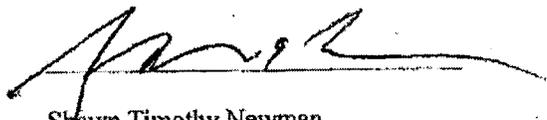
20 According to RCW 42.56.550(4) Any person who prevails against an agency in any
21 action in the courts seeking the right to inspect or copy any public record or the right to
22 receive a response to a public record request within a reasonable amount of time shall be
23 awarded all costs, including reasonable attorney fees, incurred in connection with such legal
24 action. In addition, it shall be within the discretion of the court to award such person an
25
26
27
28

COMPLAINT FOR PRA VIOLATIONS

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4322
(P) 360-866-2322

1 amount not to exceed one hundred dollars for each day that he or she was denied the right to
2 inspect or copy said public record.

3 DATED: 2/16/18
4



5 Shawn Timothy Newman
6 Attorney at Law, P.S.
7 WSBA #14193
8 2507 Crestline Drive, N.W.
9 Olympia, WA 98502
10 PH: (360) 866-2322
11 Newmanlaw@comcast.net

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COMPLAINT FOR PRA VIOLATIONS

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

18-2-00943-34
JD 31
Judgment
3610740



4

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

18 JUL 20 PM 1:13

Linda Myhre Enlow
Thurston County Clerk

1 Hearing Set: July 20, 2018
2 Time: 9:00 am
3 Judge: Schaller

THURSTON COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

Eric Johnson,

Plaintiff, No. 18-2-00943-34

vs.

EX PARTE

Washington State University (WSU) Energy
Program Office.

ORDER AND JUDGMENT

Defendant.

MONETARY JUDGMENT SUMMARY IN FAVOR OF ERIC JOHNSON

- 1. Judgment debtor: Washington State University
 - 2. Judgment debtor's attorney: Timothy J. Feulner, AAG
 - 3. Judgment creditors: Eric Johnson
 - 4. Judgment creditor's attorney: Shawn Timothy Newman
 - 5. Attorney fee award: 23,000.00
 - 6. Costs award: 555.95
 - 7. ~~Total amount of judgment:~~ ~~23,555.95~~
1,050.00 PENALTY
- B. PRINCIPLE JUDGMENT: 24,605.95

PROPOSED ORDER AND JUDGMENT

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(360) 866-7377

Newman Decl Ex 22 P 90

1 THIS MATTER having come on for hearing before the undersigned judge, and the parties
2 having appeared through their attorneys of record, and the Court having considered the following
3 pleadings:

- 4 • Complaint
- 5 • Answer
- 6 • Plaintiff's Opening Brief on Liability including:
 - 7 • Declaration of Eric Johnson
 - 8 • Defendant's Response Brief on Liability including:
 - 9 • Declaration of Sheri Glaesman
 - 10 • Declaration of James Colombo
 - 11 • Declaration of Michael Pierson
 - 12 • Declaration of Stephanie Kalasz
 - 13 • Declaration of Counsel [Timothy J. Feulner]
 - 14 • Plaintiff's Reply Brief on Liability including:
 - 15 • Declaration of Plaintiff's Counsel [Shawn Newman].
 - 16 • Plaintiff's Opening Brief on Penalties, Attorney's Fees and Costs
 - 17 • Declaration of Counsel [Shawn Newman]
 - 18 • Declaration of attorney Jon Cushman in Support of Fee Petition
 - 19 • Declaration of attorney Asa Garber in Support of Fee Petition
 - 20 • Defendant's Response Brief on Penalties, Attorney's Fees and Costs
 - 21 • Declaration of Sheri Glaesman

22 PROPOSED ORDER AND JUDGMENT

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(2) 360-866-2322

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- Declaration of Counsel [Timothy J. Feulner]
- Plaintiff's Reply Brief on Penalties, Attorney's Fees and Costs
- Declaration of Counsel [Shawn Newman]

The Court finds as follows:

1. Plaintiff is the prevailing party and entitled to fees, costs and penalties. RCW 42.56.550.
2. As for costs, the court awards: \$ 555.95
3. As for attorney fees, the court awards: \$ 23,000.00. This is based on a lodestar of 1.5 times what the court deems to be a reasonable rate \$ 175 and hours 115.
3. As for penalties, the Court considered the *Yousoufian* factors and the facts of this case,

the Court imposes the following penalties:

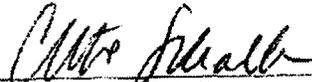
- ~~Delaying 21 days x 6,838 records @ \$20.00/day = \$2,871,960.~~
 - ~~Failing to produce 2,059 records after closing Johnson's PRA on May 9, 2018. WSU reopened Johnson's PDR 12 days later May 22, after receiving Johnson's Opening Brief on May 15. Those records were eventually produced 23 days later June 1, 2018: 23 days x 2,059 records @ \$70.00/day = \$3,314,990.~~
 - ~~Delaying production of metadata for 170 days @ \$100.00/day = \$13,000.~~
- 42 Days @ 25x 1050

PROPOSED ORDER AND JUDGMENT

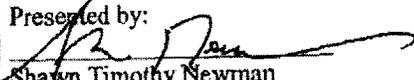
Shawn Timothy Newman
 Attorney at Law, Inc., P.S.
 WSBA 14193
 2507 Crestline Dr. NW
 Olympia, WA 98512-4322
 (P) 360-806-2322

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

DATED: 7/20/18
Olympia


Judge Christine Schaller

Presented by:


Shawn Timothy Newman
WSBA #14193
Attorney at Law, Inc., P.S.
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
Shawn@newmanlawolympia.com

CHRISTINE SCHALLER

Approved by:


Timothy J. Feulner
WSBA #45396
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445
TimF1@atg.wa.gov

PROPOSED ORDER AND JUDGMENT

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-5 to BRIEF OF APPELLANTS

Request for Recall of Conservation District Commissioners
Johnson and Mankamyer (7/18/18)

July 18, 2018

TO: THURSTON COUNTY AUDITOR

RE: REQUEST FOR RECALL OF
CONSERVATION DISTRICT
COMMISSIONERS JOHNSON
AND MANKAMYER

FROM: ARTHUR WEST
120 State Ave NE #1497
Olympia, WA. 98501

RECEIVED
THURSTON COUNTY AUDITOR

JUL 18 2018

AT 11:07 AM/PM
BY: LT DEPUT

Please regard this as a request for recall of Thurston Conservation Commission Board Members Johnson and Mankamyer, in regard to knowingly violating RCW 43.10.067 and RCW 43.10.030.

On or about June 13-July 16, and on July 16-18, 2018, State officers Mankamyer and Johnson went "rogue" and illegally retained private counsel, Shawn Newman, to represent them, in part to defend them in regard to official actions taken in their official capacities in a pending action in the Thurston County Superior Court under RCW 42.30.

RCW 43.10.030 provides, in pertinent part:

The attorney general shall...

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

Further, RCW 43.10.067 requires that:

No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or

any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general,...

By hiring private counsel to perform work required to be performed by the Attorney General the named Thurston Conservation Commission Board Members went "off the Conservation District", violated their oaths of office, and committed mis- and malfeasance. These actions took place June 13-July 16, and on July 16-18, 2018.

By so acting Thurston Conservation Commission Board members Johnson and Mankamyer committed the following...Misfeasance" or malfeasance" in office... any wrongful conduct that affects, interrupts, or interferes with the performance of official duty; Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and Additionally, "malfeasance" in office means the commission of an unlawful act; "Violation of the oath of office" means the willful neglect or failure by an elective public officer to perform faithfully a duty imposed by law.

I, Arthur West, am a qualified voter residing within Thurston County

I declare the foregoing to be correct and true under penalty of perjury of the laws of the State of Washington. Done July 18, 2018.


Arthur West

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-6 to BRIEF OF APPELLANTS

Letter from WSCC Clark to Newman (9/13/18)



STATE OF WASHINGTON

CONSERVATION COMMISSION

PO Box 47721 • Olympia, Washington 98504-7721 • (360) 407-6200 • FAX (360) 407-6215

September 13, 2018

Mr. Shawn Newman
Newman Law
2507 Crestline Dr. NW
Olympia, WA 98502

Dear Mr. Newman,

Thank you for your email of September 11, 2018. Although not clearly stated, in an abundance of caution, the Washington State Conservation Commission (WSCC) interprets your email to be, at least in part, an application for an adjudicative proceeding, RCW 34.05.413(2). Pursuant to RCW 34.05.416, the WSCC has decided not to conduct an adjudicative proceeding under the Administrative Procedures Act (APA), RCW 34.05, and provides this brief statement of the reasons to you.

The public hearing on the removal of local conservation district supervisors is required by statute, RCW 89.08.200. Unlike other statutes related to hearings, however, the Legislature does not require that the hearing on removal be conducted as an adjudication under the APA. See e.g. RCW 49.60.250, RCW 80.50.090(3), RCW 43.21B.130.

A hearing is required where a property or liberty interest may be implicated. But the form of such a hearing is dependent on a balancing of the competing interest at stake. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In this case, the interests are the private interests of your clients in retaining their volunteer positions, the governmental interest in expeditious removal if such removal is called for, the avoidance of administrative burdens, and the risk of an erroneous termination. *Id.* at 543. "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545 (citing *Mathews*, 424 U.S. at 343). This is particularly true where, as is the case here, judicial review of the agency action on removal is available. RCW 34.05.570(4).

Your clients are receiving a public hearing prior to a decision on removal, as required by statute and due process. The WSCC has determined that holding a hearing convened under the Open Public Meetings Act (OPMA), RCW 42.30, together with the procedural safeguards provided by



statute and rule, will provide sufficient process.¹ Under the WSCC's decision, your clients each have the opportunity to present a written response, a hearing brief, an oral presentation, documentary evidence, and the opportunity to respond to Commissioner questions to fully inform the WSCC prior to any decision being made. The WSCC also considered its obligations to timely resolve this matter that has been going on for some time for the benefit of everyone concerned. No further process is required.

For these reasons, the WSCC will not conduct an APA adjudicative proceeding in this matter. This decision is not subject to further administrative review.

Your email also disputes the WSCC's application of its own regulation, WAC 135-110-960. The regulation states:

(3) The conservation commission must hold at least one public hearing **no earlier than sixty days from the date of certified mailing to the supervisor** in the area served by the conservation district supervisor before acting to remove the incumbent from office.

This unambiguous regulation states that the sixty-day period begins on the date the certified mail was deposited in the mailbox to the supervisor's address of record. This is analogous to and consistent with other statutes and regulations regarding service upon mailing, including RCW 34.05.010(19).

If you have further questions you may contact Alicia McClendon at the Commission at (360) 407-6200 or amccleendon@scc.wa.gov.

Sincerely,



Mark Clark
Executive Director

¹ See RCW 89.08.200 (providing for notice and a public hearing) and WAC 135-110-960 (additionally providing for a sixty-day notice period prior to hearing and the opportunity for a written response to charges prior to hearing).

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-7 to BRIEF OF APPELLANTS

Letter from WSCC Clark to Johnson (10/8/18)



STATE OF WASHINGTON
CONSERVATION COMMISSION

PO Box 47721 • Olympia, Washington 98504-7721 • (360) 407-6200 • FAX (360) 407-6215

September 11, 2018

Mr. Eric Johnson
Supervisor, Thurston Conservation District
PO Box 100
Rochester, WA 98558

Mr. Johnson:

This letter is your notice that the Washington State Conservation Commission (WSCC) will hold a public hearing to consider your removal from the position of supervisor of the Thurston Conservation District for neglect of duty or malfeasance in office, pursuant to RCW 89.08.200. The hearing will be held no earlier than sixty days from the date of this letter, and thus will be scheduled on or after November 14, 2018, and on or before December 14, 2018. **This notice to you is considered accomplished and complete with the deposit of this letter today in the United States mail, properly addressed, certified mail postage prepaid, to your address of record.**

Evidence in the record before the WSCC currently consists of the Thurston Conservation District Investigation Report dated July 16, 2018 (Report) and exhibits cited therein, and the Response to SCC Investigation Report by TCD Supervisors Johnson and Mankamyler dated August 14, 2018 (Response) and exhibits cited therein.

Hearing briefs will be required from WSCC staff and from Supervisors Johnson and Mankamyler. Briefs must be received at the WSCC office by close-of-business 14 calendar days before the hearing itself.¹ WSCC staff must submit one brief regarding removal of Supervisor Johnson, and Supervisor Johnson must submit his individual brief. WSCC staff must submit a separate brief regarding removal of Supervisor Mankamyler, and Supervisor Mankamyler must submit his separate individual brief. Hearing briefs may not be combined and each hearing brief is limited to 40 pages maximum, exclusive of exhibits. Any new factual information supplementing the Report or the Response must be referenced in and submitted with the hearing brief. No new information or exhibits from either WSCC staff or the supervisors will be admitted into the record during the public hearing. Upon submittal of the hearing briefs to the WSCC office, the office will transmit all briefs to the Commissioners, and will transmit WSCC staff briefs to Mr. Johnson and Mr. Mankamyler.

¹ The WSCC office is located at 300 Desmond Drive SE, Lacey, WA 98503 or PO Box 47721, Olympia, WA 98504-7721.

The hearing will be convened under the Open Public Meetings Act. Two hours are allotted for each presentation. The first presentation will be from WSCC staff, followed by separate presentations from each supervisor. The order in which the supervisors present will be determined between them. The format of the hearing will be as follows:

Staff presentation: 30 minute presentation, then Commissioner questions for up to an additional 75 minutes (1.75 hours total).

Supervisor presentation: 30 minute presentation, then Commissioner questions for up to an additional 90 minutes (2 hours total).

Supervisor presentation: 30 minute presentation, then Commissioner questions for up to an additional 90 minutes (2 hours total).

Staff rebuttal presentation: 15 minutes.

The WSCC intends to vote on the options set out in the Report on the day of the hearing.

Outside of the submittal of the hearing briefs, there is no additional pre-hearing practice authorized. RCW 89.08 does not grant the WSCC power to issue subpoenas or to authorize discovery, so no such procedures are permitted.

WSCC staff member Alicia McClendon will contact you with regard to available dates for the hearing. You must respond no later than September 28, 2018. If she has not received your response by that date or if you without demonstrated good cause propose no available dates between Nov. 14, 2018 and Dec. 14, 2018, the WSCC will schedule the hearing based on Commissioner availability and proceed.

If you have further questions you may contact Alicia McClendon at the Commission at (360) 407-6200 or amccclendon@scc.wa.gov

Sincerely,



Mark Clark
Executive Director

Cc: Phyllis Barney, Assistant Attorney General
Ann Essko, Assistant Attorney General

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants,

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.

APPENDIX A-8 to BRIEF OF APPELLANTS

In the Matter of the Removal of Eric Johnson and Richard
Mankamyer from their Positions as Thurston Conservation
District Supervisors: WSCC Findings of Fact, Decision and
Notice of Appeal Rights (3/21/19)

WASHINGTON STATE CONSERVATION COMMISSION

IN THE MATTER OF THE)
REMOVAL OF **ERIC JOHNSON** AND) FINDINGS OF FACT
RICHARD MANKAMYER)
FROM THEIR POSITIONS AS THURSTON)
CONSERVATION DISTRICT SUPERVISORS)

INTRODUCTION

In response to a complaint, the Washington State Conservation Commission (Commission) directed Commission staff to conduct an investigation into actions of the five-member Board of Supervisors of the Thurston Conservation District (TCD), pursuant to the Commission’s authority under RCW 89.08.200 and WAC 135-110-960. Staff completed an investigation, and issued an investigative report containing staff’s conclusions on eleven enumerated allegations (“complaints” or “charges”).¹ The staff report included seven recommended options for Commission action, two of which were the removal of two of the five TCD supervisors, Eric Johnson and Richard Mankamyer, for malfeasance and neglect of duty.

Eric Johnson was appointed as a Supervisor of TCD by Commission to a term of office beginning May 2016 through May 2019. Richard Mankamyer was elected as a Supervisor of TCD to a term of office beginning May 2017 ending May 2020.

The two supervisors submitted a written response to the staff findings. At a special Commission meeting August 29, 2018, the Commission voted to hold a public hearing on the Thurston Conservation District Investigation.

¹ The numbers assigned to each complaint or charge herein are as designated in the investigative report.

The public hearing was held in Olympia, Washington on February 20, 2019. The question presented for hearing was:

Whether either or both of the named conservation district supervisors [Supervisor Johnson and Supervisor Mankamyler] should be removed from office by the Conservation Commission as provided in RCW 89.08.200, which reads in relevant part: “A [conservation district] 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.”

During the hearing, the Commission received evidence in the form of witness testimony and admitted exhibits from the Commission’s investigative staff and the supervisors.

Public comment was not taken. Following the hearing and deliberation, the Commission found:

- Neglect of duty on the part of Mr. Johnson and Mr. Mankamyler on Charge 2 and Charge 4;
- Malfeasance on the part of Mr. Johnson and Mr. Mankamyler on Charge 5;
- Malfeasance on the part of Mr. Johnson on Charge 7.

The Commission voted for the removal of Mr. Johnson and Mr. Mankamyler.²

Definitions – WAC 135-110-110

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

² Commissioner Carol Smith recused from the hearing, was not present during the hearing after her recusal, and did not vote. Commissioner Larry Cochran was unable to attend the hearing, and did not vote.

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.

RECORD

In making these findings, the Commission considered the following record:

- Thurston Conservation District Investigation Report and Exhibits contained in the Appendices (Investigation Report), submitted by Ron Shultz and Kirk Robinson, WSCC Staff (July 16, 2018);
- Response to SCC Investigation Report and Exhibits by Supervisors Johnson & Mankamyer (Response), submitted by Shawn Timothy Newman (August 14, 2018);

- Hearing Brief – In the Matter of Removal of Eric Johnson, Supervisor, Thurston Conservation District, submitted by Ron Shultz and Kirk Robinson (November 26, 2018);
- Hearing Brief – In the Matter of Removal of Richard Mankamyer, Supervisor, Thurston Conservation District, submitted by Ron Shultz and Kirk Robinson (November 26, 2018);
- Supervisors’ Brief & Supplemental Response; Continuing Objections; and Motions to Recuse, submitted by Shawn Timothy Newman (November 26, 2018);
- Prehearing Order (December 5, 2018);
- Second Prehearing Order (December 6, 2018);
- Third Prehearing Order (February 13, 2019);
- Preliminary Motions: Motion to dismiss complaint vs. Supervisory Richard Makamyer, Motion to disqualify Commissioners, Motion to disqualify Mr. McLean submitted by email by Mr. Newman (February 4, 2019 12:12pm);
- Washington State Conservation Commission Staff Response to Supervisors’ Motions (February 15, 2019);
- Supervisors’ Reply to Staff Response to Supervisors’ Motions (submitted by email February 16, 2019, but dated 1/16/19);
- Conservation Commission Staff’s Final List of Witnesses and Exhibits (February 15, 2019);
- Supervisors’ Continuing Objections; Pretrial Order Issues; and Final Witness List (submitted by email February 15, 2019, but dated 1/15/19);

- Supervisors' Exhibits 3, 6-10, and 12-17 entered at hearing; and
- The full transcript of the public hearing held February 20, 2019. Witnesses testifying under oath were:

Kirk Robinson
 Diretha Hollenbaugh
 Sarah Moorehead
 James Goche
 Linda Powell
 Paul Mikoloski
 Joe Hanna
 Richard Mankamyer
 Eric Johnson
 Mark Clark

FINDINGS OF FACT RELATED TO CHARGES

The Commission makes the following findings on the four complaints for which it found either Neglect of Duty or Malfeasance by the Supervisors. The Commission makes no findings on other complaints. The Commission makes these findings based on the preponderance of the evidence.

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

Commission Finding: Neglect of Duty

The Commission finds that Supervisor Johnson and Supervisor Mankamyer failed to maintain a full and accurate record of district business by failing to regularly review, finalize and sign district Board meeting minutes. Finalizing the minutes of district Board meetings took an unacceptably long time. Commission Regional Manager Shana Joy had notified the supervisors of problems regarding the minutes. The lack of ratified minutes impacted performance of all supervisors because they were left unsure what actions had

been taken. The lack of a clear record of district action items also negatively impacted the work of district staff, who were left without proper direction. While the supervisors testified that staff shortcomings were the cause of delays, the keeping of minutes and maintaining full and accurate records of district business is the responsibility of the supervisors.

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

Commission Finding: Neglect of Duty

The Commission finds that Supervisor Johnson and Supervisor Mankamyer failed to maintain a full and accurate record of district business by failing to timely sign checks and approve timesheets. The district incurred late fees on overdue bills because checks were not properly signed and bills were not timely paid. Failure to properly update bank account signing authorities put the district at risk. While review of expenditures is an appropriate role for supervisors, the district had an approved budget, and routine expenses should have been able to be met in an orderly way. Supervisor Mankamyer received training regarding financial operations, but failed to implement proper procedures. District financial policies were inadequate. Delays in approving timesheets negatively impacted the districts ability to be reimbursed for work performed.

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

Commission Finding: Malfeasance

The Commission finds that Supervisor Johnson and Supervisor Mankamyer failed to maintain a workplace free from perceived harassment, which affected, interfered with and interrupted the performance of the duties of supervisors, of staff and of the district. The Commission finds that the Supervisor Johnson and Supervisor Mankamyer also failed to implement the recommendations provided to the supervisors by Enduris, the risk sharing pool and risk management specialists for special purpose districts. This wrongful conduct added increased costs to the district in the form of a rate increase for coverage, and an increase in the district's deductible coverage. The district is at risk of losing coverage completely because of this conduct.

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

Commission Finding: Malfeasance

The Commission found that Supervisor Johnson failed in his duty, as district Board chair, to ensure proper funding for district activities. The Commission found that Supervisor Johnson acted wrongfully in a way that affected the financial future of the district by not attending a District public hearing on rates and charges by phone when that option was available.

APPEAL

The Commission's decision on removal is appealable to Thurston County Superior Court under RCW 34.05.570(4) – Review of other agency action.

SHAWN T. NEWMAN, ATTORNEY AT LAW

October 04, 2019 - 2:40 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97646-5
Appellate Court Case Title: Eric Johnson, et al. v. Washington State Conservation Commission, et al.
Superior Court Case Number: 18-2-04699-5

The following documents have been uploaded:

- 976465_Briefs_20191004143950SC625768_1501.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Johnson v WSCC - 97646-5 Appellant Brief w-Appx.pdf

A copy of the uploaded files will be sent to:

- ECYOlyEF@atg.wa.gov
- Jeff.Even@atg.wa.gov
- jeffe@atg.wa.gov
- phyllisb@atg.wa.gov

Comments:

Sender Name: Shawn Newman - Email: shawn@newmanlawolympia.com

Address:
2507 CRESTLINE DR NW
OLYMPIA, WA, 98502-4327
Phone: 360-866-2322

Note: The Filing Id is 20191004143950SC625768