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SUPREME COURT
STATE OF WASHINGTON
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NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON AND RICHARD MANKAMYER,

Appellants,

v.

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

Respondents/Cross-Appellants.

**WASHINGTON STATE CONSERVATION COMMISSION'S
REPLY OF RESPONDENT/CROSS APPELLANT**

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I. INTRODUCTION

Mr. Johnson and Mr. Mankamyer challenge the format of the hearing provided before the Washington State Conservation Commission (Commission) without challenging any of the Commission's factual findings. But Mr. Johnson and Mr. Mankamyer fail to demonstrate either that the hearing was flawed or that they suffered substantial prejudice. Failing to support their procedural challenge, the unchallenged findings are sufficient to support the Commission's vote to remove them from their volunteer positions as conservation district supervisors under RCW 89.08.200.

This Court should therefore reverse the decision of the superior court as to Mr. Johnson's and Mr. Mankamyer's challenge to the hearing format. It should also affirm the superior court with regard to Mr. Johnson's and Mr. Mankamyer's appeal of the court's rejection of their argument that recall provided the exclusive means of removing an elected supervisor from office.¹

II. ARGUMENT

Mr. Johnson and Mr. Mankamyer received a full and fair hearing, during which they presented and cross-examined witnesses and entered

¹ This claim is the subject of the initial appeal to this Court, to which the Commission has responded.

exhibits. They were not substantially prejudiced by the Commission's choice of hearing format.

A. Standard of Review

Mr. Johnson's and Mr. Mankamyer's challenge to the hearing procedure the Commission employed exposes a dilemma as to the proper standard of judicial review. Either way that dilemma is resolved, the resulting standard results in upholding the Commission's action.

If, as they claim, the hearing procedure chosen by the Commission was not a "genuine" adjudicative proceeding (Reply Brief of Appellants/Cross-Respondents (Pet. Reply 12)), then their appeal of the Commission's choice of procedure must be analyzed as an "other agency action" under RCW 34.05.570(4) because that choice of procedure was not the result of an order issued in an adjudicative proceeding. If so, the Court should uphold the Commission's action, because the choice of hearing format was not outside of the authority of the agency, nor was it arbitrary or capricious. RCW 34.05.570(4)(c).

On the other hand, if their removal hearing was an adjudicative proceeding, then Mr. Johnson and Mr. Mankamyer can only challenge the Commission's choice of procedure by demonstrating that it was an unlawful procedure or decision-making process under RCW 34.05.570(3)(c) (limited to the review of agency orders issued in

adjudicative proceedings). Under this error of law standard, their claim that the hearing was not a proceeding sufficient under the Administrative Procedure Act (APA) fails because the Commission afforded them the procedural rights to which they were entitled.

B. Mr. Johnson and Mr. Mankamyer Fail to Show that the Commission's Choice of Hearing Format was Outside its Authority, Arbitrary or Capricious, or an Error of Law

Before the superior court, Mr. Johnson's and Mr. Mankamyer's first cause of action was that the Commission's choice of hearing format was invalid under RCW 34.05.570(4)(c) because the Commission's "action to proceed with a hearing under the OPMA rather than the APA is 'outside the statutory authority of the agency or the authority conferred by a provision of law' and 'arbitrary or capricious.'" CP 16-17. The Commission's choice of hearing format was neither outside of its authority nor arbitrary or capricious.

The removal statute not only permits but in fact requires the Commission to hold a hearing before removing a local conservation district supervisor. RCW 89.08.200. The Commission did not act outside its authority by convening the removal hearing. "Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). "Where there is room for two

opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.”

Id.

Mr. Johnson and Mr. Mankamyer now appear to argue that the Commission’s choice of hearing format should be analyzed under RCW 34.05.570(3)(c), applying to orders issued from adjudicative proceedings, because the Commission’s ultimate decision removing them from their volunteer positions is not consistent with the types of decisions that have been found to be other agency action governed by RCW 34.05.570(4). Pet. Reply 12–14. Citing to the APA definition of “adjudicative proceeding” they argue, in a conclusory fashion, that because the APA’s definition of adjudicative proceeding includes the word “hearing,” the Open Public Meetings Act (OPMA) does not apply because the APA does. Pet. Reply 10; 17. The APA’s definitions apply within the APA, but do not undermine provisions providing that a governing body may hold a hearing under the OPMA, including a public hearing to receive and evaluate complaints against a public official. RCW 34.05.010; RCW 42.30.110(f).

RCW 34.05.570(3)(c) provides for relief where an agency engaged in an unlawful procedure or decision-making process, or failed to follow a prescribed procedure. Procedural errors are reviewed de novo.

Central Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 412, 128 P.3d 588 (2006). Under this standard, the Court may substitute its interpretation of the law for the agency's. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

Under RCW 34.05.570(3)(c), Washington courts have reviewed such errors as lack of proper notice, failure to accord deference due to a decision maker, or where an agency acted contrary to its own rules. *Miller*, 156 Wn.2d at 412; *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.* 176 Wn. App. 555, 583, 309 P.3d 673 (2013); *Whatcom Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 186 Wn. App. 32, 64–68, 344 P.2d 1256 (2015) (*reversed on other grounds by Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1(2016) (*noting that it declined to address the procedural argument. Id. at 688 n.14*)).

“Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). The OPMA provides that governing bodies like the Commission conduct hearings and take testimony. RCW 42.30.020(2). At meetings of the Commission, the Commission transacts official business by voting to take action. RCW 42.30.020(3), (4). Meetings of the Commission are open to the

public with few exceptions. RCW 42.30.030. Those exceptions are those listed in RCW 42.30.110, which governs executive sessions during which the public can be excluded. Specific to the issues here, the Commission has the authority to convene in executive session “to receive and evaluate complaints or charges brought against a public officer.”

RCW 42.30.110(1)(f). If, however, the subject of such an evaluation requests it, the Commission is required to conduct a public hearing or a meeting open to the public on such complaint. RCW 42.30.110(1)(f).

The Commission’s statute governing the removal of local conservation district supervisors states that the Commission may only remove a supervisor “upon notice and hearing.” RCW 89.08.200. As this Court has recognized, one of the purposes of enacting the APA was to provide greater public access to administrative decision making. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 913 n.5, 246 P.3d 1254 (2011). The OPMA’s provisions for holding open public hearings to evaluate complaints against public officer is consistent with this purpose.

The Commission’s decision to hold the required public hearing under the OPMA was made after due consideration of the merits of both OPMA procedures and APA procedures. SM 39–53.² During the

² “SM” refers to the transcript of the Commission’s August 29, 2018 Special Meeting (2018-08-29WSCCSpecialMeetingTranscript.pdf). “AR” refers to the Bates numbered Administrative Record filed below by the Commission. “CP” refers to Clerks

Commission's discussion regarding the hearing format, which took place during the August 29, 2018 special meeting, the Commission received public comment, and then weighed competing concerns regarding that format, ultimately deciding to convene the hearing under provisions of the OPMA. SM 53; AR 2436.

The Commission originally stated that the hearing would consist of presentations from Commission investigative staff and the supervisors. AR 2391–94. At Mr. Johnson's and Mr. Mankamyer's request, the format was changed to include witness testimony and cross examination.

AR 2330–31. This procedural change to allow witness testimony did not change the hearing into an APA adjudicative proceeding, as the OPMA allows for a governing body to take testimony, RCW 42.30.020(2), (3).

Assisted by a hearing examiner, the Commission held a full day hearing on February 20, 2019. It received testimony from witnesses presented by both investigative staff and by the supervisors, and received exhibits into the record. The Commission heard argument and motions, on which the hearing examiner ruled.³ At the close of witness testimony, the Commission entered into executive session to deliberate. SHRP 472–

Papers filed with this Court. "SHRP" refers to the transcript of the February 20, 2019 public hearing on removal (2019-02-20WSCCSpecialHearing.pdf).

³ Mr. Johnson and Mr. Mankamyer have not appealed any of the hearing examiner's rulings.

74. On their return from executive session to public hearing, they voted to remove Mr. Johnson and Mr. Mankamyer. SHRP 474–77. At their subsequent Commission meeting on March 21, 2019, the Commission voted to issue its findings of fact from the hearing. AR 2398–2404.

The Commission’s decision regarding hearing format was within its authority, and neither arbitrary or capricious, nor an error of law. The OPMA authorizes the Commission to hold a public hearing to evaluate complaints against a public official, and RCW 89.08.200 requires a public hearing to be held prior to the Commission determining that a local conservation district supervisor be removed. The Commission’s decision to hold the hearing under the OPMA was made after considering the facts and circumstances of the removal process. The Commission’s choice of hearing format should be affirmed.

C. Mr. Johnson and Mr. Mankamyer Were Not Substantially Prejudiced by the Hearing Format

Mr. Johnson and Mr. Mankamyer are not entitled to relief unless they show they were “substantially prejudiced” by the hearing process the Commission provided. *Mills*, 170 Wn.2d at 913 n.6 (citing *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007)).

Mr. Johnson and Mr. Mankamyer were not substantially prejudiced by the Commission’s choice of hearing format, because they received a full

public hearing before the Commission which, at their request, included witness testimony and cross examination, and the entry of evidentiary exhibits. Nevertheless they claim they were prejudiced by their inability to subpoena witnesses and engage in discovery. This argument fails for two reasons. First, both subpoenas and discovery are discretionary under the APA, and therefore there is no entitlement to those procedures. Second, Mr. Johnson and Mr. Mankamyer have not demonstrated that the testimony of the witnesses they argue they could not subpoena would have changed the result of the removal hearing.

1. Access to subpoenas and discovery is not mandatory under the APA

The APA states that a presiding officer in an administrative adjudicative proceeding “may” issue subpoenas and “may” by rule provide for discovery. RCW 34.05.446(1), (2). The use of “may” in the statute conveys that an agency has discretion to provide for subpoenas and discovery, but that the agency is not bound to do so. *Cf. Yakima Cty. (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993) (stating that the use of “may” in a statute did not bind the district to provide services to persons outside district boundaries).

This interpretation of the use of “may” as non-binding is particularly true here, where RCW 34.05.446 uses both “may” and “shall” to denote discretionary and mandatory direction. “Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.” *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). And ultimately the plain language of the statute itself confirms that providing for discovery is at the discretion of the presiding officer. RCW 34.05.446(3) (stating “In exercising such discretion, the presiding officer shall consider . . .”). Had the Commission elected to proceed under the APA, it would have been within its discretion to grant or deny access to subpoenas and discovery.

Mr. Johnson and Mr. Mankamyier’s only assertion as to why they were prejudiced by the Commission’s hearing procedure was that they did not have access to subpoenas and discovery, yet they cite no authority that the APA guarantees them access to subpoenas and discovery. It does not. Because procedures related to subpoenas and discovery were not guaranteed to them under the APA, Mr. Johnson and Mr. Mankamyier were not substantially prejudiced by their absence.

2. Mr. Johnson and Mr. Mankamyer fail to demonstrate that the process substantially prejudiced them

Mr. Johnson and Mr. Mankamyer have not challenged any of the factual findings the Commission made on their removal and so those facts are taken as true. *Cf. Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 150 Wn. App. 176, 186, 206 P.3d 1272 (2009) (stating that where the appellants did not challenge the truthfulness of the reasons given for expulsion, they are taken as true). *See also Shoreline Cmty. College Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 404, 842 P.2d 938 (1992) (where no error was assigned to a Commission's finding, it is a verity on appeal).

The Commission's unchallenged factual findings support the removal of Mr. Johnson and Mr. Mankamyer for malfeasance and neglect of duty. AR 2398–2404. While Mr. Johnson and Mr. Mankamyer claim they were prejudiced by their inability to call specific witnesses they deem “hostile,” the testimony sought from the five witnesses they name either would have been cumulative to the testimony presented, or relates to complaints other than the four specific complaints for which the Commission found either neglect of duty or malfeasance. AR 2402–04. In no event does this speculative testimony demonstrate that the Commission's unchallenged findings of fact are insufficient to support its

decision to remove Mr. Johnson and Mr. Mankamyer. The outcome of the hearing, that is, the Commission's decision to remove Mr. Johnson and Mr. Mankamyer based on malfeasance and neglect of duty, would not have changed based on the proposed testimony, and therefore they were not substantially prejudiced.

The supervisors state they that they wished to call Ron Shultz, one of the authors of the Commission's investigative report at hearing. Pet. Reply 15. While Mr. Shultz was originally on the Commission's witness list, his name was withdrawn for medical reasons, and instead the investigative report's co-author, Kirk Robinson, who had also been listed on the supervisors' proposed witness list, testified. SHRP at 70; 88–200; AR 2340. Counsel for Mr. Johnson and Mr. Mankamyer cross examined Mr. Robinson on the process of the investigation and the investigative staff findings. SHRP at 156–200. While the supervisors' contention that Mr. Shultz provided legal advice to the Commission is not germane to any of the complaints against them, they had the opportunity to, and did, ask Mr. Robinson if such advice was given. SHRP at 160–61. Mr. Robinson testified it was not. *Id.*

Mr. Johnson and Mr. Mankamyer state that they wished to call Doug Rushton to discuss what they term "special privileges." One of the complaints against Mr. Johnson was regarding whether he received

special privileges by virtue of his position as a supervisor. AR 0008–10.

The Commission, however, made no finding of malfeasance or neglect of duty related to this complaint (Complaint #1), and it was not a basis for Mr. Johnson's and Mr. Mankamyer's removal.

Sarah Moorehead, then the interim executive director of the Thurston Conservation District, also testified and was cross-examined by counsel for Mr. Johnson and Mr. Mankamyer. She was examined on district board meeting minutes that the supervisors now say would have also liked to call Paul Pickett to testify about. SHRP 258–63; Pet. Reply 16. The Commission's uncontested factual findings on Complaint #2 were that finalizing district minutes took an unacceptable amount of time overall, and even if staff had a role in the delay, district supervisors had the responsibility to see that such records were maintained. AR 2402–03. The proposed testimony of Mr. Pickett would not have challenged this finding.

Ms. Moorehead was also asked about Human Rights Commission complaints filed by district staff, and presented testimony on direct examination regarding district staff's personal concerns related to supervisor conduct. SHRP 263–65; 247–49. While Mr. Johnson and Mr. Mankamyer state that they wanted to call district employees Amy Hatch-Winecka and Amy Franks on those issues, they had the

opportunity to cross examine Ms. Moorehead on those topics.⁴ While Ms. Hatch-Winecka and Ms. Franks may have supplemented the testimony addressing the work place environment, the Commission's findings on Complaint #5, which addressed the work environment, also addressed the district's failure to respond to the district's insurance carrier. The Commission found that Mr. Johnson and Mr. Mankamyer failed to implement the recommendations from the Thurston Conservation District's risk manager. AR 2404. This resulted in higher costs to the district, and the risk of the district losing coverage completely. *Id.* A loss of coverage would have put the district at significant financial risk.

Counsel for Mr. Johnson and Mr. Mankamyer also asked Ms. Moorehead about conflict of interest allegations regarding Ms. Hatch-Winecka. SHRP 269-72. Commission staff investigated the supervisors in relation to their inquiry into Ms. Hatch-Winecka's alleged conflict of interest (Complaint #8), but the Commission made no findings on Complaint #8 and it formed no basis of the removal decision. AR 0030-31.

⁴ Ms. Franks was originally designated as a witness addressing Complaint #2 (timely record keeping) and Complaint #4 (failure to approve timesheets and sign checks), not Complaint #5 (inappropriate conduct). AR 2339.

Witnesses that appeared at hearing addressed all four complaints for which the Commission made findings of malfeasance or neglect of duty. The Commission found neglect of duty with regard to Complaint #4, Mr. Johnson and Mr. Mankamyer's failure to timely sign checks and approve timesheets. The Commission also found malfeasance with regard to Complaint #7, Mr. Johnson's failure to ensure proper funding for district activities. The uncontested findings on these two complaints are sufficient for removal. The outcome of the hearing would not have changed through additional testimony on Complaints #2 and #5, and therefore Mr. Johnson and Mr. Mankamyer have not shown they were substantially prejudiced by their inability to conduct discovery and subpoena witnesses.

Their citation to the federal and state constitutions for the proposition that they "had the right to confront their accusers" is unavailing, as the cited provisions apply to constitutional rights in criminal prosecutions, not an administrative hearing, as was conducted here. Pet. Reply 16. The witnesses who testified and were subject to cross examination addressed the complaints in the staff investigative report. In addition, the complaints were thoroughly vetted in the investigative report itself, the supervisors' written response to the investigative report, and other exhibits submitted. The unchallenged facts found by the

Commission are taken as true on appeal, and provide sufficient support Mr. Johnson and Mr. Mankamyers removal for malfeasance and neglect of duty. Mr. Johnson and Mr. Mankamyers were not substantially prejudiced by not having the ability to issue subpoenas or engage in discovery, both discretionary procedures under the APA.

D. Mr. Johnson and Mr. Mankamyers are Not Entitled to Their Requested Relief

The Commission's decision to hold the removal hearing under the OPMA was within its authority, not arbitrary or capricious, and consistent with governing law and regulation. The Commission did not violate either the OPMA or the APA when it held the hearing under the OPMA. Mr. Johnson and Mr. Mankamyers received a full and fair public hearing, and have not demonstrated substantial prejudice as a result of the Commission's chosen format. They are not entitled to the relief they seek.

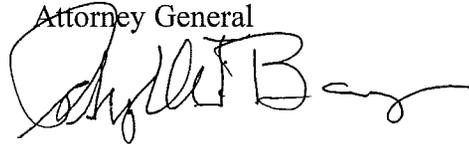
III. CONCLUSION

The procedure implemented by the Commission was consistent with its removal statute, and with other applicable laws and regulation. Mr. Johnson and Mr. Mankamyers were not substantially prejudiced by the hearing procedure provided by the Commission, and they have not demonstrated that there would have been a different outcome had they issued subpoenas or engaged in discovery. The Commission respectfully

asks the Court to reverse the superior court as to the Commission's selection of hearing procedure.

RESPECTFULLY SUBMITTED this 19th day of December 2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Phyllis J. Barney". The signature is written in a cursive style with a large initial "P" and a long horizontal flourish at the end.

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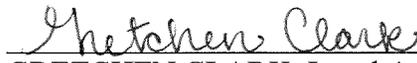
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on December 19, 2019, I caused to be served Washington State Conservation Commission's Reply of Respondent/Cross Appellant in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

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DATED this 19th day of December 2019 at Olympia, Washington.



GRETCHEN CLARK, Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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