

FILED

JUL 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 303217

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

HILLARY BUECHLER,

Appellant/Plaintiff,

v.

WENATCHEE VALLEY COLLEGE, a Division of the State of
Washington; JENNIFER CAPELO, individually; and MARCO
AZURDIA, individually,

Respondents/Defendants.

REPLY BRIEF OF APPELLANT

LACY KANE, P.S.

SCOTT M. KANE, WSBA #11592
Attorney for Appellants/Plaintiffs
Lacy Kane, P.S.
300 Eastmont Avenue,
East Wenatchee, WA 98802
(509) 884-9541

TABLE OF CONTENTS

	<u>Page</u>
I. REPLY	1
A. Respondents are liable for a failure to meet federal minimum due process requirements, where admittedly no hearing was held, where a decision was made by an unauthorized decision maker, where witnesses were not identified, and where evidence was (and is still being) withheld from the Plaintiff.	
B. Even if federal minimum due process requirements were met, Buechler is entitled to rely upon Washington’s expanded due process requirements clearly propounded in its WAC provisions.	
C. Respondents violated the Appearance of Fairness Doctrine.	
D. Respondents are not entitled to qualified immunity where they should have known their conduct was unlawful: no hearing was held but only a “token appearance,” Respondent Azurdia’s decision was void ab initio, because it was poisoned at its inception by ex-parte communications with Respondent Capelo, and Buechler was thereby prevented from confronting witnesses, knowing their identities, or even knowing the substance of their respective testimony.	
E. A party already aggrieved by due process failure is not barred by the Exhaustion Doctrine for allegedly failing to exhaust her administrative remedies.	
F. Recusal should have been automatic.	
II. ISSUES PERTAINING TO REPLY	2

- A. Does a college provide due process where it does not allow confrontation or identity of witnesses under federal due process requirements, nor meet the expanded requirements of Stone and WAC 132W-112 and WAC 132W-115?
- B. Are State WAC due process provisions to be utilized, where they were specifically directed towards WVC, where they were adopted by WVC in its handbooks, and where Stone v. Prosser and other Washington cases have affirmed their validity in this context?
- C. Did Respondents violate the Appearance of Fairness Doctrine?
- D. Are Respondents Azurdia and Capelo entitled to qualified immunity, where they ignored clearly established statutory and constitutional rights, were also contained within WVC's handbooks, and did not provide Buechler even a modicum of due process?
- E. Did Buechler have a constitutional property interest, where she paid to attend WVC, where WVC made promises of due process in its handbooks, and where WAC provisions specifically provided due process procedures to be followed in the case of alleged misconduct?
- F. Is the Exhaustion Doctrine applicable to constitutional due process deprivation?
- G. Was it an abuse of discretion for the Trial Judge not to sua sponte recuse herself?

- III. ARGUMENT 3
 - A. Introduction 3
 - B. Azurdia expelled Buechler from the nursing program under circumstances not comporting with even bare minimum

	federal due process requirements.	4
C.	State WAC provisions are not superfluous, and expanded Buechler’s due process rights.	8
D.	Respondents violated the Appearance of Fairness Doctrine.. . . .	11
E.	Respondents Azurdia and Capelo are not entitled to qualified immunity.. . . .	12
F.	Buechler had a due property right to her education, which was violated.	13
G.	Exhaustion Doctrine is inapplicable.. . . .	15
C.	Judge Allan should have recused herself automatically.	17
IV.	CONCLUSION	17

TABLE OF AUTHORITIES

Foreign Cases

<u>Colquitt v. Rich Township High Sch. Dist. No. 227</u> , 298 Ill.App. 3d 856, 699 N.E.2d 1109, 232 Ill.Dec. 924 (1998)	5
<u>Garrett v. Matthews</u> , 625 F.2d 658, 660 (5 th Cir. 1980)	7

U.S. Supreme Court Cases

<u>Board of Regents of State Colleges v. Roth</u> , 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-2710, 33 L.Ed.2d 548 (1972)	13
<u>Goss v. Lopez</u> , 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)	5, 8, 14
<u>Matthews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	5
<u>Perry v. Sindermann</u> , 408 U.S. 593, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972)	13

Washington Administrative Code Provisions

WAC §132W-112 2, 9
WAC §132W-115 2, 10, 11
WAC §180-40-305(2)(c) 8

Washington Cases

Ackerley Communications, Inc. v. Seattle, 92 Wn.2d 905, 602 P.2d 1177
(1979), cert. denied, 449 U.S. 804 (1980) 15
Danielson v. City of Seattle, 45 Wash.App. 235, 724 P.2d 1115 (1986),
aff'd, 108 Wash.2d 788, 742 P.2d 717 (1987) 15
Higgins v. Salewsky, 17 Wn. App. 207, 562 P.2d 655 (1977) 15
Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 694 P.2d 1078
(1985) 12
Milligan v Thompson, 90 Wn.App 586, 953 P.2d 112 (1998) 16
Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (1992) 5
Nieshe v. Concrete School District, 129 Wash.App. 632, 127 P.3d 713
(2005) 15
Ritter v. Board of Commissioners, 96 Wn.2d 503, 509 (1981) 13
Stone v. Prosser, 94 Wn.App. 73, 971 P.2d 125
(1999) 2, 4, 5, 7, 8, 9, 10, 14

I. REPLY

- A. Respondents are liable for a failure to meet federal minimum due process requirements, where admittedly no hearing was held, where a decision was made by an unauthorized decision maker, where witnesses were not identified, and where evidence was (and is still being) withheld from the Plaintiff.
- B. Even if federal minimum due process requirements were met, Buechler is entitled to rely upon Washington's expanded due process requirements clearly propounded in its WAC provisions.
- C. Respondents violated the Appearance of Fairness Doctrine.
- D. Respondents are not entitled to qualified immunity where they should have known their conduct was unlawful: no hearing was held but only a "token appearance," Respondent Azurdia's decision was void ab initio, because it was poisoned at its inception by ex-parte communications with Respondent Capelo, and Buechler was thereby prevented from confronting witnesses, knowing their identities, or even knowing the substance of their respective testimony.
- E. A party already aggrieved by due process failure is not barred by the Exhaustion Doctrine for allegedly failing to exhaust her

administrative remedies.

- F. Recusal should have been automatic.

II. ISSUES PERTAINING TO REPLY

- A. Does a college provide due process where it does not allow confrontation or identity of witnesses under federal due process requirements, nor meet the expanded requirements of Stone and WAC §132W-112 and WAC §132W-115?
- B. Are State WAC due process provisions to be utilized, where they were specifically directed towards WVC, where they were adopted by WVC in its handbooks, and where Stone v. Prosser and other Washington cases have affirmed their validity in this context?
- C. Did Respondents violate the Appearance of Fairness Doctrine?
- D. Are Respondents Azurdia and Capelo entitled to qualified immunity, where they ignored clearly established statutory and constitutional rights, were also contained within WVC's handbooks, and did not provide Buechler even a modicum of due process?
- E. *Did Buechler have a constitutional property interest, where she paid to attend WVC, where WVC made promises of due process in its handbooks, and where WAC provisions specifically provided*

due process procedures to be followed in the case of alleged misconduct?

F. Is the Exhaustion Doctrine applicable to constitutional due process deprivation?

G. Was it an abuse of discretion for the Trial Judge not to sua sponte recuse herself?

III. ARGUMENT

A. Introduction

In expelling Buechler, Respondents violated basic due process tenets: notice of charges, evidence and witnesses against an accused, conducting a formal hearing, and an objective, informed decision maker.

Respondents argue Buechler's alleged shortcomings which occurred *outside* the clinical and academic environment. Concurrently, Respondents ignore Azurdia's admitted failure to meet his clear duties *within* the academic environment. Assuming, arguendo, that Buechler was guilty, even guilty parties are entitled to due process. Respondents unilaterally alter due process.

Respondents argue they met federal due process minimum requirements by Capelo's and Azurdia's (neither of whom admittedly had authority to expel) decision to expel, by holding an informal meeting

Azurdia rejected as a hearing but called a “token appearance,” and through what they now deem an “opportunity to characterize her own conduct.” This does not meet federal due process requirements. Buechler was not even allowed to know the evidence or witnesses against her. Azurdia mistakenly believed Buechler had lied to Thorn about the drugs provided, and mistakenly alleged alcohol had been involved. Azurdia mistakenly believed Buechler was guilty of possessing illicit drugs, and used these mistaken beliefs as bases for approving Capelo’s ex-parte recommendation to expel Buechler.

Respondents, while ignoring the WAC’s and their own handbook procedures, blame Buechler trusting them. Deeming Respondents’ efforts (ex-parte contact, denying statements, refusing to identify witnesses, inaccurate factual assumptions, no formal or informal hearings) adequate turns due process on its head.

B. Azurdia expelled Buechler from the nursing program under circumstances not comporting with even bare minimum federal due process requirements.

Federal due process requirements were not provided Buechler. This Court’s decision in Stone (mention of which is almost entirely missing from Respondents’ responsive briefing) cited Goss and expanded its minimum requirements to include WAC provisions specifically tailored

to Washington students. The Goss court itself noted that its stated requirements of notice and an opportunity to be heard “could require more stringent due process protections . . . [and] may require more formal procedures” for suspensions longer than 10 days.¹ From a federal due process perspective alone, minimum due process requirements cited by Respondents in their briefing were not met by Azurdia in Buechler’s expulsion.

“Due process is a flexible concept calling for those procedural protections demanded by the nature of the interest affected and the context in which the alleged deprivation occurs.”² This flexible concept depends on a number of factors, mainly the private interest affected, risk of erroneous deprivation, and governmental burden in the procedure involved.³ As discussed in Buechler’s Appeal Brief, each factor favors Buechler. Respondents had no interest in subverting their own promised due process procedures or even providing her the statements or a proper

¹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 77, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 584, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)).

² Stone v. Prosser Consol. School Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999) (citing Morris v. Blaker, 118 Wn.2d 133, 144, 821 P.2d 482 (1992); Colquitt v. Rich Township High Sch. Dist. No. 227, 298 Ill.App. 3d 856, 863, 699 N.E.2d 1109, 232 Ill.Dec. 924 (1998); Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

³ Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976).

hearing. Their failure to do so was inexcusable.

Even if the minimum federal due process requirements somehow did not require provision of the identity of witnesses, or written statements against her, Buechler was never given a hearing. When asked “Was (Buechler) allowed to see any of the evidence against her before that hearing?”, Azurdia responded, “We never had a hearing.”⁴ He admitted his decision to expel was based upon an informal meeting with Buechler, in which he refused to identify witnesses or evidence against her:

“Q So, Hillary did meet with you?

A She did come in. She did come in, but I – I would not classify that as a hearing . . . it was, I guess I’d classify it as a token appearance.

Q As a result of that meeting, did you suspend her?

A Yes.”⁵

This token appearance does not meet minimum due process requirements under Goss or any federal case. No reasonable administrator or person could believe otherwise.

Respondents excuse their failure to provide due process by explaining they are okay, “so long as the process was careful and deliberate.”⁶ Assuming the un-cited premise is true – that a state entity can

⁴ CP 221, Deposition of Marco Azurdia, p. 19, ll. 11-16.

⁵ CP 221, Deposition of Marco Azurdia, p. 20, ll. 14-21.

⁶ Respondents’ Opening Brief, p. 17.

subvert basic due process requirements by simply acting carefully and deliberately – such care and deliberation did not here occur. Respondents cite Garrett v. Matthews, 625 F.2d 658, 660 (5th Cir. 1980), an Alabama case where a faculty handbook allowed for discharge of professors for misconduct, pointing out “not every violation of its own rules by an agency violates due process.”⁷ In Garrett, the employment handbook for a professor did not discuss penalties less than discharge, such as the loss of tenure, and the Court held it was not a violation of the handbook to impose a lesser sanction.⁸ In deciding so, it rightfully noted that not *every* violation by an agency of rules rises to the level of a due process claim.

Respondents would extend this dicta to completely remove any and all duty to follow even the most basic due process handbook promises, a conclusion unsupported by Garrett. Furthermore, such an analysis ignores Stone, noting that Washington due process law, under WAC provisions, is more expansive than federal due process law.⁹ No federal case or state case grants an agency the right to remove all notion of due process in favor of a single, misguided decision maker such as Azurdia. Buechler was not

⁷ Respondents’ Opening Brief, p. 18.

⁸ Garrett v. Matthews, 625 F.2d 658, 660 (5th Cir. 1980).

⁹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 79, 971 P.2d 125 (1999).

afforded minimum federal due process.

C. State WAC provisions are not superfluous, and expanded Buechler's due process rights.

Even if federal minimum due process rights were somehow met in Azurdia's informal "token appearance" with Buechler, Washington's applicable WAC provisions, customized specifically for WVC, cannot be rendered superfluous. Respondents refused to regard this Court's holding in Stone, which cited a WAC this Court refused to ignore. In Stone, the accused student argued that WAC §180-40-305(2)(c) and due process guaranteed the right to confront and question witnesses¹⁰ This Court agreed, citing Goss:

"The United States Supreme Court has held that state statutes providing a free public education through high school and compelling a student to attend school confer a property interest that may not be taken away without at least minimum due process procedures."¹¹

Any other decision would remove all purpose of handbooks and related WAC provisions for colleges. Buechler had read the handbooks, was aware of her rights, and was denied those very due process rights

¹⁰ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999).

¹¹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)) (emphasis added).

Respondents had promised.

States may expand federal due process requirements; they may not implement lower standards. This allowance, again ignored by Respondents, was noted in Stone:

“Washington law, unlike Kansas or Illinois law, provides the right to confront witnesses in expulsion hearings. In light of that right, the burden on the school administration to produce the student witnesses or to show that their appearance is not possible or advisable is not onerous enough to justify the risk of erroneously depriving the accused student of his education.”¹²

As in Stone, Buechler’s due process rights were expanded by WAC provisions, which were further memorialized within WVC’s own handbooks. Buechler’s procedural protections under WAC §132W-112-130 involved: (1) convention of the Academic Regulations Committee (“ARC”); (2) oversight by a committee chair; (3) procedures to ensure fairness; (4) no ability by Azurdia to suspend or expel unless an imminent danger existed; (5) a list of witnesses to be provided in advance of the hearing; (6) disclosure and the providing of all documentary and physical evidence; (7) the right to question witnesses; (8) a record summary of the proceedings to be kept; and (9), access to the ARC’s findings of fact and

¹² Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 79, 971 P.2d 125 (1999).

conclusions of law. To ignore the WAC provisions, contrary to Stone, is to make them superfluous.

Respondents improperly cite WAC provisions built into WVC's nursing handbook, to which they expect "Student Nurses of WVC will be expected to observe and adhere."¹³ These citations fallaciously imply Buechler is guilty as charged and thus is not entitled to due process. Respondents expected students to adhere to the WAC provisions, but continue to remonstrate students who expected WVC to do the same. The WAC provisions are not meaningless, and by failing to even refer the matter to the ARC, Respondents breached their contract with Buechler and failed to provide her promised due process rights, either under federal minimum guidelines or the expanded WAC provisions, under Stone.

Respondents state, "Buechler . . . was entitled to file a written appeal to the (ARC)." What they really mean is that Buechler was *required* to file a written appeal, a notion which squarely contradicts the crystal clear terms of the handbooks and WAC provisions. The truth is quite the opposite: WAC §132W-115-130(8) provides that WVC will conduct an ARC hearing even if a student does not cooperate, producing findings of fact, conclusions, and determining sanctions:

¹³ Respondents' Opening Brief, p. 11.

“(8) The failure of a student to cooperate with the hearing procedures, however, shall not preclude the committee from making its findings of fact, reaching conclusions and imposing sanctions. Failure of the student to cooperate may be taken into consideration by the committee in recommending penalties.”¹⁴

This is quite a different notion than that propounded by Respondents in their responsive briefing, that somehow Buechler herself must ensure the hearing occur. Buechler was not uncooperative, but even if she had been, as a serious disciplinary matter, the matter was required to be referred to the ARC. To fail to do so violated the WAC’s, and violated Buechler’s right to due process.

D. Respondents violated the Appearance of Fairness Doctrine.

Respondents violated the Appearance of Fairness Doctrine, by ex-parte contact between Capelo and Azurdia, a biased decision maker not authorized to decide, and by refusing to provide evidence against Buechler. Respondents have not disputed that the doctrine was violated.

In its briefing on appeal, WVC admits Capelo recommended Buechler be dismissed from the nursing program.¹⁵ She had no authority to make such a decision. Azurdia had no authority to expel Buechler, or

¹⁴ WAC §132W-115-130(8).

¹⁵ Respondents’ Opening Brief, p. 7.

even suspend her without determining she was an imminent danger.

Azurdia admits she was not an imminent danger.¹⁶ She remained a student at WVC after being expelled from the nursing program.

Because Respondents do not refute they violated the Appearance of Fairness Doctrine, Buechler stands behind her arguments in her initial Appeal Brief. She was never provided evidence against her, for a hearing that must but did not occur, in front of biased decision makers who were not authorized to expel her.

E. Respondents Azurdia and Capelo are not entitled to qualified immunity.

“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken ‘under color of’ state law.”¹⁷ Azurdia and Capelo acted under authority of state law, and violated Buechler’s basic due process rights. They should have known and did know better.

Respondents note that public officers may be shielded from liability where there is no violation of clearly established statutory or constitutional rights and a reasonable official would not have known their

¹⁶ CP 231, Deposition of Marco Azurdia, p. 59, ll. 6-17, CP 233, p. 65, l. 25, p. 66, ll. 1-3.

¹⁷ Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 694 P.2d 1078 (1985) (internal citations omitted).

conduct was not lawful. Here, Azurdia admits Buechler should have had a hearing.¹⁸ He simply affirmed Capelo's recommendation.¹⁹ Azurdia admits the ARC had to convene.²⁰ He admits he regularly sat on the ARC.²¹ He admits he had important facts wrong.²² Azurdia, Capelo, and WVC are not entitled to ignore very clearly established statutory and constitutional rights that were even clearly contained within WVC's handbooks. They did not provide Buechler even a modicum of due process.

F. Buechler had a due property right to her education, which was violated.

A due process property interest exists if there are such rules or mutually explicit understandings that support an individual's claim of entitlement to the benefit.²³ Buechler paid for an education at WVC,

¹⁸ CP 230, Deposition of Marco Azurdia, p. 54, ll. 24-25, p. 55, ll. 1-12.

¹⁹ CP 245, Deposition of Jennifer Capelo, p. 49, ll. 23-25.

²⁰ CP 230, Deposition of Marco Azurdia, p. 54, ll. 24-25, p. 55, ll. 1-12.

²¹ CP 220.

²² CP 225, 226, 228, Deposition of Marco Azurdia, p. 34, ll. 24-25, p. 35, ll. 1-4, ll. 11-18, p. 38, ll. 10-13, p. 47, ll. 7-14.

²³ Ritter v. Board of Commissioners, 96 Wn.2d 503, 509 (1981) (citing Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-2710, 33 L.Ed.2d 548 (1972)).

which included nursing instruction, and included reliance upon promises made by WVC in its handbook. Here, WVC's failure was in providing the due process required under federal law, WAC provisions, and in WVC's respective handbooks.

Citing WAC provisions, and Goss, this Court held in Stone:

“The United States Supreme Court has held that state statutes providing a free public education through high school and compelling a student to attend school confer a property interest that may not be taken away without at least minimum due process procedures.”²⁴

This decision mandates: (1) WAC provisions are not superfluous; and (2) federal minimum due process requirements under Goss do confer a property right that may not be taken away without due process. WVC students do not lose their due process rights at WVC's front steps, under federal or Washington law.

Whether couched as a due process violation, a promissory estoppel claim, a breach of contract, or a breach of promises of specific treatment in specific circumstances, the end result is the same: Buechler relied upon WVC's promises, to the detriment of her property interest. This property interest could not be taken away by Respondents without due process of

²⁴ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)) (emphasis added).

law. Had due process occurred, it would have been discovered that none of her alleged indiscretions occurred in an academic or clinical environment.

An administrative agency's failure to follow its own procedural process violates the constitution where it fails to comply with minimal constitutional requirements.²⁵ As in off-campus negligent driving, Azurdia (who had no authority to expel in any case) had no authority to expel Buechler for incidents that occurred outside the clinical and academic environments.

G. Exhaustion Doctrine is inapplicable.

Respondents argue their due process failures should be excused because Buechler did not force the ARC to convene, after Azurdia had expelled her. This excuses their failures at her expense. The burdens of requiring due process should not be placed upon the victim of due process failure. This was affirmed in several Washington cases, holding constitutional claims are exempt from the exhaustion doctrine.²⁶ This

²⁵ Nieshe v. Concrete School District, 129 Wash.App. 632, 127 P.3d 713 (2005) (citing Danielson v. City of Seattle, 45 Wash.App. 235, 244, 724 P.2d 1115 (1986), aff'd, 108 Wash.2d 788, 742 P.2d 717 (1987)).

²⁶ Ackerley Communications, Inc. v. Seattle, 92 Wn.2d 905, 602 P.2d 1177 (1979), cert. denied, 449 U.S. 804 (1980); Higgins v. Salewsky, 17 Wn. App. 207, 562 P.2d 655 (1977).

makes perfect legal sense, as a party aggrieved by due process failure has little reason or means of forcing a derailed due process train back onto its tracks. Furthermore, in attempting to resurrect the exhaustion doctrine, Respondents blame Buechler for failing to demand a meaningless hearing based upon evidence Respondents refused (and continue to refuse) to provide her, and without knowing who to summon as witnesses.

The Court in Milligan explained Washington's policy in waiving the exhaustion doctrine in constitutional law cases, both in relation to federal due process and under Washington's laws against discrimination:

“Congress and the Washington Legislature intended that statutory remedies protecting civil rights and preventing discrimination be independent of state administrative remedies and collective bargaining rights. Thus, Milligan was not required to exhaust his administrative remedies before bringing a cause of action under Washington's law against discrimination, or under any of the federal civil rights laws.”²⁷

To believe that Azurdia could make a decision he is not authorized to make, based upon false facts, and then force Buechler to appeal his legally meaningless but highly influential decision to expel her, is nonsense. Yet this is exactly what the Trial Court did, by ruling, upending Stone, holding: “Had Ms. Buechler here asked for a hearing . . . Buechler would

²⁷ Milligan v Thompson, 90 Wn.App 586, 596-97, 953 P.2d 112 (1998) (internal citations omitted).

be standing in the same place as - I think it was Mr. Stone.”²⁸

Respondents apparently concede that for Buechler to have appealed would have been futile. Certainly Azurdia had already made up his mind. Buechler challenged the constitutionality of Azurdia’s decision, and therefore need not exhaust administrative requirements under the WAC provisions and handbook provisions the Respondents refused to follow.

H. Judge Allan should have recused herself automatically.

The decision not to automatically recuse herself was an abuse of discretion by Judge Allan. Chelan County has only three judges, and Buechler was put in the unenviable position of accepting a biased judge or transferring a portion of her case load, to the annoyance of another judge. The decision should never have been put to the parties, for the reasons set forth in Buechler’s Appeal Brief.

IV. CONCLUSION

Buechler was not afforded due process rights, either under minimal federal standards, or under expanded state standards. Respondents failed to provide due process in any regard. Azurdia and Capelo are not entitled to qualified immunity. Respondents violated the Appearance of Fairness

²⁸ Verbatim Report of Proceedings, Motion for Reconsideration, September 30, 2011, p. 9.

Doctrine, and WVC breached its contract with Buechler. WVC specifically promised due process procedures it would follow in disciplinary matters, and instead these processes were subverted by Azurdia and Capelo.

Respectfully submitted, this 27th day of July, 2012.

 #38770
SCOTT M. KANE, WSBA #11592
Attorney for Appellant