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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

HONORABLE RICHARD B. SANDERS,

Plaintiff/Petitioner,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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**SUPPLEMENTAL BRIEF OF RESPONDENT STATE OF
WASHINGTON**

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I. INTRODUCTION

The Court asked whether the “Ethics in Public Service Act,” RCW 42.52 *et seq.* (“the Act”) has “any impact on the broad directive placed upon the Attorney General in RCW 43.10.030 and RCW 43.10.040.” This question must be answered in the affirmative. The Act confirms that ethics proceedings cannot be claims against a public officer in his or her “official capacity.” The Act also confirms the Attorney General’s discretion to determine whether a defense of ethics-related matters is appropriate, consistent with *Berge* and *Dunbar*.¹

Justice Sanders is mistaken in asserting that the Act stands “separate and apart from” ethical proceedings brought by the Commission on Judicial Conduct (“CJC”). While Justice Sanders’ CJC proceeding was neither a “citizen’s action” nor “an action subsequently commenced” after exoneration by an ethics board (and thus not directly subject to the Act, *see* RCW 42.52.460 and 42.52.430(7), respectively), the Act nonetheless “supplement[s] existing laws as may relate to the same subject,” RCW 42.52.901. The Court must harmonize the Act with RCW 43.10.030 and

¹ *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977) (recognizing the discretionary nature of the Attorney General’s obligations under RCW 43.10.030); *Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926) (Attorney General’s paramount duty is to the citizens of the state and has a duty “to obstruct and not to assist” where interests of public are antagonistic to those of state officers).

.040 with respect to the scope of the Attorney General's duty to provide a defense to a judge accused of ethics rules violations.

The Act defines "official duty" consistently with the position taken by the State in this case:

"Official duty" means those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state Constitution.

RCW 42.52.010(12). As the State previously has argued, ethical violations can never be within the scope of a judge's official duties.²

RCW 43.10.030 at most entitles a public officer to a publicly-funded defense only in proceedings where the conduct complained of occurred while he or she was "acting in his [or her] official capacity." The Act's definition of "official duty" supports the State's position that ethical violations cannot be "official capacity" acts, because ethical violations can never be "within the specific scope of employment" of a justice.

The Act also confirms that the Attorney General has discretion to determine whether a publicly-funded defense of a public officer in an ethics proceeding is appropriate. The Act confers discretion on the

² While Justice Sanders has argued that his visit to the Special Commitment Center ("SCC") is the "official duty" at issue here, the CJC specifically noted that its proceeding was "not about whether judges should visit correctional institutions." Supp. CP 234 (Corrected Amended Commission Decision of the Commission on Judicial Conduct). Rather, the CJC proceeding was about Justice Sanders' conduct while on the visit.

Attorney General to decide whether to defend a public officer in a “citizen’s action” or in “an action subsequently commenced.” Similarly, our Supreme Court has construed RCW 43.10.030 to confer discretion on the Attorney General. This was recognized in both *Berge* and *Dunbar*. The construction of RCW 43.10.030 and .040 that Justice Sanders urges not only conflicts with the Supreme Court’s rulings in *Berge* and *Dunbar*, but it also would make the Attorney General’s duty to provide a defense broader and his discretion more limited when the CJC brings ethics charges against a judge than when a citizen brings the charges. There is no basis in logic, sound public policy or caselaw for such an outcome, and it should be rejected.

II. ARGUMENT

A. **The Court Must Construe RCW 43.10.030 and .040 Consistently With The Ethics in Public Service Act.**

In 1994, the Washington State Legislature passed the “Ethics in Public Service Act,” RCW 42.52 *et seq.* (“the Act”), to strengthen and clarify the ethical standards that apply to all state officials and employees, including judges. The Legislature intended the Act to be interpreted consistently with existing laws, providing that “[t]his chapter shall be construed liberally to effectuate its purposes and policy and to supplement

existing laws as relate to the same subject.” RCW 42.52.901.³ The Act directs the CJC to enforce RCW 42.52 and the rules adopted under it with respect to “state officers⁴ and employees of the judicial branch” and to “do so according to procedures prescribed in Article IV, section 31 of the state Constitution.”⁵ RCW 42.52.370.

The CJC developed rules to implement the Act. *See* WAC 292-09. As stated by WAC 292-09-050, “[a]ny organization, association, or person . . . may make a complaint to the commission alleging violation of chapter 42.52 RCW,” and the CJC is required to investigate and evaluate any allegations. The CJC considers and prosecutes complaints against judges under the CJC’s Rules of Procedure (“CJCRP”), and the Washington State Constitution. RCW 42.52.370.

While the CJC conducted the proceedings against Justice Sanders pursuant to the CJCRP and Article IV, section 31 of the Washington Constitution, neither the Legislature nor the courts have ever indicated that the Attorney General’s defense obligations should be different for a CJC

³ Justice Sanders initially argues (p. 1) that the Act is “separate and apart” from the CJC proceedings, but later concedes (pp. 13-14) that the Act supplements previous legislation.

⁴ “State officers” includes justices of the supreme court. RCW 42.52.010(18).

⁵ The Washington State Register described the relationship between the CJC and the Act as follows: “The jurisdiction of the Commission on Judicial Conduct is expanded to include employees in the judicial branch. The Judicial Conduct Commission may fulfill its obligations under this law by exercising its authority under Article IV, Section 31 of the Constitution.” Wash. St. Reg. 177 (1994).

proceeding from those described in the Act. To the contrary, the Act was expressly intended to supplement existing law, and because it was adopted after RCW 43.10.030 and .040, it provides useful guidance about the legislature's intent with respect to these earlier statutes and the Attorney General's obligations under them. According to *Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 872, 602 P.2d 357, 359 (1979),

[t]he rule is that legislative enactments which relate to the same subject and are not actually in conflict should be interpreted so as to give meaning and effect to both, even though one statute is general in application and the other is special. Such an interpretation gives significance to both acts of the legislature.

B. The Act Confirms that Neither RCW 43.10.030 Nor .040 Require a Taxpayer-Funded Defense in an Ethics Proceeding.

1. The Act confirms the strong public interest in enforcing ethical standards and "not to assist" officers who engage in unethical conduct.

In enacting the Act, the Legislature declared:

Ethics in government are the foundation on which the structure of government rests. State officials . . . hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed.

RCW 42.52.900. The Legislature emphasized that

[t]he citizens of the state expect all state officials and employees to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public's interest.

RCW 42.52.900. The Legislature recognized that government officials are accountable for their behavior, and that accountability is a “particular obligation” of the public service:

State officials . . . are subject to the sanctions of law
[U]ltimately, however, they are accountable to the people
and must consider this public accountability as a particular
obligation of the public service.

RCW 42.52.900.

The Legislature’s declared purpose is completely consistent with the Washington cases and statutes cited in the State’s prior briefing, which establish that the Attorney General has a duty to not defend a public officer under RCW 43.10.030 when the officer is charged with unethical or unlawful conduct, at least until he or she has been exonerated.⁶ *See State ex. rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926) (Attorney General may not “sit supinely by and allow state officers to violate their duties and be recreant to their trusts.”); *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977) (although RCW 43.10.030(2) declares that the Attorney General “shall” perform certain duties, that directive actually requires the Attorney General to exercise its discretion).

⁶ In fact, the Act authorizes the Attorney General to bring a civil action in superior court against a state officer who violates the Act, and entitles the Attorney General to recover damages, civil penalties, and reasonable investigative costs. RCW 42.52.490(1).

2. The Act confirms that an ethics proceeding against a judge is not a proceeding against an officer “acting in his official capacity” under RCW 43.10.030 or .040.

The Act confirms that violating the Code of Judicial Conduct is not part of the “official duties” of a judge, and supports the State’s position that a judge subject to ethical charges is not entitled to a defense because ethical misconduct can never be an “official capacity” act under RCW 43.10.030⁷ or .040.⁸

Ethics proceedings against a state officer are quintessentially personal capacity proceedings; it can never be part of one’s official duty to violate ethics rules. *See* Br. of Resp’t at 18-25. The Act confirms this interpretation of “official capacity” by defining “official duty” in the ethics context as

those duties within the specific scope of employment of the state officer . . . as defined by the officer’s . . . agency or by statute or the state Constitution.

RCW 42.52.010(12).

The Act prohibits acts that conflict with the proper discharge of a state employee’s official duties:

⁷ RCW 43.10.030 states: “The attorney general shall: . . . [d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.” (emphasis added).

⁸ As discussed in the State’s Respondent’s Brief, RCW 43.10.040 does not give a state official an independent right to a taxpayer-funded defense; it specifies only that if a

No state officer . . . may engage in a . . . professional activity . . . that is in conflict with the proper discharge of the state officer's . . . official duties.

RCW 42.52.020 (emphasis added). Justice Sanders implies (at pp. 3, 6, 11) that the Act is focused on “ethical transgressions of a financial nature,” but its application clearly is not so narrow.

An allegedly unethical act conflicting with the proper discharge of official duties can never be an “official duty” or “official capacity” act. Thus, proceedings resulting in findings of ethical violations cannot be “proceedings against any state officer . . . acting in his official capacity” that arguably would entitle the officer to a taxpayer-funded defense under RCW 43.10.030 or .040. *See also* Br. of Resp’t at 33-37 (cases cited therein).

C. The Act Confirms the Attorney General’s Discretion to Decide Whether to Provide a Taxpayer-Funded Defense in an Ethics Proceeding.

The State’s position is that if either RCW 43.10.030 or .040 authorize the Attorney General to provide a taxpayer-funded defense in an ethics proceeding,⁹ the Attorney General still has discretion reasonably to

public officer is otherwise entitled to a defense, the Attorney General shall be the designated representative. *See* Br. of Resp’t at 25-26.

⁹ The language in RCW 43.10.030 originally was adopted by the territorial legislature in 1888. Laws of 1888, ch. 7; *State ex rel. Attorney Gen. v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 496, 68 P. 946, 949 (1902). The statute was part of the general enabling statutes that established the powers of the Attorney General.

decide not to defend a particular case. The Act supports the State's position.

Under RCW 42.52.430(7), the Attorney General can defend a state officer in a proceeding only if an "ethics board"¹⁰ has exonerated the officer in a prior ethics proceeding:

If the board makes a determination that there is not reasonable cause to believe that a violation has been or is being committed or has made a finding under subsection (6) of this section [i.e., that the officer has not engaged in an alleged violation of the Act], the attorney general shall represent the officer . . . in an action subsequently commenced based on the alleged acts in the complaint.

RCW 42.52.430(7). Likewise, pursuant to RCW 42.52.460, the Attorney General can defend a state officer in a "citizen action" only after the Attorney General has determined that the officer's conduct was ethical (*i.e.*, complied with the Act) and was within the scope of his or her employment:

Upon commencement of a citizen action¹¹ under this section, at the request of a state officer . . . who is a defendant, the office of the attorney general shall represent the defendant if the attorney general finds that the defendant's conduct complied with this chapter and was within the scope of employment.

¹⁰ "Ethics board" includes the "commission on judicial conduct." RCW 42.52.010(8).

¹¹ A party is authorized to commence a citizen action only if (a) the appropriate ethics board or the attorney general have failed to commence an action under the Act within 45 days after notice from the party, (b) the party notifies the ethics board and the attorney general that the party will commence a citizen's action within ten days upon their failure to commence an action, and (c) the ethics board and the attorney general do not bring an action within ten days of receipt of the second notice. RCW 42.52.460.

RCW 42.52.460 (emphasis added).

Neither statutory provision automatically requires the Attorney General to represent a state official at the outset of an ethics proceeding. The Act calls for the Attorney General to represent a state officer only if the Attorney General concludes that the officer acted ethically and within the scope of his or her employment, or in a subsequent action based on alleged acts with respect to which the state officer was exonerated.

Thus, the Act underscores the discretion granted to the Attorney General to decide whether to provide a publicly-funded defense of a state officer in ethics-related proceedings.¹² See Br. of Resp't at 27-35 (Attorney General has discretion to determine whether and when to provide a publicly-funded defense).¹³ If there were no discretion implied in RCW 43.10.030 and .040, those statutes would be inconsistent with the Act, which was expressly intended to "supplement existing laws as may

¹² The discretion the Act affords to the Attorney General is consistent with the discretion afforded in other contexts, including RCW 4.92.060, .070 (state officer is entitled to a defense in action for damages after Attorney General finds that an officer's acts or omissions were "purported to be in good faith" and "within the scope of that person's official duties") and RCW 10.01.150 (state officer is entitled to a defense in criminal action if the Attorney General concludes that the conduct was in accordance with the state agency's policies and the act was performed in the scope of employment).

¹³ The Act also authorizes the Attorney General to bring a civil action seeking damages, civil penalties, and reasonable investigative costs, against a state officer who violates the Act. RCW 42.52.490(1). Again here, the Act is consistent with *Dunbar's* imperative that the Attorney General must not "sit supinely by and allow state officers to violate

relate to the same subject.” RCW 42.52.901. Had RCW 43.10.030 and .040 required the Attorney General automatically to represent a state officer in all actions regardless of the circumstances (as Justice Sanders contends), the Act’s provisions would have been unnecessary because the Attorney General would already have an obligation to defend. *See Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 626, 146 P.3d 914, 926 (2006) (“A court should presume the legislature does not include unnecessary language when it enacts legislation.”).

In this case, the Attorney General’s office responded to Justice Sanders’ request for a taxpayer-funded defense at the inception of the CJC proceedings as follows:

The proper approach is to allow the proceeding before the Judicial Conduct Commission to proceed, and based on the outcome of the proceeding, determine whether reimbursement is justified . . . At the conclusion of that proceeding, we can determine if your conduct was within the scope of employment and fully in conformity with the policies or rules governing judicial conduct.

Supp. CP 72-75. This approach is exactly consistent with the Act, and reflects the limited circumstances in which the Attorney General may defend a state officer facing ethics charges – after exoneration or following a determination by the Attorney General that the officer acted

their duties and be recreant to their trusts, and [must not take the position] that instead of preventing such actions it is his duty to defend the delinquents.” 140 Wash. at 440.

ethically and within the scope of his employment. There simply is no reasonable basis under either the Act or the earlier statutes, RCW 43.10.030 and .040, to require the Attorney General to provide a defense to Justice Sanders, where the Washington Supreme Court has finally determined that he “clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality.” *In re Disciplinary Proceeding Against Sanders*, ___ Wn.2d ___, 145 P.3d 1208, 2006 LEXIS 827 *8 (Oct. 26, 2006).

D. The State’s Position is Consistent with the Act’s Requirement that a Judge in a CJC Proceeding Must Provide His or Her Own Defense.

The Act provides for enforcement by the CJC, under the rules adopted by CJC for state officers and employees of “the judicial branch.” RCW 42.52.370. But the CJC rules do not provide for a taxpayer-funded defense. To the contrary, they state that a judge may be represented by counsel in a CJC proceeding at his or her own expense:

Respondent may retain counsel and have assistance of counsel at his or her own expense.

CJCRP 9.

The rules promulgated by an agency such as the CJC are to be “interpreted as if drafted by the Legislature.” *See State v. Wittenbarger*,

124 Wn.2d 467, 484, 880 P.2d 517, 525 (1994) (“Court rules are interpreted as if drafted by the Legislature.”). To require the State to defend Justice Sanders against ethics charges, particularly when the Washington Supreme Court has affirmed those charges, would undermine the policies of both the Act and the CJC’s rules.

III. CONCLUSION

The Act confirms that Justice Sanders is not entitled to a taxpayer-funded defense for the ethics proceedings against him (nor for his fees and costs in the trial court and this appeal). The Court of Appeals should rule that neither RCW 43.10.030 nor .040 require the State to provide Justice Sanders a publicly-funded defense of the ethics charges against him.

DATED this 14th day of March, 2007.

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