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32520-9-II
SUPREME COURT No. 80393-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HONORABLE RICHARD B. SANDERS,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

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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 Commission on Judicial Conduct (“CJC”) ruled that Justice Richard Sanders violated Canons 1 and 2(A) of the Code of Judicial Conduct by speaking with residents at the Special Commitment Center (“SCC”), including residents who were then litigants in the Washington Supreme Court, and raising a topic that was the precise subject of draft opinions then circulating among the Justices at the Court.¹ The CJC held that Justice Sanders violated Canons 1 and 2(A) of the Code of Judicial Conduct, “impair[ing] the integrity and appearance of impartiality of the judiciary”²

Justice Sanders appealed the CJC decision to the Washington Supreme Court, which upheld it, agreeing that Justice Sanders “created a situation that 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.”³ Justice Sanders then petitioned for a Writ of Certiorari to the United States Supreme Court, arguing (among other things) that Canons 1 and 2(A), the cornerstones of the Code of Judicial

¹ CP 230-233.

² CP 233, II. 5-6.

³ *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 523, 145 P.3d 1208 (2006).

Conduct, were unenforceable because they violated his right of free speech. His Petition was summarily denied.⁴

Since he commenced this action seeking to require Washington's taxpayers to pay for his defense without regard to its success, Justice Sanders has exhausted all avenues of appeal of the CJC rulings. They remain unchanged. Nevertheless, he continues to insist that the state's taxpayers should bear the burden of his defense of the ethics charges, from the initial CJC proceedings in 2003, presumably through the recent denial of his Petition for a Writ of Certiorari, plus all the attorneys' fees he has incurred at every stage of this case.

Such a result is unwarranted by RCW 43.10.030 and .040. Neither of these statutes requires the state's taxpayers to pay for the defense of a judicial officer who has been found by clear, cogent, and convincing evidence to have violated applicable ethics rules. They provide for a public defense only when a judicial officer, or any other state officer or employee, has been sued for acts in his or her "official capacity" – that is, where the officer essentially stands in the shoes of the state – not where a party seeks to impose individual liability on a state official for wrongdoing connected with his or her position.

⁴ *Sanders v. Wash. State Comm'n on Judicial Conduct*, __ U.S. __, 128 S. Ct. 137, 169 L. Ed. 2d 29 (2007) (denying Petition for writ of certiorari).

This conclusion not only comports with the language and legislative history of RCW 43.10.030 and .040, but also is the only reading consistent with related provisions governing defense of state officers and employees in matters involving personal liability. State officers and employees sued individually for damages, or made parties to criminal proceedings, are not automatically entitled to a defense at taxpayer expense. In such circumstances, the Attorney General must find that the subject acts “were, or were purported to be in good faith, within the scope of that person’s official duties” (RCW 4.92.060; .070), or that alleged criminal acts “fully conformed” to the state’s written rules and policies and were within the scope of employment (RCW 10.01.150).

Similarly, state officers and employees also are not automatically entitled to defense at taxpayer expense in proceedings against them under the Ethics in Public Service Act, RCW 42.52 *et seq.* Under RCW 42.52.430(7), the Attorney General is required to defend a state officer in a subsequent proceeding only if an ethics board has found the absence of reasonable cause to believe that an ethics violation has been or is being committed. Notably, the CJC’s procedural rules provide that a “[r]espondent may retain counsel and have assistance of counsel at his or her own expense.” CJCRP 9 (emphasis added). These related provisions illustrate the scope of RCW 43.10.030 and .040, and demonstrate that

Justice Sanders' position is incorrect. The Legislature has not authorized the defense of state officers and employees found to have violated applicable ethics rules.

Justice Sanders' position also is inconsistent with case law from this and other jurisdictions. Justice Sanders has cited to no case where taxpayers were compelled to fund the defense of a judge determined to have violated ethics laws; as shown below, the relevant cases uniformly hold to the contrary.

Finally, Justice Sanders' position is inconsistent with sound public policy. If taxpayers were compelled to fund Justice Sanders' defense, every judge found to have engaged in unethical conduct, regardless of its nature or severity, would be entitled to a defense. Requiring that an official take personal responsibility for violating ethics codes, including payment of defense costs, deters unethical behavior. The public interest would be disserved by foisting that responsibility onto Washington's taxpayers. Neither the Legislature nor the courts ever has countenanced such a result.

II. STATEMENT OF THE CASE

The State incorporates by reference the "Statement of the Case" in its August 13, 2007 Answer to Justice Sanders' Petition for Review, which

summarizes the proceedings below.⁵ The State, however, does wish to correct some of the inaccurate statements that Justice Sanders has made in his prior pleadings concerning the background of this case.

Justice Sanders' repeated invocation of a 1999 decision by Judge Richard D. Hicks in a separate ethics-related proceeding involving Justice Sanders and the State of Washington is incomplete and, as a consequence, misleading. Justice Sanders asserts that Judge Hicks "ruled that the State was obligated to provide Justice Sanders a defense, as well as reimburse him for the fees he incurred"⁶ Judge Hicks required reimbursement, however, only after Justice Sanders had been exonerated of 1999 ethics charges.⁷

Justice Sanders also states that the Attorney General in the case at bar "refused to defend" him in 2004. Consistent with Judge Hicks' ruling in the prior case, however, the Attorney General offered to pay Justice Sanders' defense costs if he were exonerated. The State responded to Justice Sanders' initial request for a defense in this case as follows:

To authorize your defense at this time, and advance legal costs attendant to your defense before the Judicial Conduct Commission, would require us to make an exception to that

⁵ See Resp't State of Wash.'s Answer to Pet. for Review at 3-6.

⁶ Petition for Review at 4.

⁷ See *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998) (after the Supreme Court overturned a CJC ruling in an earlier proceeding, the superior court ruled that Justice Sanders was entitled to reimbursement of defense costs).

long standing policy and interpretation of the statutes that govern use of public funds to defend state officers and employees. 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, as was done previously by . . . Judge Hicks 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.⁸

But at every level in this case – in contrast to the case decided by Judge Hicks – Justice Sanders’ violations of Canons 1 and 2(A) have been affirmed, and thus no reimbursement of defense costs or payment of attorney fees is warranted.

Justice Sanders also asserts that in the Court of Appeals, “the State did not question the Attorney General’s basic obligations under RCW 43.10.030 and .040 as determined by the trial court,” but merely argued “factual questions” about whether Justice Sanders committed misfeasance and was acting in his official capacity.⁹ This too is incorrect. The State argued unequivocally that neither RCW 43.10.030 nor .040 required the State to provide a publicly-funded defense to Justice Sanders.¹⁰ And far from arguing “factual questions” on subjects such as whether a judge’s conduct constitutes misfeasance, the State argued that

⁸ Supp. CP 72-75.

⁹ Petition for Review at 8.

¹⁰ See, e.g., Brief of Resp’t State of Wash. at 1, 17, 18-21, 25-26, 48-49.

the superior court's limitation [*i.e.*, its misfeasance requirement] on defense at taxpayer expense in disciplinary proceedings for violation of ethics codes is too narrow, and the law does not authorize public payment for Justice Sanders' defense in disciplinary proceedings commenced by the CJC unless and until he is exonerated.¹¹

Justice Sanders further asserts that he is automatically entitled to a defense under RCW 43.10.030 and .040 because the trial court and the Court of Appeals ruled that he was acting in his "official capacity."¹² Neither of those tribunals, however, ruled that Justice Sanders was acting in his "official capacity" when he engaged in *ex parte* contacts with SCC residents on an issue then pending before the Washington Supreme Court. Indeed, there can be no official duty that violates the Canons of Judicial Conduct. The Superior Court and Court of Appeals stated only that "Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island," not that he was acting in his "official capacity" in violating the Canons.¹³

¹¹ Br. of Resp't State of Wash. at 38.

¹² Petition for Review at 5-6, 8.

¹³ CP 168 (emphasis added); *see also Sanders v. State*, 139 Wn. App. 200, 206, 159 P.3d 479, 482 (2007) (referring to CJC finding that Justice Sanders "was acting in his official capacity when he visited the SCC"). The CJC made its statement that "[a]ll the misconduct took place in the Justice's official capacity," not with reference to the meaning of "official capacity" under RCW 43.10.030, but in a distinctly different context, and for a distinctly different purpose -- considering mitigating and aggravating factors to determine the appropriate sanction for Justice Sanders' violations of the Code. One such factor was: "Whether misconduct occurred in the Justice's official capacity or his private life." CP 236. The CJC's statement means only that Justice Sanders' acts took place in the context of his status as a Justice, and not simply in his private life.

Justice Sanders even infers that the Washington Supreme Court found no improper *ex parte* contacts, stating that the Court's opinion held that "Justice Sanders did not engage in *ex parte* contact in violation of Canon 3(A)(4). . . ." ¹⁴ The Supreme Court, however, based its affirmance of the violations of Canons 1 and 2(A) on Justice Sanders' *ex parte* contacts with SCC residents, including litigants in the Court, on issues then pending before the Court:

By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of *ex parte* conduct.

In re Disciplinary Proceeding Against Sanders, 159 Wn.2d 517, 519, 145 P.3d 1208 (2006).

Justice Sanders is correct in stating that although the Court of Appeals claimed to "affirm" the trial court's dismissal of his case, his claims had not yet been dismissed. However, the Court of Appeals was authorized to modify the trial court decision, and to take any other action on the merits of the case, including dismissing it. *See* RAP 12.2. The question in this case – Justice Sanders' entitlement to a publicly-funded defense when his ethics violations have been affirmed at every level – is

¹⁴ Petition for Review at 7-8.

one of law. The Court of Appeals decision fully resolved that question and dismissal was appropriate.

III. ARGUMENT

A. **Judicial Officers Who Violate Ethics Codes are Not Entitled to a Taxpayer-Funded Defense under Washington Law**

Justice Sanders argues that under RCW 43.10.030 and .040, he is entitled to a taxpayer-funded defense of ethics charges, despite the fact that the CJC found ethical misconduct, the Washington Supreme Court affirmed, and the United States Supreme Court denied certiorari. Considered alone or in the context of related statutes (as they should be), neither RCW 43.10.030 nor .040 compel a taxpayer-funded defense in such circumstances.

1. Neither RCW 43.10.030 nor .040 require taxpayers to pay for the defense of a judge who has violated the Code of Judicial Conduct.

RCW 43.10.030(3) provides that “[t]he Attorney General shall . . . [d]efend all actions and proceedings against any state officer or employee acting in his or her official capacity.” Disciplinary proceedings against a judge are, by their very nature, not “official capacity” proceedings. A government official’s activities may be office-related or status-related, but nonetheless undertaken in his personal, not “official,” capacity. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d

114 (1985) (official capacity proceeding “generally represents only another way of pleading an action against an entity of which an officer is an agent”; official capacity suits are “in all respects other than name, to be treated as a suit against the entity.”); *see also Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 98, 829 P.2d 746 (1992) (“official capacity” lawsuit is suit against county, with individuals named only as representatives of county).

Violations of ethics codes cannot constitute acts in an officer’s or employee’s “official capacity.” A judge has no authority, much less an official duty, to violate ethics laws. Such acts are affirmatively proscribed by the law. Proceedings to address violations of ethics laws are quintessentially personal. The individual, not the state’s taxpayers, bears personal responsibility for unethical conduct. RCW 43.10.030(3) does not require Washington’s taxpayers to fund Justice Sanders’ defense of ethics proceedings brought against him by the CJC, or to pay his attorney’s fees in this case.

Nor does RCW 43.10.040 grant a state official an independent right to a publicly-funded defense before administrative tribunals. As the Court of Appeals correctly concluded, the purpose of RCW 43.10.040, enacted in 1941, was simply to preclude state agencies from the previous practice of hiring private attorneys. *Sanders v. State*, 139 Wn. App. 200,

206, 159 P.3d 479 (2007) (citing to *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977)). There is no logical reason to conclude that the enactment of RCW 43.10.040 fundamentally altered the availability of a taxpayer-funded defense for state officers and employees in administrative proceedings, extending it far beyond that available in a court proceeding under RCW 43.10.030. Statutes relating to the same subject “are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes.” *In re Kerr*, 134 Wn.2d 328, 337, 949 P.2d 810 (1998) (specific and general statutes on the same subject should be harmonized).

Moreover, in considering a different subsection of RCW 43.10.030, this Court already has rejected the argument that the term “shall” in RCW 43.10.030 connotes a lack of discretion by the Attorney General. RCW 43.10.030(2) provides that the Attorney General “shall . . . institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer.” In *Berge v. Gorton*, 88 Wn.2d 756, 761-62, 567 P.2d. 187 (1977), the Court rejected the argument that this provision required the Attorney General to maintain an action to recover certain funds improperly paid by the State, concluding that the Attorney General’s duty under the statute was to exercise judgment as to whether the litigation was

warranted, and that the Attorney General was not compelled to bring such an action.¹⁵ The same conclusion should apply here, in the defense context.

The CJC, which has constitutional authority to bring disciplinary proceedings against judicial officers, charged Justice Sanders with violating the Code of Judicial Conduct. The CJC and this Court have determined, based on clear, cogent, and convincing evidence, that Justice Sanders violated the Code. As this Court recognized in *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 440, 249 P.2d 996, 999 (1926), RCW 43.10.030 does not require the Attorney General to defend “delinquent” state officers who “violate their duties” and are “recreant to their trusts.” “The law cannot be given any such construction.” *Id.*, 249 P.2d at 999.

The Court of Appeals correctly concluded that the Attorney General had the discretion to decline to provide a defense to Justice Sanders at the expense of Washington’s taxpayers.

¹⁵ The Court of Appeals correctly noted in its analysis of *Berge* that RCW 43.10.030 (2), unlike .030(3), includes the phrase “which may be necessary,” expressly giving the Attorney General discretion in deciding whether to prosecute cases. Regardless, the Court’s analysis in *Berge* is consistent with other statutes, discussed *infra* in the text, under which the State may defend a public official only where such a defense is in the public interest.

2. Other Washington statutes relating to the defense of state officers in matters of personal liability confirm that a taxpayer-funded defense is unavailable to judges violating ethics codes.

Other statutes governing the defense of state officers and employees where personal liability is at issue confirm that Washington law does not compel a taxpayer-funded defense of judges who violate ethics codes. The Legislature has chosen to provide a publicly-funded defense only in certain carefully-prescribed circumstances. In each instance, the Attorney General has the discretion to determine the propriety of providing a taxpayer-funded defense.¹⁶

Thus, when a state official is sued individually for damages arising from acts or omissions while performing or purporting to perform official duties, he or she is entitled to a public defense only if the Attorney General finds that the official acted in "good faith" within the scope of official duties. RCW 4.92.060; .070. When state officials or employees are charged with a crime, a taxpayer-funded defense is available only if the agency and the Attorney General determine that the subject conduct "was fully in conformity with established written rules, policies and guidelines of the state" and "within the scope of employment." RCW

¹⁶ The statutes are consistent with the conclusion reached by this Court in *Dunbar*, 140 Wash. at 440, that where the Attorney General "is cognizant of ... violations of the constitution or the statutes" by state officials, "his duty is to obstruct and not to assist."

10.01.150. Moreover, a state officer or employee alleged to have violated the Ethics in Public Service Act, RCW 42.52 *et seq.*, is entitled to a publicly-funded defense only after the relevant ethics board and the Attorney General have declined to commence such an action, and (in response to a citizen's complaint), the Attorney General finds that the defendant's conduct "complied with this chapter and was within the scope of employment." RCW 42.52.460.

The Court of Appeals correctly noted "significant parallels" in the overall procedures for handling ethics complaints under RCW 42.52 and for disciplinary proceedings initiated by the CJC.¹⁷ The Court of Appeals also correctly concluded that these provisions collectively comprise "the statutory scheme by which the legislature has given effect to article III, section 21 of the state constitution in determining the scope of [the State's] duty to defend," *Sanders*, 139 Wn. App. at 207, 159 P.3d at 482. That statutory scheme does not include a taxpayer-funded defense of judicial officers who have violated applicable ethics codes.

Notably, the CJC, the independent agency of the judicial branch constitutionally charged with responsibilities for the discipline of judges and justices,¹⁸ takes the same approach. A CJC rule expressly provides

¹⁷ *Sanders*, 139 Wn. App. at 211 (citations omitted).

¹⁸ See Const., art. IV, § 31.

that a respondent in disciplinary proceedings before the CJC “may retain counsel and have assistance of counsel at his or her own expense.”

CJCRP 9 (emphasis added); *see also Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (upholding the county prosecutor’s discretion to deny a judge’s request for reimbursement of attorneys fees incurred in defending a proceeding before the CJC).

When RCW 43.10.030 and .040 are considered in the context of related statutes and regulations, as they should be, it is clear that a judge who violates applicable ethics requirements is not entitled to foist onto taxpayers the financial responsibility resulting from his defense of such misconduct.

B. Other Jurisdictions Overwhelmingly Conclude that Public Officers are Not Entitled to a Taxpayer-Funded Defense for Misconduct.

Justice Sanders has cited no case holding that a judge found to have violated ethics rules by clear, cogent, and convincing evidence is entitled to have taxpayers pay for his or her defense. Other jurisdictions addressing the issue have concluded that the public has no obligation to defend judges or other public officers against whom proceedings alleging ethical misconduct are commenced, let alone those found to have engaged in ethical misconduct. *See, e.g., Hart v. County of Sagadahoc*, 609 A.2d 282 (Me. 1992) (judge not entitled to attorneys fees in defending ethics

charges under the Code of Judicial Conduct, even though judge was exonerated); *Board of Chosen Freeholders of the County of Burlington v. Conda*, 396 A.2d 613 (N.J. Super. Ct. Law Div. 1978) (judge not entitled to reimbursement of legal expenses incurred in defending disciplinary proceedings); *Chavez v. City of Tampa*, 560 So.2d 1214 (Fla. Dist. Ct. App. 1990) (Florida indemnification statute did not entitle city official to reimbursement of her attorneys fees in successfully defending charges of unethical conduct); *City of Tualatin v. City-County Ins. Servs. Trust*, 878 P.2d 1139 (Or. Ct. App. 1994) (Oregon indemnification statute regarding public body's obligation to defend tort claims against mayor did not apply to ethics charges, and thus insurer was not obligated to reimburse City); Kimberly J. Winbush, Annotation, *Payment of Attorneys' Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body*, 47 A.L.R. 5th 553, at § 2(a) (1997) (most officials charged with ethics violations have not been reimbursed for their attorneys' fees).

The Illinois Supreme Court summarized the reasoning for denying reimbursement to a public officer for attorneys fees he or she incurs in defending against charges of misconduct. Although involving a criminal proceeding, the court's reasoning applies equally to ethics proceedings:

No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve. To the contrary, holding public officials personally liable for expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law.

Wright v. City of Danville, 675 N.E.2d 110, 117 (Ill. 1996) (citations omitted).

Under the statutes and authorities discussed above, the same rule applies to ethics proceedings in Washington. Judicial officers who have been found to have violated ethics rules are not entitled to a taxpayer-funded defense.

C. Public Policy Supports the Conclusion that a Judge Who Engages in Ethical Misconduct is not Entitled to a Taxpayer-Funded Defense

Public policy considerations also require the Court to affirm the Court of Appeals' conclusion that Justice Sanders is not entitled to a taxpayer-funded defense. If Justice Sanders' position were accepted, judicial officers who engage in the most egregious violations of the Code of Judicial Conduct could foist the financial consequences of their misdeeds onto the public. Such a result would serve no public purpose

and would be wholly at odds with sound public policy.

The public interest is served when public officers and employees, including judges, have a strong incentive to comply with ethical rules. Bearing the financial consequences of one's ethical misconduct is one such incentive. As a New Jersey court explained in denying a judge's claim for reimbursement of his legal expenses in defending a disciplinary proceeding:

No benefit accrued to the public from the defendant's contumacious conduct . . . Government's paramount function is the enforcement of the laws and protection of the public interests. It should not be required to protect those who have been charged with violation of those laws or with conduct prejudicial to those interests.

Board of Chosen Freeholders, 396 A.2d at 619.

No support exists for Justice Sanders' argument that public officials will be deterred from entering public service if they are held personally responsible for the costs attendant to their ethical misconduct. The Ethics in Public Service Act and the CJC rules require that an official bear his or her own defense costs under circumstances like those presented by this case. No dearth of highly-qualified officials in the executive or judicial branches of state government has resulted from these rules.

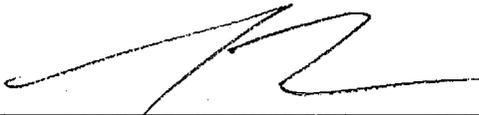
IV. CONCLUSION

Consistent with Washington law, the Attorney General advised Justice Sanders that the State would reimburse his defense costs if he was exonerated of the ethics charges arising from his conduct at the SCC. He was not exonerated; the CJC ruling was affirmed by the Washington Supreme Court, and the United States Supreme Court denied certiorari. The Attorney General's position is consistent with applicable Washington statutes, relevant case law, and public policy. This Court should affirm the Court of Appeals decision.

DATED this 7th day of July, 2008.

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