

66007-1

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No. 66007-1-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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ANDREW APRIKYAN,

Appellant,

v.

MARK EMMERT, PHYLLIS WISE, CHERYL CAMERON, and PAUL RAMSEY,

Respondents.

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REPLY BRIEF OF APPELLANT

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Frederick H. Gautschi, III  
WSBA No. 20489  
George T. Hunter  
WSBA No. 14388  
Connell, Cordova, Hunter & Gautschi, PLLC  
1325 Fourth Avenue, Suite 1500  
Seattle, WA 98101  
(206)583-0050  
Attorneys for Appellant

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## Introduction

Mark Emmert, Phyllis Wise, Cheryl Cameron, and Paul Ramsey (Four University Officers) take issue with Andrew Aprikyan's (Dr. Aprikyan's) contention that they are the University for the purposes of this litigation. That is, according to them, the adjudication that led to the current appeal involved two sets of University of Washington (University) employees: then-Provost Wise, Vice Provost for Academic Personnel Cheryl Cameron (Vice Provost Cameron), and Dean Ramsey on one side, and Dr. Aprikyan on the other. Applicable case law, Washington statutes, University regulations and policies, and the conduct of the Attorney General of Washington (Attorney General) in this case, taken together, and separately, demonstrate otherwise.

## ARGUMENT

**Applicable case law teaches that the “parties” in the dispute now before the Court have always been the University and Dr. Aprikyan.**

The University is an agency of the government of the State of Washington. *Cathcart v. Andersen*, 10 Wn. App. 429, 431, 517 P.2d 980 (1975). Like a corporation, “[a] governmental entity cannot take independent action, but must necessarily act through its agents.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 126, 829 P.2d 746 (1992). The acts of an agent of a governmental entity, when the agent is acting on

behalf of the governmental entity, are acts of the entity itself. *See Broyles v. Thurston County*, 147 Wn. App. 409, 427-431, 195 P.3d 985 (2008) and *DeWater v. State*, 130 Wn.2d 128, 137, 921 P.2d 1059 (1996). Further, suing a governmental agent in his or her official capacity is the same as suing the governmental entity itself. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed.2d 114 (1985). Dr. Aprikyan explained this clear statement of the law in his opening brief.

The Four University Officials argue, as they did before the trial court, that *Kentucky v. Graham* and the other cases to which Dr. Aprikyan cited involved “§1983” claims. Thus, so their argument goes, the principle does not extend to cases under the Washington Administrative Procedure Act (APA). There is nothing, however, in *Graham v. Kentucky* or any of the cases that have followed it as to the principle set forth above that even suggests the principle has no applicability outside the context of §1983 claims. *Carey v. EEOC*, No. C05-5720FDB, 2006 U.S. Dist. LEXIS 49044 (W.D. Wa. June 28, 2006), is but one example of the application of the teaching in *Kentucky v. Graham* in a non-§1983 context. Ms. Carey sued because the EEOC issued a “no cause” finding after she had filed a complaint in which she alleged that her employer had discriminated against her in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.* Among other things, citing to

*Kentucky v. Graham*, the court ruled that her naming of two employees of the EEOC in their official capacities was the same as suing the agency itself. *Id.* at \*1.

In *Martin v. Almeida*, No. CIV S-04-2360 MCE CMK P, 2007 U.S. Dist. LEXIS 15436 (E.D. Cal. February 14, 2007), a plaintiff had sued a department of corrections and officials of the department, the latter in their official and individual capacities, for alleged violations of Title II of the ADA and the Eighth Amendment. The court noted that Title II of the ADA does not authorize relief against persons named in their individual capacities. Accordingly the court dismissed the claims against the officials in those capacities. Citing to *Kentucky v. Graham* for the principle that naming an agency official in his or her official capacity is the same as naming the agency itself, the court dismissed the official capacity claims as redundant. *Id.* at 2-3.

In *Currie v. Maricopa Cty. Comm. Coll. Dist.*, No. CV-07-2093-PHX-FJM, 2008 U.S. Dist. LEXIS 48071 (D. Ariz. June 20, 2008), a former community college student sued the college and an instructor (Mr. Shapiro) at the college for, among other things, alleged violations of Title VI of the Civil Rights Act of 1964 (Title VI) and Title IX of the Education Amendments of 1972 (Title IX). Ms. Currie named Mr. Shapiro in both his official and individual capacities. As in *Martin*, the court noted that

there can be no individual liability under Title VI or Title IX and dismissed Ms. Currie's Title VI and Title IX claims against Mr. Shapiro in his individual capacity. Also as in *Martin*, citing to *Kentucky v. Graham*, the court noted that suing Mr. Shapiro in his official capacity under the two statutes was the same as suing the governmental entity. Accordingly, the court dismissed the official capacity Title VI and Title IX claims against Mr. Shapiro. *Id.* at \*1, \*2, \*6-\*8.

*Kentucky v. Graham* and the cases that cite it for the principle that applies to Dr. Aprikyan's case rest on the fundamental fact that in an official capacity action against a governmental entity, the governmental entity is the real party in interest irrespective of whether the name of the entity itself appears in a caption.<sup>1</sup> *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed.2d 501 (1986), reinforces that reality.

In the fall of 1981, a group of high school students in Williamsport, Pennsylvania formed a club that they named "Petros." They sought permission from school authorities to hold meetings on the premises of the high school during regular school hours on Tuesdays and

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<sup>1</sup> By implication, the Four University Officers argue that CR 10 trumps RCW 34.05.546 and required that the caption of Dr. Aprikyan's petition for judicial review contain the words "University of Washington." Where two statutory provisions apply a specific statute supersedes a general statute. *Kustura v. Dep't of Labor & Indus*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010). Analogously, RCW 34.05.546, which sets forth the required contents of a petition for judicial review, supersedes CR 10.

Thursdays. After deciding that Petros was a club that promoted religion, the principal denied the request. Subsequently, both the superintendent and the board of education (Board) upheld the principal's decision. The students then sued in federal court, claiming that in upholding the principal's decision the Board had violated their First Amendment rights, and they sought declaratory and injunctive relief. Ultimately, the district court granted summary judgment in favor of the students but did not order injunctive relief. The Board decided not to appeal the decision. *Id.* at 536-539.

Regardless, one member (Mr. Youngman) of the Board did pursue an appeal to the U. S. Third Circuit Court of Appeals. The Third Circuit reversed. In 1986, after granting the students' petition for *certiorari*, the U. S. Supreme Court reversed the Court of Appeals on an issue that no one had raised in the proceedings in the two lower courts. *Id.* at 539, 549.

Specifically, Mr. Youngman had brought the appeal in his individual capacity, his official capacity, and his capacity as a parent of a child in the school district. The question that decided the case was whether in those capacities he had standing to pursue the appeal. As to Mr. Youngman's individual capacity, the Court noted that the students did not sue him in that capacity and that the trial court did not order any relief against Mr. Youngman in his individual capacity. Thus, he did not have

standing to pursue an appeal in that capacity. Nor was the Court persuaded that Mr. Youngman had standing in his capacity as a parent. *Id.* at 545, 547.

Most significantly for Dr. Aprikyan's case, the Court noted also that

[a]s a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal. As we held in *Brandon v. Holt, supra*, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.*, at 471-472. We repeated this point in *Kentucky v. Graham*:

"Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon, supra*, at 471-472. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." 473 U.S., at 165-166 (emphasis in original, footnote omitted).

*Id.* at 543-544.

Similar to what presented in *Bender*, from the beginning of the adjudication through the petition for judicial review and this appeal, Dr.

Aprikyan has never sought relief against any of the Four University Officers in their personal capacities. *Bender* teaches that were Dr. Aprikyan to prevail on his appeal, none of the Four University Officers could obtain review at the Washington Supreme Court. Accordingly, taken together, *Kentucky v. Graham* and *Bender* teach that irrespective of whose name appeared on the captions in the petitions for adjudication, the petition for judicial review, and the notice of appeal that is before this Court, the real party in interest on the opposite side of Dr. Aprikyan has always been the University.

**Washington statutes and the University’s own rules and regulations make clear that the Four University Officers have been involved solely in their official capacities in the matter that is now before this Court.**

Pursuant to RCW 28B.20.100 the University’s primary “agent” is its Board of Regents (Regents) which has responsibility for governance of that state agency. Through Article IV, ¶1 of their By-Laws<sup>2</sup> the Regents have delegated the management of the University to a President who functions as the entity’s chief executive officer for the purpose of managing the University. Pursuant to Article IV, ¶2 of the Regents By-Laws, the President has authority to recommend to the Regents

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<sup>2</sup> The By-Laws of the Regents, the Standing Orders of the Regents, Executive Orders of the University’s President, and the University’s Faculty Code are publicly accessible at [www.washington.edu/admin/rules/policies/index.html](http://www.washington.edu/admin/rules/policies/index.html).

appointment of other officers of the University. Among those other officers are the Provost, vice presidents, deans and “other officers as may be necessary for assistance in carrying out efficiently the manifold responsibilities of the chief executive officer of the University.”

Pursuant to Chapter 1 of the Standing Orders of the Regents (SOR), in acting on behalf of that governing body the President has authority to issue executive orders (EOs). Among other things, EO No. 4 provides that “the Provost is responsible for the interpretation and implementation of University policies and procedures on appointment and retention of members of the faculty.” Within the Office of the Provost are several Vice Provosts, i.e., other officers of the University, among which is the Vice Provost for Academic Personnel. Pursuant to EO No. 6, responsibility for the University’s School of Medicine (SOM) is in the hands of another officer of the University: the Chief Executive Officer UW Medicine and Executive Vice President for Medical Affairs and Dean of the [SOM].

In addition to holding administrative positions, the President, the Provost, the Vice Provost for Academic Personnel, and the Dean of the SOM hold faculty appointments. For example, then-Provost Wise holds a faculty appointment as Professor of Physiology and Biophysics, and Obstetrics and Gynecology, in the SOM and Biology in the College of

Arts and Sciences. Vice Provost Cameron holds a faculty appointment as Professor of Dental Health Sciences in the School of Dentistry, and Dean Ramsey holds a faculty appointment as a Professor of Medicine in the Department of Medicine.<sup>3</sup>

The involvement of then-Provost Wise, Vice Provost Cameron, and Dean Ramsey in the adjudication that is at the heart of this appeal derives, however, not from the faculty positions that each of those persons holds. Instead, the jurisdictional statement of Chapter 28 of the Faculty Code (Chapter 28), set forth in §§28.32.A and B, is clear that the system for adjudications pertains solely to disputes between a faculty member and a University official/administrator. The word “employee” appears nowhere in Chapter 28. §§28.32.B.1 and 3 afforded Dr. Aprikyan an opportunity to pursue an adjudication against Cheryl Cameron and Paul Ramsey solely in their capacities as officers of the University, for actions that they took on behalf of the University. Nor did Chapter 28 authorize Phyllis Wise to pursue an adjudication against Dr. Aprikyan in her capacity as a member of the University’s faculty. Instead, pursuant to §28-32.A, in her capacity as the University’s Provost, Phyllis Wise

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<sup>3</sup> The information regarding then-Provost Wise is accessible at <http://www.washington.edu/discover/leadership/president>. Information regarding Vice Provost Cameron is accessible at <http://www.washington.edu/provost/ap/>. Information regarding Dean Ramsey is accessible at <http://uwmedicine.washington.edu/Global/About/Administration/Pages/Paul-Ramsey-Biography.aspx>.

initiated an adjudication against Dr. Aprikyan to adjudicate a charge that he had committed research misconduct. That is, she acted as an officer for the University in pursuing the adjudication against Dr. Aprikyan.

As the court explained in *Cathcart, supra*,

[a] “subagency” is not defined in [Chapter 28B.20 RCW]. The *Restatement (Second) of Agency* § 5 (1958) describes a “subagent” as “a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.”

*Cathcart v. Andersen*, 10 Wn. App. at 431. Accordingly, in managing the University, the University’s president functions as a subagent of the Regents. Similarly, the persons who assist the President in managing the University function as subagents of the University. It follows then that when then-Provost Wise and Dean Ramsey initiated an adjudication against Dr. Aprikyan, they were functioning as subagents of the University. Similarly, Dr. Aprikyan’s petition for adjudication against Cheryl Cameron and Paul Ramsey focused on actions that those two persons took while they were functioning as subagents of the University, i.e., while they were acting for the University. Thus, irrespective of whether those persons carry the designation “agents” or “subagents” the legal effect is the same.

Because a governmental agency necessarily acts through its agents, including its subagents, it follows that when those agents act on behalf of the agency, their acts are the acts of the agency. For this reason, the petition for adjudication that then-Provost Wise and Dean Ramsey filed against Dr. Aprikyan was the petition of the University. Similarly, Dr. Aprikyan's petition against Vice Provost Cameron and Dean Ramsey was against the University.

**Pursuant to state statute and University policies, representation of the Four University Officers by the Attorney General of Washington in the litigation that is before the Court encompasses only the actions of those persons in their capacity as agents of the University.**

Pursuant to Chapter 28 of the Code, i.e., §28-54.B and §28-91, presidential approval is a precondition to any monetary relief that a petitioning faculty member might obtain through a successful adjudication. There is no provision in Chapter 28 that even suggests the availability of monetary relief from the officer(s) whose alleged act(s) formed the basis for a prevailing faculty member's adjudication petition. Pursuant to Chapter 28, i.e., §28-54.B, a hearing panel does have authority, however, to direct the Provost, as an officer of the University, to take appropriate steps to effect equitable relief in the form of, for example, restoring the status and benefits of a prevailing faculty member.

Because Chapter 28 does not permit it, in his petition for adjudication Dr. Aprikyan sought no monetary relief from then-Provost Wise or Dean Ramsey. Instead, he sought monetary and equitable relief from the University. Pursuant to Chapter 28 at the conclusion of an adjudication at the University the President is to take the necessary steps to effect the relief specified. §28-91. Again, the University is not an entity that is capable of acting on its own. Instead, it acts through its agents. Chapter 28 recognizes this reality in the context of directing the President to effect the relief resulting from an adjudication. In Dr. Aprikyan's case, because President Emmert reversed the Hearing Panel, the University in the persons of its officers, i.e., subagents, Provost Wise and Dean Ramsey became the prevailing party. Consequently, in accordance with Chapter 28, President Emmert directed Dean Ramsey in his capacity as dean of the SOM to terminate Dr. Aprikyan's appointment. The resulting termination properly qualifies as an action of the University because, again, a governmental agency acts through its agents.

Consistent with his petition for adjudication, in his petition for judicial review Dr. Aprikyan sought declaratory relief in the form of a reversal of President Emmert's decision that reversed the Hearing Panel's decision. In addition, he sought injunctive relief that would prohibit the

University from terminating his employment for research misconduct. He did not seek monetary damages. CP 14.

RCW 28.10.510 provides that the Attorney General “shall be the legal advisor to the presidents and the boards of regents and trustees of the institutions of higher education and he shall institute and prosecute or defend all suits in behalf of the same.” The Office of the Attorney General of Washington, University Division, maintains a website that is accessible through [www.washington.edu/admin/ago/](http://www.washington.edu/admin/ago/). Consistent with RCW 28B.10.510, information on that website, under the heading “Requests for Legal Services,” makes clear that the assistant attorneys general (AAG) in that office may not represent employees of the University in their personal capacities:

Assistant attorneys general represent the University and are not available for personal consultation.

Under the heading “Lawsuits, Claims, and Actions,” the same website notes,

Where a lawsuit or other legal-type proceeding is brought against a University employee, student or agent that relates to the person's work for or on behalf of the University, the University may defend and indemnify the individual if certain requirements are met.

Pursuant to RCW 28B.20.250,

The [Regents]. . . , subject to such conditions and limitations and to the extent it may prescribe, [are]

authorized to provide by purchase of insurance, by self-insurance, or by any combination of arrangements, indemnification of regents, officers, employees, agents, and students from liability on any action, claim, or proceeding instituted against them arising out of the performance or failure of performance, of duties for or employment with the university, or of responsibilities imposed by approved programs of the university, and to hold such persons harmless from any expenses connected with the defense, settlement, or payment of monetary judgments from such action, claim, or proceeding.

Citing to the provision above for authority, Chapter 5, ¶2 of the SOR specifies, among other things,

the University will provide legal defense, indemnification and protection from any expenses connected with the defense, settlement or payment of monetary damages related to actions, claims or proceedings instituted against persons in the following categories, arising out of the activities specified:

A. Regents, officers, employees and agents while acting within the scope of their duties as such.

The provision above distinguishes between “officers” and “employees” in the context of litigation, just as does RCW 28B.20.250. Chapter 5, ¶8 of the SOR, labeled “Indemnification of University Personnel,” is clear that only in two circumstances may the President or his or her designee agree, on behalf of the University, to indemnify and/or represent an “employee” in his or her personal capacity in a legal matter. There is, however, no authority for the University to provide

representation to any employee who is a defendant in civil lawsuit in his or her personal capacity.

Pursuant to RCW 28B.20.253.1.B the payment of legal expenses, judgments, and settlements arising out of lawsuits against officers of the University for acts or omissions in connection with their performance of responsibilities as officers of the University comes from a self-insurance revolving fund that the University maintains. Again, as RCW 28B.20.250 and Chapter 5, ¶8 of the SOR make clear, no payments from that self-insurance revolving fund may go to pay any expenses associated with civil lawsuits in which a University employee is sued in his or her personal capacity.

Pursuant to RCW 43.10.060 and EO 19, ¶1.B, the Attorney General may appoint special AAGs to provide representation in lawsuits in which an officer of the University is involved. Again, the involvement of the officer must be the result of activities in which he or she engaged within the scope of his or her duties. Chapter 5, ¶2.A., SOR.

In the proceedings before the trial court and now before this Court, AAGs and special AAGs have represented the Four University Officers. Dr. Aprikyan has cited to case law for the proposition that when a plaintiff names an agent of a governmental agency without including the words “in his/her official capacity,” the plaintiff has named the agent in his or her

official capacity. Again, that circumstance is equivalent to naming the agency itself.

Still, as noted above, the Four University Officers insist that Dr. Aprikyan did not name them in their official capacities. It must follow, then, that he named them in their personal, or individual, capacities. Of course, that cannot be true because there is neither statutory nor University policy authority for an AAG or a special AAG to represent the Four University Officers in their personal capacities in a judicial review proceeding or an appeal arising out of such a proceeding.

The heading that then-President Emmert gave to the decision that he signed and issued on March 4, 2010 is partially consistent with that reality: ***FINAL DECISION OF THE UNIVERSITY OF WASHINGTON*** In the Matter of the Appeal of the *decision of the Hearing Panel regarding petitions submitted by Professors Andrew Aprikyan and Phyllis Wise, dated November 5, 2009* (emphasis supplied). CP 153. As then-President Emmert indicated correctly, his decision was the decision of the University. The remainder of the title of his decision is incorrect. The Hearing Panel's decision of November 5, 2009 reads simply "DECISION OF THE HEARING PANEL." CP 64. Further, again as Dr. Aprikyan explained above, Chapter 28 does not confer jurisdiction on a hearing panel to decide a dispute between two University

faculty members in their capacities as faculty members. Consistent with the jurisdictional limitations set forth in Chapter 28, the adjudication pitted a faculty member, Dr. Aprikyan, against three officers of the University in their official capacities. The adjudication did not pit one faculty member against another. CP 64, CP 153.

On April 30, 2010, Louis D. Peterson (Mr. Peterson), Mary E. Crego, and Michael J. Ewart, of the law firm Hillis Clarke Martin & Peterson, P.S., entered a Notice of Appearance (NOA) on behalf of the Four University Officials. The NOA does not indicate that those four attorneys appeared in the capacity as special AAGs. In addition, the same NOA indicates that the Attorney General, in the person of an AAG, William Nicholson (Mr. Nicholson), jointly entered the NOA in the capacity of "Of Counsel" for the Four University Officials. CP 20-21.

As Dr. Aprikyan explained above, pursuant to statutory mandate the Attorney General is charged with responsibility for defending the University and its officers in legal proceedings that derive from actions that those officers take in performance of their duties. Further pursuant to statute the Attorney General may appoint special AAGs to defend University officers in such matters. Also pursuant to statute, however, the Attorney General may not represent University officers in civil legal proceedings against those officers in their personal capacities.

Accordingly, neither may AAGs nor special AAGs represent University officers in those proceedings. Thus, in the person of Mr. Nicholson, the Attorney General's representation as Of Counsel had to have been of the Four University Officers in their official capacities. Similarly, Mr. Peterson, et al., had to have entered the NOA in the capacity of special AAGs. Consequently, irrespective of their nuanced representations to the contrary, Mr. Peterson, et al., and the Attorney General together have represented the Four University Officers in their official capacities from at least April 30, 2010.

**Since the date of Dr. Aprikyan's filing the petition for judicial review the Attorney General has always acted as the attorney of record for the University.**

At pages 5 and 6 of their brief the Four University Officers describe the events of April 16 and April 19, 2010 that involved Mia Karlsson's (Ms. Karlsson) travels to the University for the purpose of serving copies of Dr. Aprikyan's petition for judicial review and a motion for a temporary restraining order (TRO). De-emphasized in this recitation of events is the nature of the interactions of Mr. Nicholson with Dr. Aprikyan's counsel (Mr. Gautschi) on those and other dates preceding the hearing on Dr. Aprikyan's motion for a preliminary injunction. For good reason, conspicuously absent from the recitation is any reference to Mr.

Nicholson's declaration: Mr. Nicholson did not submit a declaration. Regardless, on the morning of April 16, Mr. Nicholson received the first petition for judicial review that Dr. Aprikyan filed. Later in the day Mr. Nicholson received a copy of the re-filed petition for judicial review. Apart from having different case numbers and assigned judges, the two petitions were identical. On that point there is no dispute. Nor is there any dispute that Ms. Karlsson handed a copy of the first petition to Vice Provost Cameron on April 16, 2010. CP 456-CP 457.

Mr. Nicholson phoned Mr. Gautschi at approximately 3:00 p.m. on April 16. In that conversation Mr. Nicholson initiated and continued a negotiation with Mr. Gautschi regarding Dr. Aprikyan's foregoing pursuing a TRO and instead setting a hearing on a motion for a preliminary injunction. In the same conversation, Mr. Gautschi informed Mr. Nicholson that he would be receiving another copy of the petition because in originally electronically filing the petition Ms. Karlsson had checked the wrong box as to the nature of the filing. As a result, the King County Clerk's Office had directed that Dr. Aprikyan re-file the petition. Having received that information, Mr. Nicholson did not end the conversation. Because Dr. Aprikyan's employment was set to end on April 16, before agreeing not to pursue a TRO Mr. Gautschi wanted assurance that the University would not terminate Dr. Aprikyan prior to

any proposed hearing on a motion for a preliminary injunction. “Mr. Nicholson stated that he understood but would need to speak with his clients about the condition that [Mr. Gautschi] articulated.” CP457- 458. That same afternoon Mr. Nicholson received a copy of the re-filed petition for judicial review. On Monday, April 19, 2010, he emailed Mr. Gautschi to indicate that the University would not terminate Dr. Aprikyan’s employment prior to a hearing on a motion for a preliminary injunction. CP 459.

Dr. Aprikyan did not pursue a TRO. Nor did the University terminate his employment until the end of the day on May 21, 2010, the day on which the hearing on his motion for a preliminary injunction occurred. From the outset and throughout the period of negotiations that preceded the May 21 hearing, Mr. Nicholson gave clear indications that he represented the University and that he spoke with his clients to get permission to enter into the agreement described above. Because the University can act only through its agents, he had to have been speaking with some person(s) who had authority to extend Dr. Aprikyan’s employment. The most likely such persons are some combination of then-President Emmert, then-Provost Wise, Vice Provost Cameron, and Dean Ramsey. Consequently, for that and the other reasons set forth above, it must follow that well before April 30, 2010, when Mr. Peterson, et al.,

entered a NOA, the Attorney General behaved as an attorney who is an agent of a defendant and upon whom service of papers is to be made. Consequently, as Dr. Aprikyan explained in his opening brief, *Cheek v. Employment Security Dep't*, 107 Wn. App. 79, 84, 25 P.3d 481 (2001), teaches that as of April 16, 2010, the Attorney General was the attorney of record for the University and, necessarily, the Four University Officers in their official capacities.

Finally, the Four University Officers cite *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 660 P.2d 756 (1983). The question in *Adkinson* was whether the defendants' entry of a notice of appearance insulated the plaintiffs from dismissal of their lawsuit when they had not served the defendants within the 90-day statutorily required time. The court answered the question in the negative. Two weeks after the plaintiffs filed the complaint an insurance adjuster informed the plaintiffs' counsel in writing that the plaintiffs would need to serve out-of-state defendants. In addition, the notice of appearance stated, among other things, that the defendants were not "waiving objections to proper service . . ." *Id.* at 207.

Those salient facts in *Adkison* stand in marked contrast to what Mr. Nicholson's interactions with Dr. Aprikyan's counsel reveal. Specifically, there is no evidence in the record that Mr. Nicholson, at any time during

the negotiations that he initiated and engaged in on a continuing basis on behalf of his “client,” ever suggested the existence of improper service.

**A hyper-technical application of the APA’s service requirements here would serve no legitimate purpose.**

The Four University Officers rely heavily on *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), for the apparently unequivocal proposition that strict compliance with the APA’s service requirements is the law in Washington. As Dr. Aprikyan explained in his opening brief, cases decided subsequent to *Skagit Surveyors* suggest the proposition may be limited to the facts presented in that case. Justification for the limitation finds expression in U.S. Supreme Court “notice” cases.

In *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed.2d 597 (2002), a forfeiture case, and *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed.2d 415 (2006), a tax sale case, the primary issue before the Court was the nature of notice that the due process clause of the Fourteenth Amendment requires prior to a deprivation of property. In both cases, citing to *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the Court adhered to the rule that actual notice is not required. Instead, there must be an attempt reasonably calculated to give notice and an opportunity to a

person who faces a potential deprivation of life, liberty, or property to be heard. That is, in general terms, an affected person must have the opportunity to respond to a lawsuit. *Dusenbery v. United States*, 534 U.S. at 167-169; *Jones v. Flowers*, 547 U.S. at 226.

As we have stated repeatedly, then-Provost Wise, Vice Provost Cameron, and Dean Ramsey have never been at risk of being found personally liable on Dr. Aprikyan's claims. Further, the uncontested facts are clear that those persons had notice of the petition for judicial review as of the day that Dr. Aprikyan filed it. The Attorney General's acts, particularly in the person of Mr. Nicholson, show that those three officers of the University had an opportunity to respond to the petition in a timely fashion. Indeed, they, i.e., the University, responded by having Mr. Nicholson negotiate with Dr. Aprikyan's counsel an agreement pursuant to which Dr. Aprikyan refrained from seeking a TRO. We reiterate, the Four University Officers cannot be personally liable if Dr. Aprikyan prevails on this appeal or on his petition for judicial review before the trial court. Only the University, as a "person" within the definition of that term in RCW 34.05.010(14), can be "personally" liable. Even the Four University Officers concede, albeit reluctantly, that Dr. Aprikyan strictly complied with the APA's requirement that he serve the University by delivering a copy of the petition for judicial review to the office of the President.

**Adjudications at the University always pit the University on one side and a member of its faculty on the other. The cases on which the Four University Officers rely never involve a similar circumstance.**

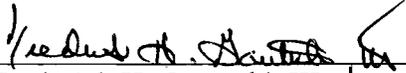
Pursuant to Chapter 41.06 RCW, a state civil service employee, not including, for example, a faculty member at the University, who wishes to contest an agency's decision to terminate his employment, must initiate an appeal of the decision with the state's Personnel Resources Board (PRB). Pursuant to the APA, once the PRB has issued a final decision, the employee's recourse is a petition for judicial review. The ensuing proceeding before a trial court then involves two state agencies and the petitioning employee. Accordingly, it is understandable that the petitioning employee would, pursuant to the APA, have to serve the PRB by delivering a copy of the petition to the office of the head of that agency. Further pursuant to the APA, he would, separately, have to serve the agency that formerly employed him. Despite this reality, the Four University Officers contend that the APA required Dr. Aprikyan to serve the University, i.e., the real party interest in this case, in several ways: by delivering a copy of the petition for judicial review to the office of the President, by serving a copy of that petition on an AAG at the Office of the Attorney General at the University, and by personally serving each of the Four University Officers with a copy of the petition. Nothing in the

APA or any case to which the four University Officers cite requires such “service overkill.”

### **Conclusion**

In his petition for judicial review Dr. Aprikyan named the real party in interest in this case, the University, in the persons of its chief executive officer and three of its other officers. Precisely in the manner that the APA sets forth, Dr. Aprikyan timely served the University with a copy of that petition. Since the day that Dr. Aprikyan served the petition, the University’s statutorily designated attorney has always behaved in a manner consistent with being the University’s attorney of record in this case. Consequently, Dr. Aprikyan reiterates his request that the Court reverse the trial court’s dismissal of his petition for judicial review.

Respectfully submitted this 23<sup>rd</sup> day of February, 2010.

  
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Frederick H. Gautschi, III  
WSBA No. 20489  
George T. Hunter  
WSBA No. 14388  
Attorneys for Andrew Aprikyan

I, Mia Karlsson, certify that on February 23, 2011, I served, by email a copy of Appellant's Reply Brief, to counsels for Respondent, whose address is shown below:

Mary E. Crego  
Hillis Clark Martin & Peterson P.S.  
500 Galland Building  
1221 Second Avenue  
Seattle, Washington 98101-2925

Dated this 23<sup>rd</sup> day of February 2011

  
Mia Karlsson