

66007-1

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No. 66007-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ANDREW APRIKYAN,

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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FILED
APR 11 2007
COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

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ASSIGNMENT OF ERROR

The trial court erred in dismissing Dr. Aprikyan's petition for judicial review on the ground that it did not have appellate jurisdiction over that petition because (a) the caption in the petition did not contain the name of the state agency that issued the decision of which Dr. Aprikyan sought review, and (b) Dr. Aprikyan did not serve the respondents whom he named in the petition.

ISSUES ARISING FROM ASSIGNMENT OF ERROR

1. Does the Washington Administrative Procedure Act (APA), Chapter 34.05 RCW, require that a petition for judicial review contain in the caption the name of the agency whose decision the petitioner seeks to have subjected to judicial review?
2. Pursuant to the APA, upon whom must a petitioner serve a petition for judicial review of an agency decision following an agency adjudication which involved administrators/officials as decision makers for the agency as parties on one side and an employee of the agency as a party on the other side?
3. As to question 2 above, what manner of service does the APA require in order to invoke the appellate jurisdiction of a superior court?

INTRODUCTION

In May 1999, Andrew Aprikyan (Dr. Aprikyan) commenced employment as an Assistant Research Professor in the School of Medicine (SOM) at the University of Washington (University). In May 2003, another faculty member in the SOM alleged that Dr. Aprikyan and a co-investigator of his had committed scientific misconduct. Subsequently, at the instigation of University Vice Provost Cheryl Cameron (Vice Provost Cameron) an investigation into the allegation began. Under applicable federal rules, as set forth in the Code of Federal Regulations, investigations into scientific misconduct must be completed within 120 days of their commencement unless the federal agency, in this case the Office of Research Integrity (ORI) at the National Institutes of Health (NIH), grants an extension. The investigation into the allegation of scientific misconduct against Dr. Aprikyan continued for approximately four years, largely because Vice Provost Cameron requested, and received, from ORI sixteen extensions. Following the investigation the Dean of the SOM concluded that Dr. Aprikyan had committed scientific misconduct. More than two years later, a University Hearing Panel exonerated Dr. Aprikyan. Ultimately, the University's President (President Emmert) reversed the Hearing Panel and ordered that Dr. Aprikyan's employment be terminated. CP

22, l. 22-25; CP 23, l. 6-8, 20-23; CP 24, l. 1-3, 12-19; CP 25, l. 1-2; CP 27, l. 21-25; CP 28, l. 1-3; CP 29, l. 9-11; CP 34, l. 21-23; CP 36, l. 7-14, 17-24; CP 131- CP 132; CP 163. Now, based on alleged procedural infirmities, University officials want to prevent Dr. Aprikyan from availing himself of the judicial system to challenge the termination of his employment.

STATEMENT OF THE CASE

An investigation into alleged scientific misconduct ultimately resulted in the University's decision to terminate Dr. Aprikyan's employment after an adjudication before a University Hearing Panel had exonerated him.

§25-51 of the University's Handbook (Handbook) provides that a faculty member may be discharged during the term of his appointment if he has engaged in conduct that qualifies as "cause" for discharge. The Handbook is accessible at www.washington.edu/faculty/facsenate/handbook/handbook.html.

Among the several causes in §25-51 is "scientific and scholarly misconduct, consisting of intentional misrepresentation of credentials, falsification of data, plagiarism, abuse of confidentiality, or deliberate violation of regulations applicable to research." §25-51.E. If a dean believes that an allegation of scientific misconduct is serious enough to lead to a dismissal, he must follow the procedures in Volume Four, Part

IX, Chapter 1 of the Handbook, titled “Policy for Addressing Allegations of Scientific and Scholarly Misconduct.”

Although Vice Provost Cameron instigated the investigation into the allegation against Dr. Aprikyan, it was Paul Ramsey (Dean Ramsey), the dean of the SOM who, in June 2007, rendered a decision, labeled “Final Decision in OSI #2003-01,” based on three reports that he received from “investigators.” CP 136. In his written decision Dean Ramsey concluded that Dr. Aprikyan committed scientific misconduct. CP 136.

§25-71.E of the Handbook provides that if after an investigation into an allegation of scientific misconduct pursuant to Volume Four, Part IX, Chapter 1,

the dean concludes that further action is warranted, he or she shall deliver to the Provost a written record stating that reasonable cause exists to adjudicate charges of wrongdoing brought against the faculty member, with enough of the underlying facts to inform the Provost of the reasons for this conclusion.

In accordance with Section 25-71.E. Dean Ramsey then forwarded his conclusion “that reasonable cause exists to adjudicate charges of wrongdoing brought against faculty member Andrew Aprikyan[.]” to University Provost Phyllis Wise (Provost Wise). CP 137.

If a dean forwards a conclusion to the Provost that reasonable cause exists to adjudicate charges that a faculty member has violated University rules or regulations, §28-32.A of the Handbook directs the Provost to determine for herself whether such reasonable cause exists. If the Provost comes to that conclusion, the same section directs her to file a petition for adjudication for resolution of the charges against the faculty member.

Pursuant to §§28-32.B.1 and B.3 of the Handbook, a faculty member has the right to an adjudication when a University official/administrator, acting in his or her official capacity on behalf of the University (a) allegedly violates University rules or regulations, and in doing so affects the terms and conditions of the faculty member's employment, or (b) allegedly commits, either through action or inaction, an injustice that adversely affects the terms and conditions of the faculty member's employment.

If the faculty member prevails in the adjudication, it is the University that effects the remedy: there can be no personal liability for the respondent administrators/officials that the petitioning faculty member names in his petition. On July 16, 2007, pursuant to §§ 28-32A. and B of the Handbook, Dr. Aprikyan filed a petition against Dean

Ramsey and Vice Provost Cameron for the actions that they took on behalf of the University in investigating him. CP 136.

In the meantime, after reviewing Dean Ramsey's written decision, Provost Wise concluded that reasonable cause existed to adjudicate charges of a violation of University rules or regulations, in the form of engaging in scientific misconduct, against Dr. Aprikyan. Consequently, on July 18, 2007, Provost Wise, in her capacity as the Provost, joined by Dean Ramsey, filed a petition for adjudication against Dr. Aprikyan for resolution of the charge of scientific misconduct. As relief Provost Wise and Dean Ramsey sought Dr. Aprikyan's dismissal. CP 137.

Over the next fifteen months of a consolidated proceeding, a Hearing Panel of five University faculty members, heard 108 hours of testimony on the claims in the two petitions. CP 27, l. 20-25. In its 70-page decision, dated November 5, 2009, the Hearing Panel ruled that Vice Provost Cameron and Dean Ramsey, acting on behalf of the University, had committed substantive violations of University rules/regulations in connection with the investigation and that the Provost Wise and Dean Ramsey, acting on behalf of the University, had not met their burden of proving by a preponderance of the evidence

presented at the hearing that Dr. Aprikyan had committed scientific misconduct. CP 63, CP 131.

Subsequently, pursuant to §28-51 of the Handbook, Provost Wise, Dean Ramsey, and Vice Provost Cameron appealed the Hearing Panel's decision to the President. On January 22, 2010, President Emmert issued a decision on the appeal in which he ruled that the Final Decision in OSI #2003-0` was the final decision of the University. Thus, according to President Emmert, the exclusive avenue open to Dr. Aprikyan as to that decision of the University involved a petition for judicial review pursuant to Washington's Administrative Procedure Act (APA), Ch. 34.05 RCW. Further, according to President Emmert, the Hearing Panel did not have jurisdiction as to Dr. Aprikyan's petition for adjudication and the hearing on the Wise/Ramsey petition should have dealt solely with the question of what discipline Dr. Aprikyan deserved for having committed scientific misconduct as Dean Ramsey had concluded in June 2007. President Emmert remanded the matter to the Hearing Panel with instructions to (a) assume that the Hearing Panel did not have jurisdiction as to Dr. Aprikyan's petition for adjudication and (b) determine whether Dr. Aprikyan's employment should be terminated. CP 140-142.

On February 10, 2010, the Hearing Panel issued its written response to the remand. In that response the Hearing Panel re-affirmed its November 5, 2009 decision. CP 145. On March 4, 2010, President Emmert issued the “Final Decision of 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*” (Final Decision of the University). In that “final decision,” President Emmert reversed the Decision of the Hearing Panel primarily on the basis that the Hearing Panel did not have jurisdiction to hear Dr. Aprikyan’s petition and that the hearing should have been confined to a determination of whether Dr. Aprikyan’s employment should be terminated given Dean Ramsey’s conclusion of June 2007 that Dr. Aprikyan had committed scientific misconduct. Further, President Emmert directed that Dr. Aprikyan’s employment be terminated. On March 12, 2010, Dr. Aprikyan requested that President Emmert reconsider his March 4, 2010 decision. In an order dated March 23, 2010, President Emmert denied Dr. Aprikyan’s request and directed that his employment be terminated effective April 20, 2010. CP 153; CP 163.

Within the 30-day statute of limitations Dr. Aprikyan served the University, including its chief executive officer and his designees with a petition for judicial review of the decision. Further, the

University's attorney of record behaved in a manner consistent with effective service of the petition for judicial review.

On Friday, April 16, 2010, Dr. Aprikyan twice filed a petition for judicial review of the March 4, 2010 Final Decision of the University. The contents of the petition conformed precisely to the requirements set forth in RCW 34.05.546, and were exactly the same in both filings. A clerical error necessitated, however, the second filing. Specifically, on the morning of April 16, 2010, Mia Karlsson (Ms. Karlsson), the legal assistant to Dr. Aprikyan's counsel, e-filed the petition in King County Superior Court and in doing so completed a required online form by checking a box that served to identify the nature of the matter that the filing involved. Because the form did not specifically list a "petition for judicial review," she checked what, in fact, was the box for a review of a denial of a license application at the Department of Licensing. Later that morning, Dr. Aprikyan's counsel reviewed the filed documents and noticed the error. By that time, Ms. Karlsson had already driven to the Seattle campus of the University for the purpose of serving copies of the petition, an accompanying case schedule, a motion for a temporary restraining order (TRO), and documents associated with the TRO upon the Attorney General, President Emmert, Provost Wise, Vice Provost Cameron, and Dean

Ramsey. CP 1-15; CP 446, I. 21-25; CP 447, I. 1-25; CP 448, I. 1-25;
CP 451, 1-14.

After arriving at the University, Ms. Karlsson stopped first at the office of the Attorney General, University of Washington Division. There, after some delay, an Assistant Attorney General accepted service of the documents. Ms. Karlsson then proceeded to the third floor of Gerberding Hall, which housed the offices of President Emmert, Provost Wise, and Vice Provost Cameron. Upon her arrival Ms. Karlsson announced to a receptionist that she had documents to serve on those three University officials/administrators. She learned that President Emmert and Provost Wise were not available. The receptionist stated to Ms. Karlsson, however, that she could accept the documents for President Emmert and see that they got to him. Ms. Karlsson then left the documents, which were in a sealed envelope, with the receptionist. After receiving directions, Ms. Karlsson then proceeded down a hallway to speak with the receptionist for Provost Wise. As before, she stated to the receptionist that she had documents to serve on Provost Wise. The receptionist stated that Provost Wise was not available, but that she could accept the documents for her. Ms. Karlsson then gave the documents, which were in a sealed envelope, to the receptionist and

proceeded to what she had learned was the office of Vice Provost Cameron. CP 448, l. 9-25; CP 449, l. 1-25.

After arriving outside that office, Ms. Karlsson spoke with a woman whom she took to be the receptionist for Vice Provost Cameron. Ms. Karlsson explained to the receptionist that she had documents to serve on Vice Provost Cameron. The receptionist stated that Vice Provost Cameron was not available, but that she could accept the documents for her. During the brief conversation with the receptionist Ms. Karlsson noticed several women nearby who were chatting with one another. Suspecting that one of those persons might be Vice Provost Cameron, Ms. Karlsson did not leave the documents with the receptionist. Instead, she went up to the woman, who, indeed, identified herself as Vice Provost Cameron and asked whether she could help Ms. Karlsson. Ms. Karlsson explained that she had documents to serve on Vice Provost Cameron. Subsequently, Vice Provost Cameron accepted the documents that were in a sealed envelope and which included, among other things, a copy of the petition for judicial review. CP 450, l. 1-10.

Ms. Karlsson then left Gerberding Hall and proceeded to the office of Dean Ramsey at the SOM. Upon arriving at what appeared to be a reception area, Ms. Karlsson noticed two women who were

working there. One of the women asked whether she could help Ms. Karlsson. Ms. Karlsson replied that she had documents to serve on Dean Ramsey, but that she was unsure whether she was at the right office. The woman assured Ms. Karlsson that she was at Dean Ramsey's office and stated that she could accept the documents for him. CP 450, l. 12-24.

After completing her "service" trip to the University, Ms. Karlsson spoke with Dr. Aprikyan's counsel, Frederick Gautschi (Mr. Gautschi), who informed her of the clerical error in that morning's e-filing. She then contacted the Superior Court Clerk's Office for instructions regarding correcting the error. She learned that the first step called for dismissing the petition and re-filing. During the afternoon of April 16, 2010, Ms. Karlsson followed the instructions and after dismissing electronically, re-filed the exact same petition for judicial review that she had filed earlier in the morning and checked the proper box on the online form to indicate the nature of the matter addressed in the petition. Subsequently, she prepared copies of the petition, the accompanying case schedule, and the TRO materials, all of which contained the new case number, for serving, that afternoon, on the Attorney General at the University, President Emmert, Provost Wise, Vice Provost Cameron, and Dean Ramsey. CP 451, l. 1-25.

At approximately 3:00 p.m., on Friday, April 16, 2010, before Ms. Karlsson had finished preparing the documents for serving, Mr. Gautschi received a phone call from Bill Nicholson (Mr. Nicholson), an Assistant Attorney General of the Office of the Attorney General, University of Washington Division. In that phone call, Mr. Nicholson represented to Mr. Gautschi that he had a copy of the petition for judicial review and the TRO documents. Mr. Gautschi mentioned the clerical error and stated that Mr. Nicholson would be receiving a re-filed petition later that day. Mr. Nicholson stated that he noticed the case was identified as an appeal from a DOL decision. Regardless, Mr. Nicholson then asked whether Mr. Gautschi would be willing to forego attempting to obtain a TRO and to set a mutually agreed date for a hearing on a motion for a preliminary injunction. Mr. Gautschi stated that his primary aim was to prevent the University from terminating Dr. Aprikyan's employment on April 20, 2010. Mr. Nicholson stated that he would have to speak to his client about the matter, but he believed that they would agree to the condition that Mr. Gautschi articulated. The phone conversation ended with Mr. Nicholson's assurance that he would communicate again with Mr. Gautschi about the matter on Monday, April 19, 2010. CP 1-25; CP 458, l. 1-4.

Having reason to believe, based on his conversation with him, that Mr. Nicholson represented the University and its administrators President Emmert, Provost Wise, Vice Provost Cameron, and Dean Ramsey (University Administrators/Officials), Mr. Gautschi instructed Ms. Karlsson to serve copies of the re-filed petition, accompanying case schedule, and the TRO documents with the new case number on the Attorney General at the University. Further, he instructed Ms. Karlsson to serve copies of the re-filed petition and accompanying case schedule on the University Administrators/Officials. Ms. Karlsson then proceeded by car to the Seattle campus of the University. Because she arrived there late in the work day, she was able to visit only the office of the Attorney General, where she did serve the documents. She phoned Mr. Gautschi to explain that it was too late in the day for her to serve the University Administrators/Officials. Mr. Gautschi replied that he needed to have her serve them on the morning of Monday, April 19, 2010, on her way into work. CP 451, l. 15-25; CP 458, l. 3-25; CP 459, 1-2.

On the morning of Monday, April 19, 2010, Ms. Karlsson again drove to the Seattle campus of the University. When she entered the reception area on the third floor of Gerberding Hall, she encountered immediate resistance to her efforts to serve the documents on President

Emmert, Provost Wise, and Vice Provost Cameron. Among other things the receptionist told Ms. Karlsson that she could not serve the documents but was to go to the office of the Attorney General. After an animated conversation deriving from Ms. Karlsson's insistence that she needed to serve the three administrators, the resisting receptionist relented and stated that she could accept the documents for those three persons. Ms. Karlsson then gave the documents to the receptionist and proceeded to Dean Ramsey's office where she encountered no resistance. Instead, as occurred on Friday, April 16, 2010, the receptionist in Dean Ramsey's office stated that she could accept the documents for Dean Ramsey and see that he got them. Ms. Karlsson handed the documents to the receptionist and then left the building. CP 452, l. 1-25, CP 453, l. 1-25.

At approximately 3:30 p.m., Monday, April 19, 2010, Mr. Nicholson sent an email to Mr. Gautschi that set out the details of an agreement the two attorneys had reached regarding the TRO/preliminary injunction matter. Among other things, Mr. Nicholson represented that his client, the University, would refrain from terminating Dr. Aprikyan's employment pending the outcome of a hearing on a motion for a preliminary injunction. CP 459, l. 9-18; CP 466.

This appeal resulted from the trial court's dismissal of the petition for judicial review.

For a variety of reasons, that hearing occurred, ultimately, on Friday, May 21, 2010. At no time prior to May 11, 2010, when Respondents served their brief in opposition to Dr. Aprikyan's motion for a preliminary injunction, did Mr. Nicholson ever suggest to Mr. Gautschi the existence of a "service" issue. CP 360; CP 365-366; CP 459, l. 19-25, 460, l. 1-2. On May 21, 2010, the Court denied Dr. Aprikyan's motion for a preliminary injunction and the University ended his employment effective 5:00 p.m. that day.

On June 23, 2010, the University Administrators/Officials filed a motion to dismiss Dr. Aprikyan's petition for judicial review. In support of the motion the University Administrators/Officials advanced two arguments: Dr. Aprikyan failed to name the University in the petition. Second, the Court lacked subject matter jurisdiction because Dr. Aprikyan did not properly serve the University Administrators/Officials that he did name. CP 386; CP 388-392.

On August 10, 2010, the Court heard oral argument and ruled from the bench

As I've already indicated for the record, all of the material that I've received. And I'm granting the motion to dismiss for failure to serve the parties that were named of record and also failure to name the agency.

I think the Muckleshoot tribe case and the Cheek case control. The Court did not gain its appellate jurisdiction in this case because they were not properly served.

R.P. at 15, l. 12-19. This appeal followed. CP 479-CP 481.

ARGUMENT

Standard of Review

At the heart of this appeal is the meaning of the APA's provisions governing (a) the required contents of a petition for judicial review of a decision of a state agency and (b) the service requirements that attach to such a petition. An appellate court subjects the meaning of a statute to de novo review. *Sprint Spectrum v. Dep't of Revenue*, 156 Wn. App. 949, 953, 235 P.3d 849 (2010).

Dr. Aprikyan's petition for judicial review strictly complied with the requirements in RCW 34.05.546. Accordingly, there was no need for the petition to include the words "University of Washington" in the caption.

RCW 34.05.546 is clear as to the contents of a petition for judicial review:

A petition for review must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the agency whose action is at issue;
- (4) Identification of the agency action at issue,

together with a duplicate copy, summary, or brief description of the agency action;

(5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

(7) The petitioner's reasons for believing that relief should be granted; and

(8) A request for relief, specifying the type and extent of relief requested.

RCW 34.05.546 is silent as to what the caption must contain. It is far from unusual for the caption in a petition for judicial review not to contain the name of the agency whose decision the petitioner seeks review. For example, in *Sprint Spectrum, supra*, the agency decision at issue emanated from Washington's Board of Tax Appeals (Board). Sprint Spectrum sought review of that agency's decision which upheld, on an appeal before it, a tax assessment issued by the Department of Revenue, the named respondent in the petition. Sprint Spectrum and the Department of Revenue were the parties to the proceeding before the Board. Consistent with the requirements of RCW 34.05.546, in its petition for judicial review Sprint Spectrum named itself the petitioner and the Department of Revenue the respondent. RCW 34.05.542 directs a petitioner to, among other things, serve a copy of the petition on the

agency whose decision is at issue. Sprint Spectrum did not serve the Board. Accordingly, the trial court dismissed the petition.

In affirming the dismissal the Court of Appeals, at 956-957, looked to *Banner Realty, Inc. v. Department of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987), where the court explained the purpose behind the service requirement as to the agency whose decision is at issue:

Both parties acknowledge that one of the principal objectives of RCW 34.04.130(2) and its 30-day service requirement is to assure that judicial review is promptly sought and accomplished. Service on the agency rendering the final decision in question is a prerequisite to and triggers transmittal of the administrative record to the court. RCW 34.04.130(4). In turn, RCW 34.04.130(5) largely confines judicial review to the record before the administrative agency. Service on the agency, therefore, is vital to the timely functioning of the review process. Without such service, there is no record before the superior court and thus, no basis for review.

Pursuant to RCW 34.05.542(4)

[s]ervice of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency.

There is no question that Dr. Aprikyan satisfied the requirement above: On October 16, 2010, and October 19, 2010, Ms. Karlsson hand-delivered a copy of the petition for judicial

review to the office of President Emmert, the chief administrative officer of the University. At that office, a person who represented herself as having authority to accept the copy, did receive it from Ms. Karlsson. The University Administrators/Officials have never suggested otherwise. Thus, by serving the University with a copy of the petition in accordance with RCW 34.05.542(4) Dr. Aprikyan satisfied the purpose of that section as *Sprint Spectrum and Banner Realty* teach.

In a circumstance analogous to the facts underlying Dr. Aprikyan's appeal, a petitioner in an appeal of a land use decision failed to name a necessary party in the caption of the petition. Regardless, the petitioner properly served the party whose name did not appear in the petition's caption. The trial court reasoned that the omission deprived it of appellate jurisdiction. The Court of Appeals disagreed. Particularly noteworthy is reasoning that informed the disagreement. For example, the Court of Appeals noted that the statute which specified the required contents of a petition for review of a land use decision did not mention what the caption had to contain. Further, the Court of Appeals explained that the petition conformed to the requirements laid out in the statute. Compliance with that statute was necessary to invoke the trial court's appellate

jurisdiction. Thus, because the petition did comply with the statute the trial court improperly dismissed the petition. *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 267-272, 108 P.3d 805 (2005).

Here, the trial court accepted the University Administrators'/Officials' contention that the omission of the words "University of Washington" from the caption in the petition deprived the court of appellate jurisdiction. Numerous reported cases involving actions brought against administrative agencies reveal that the party seeking redress for an adverse agency decision names an agent of the agency, as opposed to the agency itself, in the caption. Typically, doing so is no different from naming the agency.

Naming a state agency in the caption in a lawsuit is no different from bringing suit against the state itself. This issue arose in *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986), where the caption in the complaint named Harborview Medical Center in a "§1983" action. The Washington Supreme Court explained that

[t]he trial court found, based upon uncontroverted evidence, that Harborview is operated and managed by the University of Washington and all of its employees are employees of the University. *See also* RCW 36.62.290. Because the University of Washington is a state agency, Harborview, as operated and managed by the University, is an arm of the State. Its employees are state employees

and claims against the University's operation at Harborview are paid from a fund held by the State Treasurer. *See* RCW 28B.20.253. . .

Id. at 310.

As to the effect of naming an official of a state agency, other case law in the context of, “§1983” litigation is instructive on this point. For example, in *Monell v. Dep’t of Soc. Serv’s*, 436 U.S. 658, 691, n. 55, 98 S. Ct. 2018, 56 L. Ed.2d 611, 87 L. Ed.2d 114 (1978), the U. S. Supreme Court noted that an “official capacity” lawsuit is simply “another way of pleading an action against the agency of which the officer is an agent.” That is, when a person is named, in his or her capacity as an agency official, the action is against the agency and not the official. *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983), exemplifies this reality.

A Washington statute required George Rains to file a report, with the state’s Public Disclosure Commission (PDC) regarding expenditures that he had incurred in placing newspaper advertisements regarding certain ballot measures. Because he failed to file the required report, the PDC took legal action to enforce the statute. He countered by suing, in federal court, members of the PDC for efforts to enforce the statute. He alleged that in seeking to enforce the statute the defendants had committed several violations of the U.S. Constitution. Ultimately,

the court entered judgment for the defendants in the federal action.

Undaunted, Mr. Rains filed suit in state court against the PDC for the same alleged constitutional violations. He argued that the doctrine of res judicata did not apply because, among other things, the defendant in the state action was not the same as the defendants in the federal action. In affirming the trial court's entry of summary judgment in favor of the PDC, the Court of Appeals explained

The parties, although somewhat differently named on the complaints, were "qualitatively" the same. A suit against members of the PDC is in effect a suit against the State. As the federal district court held, there were no violations of plaintiff's rights "by the state's action". "Identity of parties is not a mere matter of form, but of substance. . . . [P]arties nominally different may be, in legal effect, the same." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 84 L. Ed. 1263, 60 S. Ct. 907 (1940) (quoting *Chicago, R.I. & Pac. Ry. v. Schendel*, 270 U.S. 611, 620, 70 L. Ed. 757, 46 S. Ct. 420, 53 A.L.R. 1265 (1926)). See *Edelman v. Jordan*, 415 U.S. 651, 664-65, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (lawsuit against officials administering Aid to the Aged, Blind, and Disabled programs was in fact an action against the state). (citation omitted).

Id. at 664-665.

Because Dr. Aprikyan named the University Administrators/Officials in their official capacities, he complied with the APA's service requirements.

In the last of the cases cited above, *Edelman v. Jordan*, 415 U.S. 651, 664-65, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), the caption

contained, following Mr. Edelman's name, the designation "Director, Department of Public Aid of Illinois." Thus, from those words it was clear that the lawsuit targeted Mr. Edelman in his official capacity as the head of a state agency. John Jordan, the representative of the plaintiff class in the lawsuit, sought declarative and injunctive relief against Mr. Edelman and another former director of the state's Department of Public Aid for their alleged administering of funds for aid to aged and blind persons in manner that was inconsistent with federal regulations and several provisions in the U.S. Constitution. After noting that naming the agency director was the same as naming the agency itself, and by extension, the state itself, the U.S. Supreme Court explained

[b]ut the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman. Addressing himself to a similar situation in *Rothstein v. Wyman*, 467 F.2d 226 (CA2 1972), cert. denied, 411 U.S. 921 (1973), Judge McGowan observed for the court (footnote omitted):

"It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .

"It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs

he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the *Eleventh Amendment* if that basic constitutional provision is to be conceived of as having any present force." 467 F.2d, at 236-237 (footnotes omitted).

Id. at 653, 664-665. The cases above teach that an official capacity action against an agency official constitutes an action against the state because it is the state that will have to provide the relief if the plaintiff prevails in the litigation.

Whether a lawsuit against an official of a state agency qualifies as an official capacity action might not be obvious in all cases. In *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985), the U. S. Supreme Court sought to clarify the difference between "personal-, or individual-, capacity" and "official-capacity" lawsuits. Citing to the footnote in *Monell*, set forth above, the Court stated that

[a]s 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. (citation omitted). It is *not* a suit against the official personally, for the real party in interest is the entity.

Kentucky v. Graham, 473 U.S. at 165.

In *Carey v. EEOC*, No. C05-5720FDB, 2006 U.S. Dist. LEXIS 44094 (W.D. Wa. June 28, 2006), in addition to the agency itself, Ms.

Carey named as defendants two employees of the agency. The lawsuit arose in response to the agency's issuance of a no cause finding on Ms. Carey's complaint that her employer had discriminated against her in violation of the Americans with Disabilities Act. The caption on the case did not specify the titles of the two employees. Further, it was silent as to whether Ms. Carey was suing those persons in their official as opposed to personal capacities. Regardless, citing to *Kentucky v. Graham, supra*, the court was clear that

[a] lawsuit against an agency employee acting in his or her official capacity is actually a suit against the agency itself.

Id. at *1.

Similarly, other case law applying the teaching of *Kentucky v. Graham* makes clear that the absence from the caption of words analogous to those that indicate a party's title does not transform the petition into a "personal capacity" matter. Specifically, in *Miller v. Smith*, 220 F.3d 491,494 (7th Cir. 2000), the Court explained that to determine whether the action is one of official capacity as opposed to personal, or individual capacity, one needs to examine the complaint. In *Mktg. Info. Masters, Inc. v. Bd. of Trustees of Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1095 (S.D. Ca. 2008), a trademark action, the court explained that "[t]he deciding factor for ascertaining whether a suit is an

official capacity suit or an individual capacity suit is not how the suit is labeled by the plaintiff, but rather the nature of the suit.” Another factor to consider is the relief requested. *Moore v. Cuttre*, No. 09-2284 (RBK/JS), 2010 U.S. Dist. LEXIS 62390, at *6-*7 (D.N.J. June 23, 2010). Further, one may look to whether anything in the complaint indicates the potential for individual liability. *Moore v. City of Harriman*, 272 F.3d 769, 772 n1 (6th Cir. 2001).

The uncontroverted facts in the record before this court make clear that the real parties in interest have always been Dr. Aprikyan and the University. The earliest indication of the University’s stance on the matter finds expression in President Emmert’s decision of March 4, 2010. As noted above, in that decision President Emmert referred to Dean Ramsey’s decision of June 2007, as the “final decision of the University,” as opposed to the “final decision of Paul Ramsey.” Further, the first six words in President Emmert’s March 4, 2010 decision read, “Final Decision of the University of Washington,” not “Final Decision of Mark Emmert.” Also, §12-11.A of the Handbook makes clear that in fulfilling the duties of the office the University’s President functions as the head of the state agency that is the University, much as Mr. Edelman functioned as the director of the Public Aid Department of Illinois:

The President of the University shall be the chief executive officer of the University and shall be responsible directly to the Board [of Regents] for the management and conduct of all the affairs of the University except those which by law, these By-laws, the Standing Orders, or other orders of the Board are the specific responsibility of other persons or bodies.

Finally, pursuant to §12-11.B of the Handbook, the President may delegate some of his authority as chief executive to other persons at the University:

The President of the University is authorized and encouraged to recommend for appointment by the Board such number of 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. All such officers of the University shall be under the general supervision of and shall exercise such powers and duties as may be prescribed by the President of the University.

Pursuant to §12-12.C of the Handbook,

[t]he President of the University or the President's designee is authorized to act for the Board of Regents regarding all personnel and employment matters concerning the faculty [with exceptions that do not apply to, for example, alleged research misconduct].

The designees referenced above include, for example, the Provost, the Vice Provost for Academic Personnel and the Dean of the SOM. Thus, when Dean Ramsey issued his “final decision” he was acting on behalf of the University as the designee of the President.

Similarly, when Provost Wise filed a petition for adjudication to resolve

a charge of wrongdoing against Dr. Aprikyan, she was acting on behalf of the University as the designee of the President. Further, consistent with the dictates of §§28-32.B.1 and B.3 of the Handbook, when Dr. Aprikyan filed his petition for adjudication against Dean Ramsey and Vice Provost Cameron, he sought relief from the University for actions taken by those two designees of the President in conducting the investigation into the alleged research misconduct.

The adjudication system at the University does not fit into the framework that attends a typical adjudication governed by the APA. For example, in *Sprint Spectrum*, one agency conducted an adjudication in which another agency was a party. In contrast, adjudications at the University always pit the University, in the form of one or more of the President's designees against a faculty member. The final authority in the adjudication is the University's chief executive officer, i.e., the designee of the Board of Trustees. Thus, the University is always both a real party in interest in an adjudication involving a faculty member and the final authority as to the adjudication.

Further, an examination of Dr. Aprikyan's petition for judicial review reveals that the contents of the document support a conclusion that he named the University Administrators/Officials in their official capacities. The caption on the petition does not contain the words "in

her/his official capacity.” Nor do titles appear in the caption. Yet, application of the teachings of *Kentucky v. Graham, et al.*, above demonstrates that the absence of those words is of no consequence.

For example, in the petition Dr. Aprikyan states that he seeks two forms of relief: reversal of President Emmert’s order, i.e., the “final decision of the University,” that reversed the decision of a University Hearing Panel that decided two petitions for adjudication in which Phyllis Wise, Cheryl Cameron, and Paul Ramsey were parties in their official capacities, and an injunction preventing the University from terminating Dr. Aprikyan’s employment for allegedly having committed scientific misconduct, as alleged in 2003. Nothing in the petition for judicial review or in the original petitions for adjudication suggested that any of the Respondents could be individually, i.e. personally, liable if Dr. Aprikyan were to prevail in the adjudication or in the hearing on his petition for judicial review. §28-54.B of the Handbook details the relief that a hearing panel may award to a prevailing party in an adjudication:

In the written decision, the Panel shall set forth its findings with respect to each of the material grounds or issues raised and to the relief requested by the parties and state its conclusions regarding those issues. It shall also state specifically any action necessitated by the decision and identify the specific relief to be provided, including but not limited to suspension or dismissal, reprimand or

warning, restoration or award of privileges, benefits or status, a cease and desist order, an order that a certain party receive counseling or other medical treatment, and including direction to the Provost or other appropriate party to take such steps as may be necessary to carry out the decision. The Panel shall have the authority to recommend the award of compensation for economic relief to a party . . . where such party has made a timely request in his or her pleadings for such relief and has proven the right to the relief during the course of the proceedings. . . .

Thus, if, for example, the Provost, as the President's designee, prevails in an adjudication regarding alleged scientific misconduct, a hearing panel may direct that the Provost take appropriate steps to terminate the offending faculty member's employment. As explained above, the Provost would have authority to do so on behalf of the University as the designee of the President.

In contrast, if the faculty member prevails, the hearing panel may *recommend* an award of compensation for economic relief. Pursuant to §28-91 of the Handbook the President has discretion whether to accept the recommendation. If the President does accept the recommendation, nothing in the Handbook remotely suggests that the administrator(s)/official(s) named in the adjudication petition will have to pay the compensation. Again, as explained above, administrators/officials can be parties to an adjudication only as the result of actions they take or fail to take on behalf of the University. If a

prevailing faculty member receives economic compensation, it will be the University, i.e., the state that pays the compensation. Or, to paraphrase the U.S. Supreme Court in *Edelman, supra*, the economic relief will not be paid out of the pockets of the administrators/officials whom the faculty member named in the petition for adjudication.

Finally, consistent with the petitions for adjudication, in his petition for judicial review Dr. Aprikyan identify the respondents as President Emmert, Provost Wise, Vice Provost Cameron, and Dean Ramsey. For this and the other reasons set forth above, *Kentucky v. Graham, et al., supra*, teach that the University Administrators/Officials are named in their official capacities. Accordingly, the petition for judicial review is an official capacity action: The University is the real party in interest.

Dr. Aprikyan served the University in the manner that RCW 34.05.542 directs.

Because the University is the real party in interest in the petition for judicial review, compliance with the service requirements of the APA finds expression in the first sentence in RCW 34.05.542(4):

Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency.

There is no dispute that on July 19, 2010, President Emmert was the chief administrative officer of the University. Nor is there any dispute that on July 19, 2010, Ms. Karlsson delivered a copy of the petition for judicial review to President Emmert's office. Thus, Dr. Aprikyan effected service on the real party interest in accordance with the dictates of RCW 34.05.542(4). Accordingly, service on the University Administrators/Officials was not necessary.

Even if service on President Emmert, Provost Wise, Vice Provost Cameron, and Dean Ramsey was necessary, Dr. Aprikyan complied with the APA's service requirements as to those persons.

To begin, RCW 28B.010.510 provides that

[t]he attorney general of the state 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.

RCW 34.05.542(6) provides that

[f]or purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

In *Cheek v. Employment Security Dep't*, 107 Wn. App. 79, 84, 25 P.3d 481 (2001), the Court noted that the Washington Legislature did not define the term "attorney of record" as it appears in RCW 34.05.542(6). In order to ascertain a meaning for the term, the Court looked to Black's Law Dictionary:

Attorney whose name must appear somewhere in permanent records or files of case, or on the pleadings or some instrument filed in the case, or on appearance docket. *Person whom the client has named as his agent upon whom service of papers may be made* [emphasis added].

An attorney who has filed a notice of appearance . . . and who hence is formally mentioned in court records as the official attorney of the party.

BLACK'S LAW DICTIONARY 129 (6th ed. 1990)
(citation omitted).

Id. Pursuant to RCW 28B.010.510, the Attorney General is the agent for the University upon whom service of papers must be made. Consequently, under the definition to which the court in *Cheek* subscribed, the Attorney General is the attorney of record for the University. Further, when the University's President or any of his or her designees acts on behalf of the University, it is the University which has acted. Accordingly, any legal action that challenges the act of the University requires service of papers on the Attorney General. There is no dispute that Dr. Aprikyan served the Attorney General, University of Washington Division, with a copy of the petition for judicial review. Thus, in doing so, Dr. Aprikyan complied with the APA's service requirements because any lawsuit initiated against the University must be served on the Attorney General.

Regardless, in an abundance of caution, as explained above, Mr. Gautschi had Ms. Karlsson attempt to serve the University Administrators/Officials personally on July 16, 2010 and July 19, 2010. Before the trial court the University Administrators/Officials argued that service on them was not proper because it did not comply strictly with the APA. The apparent operative language in that statute appears in RCW 34.05.010(19):

“Service,” except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

As noted above, service on the University is one of the instances in which Chapter 34.05 RCW does “provide otherwise.” Thus, in advancing the argument that service on them was improper, the University Administrators/Officials implicitly contend that Dr. Aprikyan named them in their personal, as opposed to official capacities. At the same, time, they noted that Dr. Aprikyan’s petition for judicial review sought as relief an order directing the University to reinstate him as a faculty member. That is, according to the argument, only the University and not the named University

Administrators/Officials could reinstate Dr. Aprikyan. That argument is altogether at odds with reality. As explained above, the University acts through its chief executive officer, i.e., its President, and his or her designees, including, for example, the Provost, the Vice Provost for Academic Personnel, and the Dean of the SOM. If Dr. Aprikyan were to be reinstated, it would be at least one of those persons who, acting on behalf of the University, would effect the reinstatement.

Even if this Court agrees with the implicit contention of the University Administrators/Officials that Dr. Aprikyan named them in their personal capacities, it is still clear that the trial court erred in dismissing the petition for judicial review for allegedly improper service on those persons. In *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), the Washington Supreme Court issued, what on the surface, appears to be an unequivocal pronouncement: a petitioner does not invoke the appellate jurisdiction of a superior court unless he strictly complies with the APA's procedural requirements. *Id.* at 556. Recently, however, the Washington Supreme Court appeared to limit the unequivocal pronouncement to the context in which *Skagit Surveyors* arose. In fact, *Skinner v. Civil Serv. Comm.*, 168 Wn.2d 845, 232 P.3d 558 (2010), strongly suggests that substantial compliance is the test for sufficiency of service under RCW 34.05.542. Although the case did not

involve the APA, by its language the case it applies in the context of the APA:

Nonetheless, substantial compliance with service requirements is generally sufficient to invoke a superior court's appellate jurisdiction. See *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 552-53, 933 P.2d 1025 (1997); *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980). The City's citation to *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), to argue for a contrary result is misplaced. ***Skagit Surveyors* relied on this court's previous decision in *Union Bay Preservation Coalition v. Cosmos Development & Administration Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995), to hold that substantial compliance, as it relates to service of attorneys instead of the parties directly, is insufficient to invoke the appellate jurisdiction of the superior court under the Administrative Procedure Act (APA), chapter 34.05 RCW. *Skagit Surveyors*, 135 Wn.2d at 555-56. The analysis in *Union Bay* focused on the legislature's deletion, as opposed to mere omission, of approval for service on a party's attorney of record. [fn. omitted]. *Union Bay*, 127 Wn.2d at 618-19. It was only in light of this fact that the court declined to apply the doctrine of substantial compliance. *Id.* at 620. Indeed, in *Union Bay*, the court stated that its conclusion had "no bearing on other statutes and other requirements of service." *Id.* Thus, *Union Bay* and *Skagit Surveyors* do not preclude application of the doctrine of substantial compliance in the present case. (emphasis supplied).**

Id. at 845-846. The highlighted remarks above make clear that the unequivocal pronouncement in *Skagit Surveyors* derived from the Court's holding in *Union Bay Preservation Coalition v. Cosmos Development & Administration Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995), a case in which a petitioner argued that he had substantially complied with the APA's service requirements by serving the attorney for a party and not the

party itself. As the Court explained in *Skagit Surveyors*, at the time of the case the Legislature had not provided for service on a party's attorney of record in the APA. Further, the Court in *Skinner* noted the limited application of *Union Bay's* holding:

Indeed, in *Union Bay*, the court stated that its conclusion had "no bearing on other statutes and other requirements of service."

Skinner v. Civil Serv. Comm., 168 Wn.2d at 846.

Accordingly, the issue then becomes whether in his efforts to serve the University Administrators/Officials Dr. Aprikyan substantially complied with the requirements of RCW 34.05.542. Substantial compliance requires showing either that the party to be served has actual notice of the appeal or that notice of the appeal was served in a manner reasonably calculated to give notice to the opposing party. *Skinner v. Civil Serv. Comm.*, 168 Wn.2d at 855. The declarations of Ms. Karlsson and Mr. Gautschi, as detailed above, demonstrate amply that Dr. Aprikyan's efforts to serve the University Administrators/Officials meet both forms of the test for substantial compliance. The University Administrators/Officials had actual notice within the 30-day statute of limitations period. Second, the efforts to serve were reasonably calculated to give notice to University Administrators/Officials: Among other things, Ms. Karlsson made two trips to the University where she hand-delivered

copies of the petitions to persons, who claimed to have authority to accept them, at five University offices, that of the Attorney General -- who by statute, again, is the attorney for the University, its President and his or her designees -- and the offices of the other three University Administrators/Officials. Further, Ms. Karlsson did personally deliver a copy of the petition to Vice Provost Cameron on July 16, 2010.

The University and its agents waived any alleged defects in service of Dr. Aprikyan's petition for judicial review.

As described above, the declaration of Mr. Gautschi reveals that under Washington case law regarding the doctrines of equitable estoppel and waiver, the conduct of the University and its agents in response to the filing of the petition for judicial review cures any alleged deficiencies in service of that petition. Equitable estoppel requires that Dr. Aprikyan establish three elements:

"(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission."

Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

As to waiver, Dr. Aprikyan must show either that the assertion of the defense of insufficiency of process is inconsistent with prior behavior or that the University Administrators/Officials were dilatory in asserting the defense. As to the latter, a defendant may not employ a "trial by

ambush” approach to litigation. *Id.* at 39-40. Or, as the Washington Supreme Court stated in *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002),

[t]he doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. *Lybbert*, 141 Wn.2d at 40.

Thus, a defendant may not intentionally wait until after the statute has run on service before asserting an insufficiency defense. *Romjue v. Fairchild*, 60 Wn. App. 278, 281-282, 803 P.2d 57 (1991).

The facts set forth in the Declaration of Frederick H. Gautschi, III, particularly as to the conduct and statements of Mr. Nicholson establish the elements under the tests above. After receiving a copy of the first-filed petition for judicial review and TRO documents, Mr. Nicholson phoned Mr. Gautschi to discuss bypassing the application for a TRO and instead agreeing to a hearing date and briefing schedule for a motion for a preliminary injunction. When Mr. Gautschi explained that he could not agree to forego seeking a TRO unless the University would agree to continue to employ Dr. Aprikyan pending the outcome of a hearing on a motion for a preliminary injunction, Mr. Nicholson stated that he would discuss the matter with his client. To discuss the matter with his client he had to talk with at least one person who could speak for the University.

That person, or those persons, could be only some combination of President Emmert and/or his designees, i.e. the three other University Administrators/Officials. By Monday, April 19, 2010, Mr. Nicholson informed Mr. Gautschi that the University, i.e. by implication some speaking agent(s) for the University, had agreed to continue to employ Dr. Aprikyan pending the outcome of a hearing on a motion for a preliminary injunction. At no time prior to the University Administrators'/Officials' filing of their brief in opposition to Dr. Aprikyan's motion for a preliminary injunction did Mr. Nicholson ever even suggest to Mr. Gautschi that there might be a "service issue." On April 30, 2010, four days after the expiration of the statute of limitations for filing a petition for judicial review, Louis D. Peterson, Mary E. Crego, and Michael J. Ewart of the law firm Hillis, Clark Martin & Peterson, P.S., along with Mr. Nicholson of the Office of the Attorney General filed a Notice of Appearance on behalf of the University Administrators/Officials. CP 20.

Subsequently, on May 10, 2010, the University Administrators/Officials filed a brief in opposition to Dr. Aprikyan's motion for a preliminary injunction. That brief contains the first articulation of the two contentions that formed the basis for the trial court's decision to dismiss Dr. Aprikyan's petition. CP 360, 365-366.

Further, Mr. Gautschi agreed to refrain from seeking a TRO in reliance on the representations of Mr. Nicholson. Otherwise, it seems reasonable to conclude that had Mr. Gautschi proceeded to court on Monday, April 19, 2010 in an effort to obtain TRO, Mr. Nicholson would have, at the hearing in ex parte court, asserted the insufficiency of service defense.

In summary, Dr. Aprikyan's counsel relied on representations of Mr. Nicholson as the attorney of record for the University and its decision makers, and engaged in negotiations initiated by Mr. Nicholson as to setting a date and a briefing schedule for a hearing on a motion for a preliminary injunction. Only after the expiration of the 30-day statute of limitations on filing Dr. Aprikyan's petition for judicial review did anyone contend that Dr. Aprikyan had not named the University in his petition and had not properly served the named University Administrators/Officials. These facts satisfy the three-part test for the application of the doctrine of estoppel.

Further, it is impossible to conceive that Mr. Nicholson had no knowledge of the alleged "service" issue as to the University Administrators/Officials prior to the expiration of the 30-day statute. His representations to Mr. Gautschi militate in favor of the opposite conclusion. In fact, Mr. Nicholson has never stated in the form of a declaration that he was unaware of a "service" issue until after the 30-day

period. There is nothing in the record on the matter of his knowledge. Consequently, his conduct satisfies both forms of the test for waiver. As the attorney of record for the University and the University Administrators/Officials Mr. Nicholson delayed, until after the expiration of the statute of limitations, asserting the defense of insufficient service. Further, his conduct qualifies as “misdirecting the [petitioner] away from a defense for tactical advantage.” Dr. Aprikyan’s counsel had reason to believe that based on his representations, particularly involving negotiations, Mr. Nicholson was proceeding, in response to the petition for judicial review, as counsel for the University, its chief executive officer and designees of the chief executive officer.

Application of the *Cheek* and *Muckleshoot Tribe* cases does not support dismissal of Dr. Aprikyan’s Petition for Judicial Review.

As described above, the trial court’s oral ruling on the University Administrators’/Officials’ motion to dismiss contained the statement that the *Cheek* and *Muckleshoot Tribe* cases are controlling. In *Cheek* the Court of Appeals, Division Three, cited to *Skagit Surveyors* for the proposition that substantial compliance with the APA’s service requirements is not sufficient to invoke the appellate jurisdiction of a superior court. *Cheek v. Employment Security Dep’t*, 107 Wn. App. at 85. The University Administrators/Officials have claimed that *Muckleshoot*

Indian Tribe v. Dep't of Ecology, 112 Wn. App. 712, 50 P.3d 668 (2002),
compels dismissal of Dr. Aprikyan's petition:

(petition dismissed on summary judgment when petition
not served on all parties)

CP 366.

As to the substantial compliance issue, *Skinner*, decided by the Washington Supreme Court in July 2010, teaches that strict compliance applies to service in a limited context not applicable here. Further, for the reasons set forth above, Dr. Aprikyan did comply with the APA's service requirements. As to the application of *Muckleshoot Tribe*, again for the reasons set forth above, the trial court did have appellate jurisdiction over Dr. Aprikyan's petition for judicial review.

Conclusion

RCW 34.05.001 reveals the purpose behind the enactment of the APA:

The legislature intends, by enacting this 1988 Administrative Procedure Act, to clarify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and ***to provide greater public and legislative access to administrative decision making*** (emphasis added). The legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in effect. The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of

other courts interpreting similar provisions of other states, the federal government, and model acts.

The order dismissing Dr. Aprikyan's petition for judicial review hardly furthers the purpose of providing greater public access to administrative decision making. Instead, it does just the opposite by elevating form over substance. As the court noted in *Muckleshoot Tribe*,

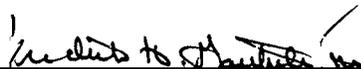
[t]he purpose of the broad service of process requirement under RCW 34.05.542(3) is not to join the parties as defendants in the judicial review process, but to afford notice to all persons who were parties to the agency proceeding itself.

Muckleshoot Indian Tribe v. Dep't of Ecology, 112 Wn. App. at 726.

As the undisputed facts in this case demonstrate, all parties who were parties to the adjudication at the University did have notice of the petition for judicial review prior to the expiration of the 30-day statute of limitations period. For this and the other reasons set forth above, reversal of the trial court's order dismissing that petition is warranted.

Respectfully submitted this 23rd day of December, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of December 2010, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

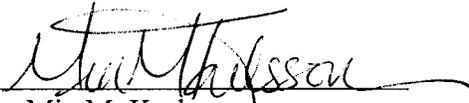
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LEXSEE



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As of: Jul 05, 2010

**SUZANNE CAREY, Plaintiff, v. THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, VALERIE JOHNSON, and RO-
DERICK USTANIK, Defendants.**

Case No. C05-5720FDB

**UNITED STATES DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF WASHINGTON**

2006 U.S. Dist. LEXIS 44094

June 28, 2006, Decided

June 28, 2006, Filed

SUBSEQUENT HISTORY: Affirmed by,
Motion denied by Carey v. Johnson, 2007 U.S.
App. LEXIS 23855 (9th Cir. Wash., Oct. 5,
2007)

COUNSEL: [*1] Suzanne Carey, Plaintiff,
Pro se, TACOMA, WA.

For Equal Employment Opportunity Commis-
sion Seattle Field Office, Valerie Johnson, Ro-
derick Ustanik, Defendant: Marion J. Mittet,
US ATTORNEY'S OFFICE (SEA), SEAT-
TLE, WA.

JUDGES: FRANKLIN D. BURGESS,
UNITED STATES DISTRICT JUDGE.

OPINION BY: FRANKLIN D. BURGESS

OPINION

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Plaintiff filed this lawsuit against the EEOC following the agency's no cause finding on her charge that her former employer, International Union of Operating Engineers, Local 612 discriminated against her in violation of the Americans with Disabilities Act. A lawsuit against an agency employee acting in his or her official capacity is actually a suit against the agency itself. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" of which the government official is an agent, because the real party in interest is the government entity.)

Defendant EEOC moves for dismissal for lack of subject matter jurisdiction and failure to state a claim. Plaintiff has filed a document entitled "Plaintiff's Motion To Suspend Pending [*2] Legal Counsel" [Dkt. # 29] in which she discusses various aspects of her case. The Court's Order of May 22, 2006 [Dkt. # 27] disposed of all then-pending motions, including a motion for appointment of counsel. Plaintiff has not shown the Court any authority that would allow this cause of action to proceed, and it will be dismissed for the following reasons.

When considering a motion to dismiss, the allegations in the Complaint are normally taken as true, and the motion will be granted if it appears that the plaintiff can prove no set of facts entitling him or her to relief on the claims. *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980). The plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West, Inc. v. Confederate Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Title VII provides federal courts with three grants of jurisdiction to hear enforcement actions brought against alleged discriminating employers (1) by private parties, (2) the Attorney General, or (3) the EEOC. (Citations omitted.) None of these sections authorizes individuals alleging discrimination by a third party to file suit against the EEOC or its employees; [*3] the EEOC when not acting as an employer, is not a proper defendant in such lawsuits. This matter must be dismissed under *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction.

Plaintiff seeks monetary damages of \$ 1,009.00, but a plaintiff must show that there is a waiver of sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980). Plaintiff has failed to identify a statute that waives sovereign immunity for the actions described in her

Complaint, and her claim for damages must be dismissed.

Congress has not expressly created a cause of action against the EEOC by employees of third parties. Only present or former employees of the EEOC (or applicants for employment) who allege an unlawful practice committed by the EEOC as an employer may bring a Title VII action against the EEOC. *Ward v. Equal Employment Opportunity Comm'n*, 719 F.2d 311, 313 (9th Cir. 1983). Plaintiff was not employed by the EEOC and she, therefore, has no cause of action against the EEOC under Title VII. Neither enforcement activities, nor administrative findings of the EEOC determine the rights of the parties [*4] because enforcement of Title VII is ultimately implemented by *de novo* federal district court action. The Ninth Circuit noted: "implying a cause of action against the EEOC contradicts [the legislative] policy of individual enforcement of equal employment opportunity laws and could dissipate the resources of the Commission in fruitless litigation with charging parties." *Ward*, 719 F.2d at 313. Thus, Plaintiff has failed to state a claim for which relief can be granted.

ACCORDINGLY, IT IS ORDERED:

1. Defendants' Motion to Dismiss [Dkt. # 28] is GRANTED and this cause of action is DISMISSED;
2. Plaintiff's "Motion to Suspend Pending Legal Counsel" [Dkt. # 29] is DENIED;
3. Plaintiff's "Motion to Compel Defendants To Answer Complaints Completely" [Dkt. # 25] is STRICKEN as MOOT in light of this Order Granting Defendants' Motion To Dismissal.

DATED this 28th day of June, 2006.

FRANKLIN D. BURGESS

UNITED STATES DISTRICT JUDGE



LEXSEE 2010 U.S. DIST. LEXIS 62390

DARRELL MOORE, Plaintiff, v. JOSEPH CUTTRE, et al., Defendants.

Civil No. 09-2284 (RBK/JS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 62390

**June 23, 2010, Decided
June 23, 2010, Filed**

2010 JUN 23 PM 4:22

NOTICE: NOT FOR PUBLICATION

(Doc. No. 21)

COUNSEL: [*1] For **DARRELL MOORE, Plaintiff:** **JAMES C. DEZAO, LEAD ATTORNEY,** PARSIPPANY, NJ.

OPINION

KUGLER, United States District Judge:

For **SUPERINTENDENT JOSEPH CUTTRE, C.O. YASOSKY, SGT. FRIEND, C.O. MULUTIN, C.O. HEARLY, Defendants:** **SUSAN MARIE SCOTT, LEAD ATTORNEY,** OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

This matter arises out of an alleged deprivation of civil rights. Presently before the Court is the motion brought by Defendants Sergeants Friend and Maschaski and Corrections Officers Hearly, Muhammed, Mulutin, and Yasosky (collectively, "Defendants"), to dismiss Plaintiff Darrell Moore's ("Plaintiff") 42 U.S.C. § 1983 claims for money damages against Defendants in their official capacities. For the reasons herein expressed, the Court grants Defendants' motion to dismiss.

For **C.O. MUHAMMED, SGT. MASCHASKI, Defendants:** **SUSAN MARIE SCOTT, OFFICE OF THE NJ ATTORNEY GENERAL,** TRENTON, NJ.

I. BACKGROUND¹

JUDGES: ROBERT B. KUGLER, United States District Judge.

¹ The facts in this section are taken from the Amended Complaint.

OPINION BY: ROBERT B. KUGLER

In 2007, Plaintiff was sent to bootcamp. After a riot at the camp, Plaintiff was transferred to the Bordentown Prison Facility

OPINION

("Bordentown"), which is run [*2] by the New Jersey Department of Corrections ("DOC").² At the time, two individuals belonging to the gang "the Bloods" were inmates at Bordentown. Plaintiff, a member of "the Crips," had previously fought with these two opposing gang members. Defendants -- sergeants and corrections officers employed with the DOC and/or Bordentown -- were all aware of the previous altercations. Because of the danger posed to Plaintiff as a "Crip" at Bordentown, and in light of Plaintiff's history with the two "Blood" members, Plaintiff was placed in protective lockup for forty-five days.

2 Defendants state that they were state officials working at Albert C. Wagner Youth Correctional Facility at all relevant times. This appears to be the official name of the institution that Plaintiff refers to as Bordentown Prison Facility. Albert C. Wagner Youth Correctional Facility is a prison facility operated by the New Jersey Department of Corrections. Because Defendants characterize themselves as state officials and Plaintiff does not challenge this characterization, the Court will treat Defendants as such for the purpose of this Opinion.

On or about October 2, 2007, Defendants informed Plaintiff that he was being [*3] released into general population at Bordentown before being transferred back to bootcamp. Plaintiff protested, informing all Defendants that he was a "Crip," was to be in protective custody, and would be harmed if he were released into Bordentown's general population. Despite their knowledge of the risk to Plaintiff's safety, Defendants released Plaintiff into general population. Within three hours of his release into general population, Plaintiff was attacked by eleven "Blood" members, including the two with whom he had previously fought. As a result, Plaintiff suffered extensive and permanent injuries.

On May 13, 2009, Plaintiff filed this civil action against Defendants. On May 20, 2009, the Court ordered Plaintiff to file an amended complaint that complied with *Local Civil Rule 8.1*. Plaintiff filed his Amended Complaint on May 26, 2009. Plaintiff seeks relief under 42 U.S.C. § 1983 for violation of his *Eighth Amendment* right to be free from cruel and unusual punishment. Plaintiff claims that, among other things, Defendants were deliberately indifferent to a serious risk of harm to Plaintiff. Plaintiff also filed a tort claim for intentional infliction of emotional distress, alleging [*4] that Defendants committed willful misconduct within the meaning of the New Jersey Tort Claims Act, *N.J. Stat. Ann. § 59:1-1 et seq.* Plaintiff seeks punitive damages for the deprivation of his rights, in addition to compensatory damages, costs, expert fees, and reasonable attorney's fees.

II. STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss an action for failure to state a claim upon which relief can be granted. With a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

In making this determination, a court must engage in a two part analysis. *Ashcroft v. Iqbal*, U.S. , 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009); [*5] *Fowler*, 578 F.3d at 210-11. First, the court must separate factual

allegations from legal conclusions. *Iqbal*, 129 S. Ct. at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, the court must determine whether the factual allegations are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. Determining plausibility is a "context-specific task" that requires the court to "draw on its judicial experience and common sense." *Id.* A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible. See *id.*

III. DISCUSSION

Defendants argue that Plaintiff's claims against Defendants in their official capacities should be dismissed because those claims are barred by the *Eleventh Amendment* and the Defendants are not "persons" amenable to suit under 42 U.S.C. § 1983. In response, Plaintiff insists that Defendants' motion should be denied because it is based on the flawed premise that Plaintiff is suing Defendants in their official capacities, when in fact Plaintiff is suing Defendants solely in their individual, or personal, capacities. Alternatively, [*6] should the Court find that Plaintiff's § 1983 claim is brought against Defendants in their official capacities, Plaintiff requests that the Court grant leave to amend the Amended Complaint in order to specify that Plaintiff is bringing suit against Defendants solely in their individual capacities.

A. Scope of Plaintiff's Amended Complaint

The Amended Complaint is ambiguous as to whether Plaintiff is suing Defendants in their official or individual capacities. In a suit against state officials in their official capacities, a prevailing plaintiff recovers from the state treasury; whereas, in a suit against state officials in their individual capacities, a prevailing plaintiff may recover from the personal assets of the individual defendants. *Melo v. Hafer*,

912 F.2d 628, 635 (3d Cir. 1990), *aff'd*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

The Third Circuit has instructed the district courts to look at the complaint and the "course of proceedings" in order to determine whether a plaintiff has sued the defendants in their individual capacities, official capacities, or both. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). The courts are to consider several factors. In determining that the plaintiffs [*7] in *Melo* sued the defendant in her individual capacity, the Third Circuit emphasized that the plaintiffs named only the state official, and not the state itself, as a defendant from whom they sought to recover damages. *Id.* at 636. The *Melo* Court also pointed out that the defendant raised the defense of qualified immunity, a defense that is only available to government officials when they are sued in their individual capacities. *Id.* The Third Circuit has also reasoned that a plaintiff's request for punitive and compensatory damages from individual defendants is indicative that the plaintiff intended to sue the defendants in their individual capacities. *Gregory v. Chehi*, 843 F.2d 111, 119-20 (3d Cir. 1988).³

3 The Third Circuit explained: "It is clear, however, that the individual defendants are not sued solely in their official capacities in the federal action. Plaintiff seeks from each of them punitive, as well as compensatory, damages. Punitive damages cannot be recovered from defendants in their official capacities. Thus, resolving doubts in favor of plaintiff, we will assume he is suing the individuals in their [individual] capacities as well." *Gregory v. Chehi*, 843 F.2d 111, 119-20 (3d Cir. 1988).

Here, [*8] the Amended Complaint does not explicitly state that Plaintiff is suing Defendants in their individual capacities, nor does

it explicitly state that Plaintiff is suing Defendants in their official capacities. Despite this ambiguity, a reasonable reading of the Amended Complaint in light of the factors that the Third Circuit enunciated in *Melo* and *Gregory* suggests that Plaintiff is suing Defendants in both capacities.

Several factors suggest that Plaintiff is suing Defendants in their individual capacities. As was the case in *Melo*, Plaintiff here has only sued, and only seeks to recover money damages from, certain state officials. Plaintiff has not named as a defendant the State of New Jersey, nor any of its departments or agencies. Additionally, Plaintiff seeks punitive damages, which cannot be recovered from Defendants if they are sued in their official capacities. As noted, the Third Circuit in *Gregory* found a similar request for damages to be sufficient in establishing that the plaintiff was suing the defendants in their individual capacities.

Other factors suggest that Plaintiff is suing Defendants in their official capacities. Although Defendants have not claimed qualified immunity [*9] in defense to Plaintiff's Amended Complaint, they explicitly request a "partial" dismissal of Plaintiff's claims against Defendants in their official capacities. Defendants do not suggest that any claims against them in their individual capacities should be dismissed, nor do they suggest that Plaintiff has failed to bring these claims. Defendants merely request dismissal of Plaintiff's claims to the extent that they can be construed to bring suit against Defendants in their official capacities. Thus, Defendants clearly read the Amended Complaint as setting forth claims against them in their official capacities.

There is also language in the Amended Complaint that suggests that Plaintiff is suing Defendants in both capacities. In the Amended Complaint, Plaintiff separately identifies each defendant as "an individual employed with the DOC and/or the Bordentown Prison Facility." Plaintiff also alleges that "Defendants were

each individually involved in the . . . deprivation of the Plaintiff's rights." This Court has previously construed a complaint with similar language as bringing suit against a state official in both his official and individual capacities. See, e.g., *Trader v. N.J., Div. of State Police*, No. 05-4065, 2006 U.S. Dist. LEXIS 64837, 2006 WL 2524172, at *4 (D.N.J. Aug. 29, 2006) [*10] (construing complaint as bring suit against state official in official and individual capacity when complaint alleged that "defendant . . . was an individual and an employee of the State").

Accordingly, the Court will construe the Amended Complaint as suing Defendants both in their individual capacities and in their official capacities.

B. Defendants' Motion to Dismiss

The *Eleventh Amendment* bars suit against these Defendants in their official capacities. The *Eleventh Amendment* protects states and their agencies and departments from suit in federal court regardless of the kind of relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Absent a waiver of immunity by the state, the *Eleventh Amendment* precludes federal suits for money damages against state officers sued in their official capacities. See *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). In this case, Plaintiff seeks money damages against state prison officials. Because nothing in § 1983 abrogates a state's *Eleventh Amendment* immunity, that immunity bars Plaintiff's claims against Defendants in their official capacities. See *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); see also *Rodriguez v. Hayman*, No. 08-4239, 2009 U.S. Dist. LEXIS 109515, 2009 WL 4122251, at *4 (D.N.J. Nov. 23, 2009) [*11] (granting *Eleventh Amendment* immunity to employees of Bayside State Prison and New Jersey Department of Corrections); *Clayton v. Clement*, No. 06-5426, 2007

*U.S. Dist. LEXIS 88091, 2007 WL 4260002, at *5 (D.N.J. Nov. 30, 2007) (granting Eleventh Amendment immunity to corrections officers at Bayside State Prison); Grabow v. S. State Corr. Facility, 726 F. Supp. 537, 539 (D.N.J. 1989) (granting Eleventh Amendment immunity to Commissioner of the Department of Corrections).*

4 The *Eleventh Amendment* provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. Const. amend. XI*.

So too does § 1983 bar Plaintiff's claims against Defendants in their official capacities. *Section 1983* provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall [*12] be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 *U.S.C. § 1983*. A suit against a state official in his official capacity is a suit against his office, and therefore amounts to a suit against the state itself. *Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*. Therefore, neither a state, nor its officials acting in their official capacities, are "persons" subject to suit under § 1983. *Id.*

For both of these reasons, Plaintiff's claims against Defendants in their official capacities should be dismissed. Dismissal of those claims does not affect Plaintiff's § 1983 claims against Defendants in their individual capacities. ⁵

5 Where a defendant is sued in his individual capacity, "the state is not the real party in interest; the suit is therefore not barred by the *Eleventh Amendment*." *Melo v. Hafer, 912 F.2d 628, 635 (3d Cir. 1990)*, *aff'd 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)*. Thus, sovereign immunity does not insulate from liability an officer sued in his individual capacity, and a plaintiff may be entitled to damages against the individual for deprivation of constitutional rights. *Sample v. Diecks, 885 F.2d 1099, 1112 (3d Cir. 1989) [*13]* ("When state officials are sued in their individual capacity, the [E]leventh [A]mendment does not bar damage suits against them for deprivations of federal rights caused by those officials under color of state law."). State officials sued in their individual capacities are "persons" under § 1983. *Hanani v. N.J. Dep't of Env'tl. Prot., 205 Fed. Appx. 71, 79 (3d Cir. 2006)* ("The *Eleventh Amendment* does not bar such suits, nor are state officers absolutely immune from personal liability under *Section 1983* solely by virtue of the 'official' nature of their acts.").

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss with prejudice Plaintiff's § 1983 claims against Defendants in their official capacities. An appropriate order shall follow.

Date: 6-23-2010

/s/ Robert B. Kugler

ROBERT B. KUGLER

United States District Judge