Supreme Court No. 101733-2
(COA No. 84009-6-I)

IN THE WASHINGTON STATE SUPREME COURT

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JULIA A. BARNETT, M.D.,

*Appellant,*

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, WASHINGTON STATE PERSONNEL RESOURCES BOARD,

*Respondents.*

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On Appeal From Snohomish County Superior Court

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# DR. BARNETT'S PETITION FOR REVIEW
**Corrected**

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Gregory M. Miller, WSBA No. 14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
Telephone: (206) 622-8020
miller@carneylaw.com

*Attorneys for Petitioner*

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## I. INTRODUCTION

Petitioner Julia A. Barnett, M.D., Appellant below, asks the Court to grant review per RAP 13.4(b) of Division I's published decision affirming dismissal of her petition for a writ of review or constitutional certiorari ("Writ Petition") of the judicial-like, three-day evidentiary review hearing conducted by the Personnel Resources Board ("PRB's") of Dr. Barnett's dismissal by the Department of Corrections ("DOC"). The dismissal and appeal were made without review of the underlying record, which the agencies refused to produce, fearing scrutiny.

This case asks whether an agency decision to terminate a public employee which is reviewed by the PRB in a judicial-like proceeding is subject to a statutory or constitutional writ of review despite RCW 41.06.170(2) which provides that its decisions "shall be final and not subject to further appeal." There is no speedy and adequate remedy at law since there are no allegations or evidence in this meager record of wrongful

discharge in violation of public policy. Speculation on an empty record does not create an adequate remedy.

Division I's conclusion that the PRB was not acting in a judicial or quasi-judicial capacity is inconsistent with the facts, applicable law, and with RCW 7.16.040, which governs statutory writs. Petitioner's focus before the PRB was on DOC's violation of the applicable statutes, agency rules, and procedures, essentially breaching of the terms of her employment, a breach of contract claim traditionally heard by the courts. Her Writ Petition asserted the DOC proceedings and the hearing before the PRB were fundamentally unlawful and unfair proceedings due in part to the breaches of the applicable statutes and agency rules.

This case shows the need to clarify that *State ex rel. Hood v. State Pers. Board*, 82 Wn.2d 396, 511 P.2d 52 (1973), relied on by the Decision and which involved a dispute over an appeal of one state agency from a PRB decision, does not apply when the PRB decision is challenged by an individual employee, who has fundamental rights at stake. That review of public agency

employment dismissals by a writ is proper and needed to secure their fundamental rights is shown by later decisions expressly cutting *Hood* back to give relief to discharged public employees. *See Williams v. Seattle Sch. Dist.*, 97 Wn.2d 215, 643 P.2d 426 (1982); *Pierce County Sheriff v. Civ. Serv. Comm. of Pierce Cnty.*, 98 Wn.2d 690, 658 P.2d 648 (1983). In light of every person's fundamental right to be free of arbitrary and capricious agency action,[1] as well as to access to the courts under the Washington Constitution,[2] the decision in *Hood* that the superior court had no jurisdiction to entertain a writ proceeding brought by the Liquor Control Board challenging the PRB's personnel decision has no application to a case such as Dr. Barnett's where the affected employee seeks judicial review.

The Court also should address whether a superior court presented with a writ application can exercise its discretion to

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[1] *See Williams* and *Pierce County Sheriff, supra.*

[2] *See* Art. I, sec. 10; *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009); and *Martin v. Wash. State Dep't. of Corrections*,199 Wn.2d 557, 510 P.3d 321 (2022).

grant or deny relief without having the administrative record to review. Allowing agencies to stonewall production of the record while purporting to determine if a writ is available is contrary to this Court's decisions dating to *Crouch v. Ross,* 83 Wash. 73, 145 P. 87 (1914), and more recent decisions.

## II. COURT OF APPEALS DECISION

The Court of Appeals' published decision ("Decision") was filed December 19, 2022, App. A-1-18, and reconsideration was denied on January 20, 2023. App. B-1. Despite the lack of the underlying administrative record, the Decision affirmed the trial court's dismissal of Dr. Barnett's petition for a writ of review or certiorari focusing on three primary points. First, that the PRB was not "exercising a 'judicial function' that would subject it to a statutory writ of review by a superior court." Decision at 2, App. A-2. Second, the trial court did not abuse its "significant discretion" when it found that there were "other legal options available" to Dr. Barnett, defeating the constitutional writ. *Id.* Third, "there is no authority holding a superior court

must receive and review the entire record" before "assessing the preliminary aspects of either writ," *id.,* or in the language of the decisions, before exercising its discretion on whether to issue a writ granting requested relief. *E.g., Bridle Trails Community Club v. City of Bellevue*, 45 Wn.App. 248, 251-254, 722 P.2d 1110 (1986) (reversing and remanding for the trial court to exercise its discretion on the full record of whether to grant relief under its inherent, constitutional powers).

Finally, the Decision held that *State ex rel Hood* is still sufficiently good law to control the issue of whether a public employee can get access to judicial review of a termination decision because it is merely a "personnel administration or management matter." Decision at 7-10, App. A-7-10. First, whatever may have been the situation in *Hood* in 1973, an employment dismissal decision is hardly a mere "personnel management matter" or there would have been no relief given the public employees in *Williams* and *Pierce County Sheriff*. Moreover, here the appeal to the PRB for failure to adhere to

DOC's own rules and governing statutes is in the nature of a breach of contract action, which has been the province of the courts for centuries.

Second, this conclusion and reliance on *Hood's* language to deny review of a public employee dismissal is called into question by the relief this Court gave to public employees in *Williams* and *Pierce County Sheriff* as well as the factual posture of *Hood*. *See Hood,* 82 Wn.2d at 402-403 (explaining that arbitrary and capricious agency action "alone would not support judicial review of the agency's action….such action also must be violative of a fundamental right before the judiciary's inherent constitutional power of review comes into being…The Liquor Control Board has informed us of no fundamental statutory rights, peculiar to it, that have been violated by the Personnel Board's action.").

## III. ISSUES PRESENTED FOR REVIEW

1. Does the Personnel Resources Board engage in judicial or quasi-judicial action by conducting a hearing with live witnesses, where the parties are represented by counsel, the Board issues detailed "Findings of Fact, Conclusions of Law, and Order of the Board" (CP 299) which purport to adjudicate claimed violations of applicable civil service statutes and regulations – a functional "breach of contract" claim – and apply the law to determine the existence of "just cause" for discharge (CP 313-14), and to determine that (CP 316, ¶5.14) "the investigation, pre-disciplinary and procedural process was consistent with the applicable rules, regulations and pursuant to fair and unbiased dismissal procedures"?

2. Can a discharged public employee have a remedy at law against the firing agency for wrongful termination by breach of the governing statutes and regulations after a determination by the PRB upholding the discharge as "consistent with the applicable rules, regulations and pursuant to fair and unbiased dismissal procedures," or is any potential remedy against the firing agency precluded?

3. Did the lower courts err by determining whether a statutory or constitutional writ could issue without having the record to review?

4. Does *State ex rel. Hood* restrict review of public employee termination decisions after the writ relief provided public employees in *Williams v. Seattle School Dist.*, and *Pierce County Sheriff v. Pierce County*, the renewed emphasis on ensuring meaningful access to the courts, and the fact that the opposing parties in *Hood* were both state agencies with no fundamental rights at issue to trigger writ review?

## IV. STATEMENT OF THE CASE

Dr. Barnett's Writ Petition states the background:

> The Respondent Department hired and employed Petitioner as a staff physician and the Facility Medical Director at its Monroe Correctional Complex in Monroe, Washington from March 2017 until April, 2019.
>
> Department personnel suspended Dr. Barnett in October, 2018, by means and meetings which violated her rights under applicable regulations and due process by, among other things, failing to properly and timely notify her of specific charges or specific issues or cases, failing to give her an opportunity to respond or prepare for review of patient records, and failing to give her the opportunity for a fair hearing with witnesses before taking adverse action. These and other deficiencies in the Department's adverse actions taken against Petitioner, particularly as related to the Department's allegations and the evidence as to the medical care as to the specific patients at issue, are detailed in Petitioner's May 15, 2019 notice of appeal to the Board, in her February 25, 2020 Prehearing Brief to the Board, and in the Board proceedings.
>
> The Department also erroneously terminated Petitioner from both her positions as Facility Medical Director and a Staff Physician 3 despite the decision-maker Dr. Hernandez's conclusion in his "Determination of Sanction" that he was not critical of her skills as a physician, but only in "your ability to perform your duties as the FMD" because, as the Facility Medical Director, she has lost her supervisory "trust", thus leaving no lawful basis to terminate her employment as a Staff Physician 3. This also is detailed in Petitioner's

> notice of appeal to the Board and the proceedings before the Board.
>
> These and other facts presented at the Board hearing demonstrate that the Department did not have a proper factual or legal basis for its termination of Petitioner from both her positions at the Monroe Complex, and provided a proper basis for appeal to the Board.

CP 290-291. The Petition describes the PRB as:

> the administrative agency that conducts hearings for Washington State civil service employees who wish to appeal adverse actions from a State employer, including the Department. It acted in a judicial capacity by holding a hearing, taking evidence, and issuing its Findings and Conclusions and Final Order dated September 24, 2021 ("Board Decision") in this case denying Petitioner's challenge to the termination of her employment….The Board's statutory structure does not provide for further appeal. *See* RCW 41.06.170(2): "Decisions of the Washington personnel resources board on appeals filed after June 30, 2005, shall be final and not subject to further appeal."

CP 291. Indeed, the PRB's decision's title reinforces its judicial nature: "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD." CP 299. So does the text of the PRB's decision.

The Petition details the failings in both the DOC's dismissal process and the PRB's review proceeding that meant

she had been subjected to arbitrary and capricious actions or proceedings which otherwise were illegal, erroneous, or not in accord with the common law. *See* CP 291-296, setting out the facts and law justifying review under RCW 7.16.040, which provides for review "whenever an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, ***or one acting illegally***, ***or to correct any erroneous or void proceeding***, ***or a proceeding not according to the course of the common law***, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." CP 296, quoting the statute (emphasis added).

The statutory writ was pleaded first because it permits a much broader scope of review, as indicated in the emphasized portions of the statute. The Respondents' actions of refusing to provide the record raise the question of what "erroneous proceeding," or "proceeding not according to the common law"

may have occurred in the conduct of the hearing, which cannot be ascertained from the self-justifying written decision.

Division I's Decision used a summary formula for the criteria for granting a statutory writ from decisions in 1998 and 1992, a summary originating in a challenge to a ***zoning*** amendment, not an employment dismissal decision. *See* Decision at 5, App. A-6 hereto, citing to *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243-245, 821 P.2d 1204 (1992) as quoted in *Wa. Pub. Emps. Ass'n v. Wash Pers. Res. Board*, 91 Wn.App. 640, 646, 959 P.2d 143 (1998) ("WPEA v. WaPRB"). The *City of Leavenworth* summary did not specify two critical criteria for issuing a writ: "to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law," criteria much more commonly at issue in employment dismissals than in zoning decisions.

The *City of Leavenworth* decision then proceeded to clarify the determination of "when a given action is quasi judicial or legislative in relation to the writ," setting out four factors from

earlier decisions, and ruled the zoning action at issue did not qualify. *Id.* The factors are:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

*City of Leavenworth*, 118 Wn.2d at 244-245, citing earlier decisions. Division II's decision in *WPEA v. WaPRB* gives a good example of application of the factors to conclude the actions in question, there the PRB's adjudication of an unfair labor complaint, were indeed judicial in nature. *Id.*, 91 Wn.App. at 646-649.

As is seen from the PRB's decision, and keeping in mind the nature of Dr. Barnett's appeal in challenging the dismissal essentially as a breach of contract – the state and agency statutes, rules, and procedures governing her public employment – these factors demonstrate the PRB in this case

acted in a judicial capacity, as the trial judge surmised in his footnote.

The PRB's decision itself notes that Dr. Barnett's appeal was over the evidence and procedures and substance governing her dismissal by DOC. For instance, at the outset of the PRB decision, it states:

> 1.3 Nature of Appeal. This is an appeal of a dismissal. Dr. Julia Barnett appealed her employment dismissal from her Facility Medical Director position at the Monroe Correctional Complex (MCC) effective April 18, 2019. Dr. Barnett disagrees with the Respondent's findings of alleged misconduct as it applies to the medical standard of care and causation under RCW 7.70, et seq. Dr. Barnett noted an alternative to her dismissal would have been evaluation, assistance, education, and training, followed by mentoring, a probationary period, or removal from her Facility Medical Director position and demoting her to a Physician 3 position.

CP 299.

In its conclusions of law, the PRB decision demonstrates how it is doing the work of the courts, applying facts to the governing law and statutes. First, it purports to adjudicate claimed violations of applicable civil service statutes and regulations – Dr. Barnett's functional "breach of contract" claim

– and apply the law to determine the existence of "just cause" for discharge. CP 313-14. It's final conclusion is the determination that "the investigation, pre-disciplinary and procedural process was consistent with the applicable rules, regulations and pursuant to fair and unbiased dismissal procedures." CP 316, ¶5.14. That is precisely the work of the courts when confronted with a claimed violation of a worker's employment rights.

## V. REASONS FOR GRANTING REVIEW.

### A. Review should be granted per RAP 13.4(b)(1), (2), (3) and (4) because the Decision fails to follow this Court's precedent, is inconsistent with published Court of Appeals Decisions, presents a significant question under the Washington Constitution, and presents an issue of substantial public interest that should be decided by this Court.

1. Review should be granted because the Decision is inconsistent with application of this Court's settled law on what constitutes judicial or quasi judicial action.

As discussed *supra*, the PRB decision easily meets the four factors for determining if an action is judicial or quasi judicial, especially when remembering the posture of the appeal brought by Dr. Barnett of holding DOC to its own statutes, rules,

and regulations – her employment contract terms – and seeking vindication of her fundamental rights. Breach of contract claims normally are brought to court in the first instance, and have been so historically. As to the third factor, the PRB decision itself purports to apply existing law to past or present facts for the purpose of enforcing liability against Dr. Barnett. *See* CP 316, ¶5.14, quoted *supra*. Finally, as noted by the Court of Appeals in *WPEA v. WaPRB,* the formal hearing with witnesses, evidence, and counsel and detailed written findings and conclusions much "more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators." *See WPEA v. WaPRB,* 91 Wn.App. at 468-469.[3]

[3] While distinguishing *Hood,* the Court of Appeals in *WPEA v. WaPRB* focused on the critical determination in *Hood* which was couched in terms of "personnel policy and administration" and thus not the traditional province of the courts. 91 Wn.App. at 650. But in this case, as its own decision shows, the PRB was not making personnel policy decisions. It was adjudicating based on the facts and governing law whether the policies which had been adopted were in fact followed or whether Dr. Barnett's statutory or procedural rights had been violated – precisely the work of the courts.

2. The Decision is inconsistent with this Court's and published Court of Appeals decisions because it dismissed Petitioner's writ petition despite the fact she has no adequate remedy at law since the tort of wrongful discharge for violation of public policy does not apply to her core complaint, which is a breach of contract and denial of due process in the procedures and rules applicable to public employees.

The Decision is also premised on the erroneous proposition that Dr. Barnett has an adequate remedy at law against DOC for wrongful discharge. In this case there is no wrongful discharge case for breach of contract that was brought. Dr. Barnett's complaint is premised on the breach of her statutory "contract" rights of employment and due process inherent in the statutes and regulations governing DOC, as well as the constitution.

It is settled that those concerns do not constitute a basis for bringing an action for wrongful discharge in violation of public policy. To the extent the Decision concluded Dr. Barnett has an adequate remedy at law, it is in conflict with the law on wrongful

discharge in violation of public policy. Division III recently summarized the law under this Court's decisions:

> ¶55 To demonstrate a prima facie case for wrongful termination in violation of public policy, the plaintiff must produce evidence that her "termination was motivated by reasons that contravene an important mandate of public policy." *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015). "[T]he burden [then] shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984). The tort for wrongful discharge in violation of public policy is generally limited to four scenarios:
>
> > "(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing."
>
> *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

*Suarez v. State*, 23 Wn.App.2d 609, 631–32, 517 P.3d 474, (2022), *review granted*, ___ Wn.2d ___ (Feb. 8, 2023).

There is no allegation in this case that Dr. Barnett was discharged in violation of public policy. Her case was expressly premised on the claim that DOC failed to follow its own policies and procedures such that she did not get the benefit of the applicable rules governing her employment – a breach of contract claim – and also due to procedural failures did not have a fair hearing – her due process rights were violated, among others. Thus, her Petition expressly argued that the PRB ignored the errors made by the DOC which amounted to arbitrary and capricious actions against her, such that the PRB decision was itself "an arbitrary and capricious and illegal action." CP 291, Petition, p. 3. Dr. Barnett's Petition detailed the claimed failures of DOC to follow its own procedures and rules and that the PRB ignored those failures at pages 4-7. *See* CP 292-295.

Any conclusion that Dr. Barnett had another, adequate remedy at law against DOC for her discharge has no basis in this record and is contrary to the settled law of this Court as cited in *Suarez*, as well as with *Suarez*. Moreover, neither the trial court

nor the Court of Appeals could draw such a conclusion without, at minimum, having before it the full record before the PRB.

Finally, the current state of the law would preclude a later suit for wrongful discharge in violation of public policy if the PRB decision cannot be challenged by one writ or the other. If the PRB decision is affirmed it will collaterally estop any later legal action by Dr. Barnett based on claimed failure to comply with governing law or rules. Under preclusion principles a writ proceeding is the only way to hold DOC accountable as well. *Christensen v. Grant County Hosp. Dist.*, 152 Wn.2d 299, 96 P.3d 957 (2004) (collateral estoppel barred a wrongful discharge action for retaliation following administrative proceedings upholding the termination proceedings by the agency, despite, as here, that the employee could not have asserted a retaliation claim before the specific agency.) *See id.* at 320, fn.13. The Court thus held that the employee had a "full and fair opportunity to litigate the relevant issue in the prior proceeding," precluding any later suit, despite the fact the agency conducting the prior

proceeding could not entertain the retaliation claim. *Id.,* 152 Wn.2d at 321. Dr. Barnett has no other remedy at law once the PRB decision is affirmed as final.

**B. Review should be granted per RAP 13.4(b)(4) to clarify the extent to which *State ex rel Hood v. State Personnel Board* is still good law.**

For the reasons set forth *supra,* review is appropriate to address the extent to which *State ex rel. Hood* can be applied in writ proceedings by a public employee challenging the dismissal for breach of the governing statutes, rules, and regulations.

**C. Review should be granted per RAP 13.4(b)(3) to clarify whether public employees have access to the courts for review of discharges which are upheld by the PRB.**

This Court has recently applied the Washington Constitution's open courts provision in art. I, sec. 10 to reinforce each individual's right of access to the Courts for remedies, including as to the State. Most recently in *Martin v. Wash. State Dep't. of Corrections*, the Court invalidated application of the "certificate of merit" required by statute to bring a medical negligence action in order to permit a claim against one of the respondents herein, DOC, applying the same rationale from the

*Putman* decision which involved private health care defendants. The *Martin* decision pointedly quoted from *Putman* to reinforce the principle that the courts are to be accessible to claimants and a statute cannot interfere. 199 Wn.2d at 564.

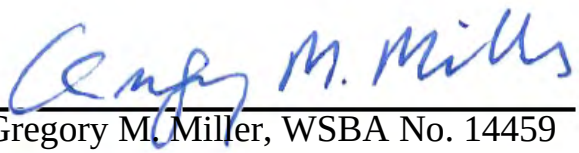
## VI. CONCLUSION

This Court should grant review to clarify that Washington law provides that public employees who are discharged by their agency are entitled to, at minimum, judicial review of the underlying administrative record to determine whether the administrative decision complies with law, and that *State ex rel Hood* is not an impediment to such review.

> This document contains 3968 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 22nd day of February, 2023.

CARNEY BADLEY SPELLMAN, P.S.

By 

Gregory M. Miller, WSBA No. 14459
miller@carneylaw.com

## APPENDICES

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email (per Email Service Agreement) to the following:

**Attorneys for Counsel for WA Personnel Resources Board:**

GCE Resource Mailbox GCEEF@atg.wa.gov
Matthew Kernutt, AAG matthew.kernutt@atg.wa.gov
John S. Meader, AAG john.meader@atg.wa.gov
Kelli Lewis, kelli.lewis@atg.wa.gov

**Attorneys for Counsel for WA State Department of Corrections:**

Susan S. Canpullo susan.danpullo@atg.wa.gov
Darcey J. Elliott Darcey.elliott@atg.wa.gov
Eloise Pimentel eloise.pimentel@atg.wa.gov

DATED this 22nd day of February, 2023.

*/s Deborah A. Groth*
Deborah A. Groth,
Legal Assistant

# APPENDIX A

FILED
12/19/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|
| WASHINGTON STATE DEPARTMENT OF CORRECTIONS, WASHINGTON STATE PERSONNEL RESOURCES BOARD,<br><br>Respondent,<br><br>v.<br><br>JULIA A. BARNETT, M.D.,<br><br>Appellant. | No. 84009-6-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

DÍAZ, J. — The Washington State Department of Corrections ("DOC") terminated Appellant, Julia Barnett, M.D., in April 2019 from her position as staff physician and medical director of the Monroe Correctional Complex ("MCC") for "incompetence." The Personnel Resources Board ("PRB") upheld the decision following a three-day hearing in October 2020. The appellant sought a Writ of Review and/or Writ of Certiorari (the "Writs") from the Snohomish County Superior Court in October 2021. That court declined to issue the Writs, finding that the PRB had acted neither illegally nor exceeded its authority and that there was another potential remedy at law available to Barnett. The superior court made such

findings without reviewing the entire administrative record, as the agencies had refused to produce it. Our Supreme Court denied direct review and transferred the appeal to this court in May.

In her appeal, Barnett asserts that the superior court erred by denying the Writs without demanding and reviewing the entire administrative record and without holding a hearing. Without such process, Barnett asserts that trial courts cannot determine whether the discharge and PRB's review exceeded its jurisdiction or otherwise was unlawful.

We affirm the superior court's denial of the Writs because, as preliminary matters, (1) the PRB was not exercising a "judicial function" that would subject it to a statutory writ of review by a superior court, and (2) the trial court did not abuse its significant discretion when finding that there were other legal options available to Barnett, which defeat the need for a constitutional writ. Further, there is no authority holding that a superior court must receive and review the entire record or hold a hearing before assessing the preliminary aspects of either writ. We do not reach the merits of the dispute or other issues the parties present.

## I. FACTS

Barnett was a staff physician and the facility medical director at the MCC, which is within the DOC, from March 2017 until her termination in April 2019. In

support of her termination, DOC conducted an investigation and produced a report, which concluded that Barnett:

> [F]ailed to exercise sound clinical judgement; provide adequate medical care to patients; advocate for patients; make timely and necessary arrangements for adequate medical care to be provided to patients outside of MCC; ensure that providers whom [Barnett] clinically supervised were providing timely, adequate medical care, evaluations or assessments; ensure that sufficient documentation and charting was occurring so that the patient's condition could be adequately monitored; and communicate significant changes in a patient's condition to other critical medical providers.

In short, in Barnett's words, she was discharged by DOC for "alleged incompetence." DOC claimed that these actions constituted misconduct and had violated the DOC's Health Plan, multiple DOC policies, and her stated job expectations, including her formal position description and performance development plan. The investigative report further detailed the resulting suffering and harm to six specific patients. DOC found just cause for termination.

Barnett appealed her termination to the PRB in May 2019, alleging multiple violations of her procedural and substantive rights. A three-day hearing was held in October 2020, during which the PRB received over 1,200 pages of exhibits and heard testimony from all witnesses offered by both parties. In September 2021, the PRB affirmed the termination decision in a written decision. Such a process is

contemplated by the State's Civil Service law, RCW 41.06.170(2), which states in pertinent part:

> Any employee who is . . . dismissed . . . shall have the right to appeal, either individually or through his or her authorized representative, not later than thirty days after the effective date of such action to the Washington personnel resources board. The employee shall be furnished with specified charges in writing when a . . . dismissal . . . action is taken. Such appeal shall be in writing.

On October 25, 2021, Barnett filed a Petition and Application for Writ of Review or for Constitutional Writ of Certiorari in Snohomish County Superior Court, naming both DOC and the PRB as respondents. The Petition alleged that the PRB committed five types of evidentiary, procedural, and legal errors, which both respondents contested. The superior court denied issuance of either a statutory or constitutional writ of review after its review of a substantial record, including four briefs and multiple declarations, totaling several hundred pages. The court found that the PRB did not act illegally or exceed its authority and that other remedies at law were available to Barnett, while expressing uncertainty about whether the PRB was exercising a judicial function. Barnett sought review by the Supreme Court. Review was denied, and the case transferred to this court in May 2022.

## II. ANALYSIS

### A. Statutory Writ of Review Under RCW 7.16.040

There are two classes of writs: (1) the constitutional or common law writ and (2) the statutory writ. Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wn.2d 756, 767, 261 P.3d 145 (2011). Barnett sought either.

As an example of the latter, RCW 7.16.040 provides that:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

In other words, to obtain a statutory writ of review, "the petitioner must show (1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law." Wash. Pub. Emps. Ass'n v. Wash. Pers. Res. Bd., 91 Wn. App. 640, 646, 959 P.2d 143 (1998) (citing Raynes v. City of Leavenworth, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992)). If any of these elements is absent, there is no basis for superior court review. Clark County PUD v. Wilkinson, et al., 139 Wn.2d 840, 845, 991 P.2d 1161 (2000) (citing Bridle Trails Cmty. Club v. City of Bellevue, 45 Wn. App. 248, 250, 724 P.2d 1110 (1986)).

Review of a superior court's decision denying a statutory writ of review is de novo. City of Seattle v. Holifield, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010) (citing Commanda v. Cary, 143 Wn.2d 651, 654, 23 P.3d 1086 (2001)). A statutory writ is an extraordinary remedy granted by statute, which should be used "sparingly." Id. at 239-40 (internal quotations and citations omitted). "Although the writ [of review] may be convenient, no authority supports its use as a matter of expediency." Dep't of Lab. & Indus. v. Bd. of Indus. Ins. Appeals, 186 Wn. App. 240, 246–47, 347 P.3d 63 (2015) (internal quotations omitted) (citing Commanda, 143 Wn.2d at 656). Courts should be wary of "broaden[ing] the scope of the statutory writ so as to be generally available rather than to be an extraordinary remedy as consistently held." Id. at 247.

Barnett glides past the first two elements to argue that the superior court could not assess the third and fourth elements without the full administrative record. Specifically, she argues that without the record the court could "not make that threshold ruling on the legality or illegality of the Board's actions. Nor could it determine what subsequent litigation Dr. Barnett could still bring." For Barnett, the "sole issue on appeal" is the presence or absence of the record. That framing, whereby a court skips over the first two elements, simply is not the law.

There is no dispute that the PRB is a tribunal (thus satisfying the first element), but the respondents assert that, regardless of the record before it, the PRB is not exercising a judicial function. We agree.

To determine whether an agency was exercising judicial functions, courts weigh the following factors: (1) whether a court has been charged with making the agency's decision; (2) whether the decision is the type that courts historically have made; (3) whether the decision involved the application of law to fact; and (4) whether the decision resembled the ordinary business of courts as opposed to legislators or administrators. Wash. Pub. Emps. Ass'n, 91 Wn. App. at 646.

Our Supreme Court and this court have held on multiple occasions that the PRB's decision that DOC properly applied its policies and procedures in a dismissal review is not a "judicial function" under the above criteria. Namely, our Supreme Court held that "the function of the [PRB], *in hearing and determining appeals from employees who have been dismissed for cause by their employing agency* is nonjudicial in nature." State ex rel. Hood v. Pers. Bd., 82 Wn.2d 396, 401, 511 P.2d 52 (1973) (emphasis added), overruled on other grounds by Pierce County Sheriff v. Civ. Serv. Comm'n of Pierce County, 98 Wn.2d 690, 658 P.2d 648 (1983); Williams v. Seattle Sch. Dist. No. 1, 97 Wn.2d 215, 221, 643 P.2d 426 (1982). The court explained that:

> Prior to creation of the [PRB], state employees had no express employment rights which were within the power of the courts to

> protect. Personnel administration was left exclusively to the discretion of management. Thus, there were no functions which the courts had or even could have performed prior to the creation of the [PRB].

Id.

The Supreme Court later further explained that, when an agency did not have to apply existing law to present facts to make its determination and when the hearing more closely resembled the business of administrators than that of courts, the actions are then not "functionally similar enough to court proceedings to warrant judicial review." Raynes, 118 Wn.2d at 244-45 (citation omitted). Indeed, since nearly the inception of the Civil Service Laws, the Supreme Court has recognized that "personnel policy and management . . . is essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government." Gogerty v. Dep't of Insts., 71 Wn.2d 1, 5, 426 P.2d 476 (1967).

Similarly, this court in Jones v. Pers. Res. Bd., 134 Wn. App. 560, 572, 140 P.3d 636 (2006), held that the "nature of the issue in dispute ultimately controls in determining whether courts historically performed the function in question." (citing Wash. Pub. Emps. Ass'n, 91 Wn. App. at 649–50). And this Court further held that PRB's resolution of an employee's grievance about a performance evaluation – even in the context of an adversarial proceeding involving a collective bargaining

agreement – is not a judicial action precisely *because* it "was essentially a personnel matter." Id.

Finally, as a matter of efficiency, our Supreme Court explained that such decision-making is not a judicial function because the PRB in a disciplinary appeal is free to use its personnel expertise and its "power to modify, as well as to reverse or affirm the decision of the employing agency. Any other approach would result in an inflexibility inconsistent with the orderly, swift and just disposition of merit system appeals." Dunaway v. Dep't of Soc. & Health Servs., 90 Wn.2d 112, 115, 579 P.2d 362 (1978) (citations omitted).

Here, "the nature of the dispute" is nothing other than a personnel administration or management matter. In other words, the PRB was not in the business of applying laws to facts, but rather to assess the performance of DOC's employee by applying state and agency policies and procedures as guided by its internal rules to the facts: the Health Plan, DOC policy documents, and her individualized position description and performance development plan. In such circumstances, the courts of Washington should resist playing the role of a super personnel department.

Barnett relies in passing on this Court's holding in Wash. Pub. Emps. Ass'n, 91 Wn. App. at 649, that, in some narrow instances, the PRB does exercise a judicial function. However, in that case, the Washington Public Employees

Association ("WPEA") petitioned for statutory or constitutional writs, after the PRB dismissed WPEA's unfair labor practices complaint against the Office of Financial Management, which had negotiated and then disapproved state employee salaries, allegedly in violation of notice and other procedural requirements. Wash. Pub. Emps. Ass'n, 91 Wn. App. at 644-45. This court found that, in that context, the PRB was exercising a judicial function because courts had historically considered such petitions and the PRB hearing resembled the ordinary business of courts. Id. at 647-49. This court specifically distinguished the nature of that dispute from the personnel and policy management dispute in Hood. Id. at 649-50. Again, this case falls in the line of cases with Hood, which remains good law on this point.[1]

For these reasons, we do not reach any additional issue, including:

1. Whether the legislative directive or statutory scheme for appeals from adverse actions against public employees would entirely preclude any further process. Namely, pursuant to RCW 41.06.170(2), "Decisions of the Washington personnel resources board on appeals filed after June 30, 2005, *shall be final and not subject to further appeal."* (emphasis added). Our Supreme Court has

[1] We also conclude that Barnett cannot establish that there is no adequate remedy at law, which showing is required for issuance of both a statutory writ and constitutional writ, which is discussed below in the analysis of the constitutional writ.

confronted an analogous "conundrum," namely, "how to reconcile the legislature's grant of review by statutory writ, RCW 7.16.040, with the legislature's denial of" appeal rights in another statute, here the final sentence of RCW 41.06.170(2). Vinson, 172 Wn.2d at 768. While the Supreme Court held that a statutory writ of review "is clearly not meant to be a substitute for an appeal and cannot be used to circumvent the legislature's clear directive," id., we need not resolve this inconsistency, if any, at this time on this record. Indeed, neither party has fully briefed the issue. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) ("This court will not consider claims insufficiently argued by the parties.").

2. Whether the PRB exceeded its jurisdiction or acted illegally *on the merits*, which Barnett does not ask us to reach in any event.

B. Constitutional Writ of Certiorari

"A constitutional right to judicial review still exists notwithstanding [a litigant's] inability to appeal" or obtain a statutory writ. Vinson, 172 Wn.2d at 768 (citing CONST. art. IV, § 6 & Williams v. Seattle Sch. Dist. No. 1, 97 Wn.2d 215, 643 P.2d 426 (1982)). However, the constitutional writ of certiorari embodied in article IV, section 6 (amendment 87) of the Washington Constitution "will rarely be granted where [direct appeal or a statutory writ are] available but [have] not been utilized by the appellant and no good cause for the lack of such utilization is shown." Bridle Trails, 45 Wn. App. at 253. Here, neither of those types of actions

is still available, so the question of whether a constitutional writ is appropriate is ripe.

The most "fundamental" purpose of such a writ is "to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." Saldin Sec., Inc. v. Snohomish County, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) (citing Bridle Trails, 45 Wn. App. at 252–53). Thus, a court will accept review only if the petitioner can allege facts that, if verified, would establish the lower tribunal's decision was "illegal or arbitrary and capricious." Saldin, 134 Wn.2d at 292 (citations omitted). However, crucially, this form of review lies "always" within the trial court's broad discretion. Bridle Trails, 45 Wn. App. at 252. As this Court explained in Bridle Trails:

> The grant of the common law writ . . . cannot be mandated by anyone, including a higher court such as this. Nor can the superior court ever lack the jurisdiction to entertain application for a writ alleging acts in excess of jurisdiction by an inferior body, whether exercising judicial functions or administrative ones. This jurisdiction is inherent in the court, as recognized in the constitution. The superior court may in its discretion refuse to exercise its inherent powers of review *so long as tenable reasons are given* to support that discretionary ruling.

Id. (emphasis added). Not even the Legislature may intrude by statute on this constitutional power. North Bend Stage Line, Inc. v. Dep't of Pub. Works, 170 Wash. 217, 227-28, 16 P.2d 206 (1932).

For these reasons, a superior court's decision denying a constitutional writ of certiorari is reviewed under an abuse of discretion standard. Newman v. Veterinary Bd. of Governors, 156 Wn. App. 132, 142, 231 P.3d 840 (2010) (citing Bridle Trails, 45 Wn. App. at 252). A court abuses its discretion only when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. Gildon v. Simon Prop. Grp., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citations omitted).

Here, the trial court denied the application for a constitutional writ, finding that there is "another potential legal remedy available to the Petitioner which precludes the constitutional writ from issuing." Indeed, the "law is well established that discretion can be exercised when *no other adequate remedy at law* is available and when the decision below is arbitrary, capricious, or contrary to law." Torrance v. King County, 136 Wn.2d 783, 787-88, 966 P.2d 891 (1998) (emphasis added) (citations omitted). The respondents argue that "Barnett had an adequate alternative option to file a tort of wrongful discharge in violation of public policy" either before the appeal to the PRB or after. Br. of Resp't. DOC at 37 (citing *inter alia* Smith v. Bates Tech. Coll., 139 Wn.2d 793, 803, 991 P.2d 1135 (2000) & RCW 4.96.010(1)).

Although she again glides past these arguments and at times conflates the legal scheme governing statutory and constitutional writs, Barnett makes three

arguments in response. First, she claims that "any such suit . . . would be dead in the water," citing to principles of preclusion and collateral estoppel. To her credit, she later acknowledges that "[c]ollateral estoppel will be applied when the agency is acting in a judicial capacity," which we determined, for the reasons provided above, the PRB is not. Thus, this argument fails.

Second, even if not precluded by the PRB's decision, Barnett claims this remedy sounding in tort would be engulfed in the "tangled thicket" of bringing a wrongful discharge claim after administrative proceedings. That is, Barnett argues that the remedy would not be "sure and certain." However, that formulation is not the standard. The standard, as framed in the analogous statutory writ context, is whether there is "any plain, speedy and adequate remedy at law." RCW 7.16.040. And, "[a]lthough the writ [of review] may be convenient, no authority supports its use as a matter of expediency." Dep't of Lab. & Indus. v. Bd. of Indus. Ins. Appeals, 186 Wn. App. at 246–47. Barnett's hand-waving that such a lawsuit would be difficult is insufficient.

Third, Barnett argues that the proposed remedy is not adequate because it would only be brought against the DOC (the appointing and discharging authority) and not the PRB, which she apparently believes is the truly guilty party. This is a distinction without a difference: ultimately this is a personnel matter, whose crux is the validity of the adverse action DOC took, which the PRB merely blessed.

Barnett provides no authority holding that an employee should be able to "hold accountable" such a sub-agency. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962), review denied, 195 Wn.2d 1031, 468 P.3d 621 (2020)).

For these reasons, we find that the Superior Court did not abuse its discretion in denying a constitutional writ of review.

As with the statutory writ, then we do not reach whether there is a "threshold" or some kind of prima facie showing a petitioner must make on any of the elements of a constitutional writ enumerated above, as Respondents ask us to establish.

C. Administrative Record Prior to the Denial of Either Writ

Again, Barnett argues that Chapter 7.16 of the RCW requires the full administrative record be filed prior to the determination of a statutory writ. Barnett claims that "[t]he statutes are explicit that this is so." We find that this reading of RCW 7.16.040 is contrary to the plain language of the statute.

Pursuant to RCW 7.16.050, "The application must be made on affidavit by the party beneficially interested" and otherwise does not mandate any specific

process a court must take. "With the application for a writ, appellant must submit material in support of it specifically designating the jurisdictional excesses, abuses of discretion, or errors of law that substantially prejudiced appellant at the administrative hearing." Phillips v. City of Seattle, 51 Wn. App. 415, 422, 754 P.2d 116 (1988) (citing Concerned Olympia Residents for Env't v. City of Olympia, 33 Wn. App. 677, 683, 657 P.2d 790 (1983)), aff'd, 111 Wn.2d 903, 766 P.2d 1099 (1989). Typically, a party seeking a writ applies to the superior court by way of motion, sometimes ex parte.[2]

If the writ is granted, the respondent certifies to the court for review the records and proceedings. Specifically, beginning at 7.16.060, the statute describes what occurs *after* the court issues a statutory writ "to any other [body] having the custody of the record or proceedings to be certified." RCW 7.16.060. And, it is the writ itself that directs a party to "return the writ with the transcript required" and "to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings. . . ." for review by the court.

[2] RCW 7.16.050 grants discretion to the trial court to grant the writ without notice, or "grant an order to show cause why [the writ] should not be allowed." In typical practice, prior to issuance of the writ of review, the moving party first applies for an "order to show cause" setting a time and place for the responding party to appear before the court and present any arguments against granting the writ, such as: timeliness of the application, lack of jurisdiction, failure of service, or lack of standing. See, e.g., Crosby v. County of Spokane, 137 Wn.2d 296, 303, 971 P.2d 32 (1999); In re King County Hearing Exam'r, 135 Wn. App. 312, 317, 144 P.3d 345 (2006); Davidson v. Thomas, 55 Wn. App. 794, 795, 780 P.2d 910 (1989).

RCW 7.16.060, .070. Only then does the court entertain "questions involving the merits." RCW 7.16.120; see, e.g., State ex rel. Melville v. Turner, 37 Wn.2d 171, 175, 222 P.2d 660 (1950). Nothing in the statute suggests that the superior court must obtain the full certified record before granting or denying a statutory writ.

What is more, there is no authority of any kind supporting the claim that a constitutional writ requires any such process. Based on the cases cited above and on this record, we do not accept the invitation to delineate a certain process.

Finally, the two cases Barnett adduces for the proposition that a full record is required before a statutory or constitutional writ is issued are inapposite. In re Dependency of B.W.K., No. 76675-9-I, slip op. (Wash. Ct. App. Oct. 29, 2018) (unpublished) https://www.courts.wa.gov/opinions/pdf/766759.pdf, is simply an example of an appellate court reviewing a trial record for error. The case has nothing to do with statutory or constitutional writs.

In Crouch v. Ross, 83 Wash. 73, 75, 145 P.87 (1914), our Supreme Court, over 100 years ago, affirmed the trial court's denial of a writ in an unusual situation; namely, where the court sought the underlying transcripts, which did not exist because the stenographer could not read her notes. The Court held that "it was not only within the *discretion* of the court, but was in a sense incumbent upon him, to dismiss the proceedings." Id. at 74 (emphasis added). There is no reference to Chapter 7.16 of the RCW, although a version of it existed. And, the opinion, if

anything, highlights, and bases the decision on, the significant discretion trial courts have in considering constitutional writs of review. We do not now impose additional requirements not mandated by any current authority.

## III. CONCLUSION

We affirm the denial of the requested statutory and constitutional writs for the reasons provided.

Díaz, J.

WE CONCUR:

Chung, J.

Mann, J.

# APPENDIX B

FILED
1/20/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| JULIA A. BARNETT, M.D.,<br><br>Appellant,<br><br>v.<br><br>WASHINGTON STATE DEPARTMENT OF CORRECTIONS, WASHINGTON STATE PERSONNEL RESOURCES BOARD,<br><br>Respondent. | No. 84009-6-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant Julia A. Barnett, M.D., filed a motion for reconsideration of the opinion filed on December 19, 2022 in the above case. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

# CARNEY BADLEY SPELLMAN

## February 22, 2023 - 3:11 PM

## Transmittal Information

| | |
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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 101,733-2 |
| **Appellate Court Case Title:** | Julia A. Barnett,v. Washington State Dept. of Corrections et al. |
| **Superior Court Case Number:** | 21-2-04973-1 |

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