NO. 99505-2

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON AND RICHARD MANKAMYER,

Petitioners,

v.

THE WASHINGTON STATE CONSERVATION COMMISSION and the following in their individual and official capacities: JIM KROPF, CHAIR; DEAN LONGRIE, VICE-CHAIR; HAROLD CROSE, COMMISSIONER; LARRY COCHRAN, COMMISSIONER; DARYL WILLIAMS, COMMISSIONER; SARAH SPAETH, COMMISSIONER; PERRY BEALE, COMMISSIONER; THOMAS MILLER, COMMISSIONER; EXECUTIVE DIRECTOR MARK CLARK; POLICY DIRECTOR RON SHULTZ; JOHN AND JANE DOES 1-10,

Respondents.

WASHINGTON STATE CONSERVATION COMMISSION'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners seek review only of the determination below that they were not entitled to costs and attorneys' fees, devoid of any claim of error as to the merits of this case. This narrow question does not merit review.

After a day-long hearing, during which it heard evidence through sworn testimony and exhibits, the Washington State Conservation Commission (Commission) voted to remove Petitioners Mr. Johnson and Mr. Mankamyer (Johnson) from their volunteer positions as Thurston Conservation District supervisors for malfeasance and neglect of duty. Johnson challenged their removal in superior court, where they successfully argued, *inter alia*, that the Commission should have held the hearing required by the Commission's removal statute, RCW 89.08.200, as an Administrative Procedure Act (APA) adjudication, rather than as a hearing governed by the Open Public Meetings Act (OPMA).

On review, the Court of Appeals affirmed the superior court on this issue, holding that the Commission misinterpreted the APA when it determined that an APA adjudicative proceeding was not required. Because the Court of Appeals also held that Johnson was not substantially prejudiced by the hearing procedure, it held Johnson did not prevail against the Commission. Johnson does not seek review of the holding that they were not substantially prejudiced, nor the holding that they did not prevail.

In their Petition for Review, Johnson challenges none of the substantive holdings of the Court of the Appeals, and instead seeks costs, attorneys' fees, and penalties under the OPMA. But the Court of Appeals

held that the OPMA did not apply, because the hearing was an adjudicative proceeding governed by the APA. The Court of Appeals denied Johnson recovery of costs and fees under the inapplicable statute. There is no conflict between the Court of Appeals' opinion in this case and prior published opinions of this Court or state Courts of Appeals, because Johnson did not prevail against the Commission, and therefore are not entitled to costs, fees or penalties, and the cases cited by Johnson are not applicable to this matter, which is governed by the APA.

II. RESTATMENT OF THE ISSUE

Did the Court of Appeals err when it declined to award costs and fees to a non-prevailing party under an inapplicable statute?

III. RESTATEMENT OF THE CASE

The Commission has the authority to remove local Conservation District supervisors from their volunteer positions for malfeasance or neglect of duty. RCW 89.08.200. Before doing so, the supervisors are entitled to notice and a hearing. RCW 89.08.200; WAC 135-110-960. After due consideration, the Commission originally determined it was not required to hold the meeting as an APA adjudication. AR 1490–91. Johnson objected, but the Commission did not change its determination. Ultimately the hearing was held on February 20, 2019, and Mr. Johnson and Mr. Mankamyer were removed from their positions. AR 2396; AR 2397.

Johnson filed an action against the Commission in superior court. Among other issues, Johnson argued that the Commission erred when it decided not to hold the hearing as an APA adjudication. CP 0026–27 (First

Amended Complaint and Petition for Judicial Review) (Appendix A) at 3–4. The superior court agreed with Johnson. *Johnson v. Wash. Conservation Comm'n*, No. 54173-4, slip op. at 6 (Wash. Feb. 9, 2021) (Appendix B). Johnson appealed the superior court's Order on Summary Judgment, and the Commission cross-appealed. The Court of Appeals held that the superior court did not err when it ruled that the Commission improperly held the removal hearing outside the APA. Appendix B at 29. However, the Court of Appeals reversed the superior court's ruling that Johnson was substantially prejudiced by the hearing procedure. Appendix B at 30. The Court of Appeals also held that Johnson was not entitled to costs or fees under either the APA or the OPMA. Appendix B at 29.

Johnson does not seek review of the Court of Appeals' holdings on the merits. Johnson only seeks costs, attorneys' fees and penalties under the OPMA, the statute they argued below did not apply.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Johnson did not prevail against the Commission, and therefore is not entitled to relief in the form of costs, fees, or penalties. Additionally, Johnson does not assign error to the Court of Appeals' determination that the agency action under review was the Commission's interpretation of the APA. Appendix B at 22. Below, Johnson argued that the removal hearing was governed by the APA, and that the OPMA did not apply. Reply Brief of Appellants/Cross Respondents (Appendix C) at 10. The Court of Appeals agreed. Appendix B at 24 ("It is outside the Commission's authority to hold an adjudication outside of the APA."). Because the agency action on review

was the Commission's interpretation of the APA, and not action taken under the OPMA, the cases cited by Johnson addressing agency action taken under the OPMA are inapplicable. There is no conflict with a decision of this Court or of the Courts of Appeals to be resolved. RAP 13.4(b).

A. Johnson is Not a Prevailing Party Entitled to Costs and Attorneys' Fees

The Court of Appeals held that Johnson was not entitled to costs and attorneys' fees under the APA because they were not substantially prejudiced by the removal hearing procedure, and therefore did not prevail. Appendix B at 29. The Court of Appeals also held that the OPMA did not apply to the action under review, which was the Commission's interpretation of the APA. *Id.* Therefore Johnson is not entitled to costs and attorneys' fees under the OPMA.

In an APA appeal, a court "shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 225, 173 P.3d 885 (2007). Under the APA, damages, compensation or ancillary relief may be awarded only to the extent expressly authorized by another provision of law. RCW 34.05.574(3).

The Court of Appeals held that Johnson was not substantially prejudiced by the Commission's action. Appendix B at 27. Johnson was not prejudiced because they were afforded procedural rights at the hearing, and the additional procedures they sought were permissive, not mandatory. Appendix B at 26. Because Johnson was not substantially prejudiced, they

did not prevail against the Commission. Appendix B at 29. Johnson does not appeal this holding. Because Johnson was not substantially prejudiced, even if another provision of law applied, they are not entitled to costs and fees under the APA. RCW 34.05.570(1)(d), .574(3).

In order to be awarded costs and fees under the OPMA, a person must have "**prevail[ed]** against a public agency." RCW 42.30.120(4) (emphasis added). The uncontested holding of the Court of Appeals was that Johnson did not prevail against the Commission. Appendix B at 29. Therefore Johnson is not entitled to costs and fees under the OPMA.

The OPMA does not apply to matters governed by the APA. RCW 42.30.140(3). Again, the action under review was "the Commission's interpretation of the APA." Appendix B at 22. The Court of Appeals reviewed the agency decision under RCW 34.05.570(3), which governs review of agency orders in APA adjudicative proceedings. Appendix B at 22. The Court of Appeals held that the Commission improperly interpreted RCW 34.05.416 as allowing it the choice to not hold the removal hearing required by RCW 89.08.200 under the APA. Appendix B at 25 (finding that the Commission misapplied RCW 34.05.416). The Court of Appeals found that the APA must apply to the removal hearing. Appendix B at 25. Because the APA applies, the OPMA does not. RCW 42.30.140(3).

Johnson is not a prevailing party. Additionally, the OPMA does not apply to the action taken by the Commission. The Court of Appeals properly declined to award costs and fees to Johnson under the OPMA.

B. Johnson is not entitled to penalties under RCW 42.30.120(1)

In no event is Johnson entitled to penalties under RCW 42.30.120(1). First, Johnson is not a prevailing party. Second, as discussed above, the action at issue was the Commission's interpretation of the APA, which the Court of Appeals analyzed under RCW 34.05.570, and the OPMA does not apply. And third, the requirement that the Commissioners have knowledge that their action was taken in violation of the OPMA is not met, because the Commissioners had no such knowledge.

Penalties against individual members of a governing body can only be imposed when those members attending a meeting held under the OPMA have knowledge that the meeting violates the OPMA. RCW 42.30.120(1); *Miller v. City of Tacoma*, 138 Wn.2d 318, 331, 979 P.2d 429 (1999). Here the Commissioners did not have knowledge that the Commission was required to hold the removal hearing under the APA, and therefore the Commissioners are not individually subject to penalties.

A claim for penalties under the OPMA requires evidence that members of a governing body know they are taking action in violation of the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 566–67, 27 P.3d 1208 (2001). Unlike the members of the School Board in *Wood*, where Board members emailed each other discussing possible OPMA violations, here there is no evidence indicating that the Commissioners had knowledge that the removal hearing could only be held pursuant to the APA.

Johnson appears to suggest that their objections to the format of the removal hearing resulted in the Commissioners having actual knowledge

their selected format was incorrect. Petition for Review at 3–4 (vaguely claiming that the Commission had "notice"). This is not the case. The Court of Appeals rejected a similar speculative argument in *Eugster v. City of Spokane*, finding that Mr. Eugster's OPMA objections to the Spokane City Council procedures were not evidence sufficient to show that the Council had prior knowledge of a violation of the OPMA. *Eugster v. City of Spokane*, 110 Wn. App. 212, 226, 39 P.3d 380 (2002). The same is true here, where Johnson's objections do not confer affirmative knowledge of a violation on the Commissioners.

In the Commission's letter of September 13, 2018, it explained its good-faith reasoning on the choice of hearing format. AR 1490–91. Johnson points to no evidence in the record that the Commissioners had the requisite knowledge they were acting in violation of the OPMA. The Commissioners are not subject to penalties pursuant to RCW 42.30.120(1). *Miller*, 138 Wn.2d at 331.

V. CONCLUSION

For these reasons, Johnson's Petition for Review should be denied. The Court of Appeals' opinion does not conflict with opinions of this Court

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nor with opinions of the Courts of Appeals, and this Court's review is not warranted.

RESPECTFULLY SUBMITTED this 15th day of March 2021.

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APPENDIX A

Honorable James J. Dixon

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

ERIC JOHNSON et al.,

Plaintiffs,

v.

WASHINGTON STATE CONSERVATION COMMISSION et al.,

Defendants.

No. 18-2-04699-34

FIRST AMENDED COMPLAINT AND PETITION FOR JUDICIAL REVIEW

1. FACTS:

1.1 The Plaintiffs are small farmers who volunteered to serve as Thurston County Conservation District (TCD) Supervisors. TCD is a local government agency.

1.2 Plaintiff Johnson was appointed by the Washington State Conservation Commission [Commission] to a term beginning May 2016 and ending May 2019.

1.3 Plaintiff Mankamyer was elected for a term running May 2017 to May 2020.

1.4 The Plaintiffs uncovered questionable conduct by staff, including conflicts of interest, questionable expenses and contract irregularities.

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1.5 Staff and others complained about the Plaintiffs to the Commission which launched an investigation.

1.6 Commission staff investigated various complaints concerning the Plaintiffs and issued a report on July 20, 2018 recommending they be removed.

1.7 Plaintiffs responded on August 14, 2018 contesting the charges and noting that a recall petition was filed on July 18, 2018.

1.8 The Commission held a special meeting on August 29, 2018 and voted to proceed with an informal public hearing under the OPMA rather than the APA.

1.9 On September 11, 2018, the Commission's Executive Director (Mark Clark) sent notice of the hearing to the Plaintiffs stating:

> Outside of the submittal of the hearing briefs, there is no additional prehearing practice authorized. RCW 89.08 does not grant the WSCC power to issue subpoenas or to authorize discovery, so no such procedures are permitted.

1.10 Concerned with the nature of the hearing, the Plaintiffs applied via email on that same day (September 11, 2018) to the Commission for an adjudicative proceeding per RCW 34.05.413(2). Mr. Clark responded by letter dated September 13, 2018 citing RCW 89.08.200 and stating:

> Pursuant to RCW 34.05.416, the WSCC has decided not to conduct an adjudicative proceeding under the Administrative Procedures Act (APA), RCW 34.05 ...

Mr. Clark explained that the WSCC would hold an informal public hearing under the OPMA, RCW 42.30, rather than an adjudication under the APA.

1.11. On February 20, 2019, the Washington State Conservation Commission held a hearing under the Open Public Meeting Act [OPMA] and voted to remove the Plaintiffs

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from their positions as Supervisors for the Thurston Conservation District for malfeasance and neglect of duty. The Plaintiffs objected to proceeding under the OPMA insisting that any adjudicative hearing should be under the APA. Notice of the Commission's decision, the right to appeal and findings were sent to the Plaintiffs on March 22, 2019.

1.12 This case was originally filed on September 24, 2018. It is entitled "Petition for Judicial Review under the APA and Complaint for Declaratory and Injunctive Relief for Violation of the Administrative Procedures Act; the Open Public Meetings Act and 42 U.S.C. 1983 & 1988."

1.13 Defendants removed the case to U.S. District Court on October 12, 2018.

1.14 On March 29, 2019, the U.S. District Court granted, *in part*, Defendants' motion to summarily dismiss Plaintiffs' 42 U.S.C. 1983 federal law claim and dismissed without prejudice Plaintiffs' state law Administrative Procedure Act (APA) and Open Public Meeting (OPMA) claims.

1.15 This amended complaint appeals Mr. Clark's decision (September 13, 2018) to proceed under the OPMA and the Commission's decision based on that hearing and sent to the Plaintiffs on March 22, 2019.

2. FIRST CAUSE OF ACTION: THE COMMISSION ACTED OUTSIDE OF ITS STATUTORY AUTHORITY BY PROCEEDING WITH A HEARING UNDER THE OPMA RATHER THAN THE APA

2.1 RCW 34.05.570 (4)(c) states that "Relief for persons aggrieved by the performance of an agency action ... can be granted only if the court determines that the

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action is ... (i) Unconstitutional; (ii) outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) arbitrary or capricious...."

2.2 The Commission's action to proceed with a hearing under the OPMA rather than the APA is "outside the statutory authority of the agency or the authority conferred by a provision of law" and "arbitrary or capricious."

2.3 The Commission is subject to the entire APA, including the rules governing adjudicative proceedings. RCW 34.05.030(5).

2.4 The APA defines "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right." RCW 34.05.010(1).

2.5 The plaintiffs have a right to a hearing under RCW 89.08.200 and under the Washington State Constitution, art. I, §§ 3 and 33.

2.6 The OPMA does not apply to "matters governed by chapter 34.05 RCW" the APA. RCW 42.30.140(3).

3. SECOND CAUSE OF ACTION: REMOVAL OF MR. MANKAMYER, AN ELECTED SUPERVISOR, BY THE COMMISSION BASED ON RCW 89.08.200 WAS UNCONSTITUTIONAL AS APPLIED TO HIM.

3.1 Plaintiffs reallege the allegations stated above.

3.2 As an elected local government official, Mankamyer is subject to removal by recall per the Washington State Constitution. Wash. Const. art. I, sec. 33 [Recall of elected officers].

3.3 There is no exception that would allow the Commission to remove an elected Supervisor.

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3.4 The Commission's action to proceed with a hearing under the OPMA rather than the pending recall is "unconstitutional; outside the statutory authority of the agency or the authority conferred by a provision of law" and "arbitrary or capricious."

4. PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for the following relief per RCW 34.50.574:

4.1 Declare that the Commission violated the APA and OPMA.

4.2 Set aside the Commission's Order removing the Plaintiffs as TCD Supervisors.

4.3 Reinstatement of the Plaintiffs as TCD Supervisors.

4.4 Award such damages and ancillary relief as authorized by law.

Dated: 4/12/19

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Judge: Dixon

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

ERIC JOHNSON et al., Plaintiffs, v. WASHINGTON STATE CONSERVATION COMMISSION et al., Defendants.	NO. 18-2-04699-34 Declaration of Service First Amended Complaint and Petition for Judicial Review [Scribner's error]

I declare under penalty of perjury under the laws of the State of Washington that:

1. I am counsel to the plaintiff in this case.

2. I personally served the Plaintiffs' First Amended Complaint and Petition for Judicial Review to defense counsel, Phyllis Barney, AAG, 2425 Bristol Ct., S.W., Olympia. WA 98502-6003. I also emailed a copy to counsel per agreement [Email: phyllis-batg.wa.gov].

3. The parties stipulated to this amended complaint and an order was entered on May 3, 2019.

4. The amended complaint filed on May 9th was not signed by counsel. This is the same amended complaint filed on May 9th but is signed by counsel.

Dated: May 10, 2019

Olympia, WA

By: _____

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APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 9, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ERIC JOHNSON and RICHARD MANKAMYER, Appellants/Cross Respondents, v. WASHINGTON STATE CONSERVATION COMMISSION and the following in their individual and official capacities: JIM KROPF, Chair; DEAN LONGRIE, Vice-Chair; HAROLD CROSE, Commissioner; LARRY COCHRAN, Commissioner; DARYL WILLIAMS, Commissioner; SARAH SPAETH, Commissioner; PERRY BEALE, Commissioner; THOMAS MILLER, Commissioner; Executive Director MARK CLARK; Policy Director RON SHULTZ; JOHN and JANE DOES 1-10, Respondents/Cross Appellants.	No. 54173-4-II PUBLISHED OPINION

WORSWICK, J. — Eric Johnson and Richard Mankamyer (collectively, appellants) were supervisors on the Thurston Conservation District. The Washington State Conservation Commission removed both appellants for malfeasance and neglect of duty. The appellants filed an action in superior court for declaratory and injunctive relief, and for attorney fees.[1] The trial

[1] The appellants sued numerous individual commissioners and employees as well as the Commission. We refer to all these defendants as "the Commission."

court entered a summary judgment order ruling that the Commission erred when it held the removal hearing under the Open Public Meetings Act (OPMA)[2] instead of under the Administrative Procedure Act (APA).[3] The court also ruled that neither election statutes nor the State Constitution required the appellants to be removed only by a recall election. The court remanded the case to the Commission for further proceedings, and granted appellants leave to request attorney fees at a later date.

The appellants appeal, arguing that (1) the trial court erred when it granted summary judgment by ruling that removal of an elected supervisor under RCW 89.08.200 does not violate article I, section 33 of the Washington Constitution, (2) the trial court erred when it granted summary judgment by remanding the matter to the Commission, and (3) they are entitled to costs and fees under RAP 18.1, the OPMA, and the APA.

The Commission cross appeals, arguing the trial court erred when it ruled that (4) the Commission erroneously held the removal hearing under the OPMA and not the APA, and (5) the appellants were denied procedural rights and were thereby substantially prejudiced.

We affirm the trial court's rulings that the APA applies to removal hearings for conservation district supervisors, the Commission erred when it held the removal hearing under the OPMA rather than the APA, and the removal of elected conservation district supervisors under RCW 89.08.200 does not violate the Washington Constitution. However, we reverse the trial court's ruling that the appellants were denied procedural rights that resulted in substantial prejudice to the appellants. Accordingly, we vacate the trial court's order remanding the matter

[2] Chapter 42.30 RCW.

[3] Chapter 34.05 RCW.

to the Commission because remand would be futile or impracticable. We also deny the appellants' request for attorney fees. Thus, we affirm in part, reverse in part, vacate in part, and deny the appellants' request for attorney fees.

FACTS

Conservation districts are local government entities governed by the Washington State Conservation Commission. RCW 89.08.020. There are 45 conservation districts around the state, including the Thurston Conservation District. RCW 89.08.070. Each conservation district is governed by a board of five supervisors, three of whom are elected and two of whom are appointed by the Commission. RCW 89.08.160, .210, .220. Supervisors serve three year terms. RCW 89.08.200. Supervisors are unpaid, but are entitled to expenses incurred during performance of their duties. RCW 89.08.200.

Eric Johnson was appointed as a supervisor on the Thurston Conservation District in September 2013. Johnson's term as supervisor expired in May 2019.[4] Richard Mankamyer was elected for a term running from May 2017 to May 2020.

In November 2017, the Commission received a complaint regarding the appellants' conduct as Thurston Conservation District supervisors.[5] The Commission informed the appellants that they were being investigated for potential removal from their positions under

[4] At the time of the summary judgment motion, another person had been appointed to Johnson's vacant position.

[5] The letter presented to the Commission identified several areas of concern regarding the appellants, including harassment and discrimination of permanent staff, neglect of duties, spreading misinformation, unethical conduct, and a lack of good governance.

RCW 89.08.200.[6] Staff at the Thurston Conservation District also filed complaints against the appellants with the Washington State Human Rights Commission in March 2018. These complaints resulted in the Commission conducting an investigation into the appellants' conduct covering the time period between January 2016 and June 2018.

In a report issued in July 2018, the Commission set out 11 charges against the appellants. The Commission then held a special meeting in August 2018 to decide whether to hold a public hearing to consider the appellants' removal. At that meeting, the Commission voted to hold a hearing under the OPMA to determine the appellants' removal. The appellants requested a hearing under the APA in September 2018.

The Commission responded to the appellants' request, but informed them that it would not conduct the public hearing as an APA adjudication. Instead, the Commission stated that it would hold the removal hearing under the OPMA. The Commission claimed it had the authority to choose not to conduct an adjudicative proceeding under the APA. *See* RCW 34.05.416.

The Commission held the removal hearing over the appellants' objections in February 2019. In a series of prehearing conferences and communications, the appellants and the Commission cooperated in reaching a determination on the procedural and administrative details of the hearing. The appellants were afforded certain procedural rights at the hearing, including representation by counsel, presenting and questioning witnesses, and entering exhibits. At the removal hearing, the Commission voted to remove Johnson and Mankamyer for neglect of duty and malfeasance based on 4 of the 11 charges.

[6] RCW 89.08.200 provides the term of office for conservation district supervisors, as well as provisions governing elections, vacancies, quorum rules, compensation, and removal.

The Commission made findings regarding the 4 charges. First, the Commission found neglect of duty by both appellants because they failed to maintain full and accurate records of district business, resulting in a lack of direction for district staff and a lack of clear district records.

Second, the Commission found neglect of duty by both appellants because they delayed approval of timesheets and signing of checks. This resulted in the district incurring late fees on overdue bills and putting district bank account signing authorities at risk.

Third, the Commission found both appellants committed malfeasance by engaging in inappropriate conduct and making inappropriate comments when working with district staff. The harassment affected, interfered, and interrupted the performance of the district. Regarding this charge, the Commission found that the appellants had failed to implement the recommendations of a risk management specialist, which resulted in increases in insurance rates and deductibles for the district.

Fourth, the Commission found Johnson committed malfeasance when he failed to attend a public hearing. Johnson's failure to attend resulted in a lack of a quorum during a budget meeting regarding the district's rates and charges and ultimately resulted in a loss of nearly a third of the district's annual budget.

Meanwhile, the appellants proceeded against the Commission in court. After learning in September 2018 that they would not be receiving a hearing under the APA, the appellants filed a petition for judicial review in Thurston County Superior Court. The appellants sought declaratory and injunctive relief under 42 U.S.C. section 1983 (civil action for deprivation of rights), the APA, and the OPMA. The Commission removed the case to federal court in October

2018. In March 2019, the United States District Court granted the Commission's motion to summarily dismiss the appellants' 42 U.S.C. § 1983 claims, and then dismissed the APA and OPMA claims without prejudice.[7] After the Commission's decision to remove the appellants from the Conservation District, they filed an amended complaint in superior court in April 2019.

The appellants and the Commission then filed cross motions for summary judgment. The trial court granted summary judgment to the appellants, ruling that the hearing was an "adjudicative proceeding" and that the Commission erred when it held the removal hearing under the OPMA rather than the APA. Clerk's Papers (CP) at 130. The court also ruled that the appellants were denied procedural rights which resulted in substantial prejudice. The court ordered that the matter be remanded to the Commission for further proceedings under the APA.[8]

The appellants now appeal the trial court's order of summary judgment and argue that the removal statute, RCW 89.08.200, violates the Washington Constitution as it applies to elected supervisors. The appellants further argue that the trial court's remand of the proceedings to the

[7] The district court found that the appellants had no property or liberty interest in "volunteer" positions and that they did not meet their burden of proof to show that they had a due process right in a recall petition. *Johnson v. Wash. Conservation Comm'n*, No. C18-5824 RJB, 2019 WL 1429503, at *6 (W.D. Wash. Mar, 29, 2019).

[8] The trial court's decision was listed in a section of the order on summary judgment entitled "Findings and Conclusions." CP at 130. Because the issue below was a summary judgment motion, findings of fact are not necessary, and are superfluous if made. *Nelson v. Dep't of Labor & Indus.*, 198 Wn. App. 101, 109, 392 P.3d 1138 (2017). Moreover, there were no material issues of fact presented to the trial court. Although designated as "findings," the statements in the order are actually rulings. However, both the appellants and the Commission refer to—and assign error to—the trial court's "findings." We treat these findings as rulings for the purposes of this appeal.

Commission for adjudication under the APA is futile and impracticable. The appellants also request attorney fees on appeal.

The Commission cross appeals. The Commission assigns error to the trial court's finding that the Commission was required to hold removal hearings under the APA and not the OPMA.[9] The Commission argues that its removal procedure did not violate either the APA or the OPMA. The Commission also assigns error to the trial court's finding that the appellants were denied procedural rights.[10] The Commission argues that the appellants had no property or liberty interest in their positions and that, accordingly, the procedure it afforded the appellants was sufficient regardless of whether the hearing was held under the OPMA or the APA. Additionally, the Commission argues that even if the procedure it used was flawed, the appellants were not substantially prejudiced by the procedures used in the removal hearing. S*ee* RCW 34.05.570(1)(d). Finally, the Commission argues that the appellants are not entitled to their requested relief.

ANALYSIS

I. CONSTITUTIONALITY OF RCW 89.08.200

The appellants argue that the trial court erred when it ruled that the removal of Mankamyer from his elected position does not violate article I, section 33 of the Washington Constitution. The appellants contend that removing elected conservation district supervisors

[9] We consider this "finding" a "ruling" because there was no material question of fact on this issue and this "finding" is an interpretation of the law.

[10] We consider this finding a ruling, also.

under RCW 89.08.200 violates article I, sections 33 and 34 of the Washington Constitution.[11] We disagree and hold that RCW 89.08.200 does not conflict with the Washington Constitution.

A. *Legal Principles*

We review summary judgment decisions de novo. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013) (plurality opinion). Where there is no genuine issue of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. *Int'l Marine*, 179 Wn.2d at 281; *Voters Educ. Comm. v. Wash. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007). We review the constitutionality of a statute de novo. *Schroeder v. Weighall*, 179 Wn.2d 566, 571, 316 P.3d 482 (2014).

"'[A] statute is presumed to be constitutional and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'" *Voters Educ. Comm.*, 161 Wn.2d at 481 (internal quotation marks omitted) (quoting *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)). Where possible, we have a duty to construe constitutional construction of statutes. *Campbell v. Tacoma Pub. Sch.*, 192 Wn. App. 874, 883, 370 P.3d 33 (2016).

Article I section 33 of the Washington Constitution states:

> Every elective public officer in the state of Washington expect [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, . . . whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, . . . is filed with the officer with whom petition for nomination, or certificate for nomination, to such

[11] At oral argument, the appellants appeared to move away from this position and argued that because RCW 89.08.200 conflicts with article V section 3 of the Washington Constitution, the only "logical option" remaining for removing an elected supervisor was the recall. We address the argument presented in their brief.

> office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

(Alteration in original.) The next section, article I, section 34, states that "[t]he legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article." The legislature passed these laws, which are codified in RCW 29A.56.110. This statute provides the procedures for recall of "*any* elective public officer of the state or of such political subdivision." RCW 29A56.110 (emphasis added).

Under article V, section 3 of the Washington Constitution, "[a]ll officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law." Only "[t]he governor and other state and judicial officers" are liable to impeachment. WASH CONST. art. V, § 2. Neither party here contends that conservation district supervisors are liable to impeachment.

The legislature has passed laws that provide for the removal of elected officials. For example, a public officer may be required to forfeit his or her office if convicted of a "felony or malfeasance." RCW 9.92.120. The legislature also provides a list of when an elective office "shall become vacant," which includes removal, conviction of a felony, refusal to take his or her oath of office, or on the decision of a competent tribunal voiding the election or appointment, or a judgment determining the incumbent has breached the condition of his or her official bond. RCW 42.12.010(3), (5)-(8). Conservation district supervisors are specifically governed under RCW 89.08.200, which states that "[a] supervisor may be removed by the state conservation commission upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason."

B. *RCW 89.08.200 and Washington Constitution Article I, §§ 33-34*

The appellants argue that removing elected conservation district supervisors under RCW 89.08.200 violates article I, sections 33 and 34 of the Washington Constitution. They argue that recall is the sole method of removing an elected officer. We disagree.

The appellants base their argument that the supervisor removal statute is invalidated by the constitution on *State ex rel. Lynch v. Fairley*, 76 Wash. 332, 333, 136 P. 374 (1913). In *Fairley*, the City of Spokane's city charter contained a recall provision. 76 Wash. at 333. Our Supreme Court held that Spokane's recall provision conflicted with sections 33 and 34 of article I of the state constitution. *Fairley*, 76 Wash. at 334. The court held that the recall procedure under the city charter, which included the form of petitions, allegations, and number of signatures required to hold a recall, were superseded by the then-new constitutional amendments in sections 33 and 34. *Fairley*, 76 Wash. at 333-34. The court explained that the sections "constitute a general law upon the subject of recall of [the] city as well as other officers, the requirements of which must be conformed with as a prerequisite to the holding of a recall election." *Fairley*, 76 Wash. at 334.

This case is distinguishable. First, RCW 89.08.200 is not a recall provision like those in *Fairley*, but a provision to remove supervisors by other means. Second, the statute is not a city ordinance put in place by a charter, but a statute voted on by the legislature and approved by the governor, as contemplated by the constitution. Finally, the statute includes no language that conflicts with sections 33 and 34 of article I of the state constitution. That is, the statute contains no language that prevents a recall of supervisors under the "general law upon the subject of recall" as laid out in the constitution. *Fairley*, 76 Wash. at 334. The statute does not provide

that the Commission's removal procedure under the statute is the sole method of removing supervisors. Indeed, there is no statute that prevents the people from petitioning and carrying out a recall of conservation district supervisors.[12] Thus, *Fairley* is not controlling.

Next, the appellants argue that RCW 89.08.200 violates article I, sections 33 and 34 of our constitution because the constitution includes a mandatory requirement for recall while the statute is merely permissive. We disagree.

Article I, section 33 of the constitution states that elected officers are "*subject to* recall and discharge" by the voters, and that upon a recall petition the officer responsible for nomination "shall call a special election." (Emphasis added.) Section 34 then states that "the legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33)." Meanwhile, RCW 89.08.200 states that a supervisor "*may be* removed" by the Commission upon notice and hearing. (Emphasis added.)

The appellants would have this court infer that the word "shall" from the phrases "shall call a special election" and "shall pass necessary laws" creates a mandatory obligation to remove elected officers by recall. Br. of Appellant at 13. They argue that this overrides the permissive "may" from RCW 89.08.200. Br. of Appellant at 13. We reject this interpretation of our constitution.

[12] The appellants also argue that the Commission ignores the fact that a recall petition had been filed against Johnson and Mankamyer with the Thurston County Auditor. The recall petition was filed in July 2018. The record on appeal is silent as to any further action taken by the Thurston County Auditor on the recall; nothing in the record on appeal suggests a recall vote took place. But the appellants do not appeal the fact that no action was taken on the recall or at least that the recall did not take place before the Commission's hearing. Instead, they appeal the Commission's decision to remove Johnson and Mankamyer and the trial court's remand for proceedings under the APA.

The "shall" in section 33 does not mandate a recall to remove elected officers, but instead mandates that election officers call a special election *after a recall petition is filed*. Elected officers are only "subject to" recall; this language is permissive. WASH. CONST. art. I, § 33. There is nothing in section 33 that says an officer "shall be" recalled or that recall shall be the only means of removing an elected officer. Instead, the "shall" from section 33 precedes "call a special election," thus mandating the election officer in the relevant political subdivision to call a special election after a recall petition is filed. Likewise, the "shall" in section 34 mandates that the *legislature* must pass the necessary laws to carry out provisions of section 33. The legislature has done this, and recalls are governed by RCW 29A.56.110.[13] The "shall" contained in section 34 mandates only that the legislature pass necessary laws, and does not modify the clear language of section 33. Accordingly, neither section 33 nor section 34 mandates recall as the sole means of removal for elected officers.

Furthermore, there are other ways in which officers may be removed apart from recall. Some officers are subject to impeachment. WASH. CONST. art. V, § 1. The governor, for example, is subject to both impeachment and recall. WASH. CONST. art. V, § 2; *see also In re Recall of Inslee*, 194 Wn.2d 563, 567, 451 P.3d 305 (2019). The constitution also provides that officers not subject to impeachment may be removed for "misconduct or malfeasance in office." WASH. CONST. art. V, § 3. All portions of the constitution must be read in harmony. *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 175, 96 P. 1047 (1908); *Chlopeck Fish Co. v. City of*

[13] Nowhere in chapter 29A.56 RCW does the legislature provide recall as the sole means of removing elected officers.

Seattle, 64 Wash. 315, 322-23, 117 P. 232 (1911). The appellants' argument that recall is the only means to remove an elected officer ignores the language of article V, sections 1, 2, and 3.

Elected officers may also be removed from office upon conviction of a felony. RCW 9.92.120; RCW 42.12.010(5). Indeed, the legislature has contemplated and codified multiple ways in which an elected office becomes vacant in RCW 42.12.010. These include a judicial decision voiding the election results or appointment. RCW 42.12.010(7); *see also* RCW 29A.68.020. Finally, this state has a tradition of the writ of quo warranto being used to challenge the entitlement of a person to hold office. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 893, 969 P.2d 64 (1998); *State ex rel. Smith v. Mills*, 2 Wash. 566, 568, 27 P. 560 (1891); RCW 7.56.010.[14]

We hold that RCW 89.08.200 does not violate article I, sections 33 and 34 of the state constitution. Accordingly, we hold that recall is not the sole means of removing an elected officer from his or her position.

C. *RCW 89.08.200 and Washington Constitution Article V, § 3*

The appellants also argue that RCW 89.08.200 conflicts with article V, section 3 of the state constitution because "neglect of duty" under the statute is "neither misconduct nor malfeasance," which are the only constitutionally permitted reasons for removing a supervisor. Reply Br. of Appellant at 1. The Commission argues that it has the authority to remove supervisors under RCW 89.08.200 because article V, section 3 of the Washington Constitution

[14] The appellants argue that *Quick-Ruben* is inapplicable because there the proponent of the writ was not successful in his action. 136 Wn.2d at 905-06. However, the *Quick-Ruben* court clearly explained that a writ of quo warranto is "designed to challenge the entitlement of a person to hold office" and that "actions for quo warranto are also part of our legal tradition." 136 Wn.2d at 893.

reserves the authority to the legislature to determine how to remove certain officers, and that the legislature provided for the removal of conservation district supervisors in RCW 89.08.200. We agree with the Commission and hold that RCW 89.08.200 grants the Commission the authority to remove conservation district supervisors consistent with article V, section 3 of the Washington Constitution.

We presume statutes to be constitutional. *Voters Educ. Comm.*, 161 Wn.2d at 481. Where possible, we have a duty to construe constitutional construction of statutes. *Campbell*, 192 Wn. App. at 883. We interpret the meaning of a statute de novo and defer to an agency's interpretation of an ambiguous statute when it is within that agency's expertise, provided that statute is ambiguous. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

The application and constitutionality of RCW 89.08.200 is a matter of first impression before this court. Under RCW 89.08.200, which governs the terms of district supervisors, "[a] supervisor may be removed by the state conservation commission upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason."[15]

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[15] The Commission defines "neglect of duty" as

> failure by a supervisor or supervisors to perform mandatory duties. Such duties include, but are not limited to:
>
> (a) Compliance with laws and rules imposed by local, state, and federal government entities;
>
> (b) Attendance at a sufficient number of board meetings so as to not impede the work of the conservation district;
>
> (c) Maintaining a full and accurate record of district business;
>
> (d) Securing of surety bonds for board officers and employees;
>
> (e) Carrying out an annual financial audit;
>
> (f) Providing for keeping current a comprehensive long-range program;

1. *Interpretation of "Neglect of Duty" and "Misconduct"*

The appellants argue that RCW 89.08.200 violates article V, section 3 of our state constitution because "[n]eglect of duty" under RCW 89.08.200 is "neither misconduct nor malfeasance." Reply Br. of Appellant at 1. We disagree.

Under article V, section 3, "[a]ll officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law." WASH. CONST. art. V, § 3. Our courts have not defined "misconduct or malfeasance" for the purpose of this section. By its own terms, however, section 3 permits the legislature to define the standards of removal in accord with this provision.

The legislature's provision for removing supervisors in RCW 89.08.200 does not contravene the provisions of article V, section 3 of the constitution. Although "misconduct" is undefined, the plain meaning of "neglect of duty" is not out of step with the plain meaning of "misconduct." There is no conflicting definition of "misconduct" in Washington law as it applies to removing elected or appointed officers. Accordingly, we construe "neglect of duty" to be a specific type of "misconduct" for the purposes of removing conservation district

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> (g) Providing for preparation of an annual work plan;
> (h) Providing for informing the general public, agencies, and occupiers of lands within the conservation district of conservation district plans and programs;
> (i) Providing for including affected community members in regard to current and proposed plans and programs; and
> (j) Providing for the submission of the conservation district's proposed long-range program and annual work plan to the conservation commission.

WAC 135-110-110. The Commission defines "malfeasance" as "wrongful conduct that affects, interrupts, or interferes with the performance of a supervisor's official duty." WAC 135-110-110. Neither Title 89 nor the Commission's regulations define "misconduct."

supervisors. In the same way, "malfeasance"—otherwise undefined for the purposes of Title 89—also aligns with the wording of the constitution. Thus, RCW 89.08.200 does not conflict with the constitution as it relates to appointed or elected officials.

The appellants argue that in *State ex rel. Howlett v. Cheetham*, 19 Wash. 330, 332, 53 P. 349 (1898), our Supreme Court distinguished neglect of duty from misconduct and malfeasance. It did not. Indeed, the *Howlett* court held that the governor *had the authority* to remove public officer without recall and stated the governor properly removed the officer for "misconduct or malfeasance." *Howlett*, 19 Wash. at 333. The court did not define "misconduct" and never mentioned "neglect of duty."

The remaining cases the appellants rely on are not apt. The appellants rely on the Wisconsin Supreme Court case *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 254, 257 (1859). We generally do not rely on cases from other jurisdictions when interpreting our own statutes. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 638, 278 P.3d 173 (2012). Moreover, *Gill* is not helpful.

In *Gill*, the court interpreted an 1857 Wisconsin statute that governed the removal of a superintendent of schools by the common council of the City of Watertown for "neglect" and other charges. *Gill*, 9 Wis. at 257, 259. The court did not distinguish "neglect" from "misconduct," but instead explained that neglect of a "formal duty" was different from the "due cause" required to remove an officer under Wisconsin law at the time. *Gill*, 9 Wis. at 256, 259-60, 262. The court did not interpret "neglect" or "neglect of duty" under any section of the Wisconsin (or Washington) constitution or otherwise compare it to "misconduct." A Wisconsin case interpreting different language under dissimilar statutes does not enlighten us.

The appellants also argue that the Ninth Circuit Court of Appeals distinguished between neglect of duty and misconduct in *Simon v. Califano*, 593 F.2d 121, 123 (1979). *Califano* was a retirement insurance benefits case under the Social Security Act, chapter 42 U.S.C. 593 F.2d at 122. There, the court examined whether negligence amounted to "affirmative misconduct" as part of a test for whether equitable estoppel could be applied against the government. *Simon*, 593 F.2d at 123. *Simon* had nothing to do with neglect of duty or misconduct as it applies to removal from office under state law.

Accordingly, "neglect of duty" in the RCW 89.08.200 aligns with "misconduct" under the constitution.[16] Likewise, "malfeasance" in the statute does not conflict with "malfeasance" in the constitution.

2. *Removal of Certain Officers Reserved to the Legislature*

The Commission quotes *Howlett* to argue that the constitution "left it entirely to the legislature" how to remove officers under article V, section 3. Br. of Resp't at 14 (quoting *Howlett*, 19 Wash. at 332). We agree.

In *Howlett*, our Supreme Court held that the governor had the authority to remove a land commissioner without recall, citing the rule from the constitution that the commissioner could be removed for "misconduct or malfeasance," which the governor had found. *Howlett*, 19 Wash. at 333. The court made no effort to define "misconduct," but instead explained that removal

[16] Although we hold that neglect of duty does not conflict with misconduct for the purposes of article V section 3, we also note that the Commission also found *malfeasance* against both supervisors. The Commission found that both appellants committed malfeasance by engaging in inappropriate conduct and making inappropriate comments when working with district staff. The Commission also found that Johnson committed malfeasance when he failed to attend a public hearing.

without recall "'in such manner as may be provided by law'" meant that "[t]he constitution left it entirely to the legislature." *Howlett*, 19 Wash. at 332 (quoting WASH. CONST. art. V, § 3). This decision from *Howlett* is in accord with our Supreme Court's later statement in *Municipal Court of Seattle ex rel. Tuberg v. Beighle*, 96 Wn.2d 753, 756, 638 P.2d 1225 (1982), that the legislature "may provide for removal of public officers without contravening the provisions of article [V], section 3."

We follow *Howlett* and *Beighle*: the state constitution "left it entirely to the legislature" to provide a method of removal other than recall for conservation district supervisors and the legislature did so provide. *Howlett*, 19 Wash. at 332. The statutory provisions of RCW 89.08.200 define a method for removal that is consistent with both article V, section 3 and *Howlett*. Accordingly, the Commission has the authority to remove supervisors without recall based on the law provided by the legislature (RCW 89.08.200), so long as the Commission finds misconduct or malfeasance in accordance with article V, section 3.

Recall is not the sole means of removing an elected officer from office. The state constitution does not invalidate RCW 89.08.200: the two should be read in harmony. Thus, the statute grants the Commission the authority to remove supervisors without a recall under article V, section 3. Accordingly, we hold that the trial court did not err when it ruled that Mankamyer's removal did not violate the Washington Constitution.

II. PROPRIETY OF REMOVAL HEARINGS UNDER THE OPEN PUBLIC MEETINGS ACT

In its cross appeal, the Commission argues that the trial court erred by ruling that the Commission improperly held the removal hearing under the OPMA. The Commission also argues that the trial court erred when it ruled that the appellants were denied procedural rights,

and that this denial substantially prejudiced them. We hold that the removal hearing was improperly held under the OPMA, but that despite this error, the appellants were not substantially prejudiced.

A. *Legal Principles*

Our fundamental goal when interpreting a statute is to determine and give effect to the legislature's intent. *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). When interpreting a statute, we determine legislative intent from the plain language and ordinary meaning of the statute. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Where a statute's language is plain and unambiguous, our inquiry ends. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Where possible, we read statutes to "'achieve a harmonious total statutory scheme.'" *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (quoting *Echo Bay Cmty. Ass'n v. Dep't of Nat. Resources*, 139 Wn. App. 321, 327, 160 P.3d 1083 (2007)). We review issues of statutory interpretation de novo. *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 518, 387 P.3d 690 (2017).

The APA applies to state agencies. RCW 34.05.030(5). The Commission is a state agency under RCW 34.05.010(2). Agencies excluded from the APA are listed in RCW 34.05.030; the Commission is not listed. *See* RCW 34.05.030. Thus, the APA applies to the Commission.

The APA establishes the means of judicial review of agency action. RCW 34.05.510. The APA defines "agency action" as "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the

granting or withholding of benefits." RCW 34.05.010(3). The APA defines an "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right *before or after the entry of an order* by the agency." RCW 34.05.010(1) (emphasis added).

The APA provides circumstances where we may grant relief when reviewing agency action. RCW 34.05.570. When reviewing agency orders in adjudicative proceedings, this court

> shall grant relief from an agency order . . . only if it determines that:
>
> . . . .
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow prescribed procedure; [or]
>
> (d) The agency has erroneously interpreted or applied the law.

RCW 34.05.570(3). Importantly, we grant relief only if the party seeking such relief has been substantially prejudiced. RCW 34.05.570(1)(d); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007). However, RCW 34.05.574 "gives a court discretion to fashion a remedy that requires an agency to comply with the law." *Boeing Co. v. Gelman*, 102 Wn. App. 862, 871, 10 P.3d 475 (2000).

We review agency action that is not rulemaking or an adjudication as "other agency action" under RCW 34.05.570(4):

> Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:
>
> (i) Unconstitutional;
>
> (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; [or]
>
> (iii) Arbitrary or capricious.

RCW 34.05.570(4)(c).

With limited exceptions, adjudicative proceedings are governed by the APA. RCW 34.05.410. When an agency receives an application for an adjudicative proceeding,

> an agency shall proceed as follows:
>
> (1) . . . within ninety days after receipt of the application . . . the agency shall do one of the following:
>
> (a) Approve or deny the application, in whole or in part, on the basis of brief or emergency adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter;
>
> (b) Commence an adjudicative proceeding in accordance with this chapter; or
>
> (c) Dispose of the application in accordance with RCW 34.05.416.

RCW 34.05.419(1). To dispose of the application, the agency must decide not to conduct an adjudicative proceeding, then "shall furnish the applicant with a copy of its decision in writing." RCW 34.05.416.

The OPMA applies to governing bodies. *See* RCW 42.30.020, .030, .110. Under the OPMA, a "governing body" includes "commission[s]" and any part of an agency that conducts hearings, or takes testimony or public comment. RCW 42.30.020(2). Thus, the Commission is a governing body. Under the OPMA, governing bodies may hold an "executive session during a regular or special meeting . . . [t]o receive and evaluate complaints or charges brought against a public officer or employee." RCW 42.30.110(1)(f). The OPMA then requires that any such hearing be made open to the public upon request. RCW 42.30.110(1)(f). The only other mention of "hearing" in the OPMA is a section which grants governing bodies the ability to grant a continuance. RCW 42.30.100. If any provision of the OPMA conflicts with the provisions of any other statute, the OPMA controls, *unless the matter is governed by the APA*. RCW 42.30.140(3).

The Commission is also governed by chapter 89.08 RCW, Conservation Districts. RCW 89.08.030. And as discussed above, a conservation district supervisor "may be removed by the state conservation commission upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason." RCW 89.08.200.

B. *Statutory Scheme for Removal Proceedings*

The Commission argues that the trial court erred when it determined that the Commission improperly held the removal hearing under the OPMA. The Commission argues that it had the authority under RCW 34.05.416 to elect not to hold an adjudicative hearing. We disagree.

We review agency orders in an adjudicative proceeding under the APA. RCW 34.05.570(3). We may grant relief if "the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure . . . [or] [t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(c)-(d).

1. *Agency Action Under Review*

As a preliminary matter, the Commission argues that its decision not to hold an adjudication under the APA was "other agency action." Br. of Resp't at 10. We disagree.

The Commission argues we review the Commission's action as "other agency action" under RCW 34.05.50, claiming that the agency action on review is the Commission's "choice of procedure." Br of Resp't at 10. However, this argument is based on the presumption that the Commission had the choice to hold the hearing outside the authority of the APA. It did not.

The agency action on review here is the Commission's interpretation of the APA, specifically, the Commission's interpretation that RCW 34.05.416 gives the Commission the choice to not hold adjudicative proceedings under the APA. We review an agency's

interpretation of a statute de novo. *In re Kittitas County for a Declaratory Order*, 8 Wn. App. 2d 585, 588-89, 438 P.3d 1199, *review denied*, 193 Wn.2d 1032 (2019). When reviewing an agency decision, we stand in the same position as the trial court. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 413, 216 P.3d 451 (2009). Accordingly, we review the Commission's decision and not the superior court's ruling. *Alpha Kappa Lambda*, 152 Wn. App. at 413. "The burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). Thus, to prevail on review, the appellants must show that (1) the agency did not follow the correct procedure, and (2) that the irregularity substantially prejudiced the appellants. *Alpha Kappa Lambda*, 152 Wn. App. at 414; RCW 34.05.570(1)(d), (3).

2. *Procedural Error*

The appellants argue that the Commission's decision to conduct an adjudicative proceeding under the OPMA rather than the APA violated RCW 42.30.140(3). The Commission argues that its decision whether to hold an adjudicative proceeding under the APA is discretionary. We agree with the appellants.

Under APA requirements in RCW 34.05.419, "Agency action on applications for adjudication," when an agency receives an application for an adjudicative proceeding the agency has three options:

> (a) Approve or deny the application, in whole or in part, on the basis of brief or emergency adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter;
>
> (b) Commence an adjudicative proceeding in accordance with this chapter; or
>
> (c) Dispose of the application in accordance with RCW 34.05.416.

RCW 34.05.419(1). To dispose of the application under RCW 34.05.419(1)(c), the agency must first decide not to conduct an adjudicative proceeding, then it "shall furnish the applicant with a copy of its decision in writing." RCW 34.05.416.

In July 2018, the Commission set out 11 charges against the appellants. The Commission then held a special meeting in August 2018 to decide whether to hold a public hearing to consider the appellants' removal. The appellants requested a hearing under the APA in September 2018.

Reading the APA in isolation, the Commission did have a choice under the APA of whether to hold a hearing. Under RCW 34.05.419, the Commission could have summarily denied the application (and given the appellants notice under RCW 34.05.416) or held a hearing under the APA.

But this reading of the APA ignores the conservation district supervisor removal statute, which requires supervisors be removed "upon notice and hearing." RCW 89.08.200. Reading these statutes harmoniously, RCW 89.08.200 limits the Commission's choice to deny the application if it attempts to remove a supervisor. *Am. Legion*, 164 Wn.2d at 588. Because the APA applies to the Commission, it is bound to follow the APA, as well as RCW 89.08.200. *See* RCW 34.05.030. It is outside the Commission's authority to hold an adjudication outside of the APA because of the unambiguous language of RCW 34.05.419(1). Thus, when the APA and removal statute are read together, the Commission has no choice: to remove a supervisor it must hold an adjudicative hearing under the APA.

The Commission responded to the appellants' request and informed the appellants that it would not conduct the public hearing as an APA adjudication. This was in accordance with

RCW 34.05.416, but in violation of the removal statute. To remove the appellants, the only alternative was for the Commission to commence an adjudicative proceeding under RCW 34.05.419(1)(b). It did not, and instead held the public hearing outside the authority of the APA. As a result, the Commission ignored the interrelationship of RCW 34.05.416 (governing a decision not to adjudicate), RCW 34.05.419 (agency action on applications for adjudication), and RCW 89.08.200 (the removal statute). The Commission misapplied RCW 34.05.416 when it determined the statute gave it the authority to hold a public hearing under the OPMA.

Just because the OPMA allows agencies to hold hearings does not mean that the hearing is exempt from the APA. *See* RCW 42.30.110. Indeed, the legislature recognized this when drafting the OPMA, and mandated that if any provision of the OPMA conflicts with the provisions of any other statute, the OPMA controls, *unless the matter is governed by the APA*. RCW 42.30.140(3). Therefore, reading the OPMA and APA harmoniously, there is no conflict between the statutes and the APA must be applied. *Am. Legion*, 164 Wn.2d at 588. Accordingly, we hold that the Commission did not have the discretion to hold the hearing under the OPMA.

3. *Substantial Prejudice*

The Commission argues that the appellants were not substantially prejudiced by the Commission holding the hearing under the OPMA because the appellants were given sufficient process, and therefore, the appellants are not entitled to relief. We agree.

We grant relief when judicial review is sought under the APA only if the party seeking relief has been substantially prejudiced. RCW 34.05.570(1)(d); *Densley*, 162 Wn.2d at 217. "The party seeking relief bears the burden of proof." *Densley*, 162 Wn.2d at 217 (citing RCW

34.05.570(1)(a)). However, RCW 34.05.574 "gives a court discretion to fashion a remedy that requires an agency to comply with the law." *Boeing*, 102 Wn. App. at 871.

Under the APA, the rights of parties in adjudicative proceedings are governed by RCW 34.05.446 (subpoenas, discovery, and protective orders); 34.05.449 (procedure at hearings); and 34.05.452 (rules of evidence—cross-examination). The presiding officer at a hearing "*may* issue subpoenas" and "*may* condition use of discovery on a showing of necessity and unavailability by other means." RCW 34.05.446(1), (3) (emphasis added).

Here, the appellants were afforded certain procedural rights at the hearing, including representation by counsel, presenting and questioning witnesses, and entering exhibits. In a series of prehearing conferences and communications, the appellants and the Commission cooperated in reaching a determination on the procedural and administrative details of the hearing.

The appellants argue that they were prejudiced by their inability to engage in discovery and subpoena witnesses as authorized by the APA. The appellants do not argue that they were denied any other rights during the hearing that they may have otherwise been accorded under the APA.

The two types of procedures the appellants claim they were entitled to are permissive: there is no attempt to show that the presiding officer would have issued subpoenas or granted any requested discovery. *See* RCW 34.05.446(1), (3). Additionally, the appellants fail to explain what discovery they wished to procure, or what testimony they wished to present. Moreover, they fail to show how such discovery or testimony might have changed the outcome of the removal hearing. Accordingly, appellants have failed to meet their burden to show that they

were substantially prejudiced by any lack of procedure accorded to them at the removal hearing.[17]

The appellants here were not substantially prejudiced for the purposes of judicial review under the APA, and thus not entitled to relief.[18] However, as explained above, RCW 89.08.200 and the APA require that removals of conservation district supervisors must take place as adjudicative hearings under the APA. Thus, because it is in the public interest and despite the lack of prejudice to the appellants, we hold that the Commission is required to follow the APA when conducting removal hearings, and that it cannot choose its own procedures. Accordingly, we hold that the trial court did not err when it ruled that the Commission erred when it held the removal hearing under the OPMA and not the APA.

III. FUTILITY OF REMAND

Both parties appeal the trial court's remand of this case to the Commission for further proceedings. The appellants argue that the trial court's remand was impracticable, futile, and unfair. We agree.

When examining matters within an agency's discretion, we "shall remand to the agency . . . unless remand is impracticable or would cause unnecessary delay." RCW 34.05.574(1). We

[17] Although the appellants here have failed to meet their burden to show substantial prejudice, it is unclear from the record on appeal whether the appellants were accorded the full amount of procedure the legislature intended to grant in administrative proceedings under the APA. RCW 34.05.446, .449, .452. Our decision should not be interpreted to mean that a hearing under the OPMA satisfies the requirements of an adjudicative hearing under the APA. Agencies do not have the authority to choose" to hold adjudicative-style hearings under the OPMA when an adjudication is mandated by the APA.

[18] Because we hold that the appellants are unable to show substantial prejudice, we do not consider the Commission's argument that the appellants have no constitutionally protected liberty or property interests in their unpaid positions.

may relieve a party of the requirement to exhaust administrative remedies if "[t]he remedies would be patently inadequate [or] [t]he exhaustion of remedies would be futile." RCW 34.05.534(3)(a)-(b). We may excuse exhaustion of administrative remedies as futile when "'the available administrative remedies are inadequate, or if they are vain and useless.'" *Buechler v. Wenatchee Valley Coll.*, 174 Wn. App. 141, 154, 298 P.3d 110 (2013) (internal quotation marks omitted) (quoting *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985). Futility is a question for the court. *Buechler*, 174 Wn. App. at 154.

The relief sought by appellants in their complaint was declaratory and injunctive.[19] They sought a declaration that the Commission violated the APA and the OPMA and sought full adjudicative hearings under the APA. Johnson's term as supervisor expired in May 2019. Mankamyer's term expired in May 2020. Any remand to the agency for removal proceedings under the APA would be useless because neither appellant has a remaining term to finish out. Accordingly, we hold that remand would be futile and impracticable.[20]

IV. ATTORNEY FEES

The appellants argue that they are entitled to costs and attorney fees under both the APA (RCW 34.05.574) and the OPMA (RCW 42.30.120(4)). We disagree.

Under the APA, "[t]he court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law." RCW 34.05.574(3). We award

[19] The appellants also sought compensatory and punitive damages under 42 USC §§ 1983 and 1988, but those causes of action were dismissed with prejudice in federal court. *Johnson*, 2019 WL 1429503 at *7.

[20] This entire case was not rendered moot by the expiration of the appellants' terms of office because they also made a claim for reasonable attorney fees under the OPMA.

costs and attorney fees to any person who "prevails against a public agency" that has violated the OPMA. RCW 42.30.120(4).

Here, the appellants did not prevail under the APA because they were not substantially prejudiced. Likewise, the appellants cite to no other "provision of law" under which they are entitled to fees or costs for the purposes of the APA. Accordingly, we do not award any relief under the APA.

Additionally, although the Commission did violate RCW 42.30.140(3) of the OPMA, that section states that the OPMA does not apply to issues that are properly under the APA. The relief sought by the appellants was based on their argument that the removal hearing was not proper under the APA. For the reasons explained above, we agree. Since the OPMA does not apply, we do not award any costs or fees under the OPMA. Thus, we hold that the appellants are not entitled to fees.

V. CONCLUSION

We hold that the trial court did not err when it granted summary judgment and found that the removal of Mankamyer from his elected position did not violate article I, section 33 of the Washington Constitution. Accordingly, we hold that removing elected conservation district supervisors under RCW 89.08.200 does not violate article I, sections 33 and 34 or article V, section 3 of the of the Washington Constitution. We hold that the trial court did not err when it found that the Commission improperly held the removal hearing outside the APA and under the OPMA. Although the Commission need not hold all hearings under the APA, it is required to hold RCW 89.08.200 removal hearings under the APA. However, we hold that the appellants were not substantially prejudiced by the agency's failure to use proper procedure. Finally, we

hold that any remand to the agency to review the appellants' removal would be impracticable and futile because both of their terms have since expired.

Consequently, we *affirm* the trial court's summary judgment and rulings on RCW 89.08.200 because it did not err in determining that that the statute does not conflict with the constitution and that a recall is not required. We *affirm* the trial court's ruling that the removal hearing should have been held under the APA. We *reverse* the trial court's ruling that the appellants' were denied procedural rights, which resulted in substantial prejudice to them. We *vacate* the trial court's order remanding the hearing to the Commission because it would be futile because both Johnson and Mankamyer's terms have expired.

Worswick, J.

We concur:

Sutton, A.C.J.

Cruser, J.

APPENDIX C

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON AND RICHARD MANKAMYER,

Appellants,

v.

THE WASHINGTON STATE CONSERVATION COMMISSION and the following in their individual and official capacities: JIM KROPF, CHAIR; DEAN LONGRIE, VICE-CHAIR; HAROLD CROSE, COMMISSIONER; LARRY COCHRAN, COMMISSIONER; DARYL WILLIAMS, COMMISSIONER; SARAH SPAETH, COMMISSIONER; PERRY BEALE, COMMISSIONER; THOMAS MILLER, COMMISSIONER; EXECUTIVE DIRECTOR MARK CLARK; POLICY DIRECTOR RON SHULTZ; JOHN AND JANE DOES 1-10,

Respondents/Cross-Appellants.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

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The Commission argues that RCW 89.08.200 is an alternative to recall citing Washington Constitution, Article V § 3.[1] However, Article V § 3 limits removal to "misconduct or malfeasance in office" while RCW 89.08.200 limits removal to "neglect of duty or malfeasance in office." Neglect of duty is neither misconduct nor malfeasance.

The Commission's decision to proceed with an adjudication under the OPMA, rather than the APA, violated RCW 42.30.140(3). It conflates adjudication with "other agency action." Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena hostile witnesses as authorized by the APA. RCW 34.05.446.

II. Arguments:

A. RCW 89.08.200 is not a valid alternative to recall because it conflicts with Article V § 3.

A statute cannot add to the Constitution qualifications to hold office.[2] Article V § 3 allows for "removal for misconduct or malfeasance in office." RCW 89.08.200 conflicts with Article V § 3 because it limits

[1] Resp. Br. at 1, 14. Article V § 3 was part of the original constitution which was amended in 1912 to add the recall power. Wash. Const. art. I § 33 (8th amendment).
[2] *See, e.g. Parker v. Wyman*, 176 Wn.2d 212, 217 (2012).

removal of supervisors to "neglect of duty or malfeasance in office." The Commission is not free to name other causes for removal.[3]

Here, the Commission removed Johnson and Mankamyer based on four out of eleven complaints:[4]

> Complaint #2: Supervisor Johnson and Supervisor Mankamyer failed to provide a timely and accurate record of District Business.
>
> Response #2: Meetings are taped. Minutes prepared by staff were delayed and included obvious errors. RCW 42.30.035 does not mandate written minutes. TCD meetings are taped and available for public inspection. The paid staff are responsible for creating the minutes for the board to review and approve. Paid staff held minutes back and inserted false and self-serving statements to support their personal complaints against Johnson, Mankamyer and the TCD. Specifically, minutes for February 2017 to date were only recently provided to Johnson for approval. Moreover, staff did not make corrections to the minutes as directed.[5]
>
> - Commission Finding: Neglect of duty.
>
> Complaint #4: Supervisor Johnson and Mankamyer delayed approval of timesheets and signing of checks.

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[3] *Cf* RCW 31.12.285. A credit union board of directors may suspend a member of the board or a member of the supervisory committee for a "cause" not specifically identified in the statute; i.e., a credit union board of directors is free to denominate another "cause" for suspension that is not listed in the statute. What constitutes "cause" is within the board's discretion so long as the board's reasons are rationally related to a legitimate credit union interest. See, *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 150 Wn. App. 176, 178 (2009).

[4] See AR 8-43; AR 1564-1595 [Commission Investigation Report]; AR 2402-2403. Johnson and Mankamyer responded and disputed each and every charge. AR 1602-1686.

[5] AR 1605-1606. This included erroneous self-serving comments supporting staff legal claims against the TCD and supervisors. Including a statement that the board discussed in executive session firing Ms. Moorehead for filing a complaint with the Human Rights Commission against the TCD and supervisors. AR 1606.

Response #4: Mankamyer, as Board Auditor, carefully scrutinizes checks and timesheets because he is legally responsible. Timecards were not submitted in a timely manner by staff. Back in 1999-2000, *The Olympian* reported on the state audit of TCD which found falsified time sheets. Mankamyer recently discovered that the Interim Executive Director unilaterally awarded staff retroactive pay increases to use up RCO grant money in violation of the grant award.[6]

- Commission Finding: Neglect of duty.

Complaint #5: Supervisor Johnson and Supervisor Mankamyer engaged in inappropriate conduct and making inappropriate comments when working with District staff and failed to respond to the District's insurance carrier's risk management recommendations.[7]

Response #5: The allegation spring from staff objections to a strong board and include isolated, trivial or casual comments that would not amount to harassment under the law.[8]

- Commission Finding: Malfeasance

Complaint #7: Supervisor Johnson failed to attend a District public hearing to consider future county funding for the District.

Response #7: The hearing at issue concerned transitioning from an assessment funding model to one based on rates and charges. Johnson and Mankamyer showed up for the Thurston County Commissioner's public hearing on

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[6] AP 1608-1609.

[7] Sarah Moorehead, acting district executive director, and Amy Franks, district treasurer, filed complaints alleging harassment and retaliation with the Human Rights Commission on March 6, 2018. Attached was Johnson's complaint for violation of the Public Records Act. AR 158-164; AR 228-234. On May 21, 2018 the HRC concluded that no action was required and took no action. AR 83-86.

[8] AR 1609. In addition, complaints were pending before the State Human Rights Commission which determined not to take any action. AR 83-86; AR 1796-1805; 1892.

> October 17, 2017. Moorehead told them it was cancelled because she was told by the County Prosecutor that TCD needed to have a public hearing before the commissioners held one. The staff had months to hold the public meeting but screwed up. They now want to shift the blame to Johnson and Mankamyer. The next meeting was scheduled for November 6, 2017, when Moorehead knew that Johnson was attending a conference in Yakima.[9]

- Commission Finding: Malfeasance.[10]

An objective judge looking at the eleven complaints[11] would conclude that the Commission staff had broad discretion to designate actions as "neglect of duty" and/or "malfeasance"[12] In fact, some complaints were characterized as both.[13] Without a court to determine the legal and factual sufficiency of the charges (as in a recall), Johnson and Mankamyer were forced to defend against all eleven charges.[14]

Application of WAC 135-110-110 in this case was arbitrary. capricious and inconsistent with protection afforded elected officials facing a recall.[15] For example, one of the charges was that Johnson and

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[9] AR 1610-1611.
[10] Such discretionary actions cannot be the basis for a recall. See, e.g. *Cole v. Webster*, 103 Wn.2d 280, 284 (1984); See also *In re Recall of Inslee*, 2019 Wash. LEXIS 667, *5 (2019) [finding insufficient the charge that Governor Inslee's frequent out-of-state travels created a vacancy in his office.]; See also AR 1604.
[11] AR 0008-0038.
[12] App. A-9 [WAC 135-110-110 (excerpted definitions of "malfeasance" and "neglect of duty"]; AR 1919-1920.
[13] For example, "inappropriate conduct toward staff." AR 1609; 1611.
[14] AR 1604-1688; 2022-2108.
[15] See RCW §§ 29A.56.110 -29A.56.270; This issue was raised before the Commission. AR 1604; SHRP (February 20, 2019 transcript) at 155-164.

Mankamyer failed to "comply with the laws and rules of the state."[16] another was that "Supervisor Mankamyer's complaints regarding the March election were unfounded and violated state law."[17] These frivolous charges were intended to harass and retaliate against Johnson and Mankamyer. Had this been a recall, a neutral judge would have assessed the legal and factual sufficiency of the charges to protect Johnson and Mankamyer from harassment.[18]

Moreover, the law distinguishes neglect of duty from misconduct and malfeasance. For example, in *State ex rel. Howlett v Cheetham*,[19] a former land commissioner filed a writ of mandamus to compel the state auditor to issue him a warrant for his salary. The commissioner held the position under appointment by the governor. The governor found that the commission was guilty of misconduct in office and removed him from his office. The court, citing Article V § 3, held that the governor had the authority to remove the commissioner "whenever he was satisfied that the incumbent had been guilty of misconduct or malfeasance in office."[20]

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[16] AR 1611.
[17] AR 1612.
[18] RCW 29A.56.140.
[19] 19 Wash. 330, 331 (1898).
[20] *Id.* at 332-333 (1898). Emphasis added.

State ex rel. Gill v Common Council of Watertown[21] concerned a mandamus action to reinstate a superintendent of schools who had been removed based on four charges similar to those filed against Johnson and Mankamyer:

> 1st. Neglect and refusal to prepare and submit to the common council a report pursuant to the provisions of law.
>
> 2d. Neglect, during the past year, to visit the schools, at least twice during each term, and to report the condition of the same to the board of education.
>
> 3d. Consenting to and causing to be paid out the contingent expenses of the board of education, during the year ending April 1, 1859, without having the same audited and allowed by the common council, as required by law.
>
> 4th. That Gill, as a member of the board of education, had voted with others to refuse to allow J. J. Enos to take his seat and act in said board, after he had been duly elected as a member thereof.
>
> Gill answered as to the 1st charge, that it was the duty of the board of education and not of the superintendent to make the report. He denied the 2d charge and insisted that he had visited the schools during the last term where new teachers had been employed and did not deem it necessary to visit the others; and that the board of education was duly informed of the condition of all the schools. He admitted the 3d charge and claimed that it was a right belonging to that body. The 4th charge he denied; and insisted that, in his opinion, Enos was not entitled to a seat in the board, and he voted, as he thought, rightly.[22]

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[21] 9 Wis. 254 (1859).

[22] *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 254, 257 (1859).

The Wisconsin Supreme Court ruled in favor of the superintendent (Gill) stating:

> [T]he charges show nothing more than a mere neglect of some formal duty which the law may have required, involving no moral delinquency, and which, if violations of duty at all, must have been well known to the appointing power, we do not think where they relate entirely to acts during a prior term of office, that they constitute due cause in law for the removal of an officer."[23]

In *Simon v. Califano*,[24] a mother and children brought claims for Social Security benefits arguing that the government should be estopped from denying those benefits due to a trainee's negligence. The Ninth Circuit stated:

> [T]he doctrine of equitable estoppel may still not be invoked against the government in its sovereign capacity unless that conduct can properly be called "affirmative misconduct." Mere neglect of duty is not enough.[25]

B. Recall and the alternatives cited by the Commission[26] involve a neutral judge to protect public officials from harassment.

The law allows "recall for cause" to "free public officials from the harassment of recall elections grounded on frivolous charges or mere

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[23] *Id.*, at 262; See, generally Thomas J. Goger, Annotation: *Removal of public officers for misconduct during previous term*, 42 A.L.R.3d 691, 4 (2019)].
[24] 593 F.2d 121, 123 (1979).
[25] Emphasis added.
[26] Resp. Br. at 14-17; *Quo warranto* [Ch. 7.56 RCW]; judicial contests [RCW 29A.68.011]; Municipal Code of Ethics [RCW 42.23.050]; removal from office as punishment for conviction of a felony [RCW 9.92.120]; Impeachment [Wash. Const. art. V, § 1].

insinuations."[27] The process used here involves the Commission acting as the grand inquisitor, judge, jury and executioner based on charges made by its own staff.[28] Johnson, Mankamyer and former District supervisor James Goche,[29] repeatedly insisted on an independent administrative law judge and repeatedly objected to having the Commissioner judge the case.[30]

The Commission argues that "Recall under general election laws is not the exclusive means for removing an individual from office."[31] The Commission ignores the fact that a recall had been filed against Johnson and Mankamyer.[32] The proponent is the same voter who filed the recall petition *In the Matter of the Recall of Jay Inslee, Governor of the State of Washington*.[33]

Moreover, the cases relied upon by the Commission are distinguishable. For example, the petitioner in *Quick-Ruben v. Verharen*

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[27] *Chandler v. Otto*, 103 Wn.2d 268, 274 (1984).
[28] AR 0041-0044.
[29] AR 87-98. Mr. Goche is also an attorney, professor, former district prosecutor and state senior hearings examiner. AR 1626-1627; 2338.
[30] AR 1459-1460; AR 1470-1520 [Supervisors' Brief and Supplemental Response; Continuing Objections; and Motions to Recuse]; AR 2337-2338; SHRP (February 20, 2019 transcript) at 39.
[31] Resp. Br. at 14-15.
[32] AR 1654-1655; Appendix A-5: Request for Recall of Conservation District Commissioners Johnson and Mankamyer (7/18/18).
[33] 2019 Wash. LEXIS 667, *5 (2019).

lost his private *quo warranto* action based on procedural errors.[34] "Quick-Ruben was advised of this problem by opposing counsel."[35] Nevertheless, he persisted. Here, Johnson and Mankamyer repeatedly warned the Commission and filed motions[36] asserting that it was improper to proceed with an adjudication under the OPMA. Nevertheless, as in the *Quick-Ruben* case, the Commission persisted and summarily dismissed those concerns.

The Commission also cites *Austin v. Superior Court for Whatcom Cty.*,[37] for the proposition that "Such removal is not conditioned in any way, nor limited to removal by recall election."[38] That case concerned an application for a writ of prohibition to prevent the court from taking further action in a *quo warranto* proceeding. That case does not discuss or mention recall.

Finally, the Commission does not distinguish between elected and appointed supervisors. There is a difference. Elected supervisors receive

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[34] Quick-Ruben failed to plead and prove a special interest in the Pierce County superior court judge position, an essential predicate to a private *quo warranto* action. Moreover, his action for *quo warranto* was prematurely filed and he was aware the action was premature. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905-906 (1998).
[35] "Quick-Ruben was advised of this problem by opposing counsel and given the opportunity to dismiss the action, refile it after Verharen's term commenced, and serve process on opposing counsel. He declined. In order to sustain a private *quo warranto* action he had to plead and prove a present special interest in the public office in question." *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 901 (1998).
[36] AR 2337-2338.
[37] 6 Wn.2d 61, 65 (1940).
[38] Resp. Br. at 15.

their office directly from the people while appointed supervisors receive their office from the Commission. Voters should decide on removal of an elected supervisor via recall just as it does for all other elected officials, other than judges.[39]

C. The APA covers three things: rulemaking, adjudication and "other agency action." The Commission conflates adjudication with "other agency action." It argues that RCW 89.08.200 is "other agency action" authorizing adjudication under the OPMA. However, adjudication proceedings are expressly governed by the APA, not the OPMA. RCW 42.30.140(3). Moreover, caselaw concerning "other agency action" does not support the Commission's argument.

RCW 42.30.140(3) clearly states that the OPMA "shall not apply to matters governed by chapter 34.50 RCW, the Administrative Procedure Act." The APA governs "adjudicative proceeding" which it defines as:

> [A] proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.[40]

Johnson and Mankamyer have a right to a hearing under RCW 89.08.200 which states:

> A supervisor may be removed by the state conservation commission upon notice and hearing, for neglect of duty or malfeasance in office, but for no other reason.

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[39] *See* Appellants' Opening Br. at 13.
[40] RCW 34.05.010.

Normal and regular agency action assumes one of three basic forms: adjudication, rulemaking, and "other agency action."[41] The APA defines rulemaking and adjudication.[42] Informal, discretionary action encompasses all "other agency action." In *Swanson Hay Co. v. Emp't Sec. Dep't*,[43] the court stated:

> The APA authorizes three types of judicial review of agency action. Under RCW 34.05.570(2), courts are authorized to review the validity of agency rules. Under RCW 34.05.570(3), they are authorized to grant relief from "an agency order in an adjudicative proceeding." All other agency action or inaction is reviewable by courts under RCW 34.05.570(4). Relief for persons aggrieved by the performance of this last category of agency action or inaction is available if the agency's action or inaction is unconstitutional, outside the agency's statutory or other legal authority, arbitrary or capricious, or taken by persons not lawfully entitled to take the action. RCW 34.05.570(4)(c).

The Commission argues that its "choice of procedure" (i.e. adjudication under the OPMA) is authorized by RCW 89.08.200 as "other agency action" and distinguishable from "an order issued in an adjudicative proceeding"[44] under the APA. That argument is disingenuous

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[41] *See, generally,* William Anderson, *The 1988 Washington Administrative Procedure Act -- an introduction.*, 64 Wash. L. Rev. 781, 833 (1989); and Jonathan A. Schorr, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. Rev. 765, 802 (1983).
[42] Ch. 34.05 RCW.
[43] 1 Wn. App. 2d 174, 219 (2017).
[44] Resp. Br. at 10.

and ignores the fact that adjudication proceedings are expressly governed by the APA, not the OPMA.[45]

The APA provides extensive judicial review of agency action, findings and orders.[46] The APA defines "order" as "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons."[47] It is undisputed that the Commission issued Findings of Fact[48] and ordered Johnson and Mankamyer be removed as district supervisors.

The Commission wants the court to bless their faux adjudication under the OPMA as "other agency action" under the APA.[49] This blurs the line between genuine APA adjudication[50] and "other agency action." The Commission's argument is essentially that Johnson and Mankamyer received *nearly* everything a genuine APA adjudication affords (albeit under the OPMA), including briefs, prehearing orders, motions, witnesses, etc.[51] However, as noted below, Johnson and Mankamyer were prejudiced

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[45] RCW 42.30.140(3).
[46] RCW 34.05.010; See also, 5 U.S.C. §706(2) (2000). "Agency actions" are defined broadly under the APA to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Id. §551(13).
[47] RCW 34.05.010.
[48] Resp. Br. at 9; AR 2398-2404.
[49] RCW 34.05.570(4).
[50] *See* RCW 34.05.410 et seq.
[51] Resp. Br. at 7-9.

by their inability to engage in discovery and subpoena hostile witnesses as authorized by the APA.[52]

Moreover, the Commission ignores the caselaw where "other agency action" was applied.[53] For example:

- In *Brown v. Department of Commerce*,[54] the Court held that a decision by the Department to deny a request for mediation under the foreclosure fairness act constitutes "other agency action" subject to judicial review.

- In *Purse Seine Vessel Owners Ass'n v. State*[55] the issue was the state fish and wildlife department's decision not to close treaty herring fisheries while closing the non-treaty fisheries. The Court held that the Department's failure to allow nontreaty spawn-on-kelp fishery is an "other agency action" subject to review under RCW 34.05.570(4).

- In *Children's Hosp. v. Dep't of Health*,[56] the hospital filed a petition for judicial review, challenging the DOH's determination that another hospital could perform pediatric open heart surgeries without a Certificate of Need (CN) review. The court found the hospital was not entitled to relief under Wash. Rev. Code § 34.05.570(4) finding that the hospital in question could perform pediatric open heart surgery, only if the DOH first conducted a CN review.

- In *Wells Fargo Bank, NA v. Dep't of Revenue*,[57] the court held that DOR's denial of Wells Fargo's demand that DOR pay interest on the settlement amount was neither agency rulemaking nor an order

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[52] RCW 34.05.446.
[53] *See*, Daniel W. Morton-Bentley, Annotation: *Construction and Application of Administrative Procedure Act, 5 U.S.C.A. §§ 500 et seq – Supreme Court Cases*, 24 A.L.R. Fed. 3d 5 (2019).
[54] 184 Wn.2d 509, 544-545 (2015).
[55] 92 Wn. App. 381, 388 (1998).
[56] 95 Wn. App. 858, 860 (1999).
[57] 166 Wn. App. 342, 360-361 (2012).

entered in an adjudicative proceeding; thus, it was "other agency action" falling under RCW 34.05.570(4).

- In *Evergreen Wash. Healthcare Frontier, LLC v. Dep't of Soc. & Health Servs.*[58] the court held that DSHS's payment rate determinations, which were not the result of agency rule making or adjudicative procedures, were an implementation of the DSHS's duties under former RCW 74.46.431(1) to establish payment rates for participating nursing facilities. Accordingly, the rate determinations were "other" agency action subject to the APA's requirements.

- In *Squaxin Island Tribe v. Dep't of Ecology,*[59] the court held that DOE's decision to deny a rule making petition is subject to judicial review as "other agency action" under RCW 34.05.570(4).

- In *Kadlec Reg'l Med. Ctr. v. Dep't of Health,*[60] the court found that the hospital was entitled to an adjudicative hearing because the hospital's application clearly focused on a 114-bed request with two other scenarios seeking fewer beds as essentially secondary alternatives, and, thus, the DOH's grant of the 55-bed certificate of need functioned as a denial of the hospital's 114-bed request.

- In *Am. Waterways Operators v. Dep't of Ecology,*[61] the court affirmed the Pollution Control Hearings Board's dismissal of the operators' appeal of the State's Certificate of Need to the EPA for permission to engage in rulemaking to prohibit marine vessel sewage discharge into Puget Sound.

D. Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena witnesses per the APA.[62]

The Commission argues that "Mr. Johnson and Mr. Mankamyer were not prejudiced by the lack of procedures which were not guaranteed to be

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[58] 171 Wn. App. 431, 446 (2012).
[59] 177 Wn. App. 734, 740 (2013).
[60] 177 Wn. App. 171, 176-177 (2013).
[61] 7 Wn. App. 2d 808, 810 (2019).
[62] RCW 34.05.446.

available to them in the first instance."[63] The Commission's position epitomizes what baseball great Frank Robinson famously said, "Close don't count in baseball. Close only counts in horseshoes and hand grenades."[64]

The Commission chose to proceed under the OPMA for political expediency[65] and has since secured a stay from this court of any hearing. Without discovery or subpoenas, only those witnesses called by the Commission or who would voluntarily appear testified. Among the "hostile witnesses" who were listed by Johnson and Mankamyer in their objections to the pretrial orders[66] and who participated in the Commission's investigation,[67] but did not appear included:

- Ron Shultz, Commission Policy Director, attorney and co-author of the Commission's staff investigation. In addition to the protocol he used in the investigation, Mr. Shultz would have been asked about legal advice[68] he provided to the Commission and its Executive Director, Mark Clark.[69]

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[63] Resp. Br. at 31.
[64] BrainyQuote https://www.brainyquote.com/quotes/frank_robinson_140160 .
[65] Resp. Br. at 6. "Commissioners expressed concern regarding the length of time the investigation had already taken" and wanted to conclude "the matter as soon as possible."
[66] AR 2339-2340.
[67] AR 1-61; AR 1086-1087; 1156-1157 [Commission staff interview notes with Amy Franks].; AR 1154-1155 [Commission staff interview notes with Sarah Moorehead]; AR 1706 [Witnesses interviewed by Commission Staff].
[68] Mr. Shultz is not employed by the Attorney General's Office which is the legal adviser to state officers and state agencies. Wash. Const. art. III, § 21.
[69] AR 2339.

- Doug Rushton, District Supervisor.[70] Mr. Ruston is a long time District supervisor. He would be called to testify about his history of obtaining special privileges as detailed in *The Olympian.*[71]

- Paul Pickett, District Supervisor. Mr. Pickett would have been called to testify regarding Neglect of Duty Charge #2 (not maintaining timely and accurate records of District business) and alleged violations of the OPMA.[72] This includes testimony regarding his discovery of staff inserting false and self-serving statements to support their personal complaints against Johnson, Mankamyer and the TCD.[73]

- Amy Hatch-Winecka, former District Deputy Director who was hired by the District's acting executive director (Moorhead) despite her being terminated from the Mason Conservation District for alleged illegal/unethical behavior, including conflicts of interests involving her husband's non-profit.[74] She accused Johnson and Mankamyer of harassment for continuing to question what appeared to be her on-going conflict of interest.[75]

- Amy Franks, District treasurer/bookkeeper Director who accused Johnson and Mankamyer of harassment;[76]

Surely, Johnson and Mankamyer had the right to confront their accusers.[77]

III. Conclusion:

While the Commission "may" remove supervisors it appoints,[78] it may not remove elected supervisors for reasons not specified in the

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[70] Mr. Ruston was interviewed by Commission staff. AR 1164.
[71] AR 2339.
[72] AR 2339.
[73] AR 1605-1606.
[74] AR 2339.
[75] AR 0021; CP 122-128.
[76] AR 0021; CP 122-128.
[77] *See, e.g.* U.S. Const. amend. VI; Wash. Const. art. I § 22.
[78] RCW 89.08.200.

constitution.[79] The default would be a recall which provides for direct accountability to the people. The recall process protects supervisors from retaliation and harassment for demanding accountability. The charges made against Johnson and Mankamyer epitomize harassment.

The Commission's use of the OPMA for an "adjudicative proceeding"[80] violates the OPMA and the APA. RCW 42.30.140 states that the OPMA "shall not apply to … (3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act." The APA governs "adjudicative proceedings."[81] Johnson and Mankamyer were prejudiced by their inability to engage in discovery and subpoena hostile witnesses.[82]

Finally, while the Commission argues that remand is appropriate,[83] it secured a stay acknowledging that remand is impractical, futile and unfair.

Date: 11/26/19

Shawn Timothy Newman WSBA 14193
Shawn Timothy Newman, Inc., P.S.
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2507 Crestline Dr., N.W.
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[79] Wash. Const. art. V § 3.
[80] RCW 34.05.010(1).
[81] *Id.*, See also RCW 34.05.410 et seq.
[82] RCW 34.05.446.
[83] Resp. Br. at 34.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I emailed the Reply Brief of Appellants/Cross Respondents to respondents' counsel via the Appellate Court Portal Filing system.

Date: 11/26/19
Olympia

Shawn Timothy Newman WSBA 14193

NO. 97646-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC JOHNSON and RICHARD MANKAMYER,

Appellants/Cross Respondents,

v.

WASHINGTON STATE CONSERVATION COMMISSION, and the following in their individual and official capacities: JIM KROPF, CHAIR; DEAN LONGRIE, VICE-CHAIR; HAROLD CROSE, COMMISSIONER; LARRY COCHRAN, COMMISSIONER; DARYL WILLIAMS, COMMISSIONER; SARAH SPAETH, COMMISSIONER; PERRY BEALE, COMMISSIONER; THOMAS MILLER, COMMISSIONER; EXECUTIVE DIRECTOR MARK CLARK; POLICY DIRECTOR RON SHULTZ; JON AND JANE DOES 1-10.

Respondents/Cross Appellants

APPENDIX A-9 to REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

WAC 135-110-110

WAC § 135-110-110 [excerpted definitions of "malfeasance" and "neglect of duty"]

"Malfeasance" means wrongful conduct that affects, interrupts, or interferes with the performance of a supervisor's official duty.

"Neglect of duty" means failure by a supervisor or supervisors to perform mandatory duties. Such duties include, but are not limited to:

(a) Compliance with laws and rules imposed by local, state, and federal government entities;
(b) Attendance at a sufficient number of board meetings so as to not impede the work of the conservation district;
(c) Maintaining a full and accurate record of district business;
(d) Securing of surety bonds for board officers and employees;
(e) Carrying out an annual financial audit;
(f) Providing for keeping current a comprehensive long-range program;
(g) Providing for preparation of an annual work plan;
(h) Providing for informing the general public, agencies, and occupiers of lands within the conservation district of conservation district plans and programs;
(i) Providing for including affected community members in regard to current and proposed plans and programs; and
(j) Providing for the submission of the conservation district's proposed long-range program and annual work plan to the conservation commission.

SHAWN T. NEWMAN, ATTORNEY AT LAW

November 26, 2019 - 11:38 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97646-5
Appellate Court Case Title:	Eric Johnson, et al. v. Washington State Conservation Commission, et al.
Superior Court Case Number:	18-2-04699-5

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ADMINISTRATIVE RECORD DOCUMENTS

STATE OF WASHINGTON
CONSERVATION COMMISSION
PO Box 47721 • Olympia, Washington 98504-7721 • (360) 407-6200 • FAX (360) 407-6215

September 13, 2018

Mr. Shawn Newman
Newman Law
2507 Crestline Dr. NW
Olympia, WA 98502

Dear Mr. Newman,

Thank you for your email of September 11, 2018. Although not clearly stated, in an abundance of caution, the Washington State Conservation Commission (WSCC) interprets your email to be, at least in part, an application for an adjudicative proceeding. RCW 34.05.413(2). Pursuant to RCW 34.05.416, the WSCC has decided not to conduct an adjudicative proceeding under the Administrative Procedures Act (APA), RCW 34.05, and provides this brief statement of the reasons to you.

The public hearing on the removal of local conservation district supervisors is required by statute, RCW 89.08.200. Unlike other statutes related to hearings, however, the Legislature does not require that the hearing on removal be conducted as an adjudication under the APA. *See e.g.* RCW 49.60.250, RCW 80.50.090(3), RCW 43.21B.130.

A hearing is required where a property or liberty interest may be implicated. But the form of such a hearing is dependent on a balancing of the competing interest at stake. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In this case, the interests are the private interests of your clients in retaining their volunteer positions, the governmental interest in expeditious removal if such removal is called for, the avoidance of administrative burdens, and the risk of an erroneous termination. *Id.* at 543. "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545 (citing *Mathews*, 424 U.S. at 343). This is particularly true where, as is the case here, judicial review of the agency action on removal is available. RCW 34.05.570(4).

Your clients are receiving a public hearing prior to a decision on removal, as required by statute and due process. The WSCC has determined that holding a hearing convened under the Open Public Meetings Act (OPMA), RCW 42.30, together with the procedural safeguards provided by

statute and rule, will provide sufficient process.[1] Under the WSCC's decision, your clients each have the opportunity to present a written response, a hearing brief, an oral presentation, documentary evidence, and the opportunity to respond to Commissioner questions to fully inform the WSCC prior to any decision being made. The WSCC also considered its obligations to timely resolve this matter that has been going on for some time for the benefit of everyone concerned. No further process is required. .

For these reasons, the WSCC will not conduct an APA adjudicative proceeding in this matter. This decision is not subject to further administrative review.

Your email also disputes the WSCC's application of its own regulation, WAC 135-110-960. The regulation states:

> (3) The conservation commission must hold at least one public hearing **no earlier than sixty days from the date of certified mailing to the supervisor** in the area served by the conservation district supervisor before acting to remove the incumbent from office.

This unambiguous regulation states that the sixty-day period begins on the date the certified mail was deposited in the mailbox to the supervisor's address of record. This is analogous to and consistent with other statutes and regulations regarding service upon mailing, including RCW 34.05.010(19).

If you have further questions you may contact Alicia McClendon at the Commission at (360) 407-6200 or amcclendon@scc.wa.gov.

Sincerely,

Mark Clark
Executive Director

[1] *See* RCW 89.08.200 (providing for notice and a public hearing) and WAC 135-110-960 (additionally providing for a sixty-day notice period prior to hearing and the opportunity for a written response to charges prior to hearing).

STATE OF WASHINGTON
CONSERVATION COMMISSION
PO Box 47721 • Olympia, Washington 98504-7721 • (360) 407-6200 • FAX (360) 407-6215

March 22, 2019

Mr. Eric Johnson
PO Box 100
Rochester, WA 98579

Mr. Johnson,

As you are aware, on February 20, 2019, the Washington State Conservation Commission (Commission) voted to remove you from your position as a supervisor for the Thurston Conservation District for malfeasance and neglect of duty.

Attached please find the official Findings of Fact that are the basis for the Commission's decision. The Findings of Fact were issued March 21, 2019.

The Commission's decision is appealable to Thurston County Superior Court as an "other agency action" under RCW 34.05.570(4).

Sincerely,

James Kropf
Chairman

cc: Kirk Robinson, Commission Interim Executive Director
Shawn Newman, Attorney at Law, P.S.
Chris Reitz, Assistant Attorney General
Phyllis Barney, Assistant Attorney General

STATE OF WASHINGTON
CONSERVATION COMMISSION
PO Box 47721 • Olympia, Washington 98504-7721 • (360) 407-6200 • FAX (360) 407-6215

March 22, 2019

Mr. Richard Mankamyer
PO Box 234
McKenna, WA 98558

Mr. Mankamyer,

As you are aware, on February 20, 2019, the Washington State Conservation Commission (Commission) voted to remove you from your position as a supervisor for the Thurston Conservation District for malfeasance and neglect of duty.

Attached please find the official Findings of Fact that are the basis for the Commission's decision. The Findings of Fact were issued March 21, 2019.

The Commission's decision is appealable to Thurston County Superior Court as an "other agency action" under RCW 34.05.570(4).

Sincerely,

James Kropf
Chairman

cc: Kirk Robinson, Commission Interim Executive Director
Shawn Newman, Attorney at Law, P.S.
Chris Reitz, Assistant Attorney General
Phyllis Barney, Assistant Attorney General

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

March 15, 2021 - 11:18 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99505-2
Appellate Court Case Title:	Eric Johnson, et al. v. WA State Conservation Commission, et al.
Superior Court Case Number:	18-2-04699-5

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