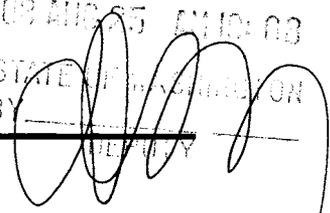


FILED
COURT OF APPEALS
DIVISION II

08 APR 85 11:10:03

STATE OF WASHINGTON
BY 
IDENTITY

NO. 37272-0

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SAVE COLUMBIA CU COMMITTEE, ET AL.,

Appellants,

v.

COLUMBIA COMMUNITY CREDIT UNION, AND STATE OF
WASHINGTON, DEPARTMENT OF FINANCIAL INSTITUTIONS,

Respondents.

**BRIEF OF RESPONDENT STATE OF WASHINGTON,
DEPARTMENT OF FINANCIAL INSTITUTIONS**

ROBERT M. MCKENNA
Attorney General

CHARLES E. CLARK
WSBA No. 28918
HEATHER L. POLZ
WSBA No. 30502
Assistant Attorneys General
1125 Washington St SE
Olympia, WA 98504
(360) 586-3650

P.M. 8-22-85

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER-STATEMENT OF ISSUES2

III. COUNTER-STATEMENT OF THE CASE.....2

 A. Factual Background2

 1. The Actions of Save Columbia CU Committee and
 its Supporters2

 2. The Actions of the Department’s Division of Credit
 Unions.....5

 B. Regulatory Background6

 C. Procedural History Related To The Department8

IV. SUMMARY OF ARGUMENT.....9

V. STANDARD OF REVIEW.....10

VI. ARGUMENT11

 A. Under the Administrative Procedure Act, There Is No
 Right To Challenge The Department’s Discretionary
 Decision Not To Take Enforcement Action.11

 B. The Department’s Decisions Not To Take Enforcement
 Action Were Not Arbitrary And Capricious.16

 1. There is no issue of material fact that the
 Department’s decision not to take enforcement
 action regarding the July 22, 2006 special
 membership meeting was not arbitrary and
 capricious.....17

 2. There is no issue of material fact that the
 Department’s decision not to take enforcement

action regarding the expulsions at the August 15, 2006 special board meeting was not arbitrary and capricious.....	18
3. Appellants’ allegation of improper motives for agency inaction does not raise an issue of material fact.	19
C. Appellants’ Examples Of The Department’s Interaction With Columbia In Prior Years Are Irrelevant Because The Examples Do Not Raise An Issue Of Material Fact.	20
VII. CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Aripa v. Dep't of Soc. & Health Servs.</i> , 91 Wn.2d 135, 588 P.2d 185 (1978).....	14
<i>Central Puget Sound Reg'l Transit Auth. v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006).....	20
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	13
<i>Jones v. Personnel Resources Bd.</i> , 134 Wn. App. 560, 140 P.3d 636 (2006).....	10
<i>National Elec. Contractors Ass'n, Cascade Chapter v. Riveland</i> , 138 Wn.2d 9, 978 P.2d 481 (1999).....	12, 13, 14, 15
<i>Pierce Cy. Sheriff v. Civil Service Comm'n</i> , 98 Wn.2d 690, 658 P.2d 648 (1983).....	17
<i>Plemmons v. Pierce Cy.</i> , 134 Wn. App. 449, 140 P.3d 601 (2006).....	passim
<i>Port of Seattle v. Pollution Control Hearings Board</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	16, 17, 24
<i>Stevens v. Brink's Home Security, Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007).....	10

Statutes

RCW 7.16.160	13
RCW 7.16.360	13
RCW 31.12	6
RCW 31.12.005(14).....	15

RCW 31.12.005(24).....	15
RCW 31.12.015	7
RCW 31.12.185	23
RCW 31.12.195	18
RCW 31.12.225	23
RCW 31.12.516(1).....	7
RCW 31.12.516(5).....	7
RCW 31.12.545	7
RCW 31.12.575	7
RCW 31.12.585	7, 8, 15
RCW 31.12.630	8
RCW 31.12.637	7, 8
RCW 31.12.641	8
RCW 31.12.644	8
RCW 31.12.647	8
RCW 31.12.651	8
RCW 31.12.657	8
RCW 31.12.661	8
RCW 31.12.664	8
RCW 31.12.667	8
RCW 31.12.671	8

RCW 31.12.721	8
RCW 34.05.510	11
RCW 34.05.514	11, 12
RCW 34.05.570	20
RCW 34.05.570(4).....	11
RCW 34.05.570(4)(b).....	12, 13, 15
RCW 34.05.570(4)(c)	16
RCW 34.05.574(1).....	17
RCW 43.320	6
RCW 43.320.010	8
RCW 43.320.050	7

I. INTRODUCTION

The Department of Financial Institutions (“Department”) properly exercised its discretion in deciding not to take enforcement action against Columbia Community Credit Union (“Columbia”) concerning Columbia’s special membership meeting on July 22, 2006, and regarding the Appellants’ expulsion from Columbia at a special board meeting on August 15, 2006. The Appellants’ Complaint sought relief in the alternative, asking, for example, that the court declare the votes at the July 22, 2006 meeting void and require a new voting process, or that the court direct the Department to take enforcement action in this regard. CP 15. Similarly, it asked that the expulsions and removal from elected positions effected at the August 15, 2006 board meeting be declared void or that the Department be ordered to take enforcement action in this regard. *Id.* Thus, the requested relief was intended to seek a specific outcome as to Columbia. The requested relief also effectively asked the superior court to substitute its judgment for that of the Department as to when it is appropriate to take enforcement action against credit unions. The superior court correctly granted the Department’s motion for summary judgment and dismissed the Department from the case.

II. COUNTER-STATEMENT OF ISSUES

The issues presented in this appeal that involve the Department are as follows:

A. Do Appellants have a right to challenge the Department's discretionary decisions not to take enforcement action where the Administrative Procedure Act only allows judicial review for an agency's failure to perform a duty it is required by law to perform?

B. Did the superior court properly conclude that the Department's decisions not to take enforcement action with regard to the July 22, 2006 special membership meeting and the August 15, 2006 member expulsions were not arbitrary and capricious?

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background

1. The Actions of Save Columbia CU Committee and its Supporters

Appellant Save Columbia CU Committee ("Save CCU") is a nonprofit corporation that was a member of Columbia. CP¹ 4. Appellants Cathryn Chudy, Kathryn Edgecomb, Lloyd Marbet, and Robert Tice are members of Save CCU and were also members of Columbia. CP 5. Ms. Chudy and Ms. Edgcomb were directors of Columbia until they were

¹ Throughout this brief "CP" shall refer to the Clerk's Papers from the Thurston County Superior Court.

expelled on August 15, 2006. CP 12. They were considered minority directors because they opposed a five-member majority of directors on issues of corporate governance. CP 8. Mr. Marbet was a member of Columbia's supervisory committee until he was expelled from Columbia on August 15, 2006. Based upon the allegations in the Complaint², Mr. Tice did not hold any office with Columbia at the time of his expulsion on August 15, 2006. Prior to Appellants' expulsion from Columbia, and prior to members of Save CCU being elected as directors, Save CCU had supported the removal of all nine directors of Columbia. CP 5. On March 16, 2004, Save CCU and three of its members, including Mr. Tice, sued Columbia in Clark County regarding various corporate governance issues. CP 6-7. On May 14, 2006, Save CCU placed a newspaper display ad in *The Columbian*, Vancouver's daily newspaper, urging readers to run for election to Columbia's board of directors and its supervisory committee. CP 9. The ad arguably disparaged Columbia's existing majority board. *Id.*

In late June 2006, a special meeting of the membership was set for July 22, 2006, at 10:00 a.m., to vote on three specific questions. CP 9-11. On July 20, 2006, two days before the special membership meeting was

² Throughout this brief, the term "Complaint" refers to Appellants' Complaint for Declaratory Judgment and Petition for Judicial Review filed September 8, 2006, in

scheduled to occur, Columbia's board amended Columbia's bylaws by adopting new rules for membership meetings. These new rules allowed members to visit the meeting site between the hours of 10:00 a.m. to 3:00 p.m. for purposes of voting, versus showing up and voting at a specific time. CP 11. Save CCU viewed the outcome of the vote as unfavorable and took issue with the way the bylaws were amended. CP 11. Save CCU notified the Department of its version of these events, and the Department elected not to take enforcement action. *Id.*

At a special board meeting on August 15, 2006, Columbia's majority directors amended its bylaws regarding the definition of "for cause." The amended definition allowed a member's immediate "for cause" expulsion from Columbia for "any other reason which in the opinion of the Board members voting for the expulsion agree is inimical to the best interests of the Credit Union." CP 12. At this same meeting, the majority directors also voted to expel the Appellants. *Id.* The basis for the "inimical-to-Columbia" finding in the Appellants' expulsion notices were Save CCU's placing of the newspaper advertisement, the supervisory committee's calling of a special meeting, and the Clark County lawsuit. CP 120-38. Finally, the majority directors found that Appellants breached

Thurston County Superior Court. CP 4-16. Appellants filed an amended complaint after the Department was dismissed from the case. CP 587-99.

their duty of loyalty and caused Columbia to suffer a loss by engaging in such conduct and by causing or contributing to member withdrawals. *Id.*

2. The Actions of the Department's Division of Credit Unions.

Linda Jekel, the Director of the Department's Division of Credit Unions ("Division"), explains in her Declaration that in the Division's role as regulator, it rarely gets involved in issues relating to the governance of credit unions. CP 406. Further, the Division would only have authority to get involved in corporate governance issues if there is a violation of law or safety and soundness concerns. *Id.* This is consistent with the practice of other credit union regulatory authorities across the country, including the National Credit Union Administration³ ("NCUA"). CP 406.

Director Jekel elected not to involve the Department in Columbia's governance issues in July 2006. In making this decision, Director Jekel considered the July 20, 2006 changes to Columbia's bylaws that altered the voting procedures for the July 22, 2006 special membership meeting. CP 105. She concluded that Columbia's board had the authority to create such procedures, and the procedures were in compliance with relevant law. *Id.*

³ The NCUA is the federal agency that insures credit union deposits, much like the FDIC for banks.

Director Jekel received prior notice that on August 15, 2006, Columbia's board of directors planned to expel Appellants Chudy, Edgecomb, Marbet, Tice and others from membership. CP 408. Board member Ralph Erdmann asked Ms. Jekel to stop the removal of the elected officials and the member expulsions. *Id.* In considering the request, Ms. Jekel reviewed the Washington State Credit Union Act ("the Act"), RCW 31.12, and consulted with the Division's Assistant Attorney General. CP 408. Based on Ms. Jekel's interpretation of the Act and in conjunction with legal counsel, she determined that Columbia's board of directors had authority to establish reasons for expulsion of a member. *Id.* She also concluded that the Act contained no exceptions that would prevent the board from expelling a member just because the member happened to serve on the board or supervisory committee. CP 408. Because the board's planned actions did not appear to violate the Act, Ms. Jekel did not believe that the Division had authority to take action to prevent the members from being expelled. *Id.*

B. Regulatory Background

The Department is a state agency established in RCW 43.320.⁴ This chapter directs that one of the four divisions of the Department shall

⁴ The Department is to "be organized and operated in a manner that to the fullest extent permissible under applicable law protects the public interest, protects the safety and soundness of depository institutions and entities under the jurisdiction of the

be the Division of Credit Unions, with “regulatory authority over all state-chartered credit unions” RCW 43.320.050. The Act provides details about the purpose of the Division of Credit Unions:

The director is the state’s credit union regulatory authority whose purpose is to protect members’ financial interests, the integrity of credit unions as cooperative institutions, and the interests of the general public, and to ensure that credit unions remain viable and competitive in this state.

RCW 31.12.015.

The primary purpose of the Division is to ensure that credit unions operate in a safe and sound manner such that members’ financial accounts are secure. *See* RCW 31.12.015; RCW 31.12.516(5); RCW 31.12.585; RCW 31.12.637. To fulfill this purpose, the majority of the Division’s time is spent conducting regular examinations of the 79 state-chartered credit unions. CP 405. By statute, each of these credit unions must be examined at least once every eighteen months. RCW 31.12.545.

The Act provides that the “director shall require each credit union to conduct business in compliance with this chapter.” RCW 31.12.516(1). However, the Act does not specify any particular means by which the Department must accomplish this. Instead, the Act makes a number of tools available to the Division and provides standards for when each can be used. *See* RCW 31.12.575 (removal or prohibition orders);

department, ensures access to the regulatory process for all concerned parties, and

RCW 31.12.585 (cease and desist orders); RCW 31.12.630 (authority to call special meeting of board); RCW 31.12.637, .641, .644, .647 (supervisory direction); RCW 31.12.651, .657, .661 (appointment of conservator); RCW 31.12.664, .667 (involuntary liquidation); RCW 31.12.671-.721 (receivership). The Division's authority to take enforcement action (i.e. issue written notice of administrative charges) is restricted to situations in which the credit union has committed or is about to commit a "*material* violation of law" or an "unsafe or unsound practice." RCW 31.12.585 (emphasis added).

C. Procedural History Related To The Department

On September 8, 2006, Appellants filed a Complaint for Declaratory Judgment and Petition for Judicial Review in Thurston County Superior Court. CP 4-16. The Department moved for summary judgment, which was granted on or about April 6, 2007. CP 390-403; 579-80. The Order Granting Summary Judgment stated that the Department's decision to bring an enforcement action is a discretionary matter and that the Department did not have a duty to bring an enforcement action. CP 579. The Order further provided that "the

protects the interests of investors." RCW 43.320.010.

allegations in the complaint are insufficient to constitute arbitrary and capricious action by the Department.”⁵ *Id.*

IV. SUMMARY OF ARGUMENT

The Department was not required to take enforcement action as to either the July 22, 2006 special membership meeting or the August 15, 2006 member expulsions. As a result, the Appellants’ case is insufficient as a matter of law, and there is no basis for any allegation that the Department’s actions were arbitrary and capricious.

Additionally, Appellants failed to raise any issue of material fact with regard to the July 22, 2006 special membership meeting, the August 15, 2006 expulsions, or the allegation of improper motives on the part of Director Jekel. Consequently, the Department was entitled to summary judgment in its favor.

Finally, Appellants’ examples of the Department’s interaction with Columbia in prior years are irrelevant, are not examples of prior enforcement actions, and do not demonstrate that the Department acted arbitrarily and capriciously concerning the two decisions at issue.

⁵ Columbia also moved for summary judgment. An order denying this motion and granting Appellant’s Motion for Leave to Amend Complaint was filed June 19, 2007. CP 600-14. This same day, Appellants filed their First Amended Complaint for Declaratory Judgment and Petition for Judicial Review. CP 587-99. On July 20, 2007, Columbia filed a Motion to Dismiss or, Alternatively, for Summary Judgment. CP 619-36. An Order granting this motion was entered on December 20, 2007. CP 678-84. This appeal followed.

V. STANDARD OF REVIEW

The trial court properly granted summary judgment dismissal of Appellants' claims as to the Department. CP 579. It concluded that whether to take an enforcement action is a matter of discretion, and that the Department's actions were not arbitrary and capricious. *See* CP 579. The Court of Appeals reviews summary judgment orders de novo. *Jones v. Personnel Resources Bd.*, 134 Wn. App. 560, 566, 140 P.3d 636 (2006).

When reviewing an order of summary judgment, an appellate court engages in the same inquiry as the trial court and views the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007). Summary judgment is appropriate where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. *Stevens*, 162 Wn.2d at 46-47.

After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Plemmons v. Pierce Cy.*, 134 Wn. App. 449, 455-56, 140 P.3d 601 (2006). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.* A court should grant the motion if, from all of the evidence, a

reasonable person could reach but one conclusion. *Plemmons*, 134 Wn. App. at 455.

VI. ARGUMENT

A. **Under the Administrative Procedure Act, There Is No Right To Challenge The Department's Discretionary Decision Not To Take Enforcement Action.**

The Appellants claim that the Department should have taken enforcement action with regard to 1) the voting procedures at Columbia's July 22, 2006 special membership meeting and 2) the expulsions at the August 15, 2006 special board meeting. As such, they are asking the Court to review the Department's decisions not to take enforcement action. Said another way, they are asking the Court to mandate a particular enforcement measure despite the fact that the Department's enforcement powers are discretionary.

With limited exceptions not relevant here, the Administrative Procedure Act ("APA") displaces the common law and other statutes when there is judicial review of agency action. *See* RCW 34.05.510. RCW 34.05.570(4) allows judicial review of "other agency action." Specifically, "[a] person whose rights are violated by an agency's failure to perform *a duty that is required by law to be performed* may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant

to this subsection requiring performance.” RCW 34.05.570(4)(b) (emphasis added).

Appellants must first establish that the Department had “a duty that is required by law to be performed”. RCW 34.05.514. The Washington State Supreme Court has held that decisions associated with taking enforcement action are discretionary:

[The Department of Labor and Industry’s] enforcement powers include performing investigations, conducting inspections, and issuing citations. [Citations omitted.] *As a practical matter, decisions associated with exercising these enforcement powers are discretionary. See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (holding a presumption of unreviewability of decisions of agency not to undertake enforcement action); *Nerbun v. State*, 8 Wash.App. 370, 376, 506 P.2d 873 (1973) (Department of Labor and Industries’ duty to conduct spot inspections of workplaces is not absolute).

National Elec. Contractors Ass’n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 31, 978 P.2d 481 (1999) (emphasis added)⁶. Because decisions on whether or not to take enforcement action are discretionary, there is no “duty required by law”, and Appellants have failed to meet this requirement for judicial review under the APA.

In *National Elec.*, the Department of Corrections (“DOC”) used inmate labor to perform electrical work in prison facilities, assigned

⁶ *National Elec. Contractors Ass’n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 31, 978 P.2d 481 (1999), concerns a mandamus action against the Department of Labor and Industries to compel enforcement of certain laws.

inmates to construction projects without using the competitive bidding process, and paid inmates a gratuity less than the prevailing wage. *National Elec.*, 138 Wn.2d at 14. Through the means of a mandamus action⁷, the plaintiffs sought to compel the Department of Labor and Industries (“DLI”) to enforce various laws regarding electrical licensing, workplace safety and prevailing wages against the DOC. *Id.* at 13-14, 31. While none of these statutes exempted the DOC, the DLI construed them to be inapplicable to the DOC. *Id.* at 14.

The court found that DLI’s decision not to enforce the electrical licensing statute was a discretionary decision and that, where the agency had exercised its discretion not to act, it could not be compelled to act. *National Elec.*, 138 Wn.2d at 32. In reaching this decision, the court considered the following law:

Mandamus lies to compel discretionary acts of public officials when they have totally failed to exercise their discretion to act, and therefore it can be said they have

⁷ In *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 378, 932 P.2d 139 (1997), the plaintiffs sought and obtained a writ of mandamus from the trial court ordering the Department of Ecology to take certain action. On appeal, the Washington State Supreme Court noted that an order requiring performance should have been issued pursuant to the Administrative Procedure Act, RCW 34.05.570(4)(b). *Id.* at 380 n.3. Citing the mandamus statute, RCW 7.16.360, the Court explained that since 1989, “the mandamus statute has provided that a writ of mandamus is no longer available for state agency action which is reviewable under the Administrative Procedure Act, RCW 34.05.” *Id.* The mandamus statute allows a court to order an inferior tribunal “to compel the performance of an act which the law especially *enjoins as a duty* resulting from an office, trust or station...” RCW 7.16.160 (emphasis added). In RCW 34.05.570(4)(b), the judicial review statute similarly allows a court to compel an agency to perform “a duty that is required by law to be performed...” Thus, in the context of agency action, the APA appears to have replaced the mandamus statute.

acted in an arbitrary and capricious manner. Once officials have exercised their discretion, mandamus does not lie to force them to act in a particular manner.

National Elec., 138 Wn.2d at 32 (citing *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 588 P.2d 185 (1978)). While the court acknowledged the arbitrary and capricious standard for review of agency action, its analysis turned on the fact that with respect to discretionary enforcement decisions, as long as the DLI exercised its discretion, the court could not compel the DLI to exercise its discretion differently. *See id.* The Department exercised its discretion in this case, just as the DLI exercised its discretion in *National Elec.*

In the case at bar, there is no statute or case law requiring the Department to take enforcement action. Instead, the Credit Union Act gives the Department discretion as to whether to take enforcement action: “[t]he director *may* issue and serve a credit union with a written notice of charges and intent to issue a cease and desist order if, in the opinion of the director, the credit union has committed or is about to commit: (1) A material violation of law⁸; or (2) An unsafe or unsound practice⁹.”

⁸ “Material violation of law” means:

- (a) If the credit union or person has violated a material provision of:
 - (i) Law;
 - (ii) Any cease and desist order issued by the director;
 - (iii) Any condition imposed in writing by the director in connection with the approval of any application or other request of the credit union; or
 - (iv) Any written agreement entered into with the director;

RCW 31.12.585 (emphasis added). The Supreme Court has found that the use of the term “may” in a statute has a permissive or discretionary meaning. *National Elec.*, 138 Wn.2d at 38. The fact that the Department has discretion is important because a prerequisite for judicial review is that a person’s rights be violated by an agency’s “failure to perform *a duty that is required by law to be performed...*” RCW 34.05.570(4)(b) (emphasis added).

Consistent with *National Elec.* and RCW 34.05.570(4)(b), the only duty that exists in this case is the Department’s duty to exercise its discretion under RCW 31.12.585 by deciding whether or not to take enforcement action. As a result, it cannot be said that the Department failed to perform a duty when the Department exercised its discretion and decided not to take enforcement action. Further, it makes no difference if the Appellants disagree with the decision that was made. Appellants

-
- (b) If the credit union or person has concealed any of the credit union's books, papers, records, or assets, or refused to submit the credit union's books, papers, records, or affairs for inspection to any examiner of the state or, as appropriate, or
 - any examiner of the national credit union administration; or
 - (c) If the person has breached his or her fiduciary duty to the credit union.

RCW 31.12.005(14).

⁹ “Unsafe or unsound practice” means:

any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the likely consequences of which, if continued, would be abnormal risk of loss or danger to a credit union, its members, or an organization insuring or guaranteeing its shares and deposits.

RCW 31.12.005(24).

cannot compel the Department to take enforcement action where it made a discretionary decision not to take enforcement action.¹⁰ However, should the Court decide that the Department did have a duty to take enforcement action, summary judgment was still proper because the Department's decisions were not arbitrary and capricious, as explained *infra*.

B. The Department's Decisions Not To Take Enforcement Action Were Not Arbitrary And Capricious.

Relief under a petition for review can only be granted if the court determines the agency's inaction was:

- (i) Unconstitutional;
- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (iii) Arbitrary or capricious; or
- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 34.05.570(4)(c). The Appellants' Complaint alleges that the Department acted "arbitrarily and capriciously" and does not reference any of the other provisions of RCW 34.05.570(4)(c). CP 14.

Arbitrary and capricious action means "willful and unreasoning action, taken without regard to the attending facts and circumstances." *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (citations omitted). Where there is room for two

¹⁰ Note that this case might be different if the Department had not exercised its discretion and made no decision one way or the other. However, this is not what happened.

opinions, and the agency acted honestly and upon due consideration, the reviewing court should not find that an action was arbitrary and capricious, even though the court may have reached the opposite conclusion. *Id.* Thus, the scope of review is narrow, and the party challenging the agency action carries a heavy burden. *Pierce Cy. Sheriff v. Civil Service Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). A court “shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1); *Port of Seattle*, 151 Wn.2d at 589. Rather, when reviewing matters within agency discretion, the court’s function is merely to verify that an agency has used its discretion in accordance with law. RCW 34.05.574(1).

- 1. There is no issue of material fact that the Department’s decision not to take enforcement action regarding the July 22, 2006 special membership meeting was not arbitrary and capricious.**

After the Department filed its motion for summary judgment, the burden shifted to the Appellants to come forward with evidence that created an issue of material fact. *Plemmons*, 134 Wn. App. at 455-56. In Appellants’ Response, no issues of material fact were raised regarding the Department’s decision not to take enforcement action regarding the July 22, 2006 special membership meeting. Instead, Appellants only

made argumentative assertions regarding the Department's past interactions with Columbia. *See id.*

The record indicates that Director Jekel carefully considered evidence about Columbia's July 20, 2006 bylaw changes that altered the voting rules for the July 22, 2006 special membership meeting. CP 105. For example, a July 21, 2006 letter by Director Jekel shows that she found the "Rules of Procedure" adopted for the July 22, 2006 special membership meeting to be in compliance with the statute dealing with special membership meetings, RCW 31.12.195. CP 105. Further, Director Jekel concluded that Columbia's board had authority to decide the procedures for a special membership meeting. *Id.* She also found that the bylaw changes were appropriate and reasonable for the circumstances of the meeting. *Id.* Thus, the evidence shows that the Department made a reasoned decision not to interfere with Columbia's July 22, 2006 special membership meeting, and this decision was made with full consideration of the attending facts and circumstances. CP 105.

- 2. There is no issue of material fact that the Department's decision not to take enforcement action regarding the expulsions at the August 15, 2006 special board meeting was not arbitrary and capricious.**

Director Jekel's Declaration explains how she concluded that she did not have authority to prevent the August 15, 2006 member

expulsions. CP 408. In reaching this conclusion, Director Jekel reviewed the Act and consulted with an Assistant Attorney General. *Id.* She also concluded that Columbia's board had authority to establish reasons for member expulsion and that there were no exceptions to the Act to prevent such an expulsion. *Id.* Thus, the record contains evidence that the Department took a reasoned approach and considered the attendant facts and circumstances when it decided not to take enforcement action. Appellants' Brief and the record contain no evidence that creates an issue of material fact in this regard. For these reasons, the Department's action was not arbitrary and capricious, and summary judgment was appropriate.

3. Appellants' allegation of improper motives for agency inaction does not raise an issue of material fact.

Appellants' Complaint alleges that the Department's conclusion that the Department could not prevent the August 15, 2006 expulsions was based on improper motives. Specifically, it alleges that "DFI's inaction is improperly based in part upon a close friendship between career officials in DFI's DCU and Columbia's CEO, Parker Cann, who recently directed DCU." CP 14. Director Jekel's Declaration debunked this allegation, explaining that Mr. Cann was not involved in her appointment as Division Director. CP 407. In her Declaration, she also testified that "[t]he allegation of a close friendship having an influence on my decisions as the

Division Director is simply not the case.” *Id.* Because Appellants have only relied on “argumentative assertions” on the issue of alleged improper motives for Department inaction, summary judgment was appropriate. *Plemmons*, 134 Wn. App. at 455-56.

The law Appellants cite regarding alleged improper motives is inapposite. They cite to the dissenting opinion in a condemnation case for the proposition that “[A]n agency declaration will not be upheld where it is arbitrary or capricious, or through abuse of discretion, violation of law, improper motives, or collusion.” App. B. at 36 (citing *Central Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wn.2d 403, 437, 128 P.3d 588 (2006)). The “agency declaration” referenced is the Regional Transit Authority’s declaration of the public necessity to take land through eminent domain. *Id.* The standard of review in an eminent domain context is not relevant to judicial review under RCW 34.05.570 of an agency’s decision not to take enforcement action.

C. Appellants’ Examples Of The Department’s Interaction With Columbia In Prior Years Are Irrelevant Because The Examples Do Not Raise An Issue Of Material Fact.

The Appellants have provided no evidence that the Department acted arbitrarily and capriciously in deciding not to take enforcement action concerning the July 22, 2006 special membership meeting and concerning the August 15, 2006 member expulsions. Rather, they rely on

several examples of situations involving Columbia from years past in which the Department addressed corporate governance issues. App. B. at 39-43. These examples are not relevant to whether the Department acted arbitrarily and capriciously in deciding not to take enforcement action regarding the two *specific* events at issue in this case. Further, none of the examples involved the Department initiating enforcement action against a credit union.

One situation cited by Appellants is a statement in a meeting agenda prepared by the Department for a meeting with Columbia's supervisory committee and board of directors on September 22, 2004. App. B. at 39; *see* CP 507. These materials include a statement that Save CCU's pending lawsuits against Columbia created a conflict of interest with Columbia, and that the Save CCU members should not participate in discussion or decision-making pertaining to the lawsuit. CP 507. Later, in April 2005, in response to the Chair of Columbia's board seeking guidance on how to handle conflicts of interest by candidates for the board or supervisory committee, the Department sent a letter stating that the litigation created a conflict of interest that should be disclosed in election materials. CP 483-88. This evidence of the Department's prior expressions of opinion from years back are not examples of prior

enforcement action and have nothing to do with the issues before this Court.

Appellants point to an instance in January 2004, where the Department informed Columbia that having its CEO on the board of directors conflicted with its bylaws. App. B. at 41; *see* CP 489-91. After being informed of the issue, Columbia promptly reported to the Department that the CEO had resigned. CP 491. No enforcement action was brought or necessary. This example of the Department's interaction with Columbia has no relevance to the issues at hand.

Appellants also cite to a 2004 interpretive letter as an example of the Department's involvement in corporate governance issues. App. B. at 41-42; *see* CP 411-16. The interpretive letter was addressed to Stephen A. Straub and responded to several issues regarding a petition for a special membership meeting by Columbia members. CP 411-16. On page 5 of this letter, the Department stated that it "would have concern" about any latent amendments to the bylaws or procedural rules "which could materially affect the resulting outcome of a Special Membership Meeting in a manner different than would otherwise happen if the Board did not adopt the amendments or temporary rules." CP 415. This statement did not constitute taking enforcement action as it only referenced *concern* about something *if* it happened. After issuance of the Interpretive Letter,

the Division entered into negotiations with Columbia as an alternative to filing an enforcement proceeding to require that the special meeting be held. CP 406-07. The result of the negotiations was an agreement in which Columbia promised, among other items, to provide each candidate for a contested position in the 2004 annual election a 500-word statement in support of his or her candidacy to be distributed to all members by Columbia. CP 407, 422. The terms of this agreement clearly only applied to the 2004 annual meeting.¹¹ This example of the Department's interaction with Columbia has no relevance to the issues in this case.

Lastly, Appellants cite to a June 30, 2006 letter to Robert Tice from the Department, which stated that a bylaw amendment adopted by Columbia's board on June 5, 2006 was prohibited by Columbia's then-existing bylaws. App. B. at 43; *see* CP 80-84. The Department directed Columbia's board to promptly rescind the amendment, and Columbia's board complied with the request. CP 554. Again, like all of the other examples cited by Appellants, no enforcement action was taken or

¹¹ Although the Division was able to negotiate this agreement in order to resolve issues about the special meeting, the Act includes no requirements for how an election at an annual meeting must be conducted. The Act, in RCW 31.12.185, only requires the meeting to be held at such time and place as the credit union's bylaws prescribe, and that it is to be conducted according to the rules of procedure approved by the board. In addition, RCW 31.12.225 requires directors to be elected at the annual membership meeting. Clearly, the Act leaves credit unions considerable discretion to determine how elections should be conducted.

necessary, and this prior incident is of no relevance to the issues before this Court.

The above examples of the Department's interaction with Columbia are not probative of whether the Department's decision to not take enforcement action was a "willful and unreasoning action, taken without regard to the attending facts and circumstances." *See Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (citations omitted). The Appellants have failed to offer evidence that the Department's decisions to not take enforcement action regarding the July 22, 2006 special membership meeting and regarding the August 15, 2006 membership expulsions were arbitrary and capricious. *Id.* In a motion for summary judgment, where the Appellants have not provided competent evidence, they may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Plemmons v. Pierce Cy.*, 134 Wn. App. 449, 455-56, 140 P.3d 601 (2006). Therefore, the superior court properly granted the Department's Motion for Summary Judgment.

VII. CONCLUSION

Based on the foregoing, the Department respectfully requests that the superior court's order granting summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 2008.

ROBERT M. MCKENNA
Attorney General



CHARLES E. CLARK, WSBA No. 28918
HEATHER L. POLZ, WSBA No. 30502
Assistant Attorneys General
Attorneys for the State of Washington

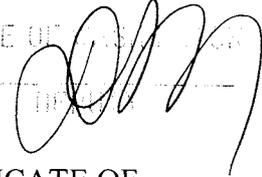
FILED
COURT OF APPEALS
DIVISION II

NO. 37272-0

09 AUG 25 09:10:00

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON



SAVE COLUMBIA CU COMMITTEE,
ET AL.,

Appellants,

v.

COLUMBIA COMMUNITY CREDIT
UNION, AND STATE OF
WASHINGTON,
DEPARTMENT OF FINANCIAL
INSTITUTIONS,

Respondents.

CERTIFICATE OF
SERVICE

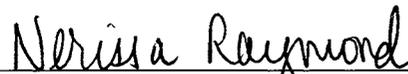
I certify that on August 22, 2008, I caused the Brief of Respondent State of Washington, Department of Financial Institutions in the above-captioned matter to be served upon the parties herein by placing the same in the U.S. mail, affixed with proper postage to:

DOUGLAS SCHAFFER
SHAFFER LAW FIRM
PO BOX 1134
TACOMA WA 98401

JOHN NEUPERT
MILLER NASH LLP
3400 US BANCORP TOWER
111 SW 5TH AVE
PORTLAND OR 97204

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of August, 2008.



NERISSA RAYMOND
Legal Assistant