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No. 322520-9-II
(consolidated with No. 34130-1-II)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

The Honorable Richard B. Sanders,

Appellant,

v.

The State of Washington,

Respondent.

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STATE OF WASHINGTON
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APPELLANT'S SUPPLEMENTAL BRIEF
REGARDING THE ETHICS IN PUBLIC SERVICE ACT

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I. INTRODUCTION

The Court has asked whether the Ethics in Public Service Act, ch. 42.52 RCW, impacts Justice Sanders' entitlement to representation by the Attorney General's office with regard to his alleged violations of the Code of Judicial Conduct in proceedings before the Commission on Judicial Conduct and the Supreme Court. The answer is no. The process and procedures for judicial disciplinary proceedings are constitutionally established as separate and apart from proceedings under the Ethics in Public Service Act. To the extent that the Ethics in Public Service Act creates any additional substantive ethics requirements applicable to the judiciary, such requirements were not at issue in Justice Sanders' case, and do not alter the Attorney General's duties under RCW 43.10.030 and .040.

The Attorney General's obligations under the Ethics in Public Service Act concern specific substantive violations of the Act itself, and apply to "citizen actions" or other actions filed after ethics charges are dismissed. Justice Sanders was not accused of violating, nor did he face statutory proceedings under the Ethics in Public Service Act; Justice Sanders' proceedings pertained to the Code of Judicial Conduct and were conducted by the Commission on Judicial Conduct. Moreover, the specific provisions of the Act relating to the Attorney General's

obligations do not expressly or implicitly amend or limit the obligation to represent state officers acting in their official capacity, as set forth in RCW 43.10.030 and .040.

Accordingly, RCW 43.10.030 and .040, and not the Ethics in Public Service Act, apply to this case. For the reasons set forth in prior briefing and in oral argument, Justice Sanders is entitled to a defense under those statutes.

II. SUPPLEMENTAL ARGUMENT

A. Judicial Ethics Proceedings are Not Governed by the Ethics in Public Service Act.

In certain circumstances, selected provisions of Washington's Ethics in Public Service Act, ch. 42.52 RCW, supplement the broad duty of the Attorney General to defend state officials in court or before administrative tribunals. But disciplinary ethics actions against judges, such as those at issue in this case, are not governed by the Ethics in Public Service Act. Judicial ethics proceedings addressing allegations under the Canons of the Code of Judicial Conduct follow a separate set of procedures mandated by Article IV, Section 31 of the Washington Constitution and the Commission on Judicial Conduct Rules of Procedure ("CJCRP"). In the context of constitutionally created judicial

proceedings, the requirements of the Ethics in Public Service Act relating to the Attorney General do not apply.

Article IV, Section 31 of the Washington Constitution created the Commission on Judicial Conduct (the “Commission”) and established specific procedures for ethics actions against the judiciary. Section 31, for example, carefully prescribed what types of individuals would make up the Commission, including judges from a variety of courts as well as lay persons; what forms of discipline the Commission may apply to judges; and how a decision of the Commission could be appealed. The Constitution also directed the Commission to establish its own additional rules of procedure, which the Commission did through the CJCRP. *See* CJCRP Rules 1 and 2(a). It is these Constitutional procedures that governed the ethics action against Justice Sanders at issue in this case.

The Ethics in Public Service Act sets forth a different set of statutory procedures primarily related to ethical transgressions of a financial nature. And although RCW 42.52.370 provided that the Commission could enforce certain substantive requirements of the law, e.g. if a Justice engaged in the type of financial misconduct prohibited by the Act, it also required that actions against judges would be governed by a separate set of procedures as mandated by the Washington Constitution:

The commission on judicial conduct shall enforce this chapter and rules adopted under it with respect to state officers and employees of the judicial branch and may do so according to the procedures prescribed in Article IV, section 31 of the state Constitution.

RCW 42.52.370 (emphasis added). Thus, the Ethics in Public Service Act explicitly outlines the authority and nature of the Legislative and Executive Ethics Boards, but does not discuss or create any similar board for the judiciary.¹ The implementing regulations of the Ethics in Public Service Act further emphasize this distinction.

Washington Administrative Code 292-09 was adopted to implement the Act in conjunction with the “procedures prescribed in Article IV, Section 31 of the Constitution of the state of Washington and chapter 2.64 RCW for the commission on judicial conduct.” WAC 292-09-010. Under WAC 292-09-010, the Commission “has jurisdiction to investigate and consider complaints of violations of the Ethics in Public Service Act”, in addition to violations of the Code of Judicial Conduct. Yet, “[a]ll proceedings involving ‘judges’ as defined in RCW 2.64.010 and the Code of Judicial Conduct shall proceed exclusively under the rules set forth in the CJCRP.” WAC 292-09-010.

¹ See RCW 42.52.310 and .320 discussing the Legislative Ethics Board and RCW 42.52.350 and .360 discussing the Executive Ethics Board.

In sum, the constitutionally mandated process for adjudicating judicial disciplinary actions for violations of the Code of Judicial Conduct stands on its own without regard to the procedural requirements of the Ethics in Public Service Act. The interplay between the Ethics in Public Service Act and the Commission is limited to the Commission's authority to investigate alleged violations of the Act not relevant here. The primary substantive ethics provisions governing the judiciary remain the Canons of the Code of Judicial Conduct, which are at issue in this case. Accordingly, whatever limited duties the Attorney General has in statutory proceedings under the Ethics in Public Service Act, they do not govern Justice Sanders' request for a defense in judicial ethics proceedings concerning the Canons of the Code of Judicial Conduct pursuant to the Washington Constitution and the CJCRP.

B. The Attorney General's Duties under the Ethics in Public Service Act Are Distinct from Duties in Judicial Ethics Proceedings.

Because the statutory procedures set forth in the Ethics in Public Service Act are inapplicable to judicial ethics proceedings, the Attorney General's obligations under the Act are inapplicable to this case. Two provisions of the Ethics in Public Service Act, RCW 42.52.430(7) and .460, do require the Attorney General to represent state officials, but these provisions relate to violations of the Act not at issue in this case, and

apply only to “citizen actions” and other actions filed after ethics charges are dismissed, similarly not relevant here.

First, RCW 42.52.460 concerns the Attorney General’s representation of state officers who are charged with wrongfully using public resources for political campaigns, and only when such allegations arise in “citizen actions.” As provided by the statute, a citizen action is a special proceeding in the courts, not before an ethics board.² Under RCW 42.52.460, an individual may bring a citizen action in the name of the State only if he or she has “reason to believe that RCW 42.52.180 is being or has been violated” and satisfies a number of specific procedural requirements.³ The individual must first notify the appropriate ethics board and the Attorney General that there is reason to believe that a violation of RCW 42.52.180 has taken place. *See* RCW 42.52.460. If neither the board nor the Attorney General has commenced an ethics

² RCW 42.52.460 plainly contemplates that citizen actions will be brought in court rather than before an ethics board given the numerous uses of “the court,” as opposed to “the appropriate ethics board” in the statute. Furthermore, RCW 42.52.460 mirrors the procedure for a “citizen’s action” under the Public Disclosure Act, RCW 42.17.400(4), as interpreted in *State ex rel. Evergreen Freedom Foundation v. National Education Association*, 119 Wn. App. 445, 81 P.3d 911 (2003) (discussing the procedure for filing a citizen action and the jurisdiction of the Superior Court).

³ RCW 42.52.180 states, in part, that state officers or employees may not “use or authorize the use of facilities of an agency, directly or indirectly, for the purposes of assisting a campaign for the election of a person to an office or for the promotion of or opposition to a ballot proposition.”

proceeding within 45 days, the individual must again provide notice that he or she plans on filing a citizen action. If the Attorney General and the board still fail to act after 10 more days, the individual may initiate proceedings in court. *Id.*

RCW 42.52.460 requires the Attorney General to defend officials when a citizen action does take place, as follows:

Upon commencement of a citizen action under this section, at the request of a state officer or state employee who is a defendant, the office of the Attorney General shall represent the defendant if the Attorney General finds that the defendant's conduct complied with this chapter and was within the scope of employment.

RCW 42.52.460. This statute reaffirms the importance of the Attorney General defending officers in a statutorily created citizen ethics proceeding, but has nothing to do with a violation of the Code of Judicial Conduct heard before the Commission under Constitutional procedures.

Here, Justice Sanders has not been charged with using public resources for a political campaign, or otherwise violating RCW 42.52.180. Furthermore, there has been no citizen action brought against him. The initial hearing regarding Justice Sanders' visit to the Special Commitment Center did not take place in state court.⁴ No citizen

⁴ As a citizen action under RCW 42.52.430, appears to take place in Superior Court and not before a mixed panel of judges and lay persons, it seems that one could never bring a citizen action against a judge without violating Article IV, Section 31 of the Constitution.

provided the Attorney General and the Commission with the requisite 45-day and 10-day notices, or ever initiated an independent action.

Conversely, the proceedings against Justice Sanders followed the standard procedure set forth in CJCRP 17-25 and concerned Canons 1, 2, and 3 of the Code of Judicial Conduct. The duties of the Attorney General under RCW 42.52.460 do not impact Justice Sanders' right to a defense.

RCW 42.52.430(7) also supplements the Attorney General's obligations to defend state officers, but only with regard to substantive violations of the Ethics in Public Service Act, and only after ethics charges have been dismissed. RCW 42.52.430(1) first requires ethics boards to determine whether there is reasonable cause to believe that a "violation of this chapter," the Ethics in Public Service Act, has taken place; if there is reasonable cause, the board must hold a hearing, but otherwise, the charges must be dropped. RCW 42.52.430(6) states that the ethics charges will also be dismissed if the board proceeds with a hearing but finds that the officer has not engaged in the alleged violation. The Attorney General's duty to defend state officers under RCW 42.52.430(7) arises after ethics proceedings are concluded in one of these two ways.

RCW 42.52.430(7) states as follows:

If the board makes a determination that there is not reasonable cause to believe that a violation has been or is being committed or has made a finding under subsection (6) of this section, the Attorney General shall represent the officer or employee in any action subsequently commenced based on the alleged facts in the complaint.

Thus, RCW 42.52.430(7) applies to subsequent actions, not to ethics proceedings themselves. If a board dismisses ethics charges, either before or after a full hearing, RCW 42.52.430(7) requires the Attorney General to defend the officer in different actions arising from the same facts.⁵ For example, the Attorney General may be required to defend a state officer against criminal charges, in a tort suit, or in a recall proceeding.

Even assuming that RCW 42.52.430 somehow functions in concert with the CJCRP, section (7) must apply to subsequent actions other than ethics proceedings because, under the CJCRP, there is no appellate review or rehearing of ethics charges once they are dismissed.⁶

⁵ While “action” is not explicitly defined in the Ethics in Public Service Act, its meaning is broad under RCW 42.52.430(7), given that such “actions” may take place after ethics proceedings are concluded and the complaint is dismissed under section (6), and as further illustrated by the use of the term later in the Act to refer to other “civil actions.” RCW 42.52.490 (“Action by attorney general”). Similarly “action” is defined in Black’s Law Dictionary as follows: “action. 1. The process of doing something; conduct or behavior. 2. A thing done; ACT (2). 3. *Patents*. OFFICE ACTION 4. A civil or criminal judicial proceeding.” BLACK’S LAW DICTIONARY (8th ed. 2004) (emphasis added).

⁶ If there is not reasonable cause to believe that an ethics violation has taken place, the Commission will dismiss the case. CJCRP 17(d)(4)(A). The CJCRP do not provide for

Here, RCW 42.52.430 is inapplicable because Justice Sanders was not charged with violating the Ethics in Public Service Act; the allegations against Justice Sanders fell exclusively under the Canons of the Code of Judicial Conduct. Furthermore, Justice Sanders requested representation in an ethics proceeding before the Commission, not in a subsequent action or a proceeding before a body governed by the Ethics in Public Service Act. Like RCW 42.52.460, RCW 42.52.430(7) has no bearing on the Attorney General's obligation to defend Justice Sanders.

C. The Ethics in Public Service Act Does Not Limit the Application of RCW 43.10.030 and .040 in this Case.

The existence of separate statutes that require the Attorney General to represent other state officers under different circumstances does not negate the Attorney General's broad duties under RCW 43.10.030 and .040. RCW 42.52.430 and .460 merely supplement the Attorney General's obligations to state officials.

There is no record that the Legislature intended the relevant provisions of the Ethics in Public Service Act to supersede or limit RCW

review or appeal of such a dismissal. CJCRP 24(c) similarly provides for the Commission to dismiss a case if a hearing on the merits shows that the judge in question has not committed an ethics violation. While a party may ask the Commission to reconsider its decision to dismiss a case within 14 days, CJCRP 25 does not provide for any further appellate review or rehearing of particular ethics charges. Thus, the only subsequent actions that could take place are actions other than ethics proceedings.

43.10.030 and .040. If the Legislature wished to repeal or replace the broad mandate in RCW 43.10.030 and .040, it would have said so.

Instead, the Legislature explicitly stated that the Act “shall be construed ... to supplement existing laws as may relate to the same subject.” RCW 42.52.901 (emphasis added). As discussed below, repeal by implication is disfavored.

RCW 42.52.460 expressly requires the Attorney General to defend state officials in certain actions pertaining to alleged violations of RCW 42.52.180. Because using public resources in support of a private election campaign would probably not fall within an officer’s “official capacity,” RCW 42.52.460 thus provides for a defense that may not be available under RCW 43.10.030 and .040. RCW 42.52.460 also clarifies that the Attorney General’s duties apply in citizen actions. Citizen actions are a unique type of proceeding: they involve moving what is normally an administrative proceeding into state court; they are brought by independent citizens but on behalf of the State; a judgment may be awarded, but with the damages escheating to the State – which must then reimburse the citizen for his or her attorney’s fees. Given the complex character of a citizen action, it could be difficult to determine which defense statute sets forth the Attorney General’s relevant responsibilities. Accordingly, the Legislature supplemented these statutes through RCW

42.52.460, clearly stating that the Attorney General has an obligation to defend state officials in this context.

Similarly, RCW 42.52.430(7) expands the scope of the Attorney General's duties in "any action subsequently commenced" after ethics charges have been dismissed. Unlike RCW 43.10.030 and .040, RCW 42.52.430(7) does not require the officer to have been acting in his "official capacity" in order to be eligible for a state-funded defense. Neither "official capacity" nor "scope of employment" appear anywhere in RCW 42.52.430. Thus, if an official was charged with improprieties outside his or her official capacity but there was not reasonable cause to believe that the violation took place, the Attorney General would be required to defend the official in any civil or criminal proceeding based on the same facts.

As both RCW 42.52.430 and .460 extend, rather than conflict with the Attorney General's pre-existing duties, there is no reason to conclude that these statutes implicitly repeal, or somehow limit the application of RCW 43.10.030 and .040. "Preference is given a more specific statute *only* if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized." *State v. Thomas*, 121 Wn.2d 504, 511, 851 P.2d 673 (1993) (emphasis in original), quoting *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 425, 799 P.2d 235

(1990) (superseded by statute on other grounds). That is not the case here.

Furthermore, the Supreme Court has “stated many times that the implicit repeal of statutes is strongly disfavored” and it has long been a “cardinal rule that two statutes dealing with the same subject matter will, if possible, be so construed as to preserve the integrity of both.” *State v. Fairbanks*, 25 Wn.2d 686, 690, 171 P.2d 845 (1946); *see also Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995), citing, *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993). In fact, a court will only find an implicit repeal in the following circumstances:

[T]he later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or unless the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.

Washington Federation of State Employees, Council 28, AFL-CIO v. Office of Financial Management, 121 Wn.2d 152, 165, 849 P.2d 1201 (1993), citing, *Abel v. Diking & Drainage Imp. Dist. 4*, 18 Wn.2d 356, 363, 142 P.2d 1017 (1943).

Here, the Legislature explicitly stated that the Ethics in Public Service Act was intended to “supplement” previous legislation; the

purposes of RCW 43.10.030 and .040 and RCW 42.52.430 and .460 are not repugnant to, but compliment each other; and RCW 42.52.430 and .460 do not cover the entire area of the Attorney General's duty to represent state officials, or even concern the representation of officials in judicial ethics proceedings. In fact, several courts have considered the wide range of potentially relevant defense provisions before ruling under the most applicable one.⁷ There is no justification for the argument that the Ethics in Public Service Act supersedes, limits, or implicitly repeals RCW 43.10.030 or .040.

Indeed, if RCW 42.52.430 and .460 were the exclusive means of defense for the judicial branch, the result would be that judges would be denied a defense in virtually all circumstances. Even the State has never suggested such a result.

D. Both Parties, and Every Court to Consider this Issue, Agree that RCW 43.10.030 and .040 Govern the Attorney General's Duty to Represent Judges in Ethics Proceedings.

In light of the above, it is unsurprising that there has been broad consensus that RCW 43.10.030 and .040 exclusively control whether or

⁷ See e.g., *State v. Herrmann*, 89 Wn.2d 349, 352-54, 572 P.2d 713 (1977) (considering RCW 43.10.030 and .040, RCW 4.92.060 and .070 -governing actions for damages, and RCW 48.02.080 - referring to the Attorney General's representation of the Insurance Commissioner, before applying RCW 4.92.060 and .070 because the proceedings involved a request for damages.

not the Attorney General is required to represent Justice Sanders before the Commission and the Supreme Court. The trial court below ruled that “RCW 43.10.030 requires the Attorney General to defend state officials acting in their official capacity in, inter alia, administrative proceedings, including proceedings before the Commission on Judicial Conduct”

CP 168. The State has repeatedly recognized that the Ethics in Public Service Act “applies to state officials other than judges.” Brief of Respondent State of Washington, at 31; *see also* CP 108 (describing RCW 42.52.460 as relating to “specific executive ethics matters”). The State has also conceded that RCW 43.10.030 and .040 require the Attorney General to defend judges in at least some circumstances.⁸

Finally, when Justice Sanders faced charges before the Commission on a previous occasion, Judge Hicks ruled that the Attorney General was required to defend Justice Sanders under RCW 43.10.030 and .040. CP 81-82.

⁸ *See e.g.*, Brief of Respondent State of Washington, at 12, 17; Brief of Respondent State of Washington in Opposition to Motion for Discretionary Review and Motion to Lift Stay of the Appeal, at 1-2; Defendant’s Renewed Motion for Summary Judgment or in the Alternative, Motion to Apply Commission’s Decision to Previous Summary Judgment Order, at Supplemental Clerk’s Papers (“Supp. CP”) 166; Brief in Support of State of Washington’s Motion to Stay Proceedings, at Supp. CP 385-6. While the State did seem to argue in a footnote that RCW 43.10.030 and .040 do not ever independently require the Attorney General to represent state officials, (*See* CP 108) they have since repeatedly conceded this point, as indicated above.

After three years of litigation regarding Justice Sanders' current request for a defense, neither party relied on the Ethics in Public Service Act because it does not apply to this case. Whether or not the Attorney General was required to defend Justice Sanders before the Commission and the Supreme Court is determined exclusively by RCW 43.10.030 and .040.

III. CONCLUSION

RCW 43.10.030 and .040 govern Justice Sanders' request for a defense before the Commission on Judicial Conduct and the Supreme Court. The Ethics in Public Service Act has no bearing here because the Attorney General's duties under RCW 42.52.430 and .460 apply only to violations of the Act, and proceedings under the Act. There is, furthermore, no reason to conclude that the Ethics in Public Service Act limits or supersedes RCW 43.10.030 and .040 as applied to Justice Sanders' case.

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As explained in earlier briefing before the Court, the allegations against Justice Sanders arose out of his official capacity, and therefore, the Attorney General is required to provide for his defense.

DATED this 21st day of February, 2007.

Respectfully submitted,

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