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No. 1044062

SUPREME COURT
OF THE STATE OF WASHINGTON

MATTHEW MERZ,

Petitioner,

and

COWLITZ COUNTY,

Respondent.

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Matthew Michael Merz asks this Court to accept review of the Court of Appeals decision terminating review, as identified in Part B. Mr. Merz was the appellant in the Court of Appeals and is the whistleblower claimant whose case was dismissed on procedural grounds. He appears pro se in seeking this Court's discretionary review.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished Court of Appeals decision in *Merz v. Cowlitz County*, No. 59266-5-II (Wash. Ct. App. Div. II), filed on June 24, 2025, which affirmed the Cowlitz County Superior Court's dismissal of Mr. Merz's action. No motion for reconsideration of the Court of Appeals decision was filed. A copy of the Court of Appeals opinion is included in the Appendix at pages 26 through 30.

Parts of the decision for which review is sought: Petitioner seeks review of the Court of Appeals' holdings that (1) his petition for judicial review was properly dismissed for failure to

meet statutory service requirements, (2) his motion for reconsideration was properly denied as untimely, and (3) whether the Local Government Whistleblower Protection Act (RCW 42.41) protects a local elected official who reports misconduct and faces retaliation by a local government — a question the Court of Appeals declined to address, but which is necessary to the fair resolution of the matter and of substantial public interest. These rulings effectively terminated Petitioner’s whistleblower retaliation claim without any decision on the merits.

III. ISSUES PRESENTED FOR REVIEW

1. **Strict Compliance vs. Due Process:** Did the lower courts err in dismissing a pro se petitioner’s administrative appeal for failure to serve the agency, despite the agency’s final order providing notice of appeal rights that omitted that service requirement – thereby raising a significant due process question about whether such misleading notice can excuse strict compliance with RCW 34.05.542(2)?

2. **Scope of Whistleblower Protection:** Does the Local Government Whistleblower Protection Act (RCW 42.41) protect a local elected official who faced retaliatory action by another local government, and should the term “employee” in RCW 42.41.040(1) be interpreted consistent with the state Whistleblower Act at RCW 42.40.020(2) to include individuals “holding office,” in light of the legislature’s intent – an issue of substantial public interest for government accountability?

3. **Substantial Public Interest:** More broadly, do the circumstances of this case present an issue of substantial public interest in ensuring that whistleblowers are not deprived of a remedy due to procedural traps and that administrative agencies provide clear, accurate notice of appeal requirements to unrepresented parties?

IV. STATEMENT OF THE CASE

Factual Background: Petitioner Matthew Merz was an elected city council member in the City of Kalama. In 2022, he reported

alleged improper governmental actions involving officials in his city (including Open Public Meetings Act violations, usurpation of city council powers, and misconduct relating to the administration and police department's concealment of a mentally ill man repeatedly traveling from Salem to Kalama to stalk Mr. Merz with deadly intent, as well as the deletion of a death threat sent to Mr. Merz's city email account before he was aware of it). CP 2-3, 6. Petitioner contends that in retaliation for his whistleblowing, officials of Respondent Cowlitz County — including the County Sheriff and Prosecutor — took adverse actions against him, notably causing him to be criminally charged, arrested, briefly incarcerated under a pretext (misuse of “cybercrime” laws), and forced into a jail hallway with the same mentally ill man searching for his home with the intent to murder him. CP 3-4. Petitioner further contends that phone records, text messages, and other public records indicate that officials of Respondent conspired with City of Kalama officials to conceal their potentially criminal actions and intimidate Merz into

silence in exchange for endorsements for the Cowlitz County Sheriff in his 2022 re-election campaign, which commenced only weeks after Merz's arrest after attempting to report. CP 6-7. These acts, Petitioner alleges, were intended to punish him for exposing government wrongdoing and to dissuade him and others from such disclosures.

In response, Mr. Merz filed a whistleblower retaliation complaint against Cowlitz County under the Local Government Whistleblower Protection Act, chapter 42.41 RCW. The complaint was adjudicated by an Administrative Law Judge ("ALJ") with the state Office of Administrative Hearings ("OAH"), pursuant to RCW 42.41.040(5) (applying the Administrative Procedure Act (APA) to local whistleblower cases). On August 5, 2022, the ALJ issued a Final Order dismissing Mr. Merz's whistleblower complaint for lack of standing. CP 77-83. The ALJ concluded that because Mr. Merz was serving as a city councilmember (an elected official of a city) rather than as an "employee" of Cowlitz County, he was not a

“local government employee” protected by RCW 42.41.040, and thus could not bring a retaliation claim against the County. The ALJ’s dismissal was a final decision on the merits of the administrative complaint. Importantly, the ALJ’s written decision included a notice explaining how to seek judicial review in superior court under the APA. CP 82. That notice, however, did not explicitly mention that the petition for judicial review must be served on the issuing agency (OAH) or on the Attorney General’s Office, even though such service is mandated by statute. The notice stated that the petition “must be served on all parties of record within thirty (30) days of mailing of the final order,” but it did not list OAH as a party to be served. CP 82. Mr. Merz, acting pro se, relied on this notice language in pursuing judicial review.

Superior Court Proceedings: On September 2, 2022, within the APA’s 30-day deadline, Mr. Merz filed a petition for judicial review in Cowlitz County Superior Court, seeking review of the OAH final order under RCW 34.05.570(3). CP 1-19. He timely

served his petition on the Cowlitz County Sheriff's Office and Prosecuting Attorney's Office (the local offices representing the respondent county). However, Mr. Merz did not serve a copy of the petition on OAH, the agency that issued the decision, nor on the Washington Attorney General's Office. Unaware of the omission at the time, Mr. Merz proceeded under the assumption that serving the County's offices satisfied the notice requirements, since the OAH's appeal notice had only referred to "opposing parties" and "parties of record" (which Mr. Merz understood to mean Cowlitz County itself).

The superior court initially took no action on the petition for many months. In late 2023, Petitioner noted the matter for a hearing, prompting the court to set a briefing schedule. Cowlitz County, in its responsive briefing, moved to dismiss the petition for lack of subject matter jurisdiction, arguing that Mr. Merz had failed to strictly comply with RCW 34.05.542(2) by not serving OAH within 30 days. In reply, Mr. Merz acknowledged not serving OAH but contended that he was "not required to serve

OAH” because the agency’s own notice of appeal rights did not list that requirement in the Final Order, which he argued amounted to OAH waiving or being estopped from enforcing the statutory service requirement, and because OAH explicitly told Mr. Merz not to serve them with the petition for judicial review. CP 193, 225, 234-236. Mr. Merz essentially argued that it was fundamentally unfair to penalize him for failing to serve OAH when the official notice misled him into believing service on the County was sufficient, and that the Administrative Procedures Act clearly states that all parties are to be able to rely upon the directions given in a final order. CP 193-195, RP 18-26, 29-30. On December 20, 2023, the superior court rejected Mr. Merz’s argument and entered an order dismissing the petition for judicial review with prejudice. CP 216. The court agreed with the County that the failure to serve OAH (a necessary party under the APA) deprived the court of appellate jurisdiction. RP 39. Sixteen days later, on January 5, 2024, Mr. Merz filed a motion for reconsideration in the superior court. CP 217-234. The superior

court denied the motion as untimely, noting that under Civil Rule 59(b) a motion for reconsideration must be filed within 10 days of entry of judgment, and that under Civil Rule 6(a) the exclusion of weekends/holidays in computing time applies only to periods shorter than 7 days. Mr. Merz's 16-day delay exceeded the permissible period even accounting for court holidays. CP 238-239. As a pro se litigant, Mr. Merz had misinterpreted the procedural rules and believed the 10-day reconsideration period was measured in judicial days.

Court of Appeals Decision: Mr. Merz timely appealed. CP 240-242. On June 24, 2025, the Court of Appeals (Division II) issued an unpublished opinion affirming the superior court in all respects. The appellate court held that Mr. Merz's failure to serve OAH with the petition within 30 days was a fatal jurisdictional defect under the APA, and it rejected his assertion that OAH's notice language excused or waived the requirement. The court noted that RCW 34.05.542(2) explicitly requires service on "the agency, the office of the attorney general, and all parties of

record” within thirty days, and that OAH is the “agency” whose order was being reviewed. Even assuming arguendo that an agency could waive such requirements, “nothing in OAH’s final order” or notice “can be construed as an affirmative statement” that service on the agency was not required. To the contrary, the notice cited RCW 34.05.542(2), which on its face includes the agency service mandate. The Court of Appeals concluded that Mr. Merz was obligated to comply with RCW 34.05.542 and his failure to serve OAH compelled dismissal. As to reconsideration, the Court of Appeals agreed that the motion was untimely under CR 59(b) (filed 16 days after the order, well beyond 10 days) and that Mr. Merz’s pro se status did not excuse noncompliance. Accordingly, the Court of Appeals affirmed the dismissal of the petition and the denial of reconsideration.

Mr. Merz now seeks this Court’s discretionary review under RAP 13.4 to address the important issues described below. No further motions were made in the Court of Appeals, and the

mandate has not yet issued pending the outcome of this Petition for Review.

V. ARGUMENT – WHY REVIEW SHOULD BE ACCEPTED

This case meets multiple criteria for Supreme Court review under RAP 13.4(b). It presents significant questions of law having broad public impact and constitutional import, and it raises an issue of substantial public interest: namely, how strictly courts should enforce APA technicalities against well-intentioned whistleblowers and other litigants, especially when an agency's own actions may have contributed to the error. Petitioner respectfully urges the Court to grant review under RAP 13.4(b)(3) and (4). This case involves significant constitutional questions, including due process and the procedural rights of pro se litigants, implicating RAP 13.4(b)(3). It also involves a legal issue of substantial public interest affecting whistleblower protections for elected officials, satisfying RAP 13.4(b)(4).

1. Significant Question of Law: Due Process and Fair Notice in Administrative Appeals

This Court should grant review because the case presents a significant, unresolved question of law under the state and federal constitutions – specifically, the requirements of due process in the context of procedural traps for pro se litigants. Washington courts have long held that when a superior court exercises “limited appellate” jurisdiction under the APA, strict compliance with statutory filing and service requirements is a “necessary condition” to invoke jurisdiction. *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 958 P.2d 962 (1998). Indeed, failure to serve *all* parties specified in RCW 34.05.542(2) within 30 days will ordinarily deprive the court of subject matter jurisdiction and require dismissal. That principle, established by decisions like *City of Seattle v. PERC* and *Union Bay Preservation Coalition v. Cosmos Development*, is not in dispute here. Petitioner

acknowledges that, as a general rule, a party must serve the agency whose decision is challenged, in addition to other parties, and that courts have rigorously enforced this rule in numerous cases (often harshly). For example, in *Sprint Spectrum, LP v. State*, a petitioner's failure to properly serve the agency within 30 days resulted in dismissal of the appeal. Likewise, in *Cheek v. Employment Security Department*, the Court of Appeals dismissed an APA appeal where service on the agency was four days late, even though the petitioner had timely served the Attorney General's Office; the court strictly held the statute must be followed and the appeal was lost. *Cheek v. Emp't Sec. Dep't*, 107 Wn. App. 79, 25 P.3d 481 (2001). Washington's courts have even stated that actual notice to the agency does not cure defective service; *i.e.*, an agency's having knowledge of the petition is "not an excuse" for failing to meet the jurisdictional service requirements. *Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 391 P.3d 605 (2017).

However, the specific scenario presented by Mr. Merz's case raises a question of first impression in Washington: What if the *reason* the petitioner failed to strictly comply is that the administrative agency itself provided incomplete or misleading information about the requirements for judicial review? Does due process allow a court to slam the door on a litigant under those circumstances, or must there be some leeway (or estoppel of the agency/other party) to preserve fundamental fairness? This Court has not squarely addressed this question. Petitioner submits that where an agency's official notice of appeal rights omits a key statutory requirement, due process principles should prevent that omission from becoming a fatal trap for the unwary. Due process, at minimum, requires that notice to a party be "reasonably calculated, under all the circumstances, to apprise interested parties" of the action and afford them an opportunity to protect their rights. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *State v. Dolson*, 138 Wn.2d 773, 982 P.2d 100

(1999). Here, OAH's final order notice was not reasonably calculated to inform Mr. Merz of all the steps he needed to take – it never mentioned serving OAH or the Attorney General at all. A pro se litigant reading that notice would naturally conclude that serving the opposing party (the County) sufficed. In essence, the agency's notice was misleading by omission. Punishing Mr. Merz with dismissal in this context raises serious due process concerns. It effectively allowed a *procedural ambush* – created by the agency's lapse – to deprive him of any day in court on his claims. This outcome undermines confidence in the administration of justice and may violate the open courts guarantee of our state constitution (Wash. Const. art. I, §10) and the due process clause (art. I, §3).

Notably, other litigants have faced similar predicaments. In *Cheek*, for example, the petitioner argued that the agency should be estopped from contesting service because the agency's own decision letter directed her to serve the wrong party (the Attorney General) – essentially the same argument Mr. Merz raised. The

Court of Appeals in *Cheek* acknowledged the “apparent oversight” by the Legislature in the APA’s wording and noted the situation was “*an apparent oversight that should be addressed by the Legislature*”. Yet, lacking further guidance, the court still enforced the rule strictly and dismissed Cheek’s case. The present case squarely presents to this Court the opportunity (and need) to address this problem at a higher level. Does Washington’s commitment to strict jurisdictional rules override any consideration of an agency’s role in causing the error? Or can equitable principles or constitutional due process intervene to prevent manifest injustice in rare cases? Petitioner submits this is a significant question of law that merits this Court’s review. The Court’s guidance is needed to harmonize the strict jurisdictional doctrine with basic fairness. As the record shows, Mr. Merz reasonably relied on OAH’s notice, which *omitted* the agency service requirement. In such a scenario, fundamental fairness and due process arguably require that he not be doomed by the agency’s omission. At a minimum, this Court should

clarify whether an agency's failure to give full notice can amount to a waiver or whether equitable estoppel could apply against a governmental entity in this context (recognizing that equitable estoppel requires a statement inconsistent with a later position and reasonable reliance. *Lybbert v. Grant County*, 141 Wn.2d 29, 34-40, 1 P.3d 1124 (2000). Mr. Merz's case meets those elements: OAH's notice implied service on the agency was unnecessary, and Mr. Merz relied on it to his detriment.

Moreover, RCW 34.05.461(3) explicitly mandates that a final order from an administrative agency "shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief." RCW 34.05.010(11a) further emphasizes the essential purpose of these instructions by defining an 'order' as a written statement that "finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." The legislature's clear intent is that all parties must be able to reasonably rely upon instructions provided in a final

agency order. Here, OAH partially complied with RCW 34.05.461(3), RCW 34.05.080(7), and WAC 10-08-210(6) by providing general instructions in the Final Order yet omitted critical guidance concerning the mandatory service requirements on the agency itself. The incomplete instructions affirmatively misled Petitioner, a pro se litigant, into reasonably concluding OAH had waived service, which OAH affirmed. Enforcing dismissal under these circumstances contravenes fundamental fairness, procedural due process, and the express legislative intent underlying RCW 34.05.

This Court has held that agencies and opposing parties can waive or forfeit objections to service defects by delay or misleading conduct in civil cases. *Romjue v. Fairchild*, 60 Wn. App. 278, 284, 803 P.2d 57 (1991). (recognizing that equitable estoppel may apply against governmental entities where procedural fairness requires). Should not a similar principle protect a citizen when the agency's own confusing notice induced the mistake? The question is novel in Washington, constitutional in dimension,

and transcends Mr. Merz's individual case. It warrants this Court's attention under RAP 13.4(b)(3).

2. Issue of Substantial Public Interest: Protecting Whistleblowers and Ensuring Access to Justice

Even apart from the due process question, this case involves an issue of substantial public interest under RAP 13.4(b)(4). Washington has a strong public policy of encouraging and protecting whistleblowers in government. The Local Government Whistleblower Protection Act (RCW 42.41) was enacted "to encourage local government employees to disclose improper governmental actions" and to shield them from retaliation. Mr. Merz's situation exposes a potential gap or weakness in that statutory scheme that could adversely affect many future would-be whistleblowers. Namely, if a *local elected official* (such as a city councilmember) uncovers wrongdoing and faces retaliation by another local government (such as a county or another agency), the law as currently interpreted offers no clear protection or remedy. The ALJ ruled – and the lower

courts never reached the merits to consider otherwise – that an elected city official is not a “local government employee” and therefore cannot invoke RCW 42.41’s protections. The statute RCW 42.41.040(1) indeed, on its face, prohibits retaliation only against a “local government employee” (by a local government official or employee). It does not explicitly mention elected officials in the protected class. Yet the legislative history (*House Historical Bill Report for SSB 6321, 1991-1992* and *Original Senate Bill 6321, 1991-1992*) suggest that chapter 42.41 RCW was modeled on the state employee whistleblower law (RCW 42.40), which *does* define “employee” broadly to include “any individual employed or holding office” in a state agency. CP 8-9, 191. In other words, the legislature likely intended similar coverage at the local level, but the wording of RCW 42.41 left an ambiguity or omission. As a result, individuals like Mr. Merz – who hold local public office and courageously speak out against misconduct – might be left without the legal protections afforded to their employee counterparts, simply due to their title.

This Court's intervention is needed to clarify the law and potentially to fill that gap by interpretation, if possible. At minimum, the Court can highlight this important public issue, which could spur legislative attention if a judicial remedy is not feasible. Ensuring that "whistleblowers" are protected from retaliation regardless of their specific employment status is vital to the public interest of transparent and ethical government. Future whistleblowers should not be deterred by the fear that they will fall through a crack in the law. By accepting review, this Court can address whether the term "employee" in RCW 42.41 should be construed — perhaps in light of RCW 42.40.020(2)'s definition — to cover someone in Mr. Merz's position. This is an issue of first impression with broad implications for accountability in local governments statewide. It is manifestly a matter of substantial public interest that extends beyond the parties here.

Additionally, the public has a strong interest in access to justice and the fair administration of laws. When procedural

technicalities – especially ones not clearly communicated – bar someone from any consideration of serious allegations of public misconduct, it undermines public confidence. Whistleblower cases, by their nature, often involve pro se individuals or employees of modest means who are trying to vindicate the public’s interest in honest government. The administrative appeal process should not become a minefield that defeats those goals. By granting review, this Court can provide guidance to lower courts, agencies, and litigants on how to balance strict compliance with fairness. For instance, the Court could instruct that where an agency’s notice omits a required element, a court should consider equitable relief or perhaps treat the omission as grounds to excuse noncompliance (similar to how a defective official notice can toll or extend filing deadlines in other contexts). Such guidance would have systemic value, improving how agencies draft notices and how courts handle similar cases in the future. This will directly benefit not only whistleblowers, but any Washingtonian seeking judicial review of an agency

decision, particularly **pro se** individuals. The criteria of RAP 13.4(b)(4) are therefore met: the case presents a question “the public has a substantial interest in having determined” by the Supreme Court. The Court of Appeals’ disposition, though legally in line with prior strict-compliance cases, arguably conflicts with the broader values of due process and justice in a way that only this Court can rectify.

In sum, review is warranted to address whether Washington law should continue to adhere to an unforgiving rule even in the face of an agency’s misleading notice (potentially tempering the rule in rare equitable circumstances), and to consider the proper interpretation of the local whistleblower statute to ensure it fulfills its remedial purpose. These issues have far-reaching consequences for government accountability and citizen rights, well beyond Mr. Merz’s individual stake. Resolving them will provide needed clarity and potentially prevent future miscarriages of justice.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review under RAP 13.4. Petitioner seeks reversal of the Court of Appeals' decision and relief from the dismissal of his case. Specifically, if review is accepted, Petitioner asks this Court to hold that the dismissal of his petition for judicial review was improper and to remand the matter to superior court for a hearing on the merits of his whistleblower retaliation claims (with the service defect excused or cured). In the alternative, Petitioner asks this Court to clarify that as a city councilmember he is within the class of persons protected by RCW 42.41, thereby allowing his claim to proceed. Petitioner further requests any other relief the Court deems appropriate, including an award of costs and fees as allowed by law if he ultimately prevails. By taking this case, the Court can both do justice for Mr. Merz and establish precedent that will guide and protect future whistleblowers and pro se litigants in Washington.

Respectfully submitted this 7th day of August, 2025.



Matthew Merz, Petitioner, PRO SE

CERTIFICATE OF COMPLIANCE

This Petition for Review *complies with* RAP 18.17. It contains 3,949 words as counted by Microsoft Word, excluding the parts of the document exempted from the word count by RAP 18.17(b).

Dated: August 7, 2025

Respectfully Submitted



Matthew Merz, Petitioner, PRO SE

APPENDIX A

Court of Appeals Opinion

June 24, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MATTHEW MICHAEL MERZ,

Appellant,

v.

COWLITZ COUNTY,

Respondent.

No. 59266-5-II

UNPUBLISHED OPINION

PRICE, J. — Matthew Merz appeals the superior court’s orders dismissing his petition for judicial review and denying his motion for reconsideration. Because Merz failed to comply with the procedural requirements for filing both a petition for judicial review and a motion for reconsideration, we affirm the superior court’s orders.

FACTS

After a convoluted series of events that are well known to the parties in this case, Merz filed a whistleblower retaliation complaint against Cowlitz County. An Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH) ruled that Merz, a city council member for the City of Kalama, was not an employee of Cowlitz County and, therefore, did not have standing to bring a whistleblower retaliation complaint against Cowlitz County.

On August 5, 2022, the ALJ dismissed Merz’s whistleblower retaliation complaint with a final order that contained the following notice regarding judicial review:

This order becomes final on the date of mailing unless within thirty (30) days of mailing, a party files a petition for judicial review with the Superior Court. RCW 34.05.542(2). The petition for judicial review may be filed in the Superior Court of Thurston County, of the county where petitioner resides, or of the county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514(1). The petition for judicial review must be served on all parties of record within thirty (30) days of mailing of the final order. Service of the petition for judicial review on opposing parties is completed when deposited in the U.S. Mail, as evidenced by the postmark. RCW 34.05.542(4).

The petition for judicial review must include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the petitioner's attorney, if any; (3) facts that demonstrate that the petitioner is entitled to obtain judicial review; (4) the petitioner's reasons for believing that relief should be granted; and (5) a request for relief, specifying the type and extent of relief requested. RCW 34.05.546.

Clerk's Papers at 82.

On September 2, 2022, Merz filed a petition for judicial review of OAH's order dismissing his whistleblower retaliation complaint. The petition was served on the Cowlitz County Sheriff's Office and the Cowlitz County Prosecuting Attorney's Office, but was not served on OAH. No action was taken on the case until a year later when Merz noted a hearing on his petition. At the hearing, the superior court ordered responsive briefing to be filed by Cowlitz County and set a briefing schedule.

In its responsive briefing, Cowlitz County argued that the superior court was required to dismiss the petition because Merz failed to serve OAH as required by statute. In response to the County's argument, Merz contended that he was not required to serve OAH because the notice language regarding judicial review did not state that serving OAH was a requirement of filing a petition for judicial review. Thus, according to Merz, OAH had waived that statutory requirement of service.

On December 20, 2023, the superior court entered an order dismissing Merz's petition for judicial review with prejudice. Sixteen days later, on January 5, 2024, Merz filed a motion for reconsideration. The superior court denied Merz's motion for reconsideration as untimely.

Merz appeals.

ANALYSIS

Merz argues that the superior court erred by dismissing his petition for judicial review for failure to comply with the statutory requirements for service. Merz also argues the superior court erred by denying his motion for consideration as untimely. We disagree.

I. DISMISSAL OF PETITION FOR JUDICIAL REVIEW

Merz argues that the superior court erred by dismissing his petition for judicial review based on the failure to serve OAH as required by statute. Specifically, Merz claims that he was entitled to rely on the notice language included in OAH's final order as the agency's waiver of the statutory requirements. We disagree.

Proceedings related to whistleblower retaliation complaints are generally governed by the provisions of the Washington Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 42.41.040(5). RCW 34.05.542(2) provides, "A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." The "agency" referred to in RCW 34.05.542(2) is the agency whose final order is the subject of judicial review—in this case, OAH. *Sprint Spectrum, LP v. State*, 156 Wn. App. 949, 954-55, 235 P.3d 849 (2010), *review denied*, 170 Wn.2d 1023 (2011). When the party seeking judicial review fails to properly serve the agency, dismissal is an appropriate remedy. *Id.* at 958, 963.

Here, it is undisputed that Merz failed to serve OAH with his petition for judicial review. Instead, Merz argues that he was not required to serve OAH because OAH waived the statutory requirements due to the language in its final order. Even assuming, without deciding, that OAH may waive the statutory requirements for judicial review under the APA, the notice language does not support Merz's position. Nothing in OAH's final order can be construed as an affirmative statement that service on the agency under RCW 34.05.542(2) was not required. Further, the notice expressly cites to RCW 34.05.542(2), which clearly requires that the petition for judicial review must be served on the agency. Merz was required to comply with the requirements of RCW 34.05.542 and failed to do so. Accordingly, the superior court did not err by dismissing Merz's petition for judicial review.

II. MOTION FOR RECONSIDERATION

Merz also argues that the superior court erred by denying his motion for reconsideration as untimely. We disagree.

CR 59(b) requires that a motion for reconsideration be filed within 10 days. And CR 6(a), which governs computation of time, clearly exempts the inclusion of non-judicial days (Saturdays, Sundays, and legal holidays) in the computation only when the time prescribed is less than 7 days.

Merz's motion for reconsideration was filed 16 days after the superior court's decision, well past the 10-day deadline. Nevertheless, Merz asserts that he believed that he had 10 judicial days to file a motion for reconsideration and, because he is self-represented, his motion for reconsideration should still be considered timely. But self-represented litigants "are bound by the same rules of procedure and substantive law as attorneys." *Westberg v. All-Purpose Structures*,

No. 59266-5-II

Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Because Merz failed to comply with CR 59(b) and CR 6(a), the superior court properly denied his motion for reconsideration as untimely.

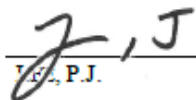
CONCLUSION

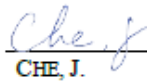
The superior court did not err either by dismissing Merz's petition for judicial review or by denying Merz's motion for reconsideration as untimely. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


PRICE, J.

We concur:


PRICE, J.


CHE, J.

APPENDIX B

Superior Court Order Denying Motion for Reconsideration

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22-2-00751-08
ORMRC 31
Order on Motion for Reconsideration
15950135



FILED
SUPERIOR COURT

2024 JAN 16 PM 12: 01

COWLITZ COUNTY
STACI L. MYKLEBUSZ, CLERK

BY: mb

2

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

MATTHEW MERZ,
Plaintiff,

Vs.
COWLITZ COUNTY,
Defendant.

No. 22-2-00751-08

**COURT'S ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

This matter came before the undersigned Judge of the above Court upon the Motion for Reconsideration filed by Plaintiff on January 5, 2024, requesting reconsideration of the Court's order of dismissal of Plaintiff's case dated and filed on December 20, 2023.

Timeliness

Pursuant to CR 59(b), plaintiff was required to file a motion for reconsideration within 10 days of entry of the order being reconsidered. 10 days from December 20th, (not including the 20th) would be December 30, 2023, a Saturday.

(31)

COURT'S ORDER DENYING MORION FOR RECONSIDERATION
Page 1 of 2

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1 If the date to file by falls on a weekend or holiday, per CR 6, the next "court day" is
2 the new deadline, or January 2, 2024. The motion was not filed until January 5, 2024,
3 and is untimely.

4
5 **Findings**

6 The Plaintiff's motion for reconsideration is untimely and cannot be considered by
7 the Court.

8
9 **Order**

10 After review of the foregoing, the Court denies Plaintiff's Motion for
11 Reconsideration as untimely and the Order of December 20, 2023, shall remain in full
12 force and effect.

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14 Dated this 16th day of January 2024.

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17 Judge Gary Bashor
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APPENDIX C

Superior Court Order Granting Motion to Dismiss

22-2-00751-08
ORDSMWP 27
Order of Dismissal With Prejudice
15812043



FILED
SUPERIOR COURT

2023 DEC 20 P 3:33

COWLITZ CO. CLERK
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BY WA

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

MATTHEW M. MERZ,

Plaintiff,

v.

COWLITZ COUNTY,

Defendant.

No. 22-2-00751-08

ORDER OF DISMISSAL

THIS MATTER having come on before the above-entitled Court on the Respondent's Motion For Dismissal, and the Court being fully apprised on the matter, now, therefore,

IT IS HEREBY ORDERED that the Plaintiff's Complaint is hereby dismissed **with** prejudice and without costs to any party.

Dated: 20 December, 2023.

JUDGE

Presented by:

NICOLE TIDEMAN, WSPA #45260
Email: tideman@walstead.com
Of Attorneys for Defendant

PAGE 1 OF ORDER OF DIMISSAL

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Page 216

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

APPENDIX D

O.A.H. Final Order

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of:

Matthew Merz,

Petitioner,

and

Cowlitz County,

Respondent.

Docket No. 05-2022-GOV-00035

**FINAL ORDER GRANTING MOTION TO
DISMISS**

Agency: Cowlitz County

Program: Local Government Whistleblower

1. ISSUES

1.1. Does Petitioner, Matthew Merz, have standing to bring a local government whistleblower retaliation complaint against Respondent, Cowlitz County?

1.2. Should Cowlitz County's Motion to Dismiss be granted?

2. ORDER SUMMARY

2.1. Matthew Merz lacks standing to bring a local government whistleblower retaliation complaint against Cowlitz County.

2.2. Cowlitz County's Motion to Dismiss is GRANTED.

2.3. Because Cowlitz County's Motion to Dismiss is granted, the status conference scheduled for August 11, 2022, and the evidentiary hearing scheduled for August 16, 2022, are **CANCELLED**.

3. FACTS AS A MATTER OF LAW:

The documents establish the following facts as a matter of law:

Jurisdiction

3.1. On January 3, 2022, Matthew Merz ("Mr. Merz") filed a whistleblower complaint with the Cowlitz County Prosecuting Attorney's Office, alleging illegal activity by his employer, the City of Kalama.

3.2. On March 8, 2022, Cowlitz County Sheriff's Office arrested Mr. Merz for illegally obtaining the information he presented to the Cowlitz County Prosecuting Attorney's Office regarding the alleged illegal activity by his employer, the City of Kalama.

3.3. On April 5, 2022, Mr. Merz filed a whistleblower retaliation complaint against Cowlitz County alleging, in relevant part, that Cowlitz County retaliated against him for filing a whistleblower complaint against the City of Kalama. Mr. Merz alleged in his

complaint that Cowlitz County disclosed confidential information regarding his whistleblower status to unauthorized individuals, charged, arrested, and imprisoned him, forced him to walk in close proximity to the individual at the heart of the alleged illegal activity by the City of Kalama, and publicized his whistleblower status on Facebook and in a statement to the press. Furthermore, in his April 5, 2022, complaint, Mr. Merz requested a hearing on the matter.

3.4. On May 26, 2022, Cowlitz County Prosecuting Attorney's Office forwarded the request for hearing to the Office of Administrative Hearings.

Motion to Dismiss

3.5. Cowlitz County filed a Motion to Dismiss¹ on June 30, 2022.

3.6. Matthew Merz filed a Response in opposition to the motion on July 13, 2022.

3.7. Cowlitz County filed a Reply in support of the motion on July 21, 2022.

Mr. Merz's Employment

3.8. During the period of alleged whistleblower activity and alleged whistleblower retaliations, Mr. Merz was an elected City Council Member, employed by the City of Kalama.

3.9. Mr. Merz was not, nor has he ever been, an employee of Cowlitz County.

4. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Subject Matter Jurisdiction

4.1. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." CR 12(h)(3). The following defenses may be made by motion outside the pleadings: (1) lack of subject matter jurisdiction, and (2) failure to state a claim upon which relief may be granted. CR 12(b)(1),(6).

4.2. Administrative agencies may exercise only those powers conferred by statute, either expressly or by necessary implication. See *Kailin v. Clallam County*, 152 Wn.App. 974, 979 (2009). Regarding OAH, when a state or local agency conducts a hearing which is not presided over by officials of the agency who are to render the final decision, the hearing shall be conducted by an administrative law judge, assigned under Chapter 34.12 RCW. RCW 34.12.040.

4.3. A tribunal lacks subject matter jurisdiction only when it attempts to decide a type of controversy over which it has no authority to adjudicate. See *In re Estate of Berry*,

¹ Cowlitz County submitted its motion as a Motion for Summary Judgment. Given the jurisdictional arguments presented, the motion is properly treated as Motions to Dismiss. See CR 12(b)(1) & (6).

189 Wn.App. 368, 377 (2015), citing *Marley v. Dept. of Labor and Industries*, 125 Wn.2d 533, 539 (1994).

- 4.4. Although the Washington State Superior Court Civil Rules are not binding on this tribunal, they provide guidance in complying with the hearing rules prescribed by the Washington Administrative Procedure Act. See RCW 34.12.080, RCW 34.05.250, and WAC 10-08-001.
- 4.5. CR 12(b)(6) motions should be granted only sparingly and with care. A dismissal for failure to state a claim is only appropriate if it appears beyond doubt that the charging party cannot establish facts consistent with the charging document which would entitle the charging party to relief. See *Futureselect* at 865, 874; *Haberman v. WPPSS*, 109 Wn.2d 107, 120 (1987).

Local Government Whistleblower Protection Law

- 4.6. RCW 42.41.010 sets forth the policy behind Washington's local government whistleblower protections. It states:

It is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government officials and employees. The purpose of the chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.

RCW 42.41.010.

- 4.7. "Local government" is defined as "any governmental entity other than the state, federal agencies, or an operating system established under chapter 43.52 RCW. It includes, but is not limited to cities, counties, school districts, and special purpose districts." RCW 42.41.020(2).
- 4.8. RCW 42.41.020 does not define the term "employee"².
- 4.9. Every local government employee has the right to report to the appropriate person or persons information concerning an alleged improper governmental action. RCW 42.41.030(1).
- 4.10. It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information

² RCW 42.40.030(2) does define employee as "any individual employed or holding office in any department or agency of state government." However, RCW 42.40 is the state employee whistleblower protection code. As Mr. Merz is not a state employee, RCW 42.40 is not applicable.

in good faith in accordance with the provisions of this chapter that an improper governmental action occurred. RCW 42.41.040(1).

Statutory Interpretation

- 4.11. "The rules of statutory construction apply to agency regulations as well as statutes . . . The language of an unambiguous regulation is given its plain and ordinary meaning unless legislative intent indicates to the contrary." *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28, 34 (2008) (citation omitted).
- 4.12. In the current matter, the scope of the term 'employee' is unclear in the statute. As such we must look to the legislative history for guidance. The Legislative History relating to the inception of RCW 42.41 states the following:

Local government employees do not have any established procedure for reporting wrongdoing *within their agencies*. When employees do attempt to report wrongdoing *within their agencies*, there is no specific protection from retaliatory actions by their superiors nor are there any specific procedures for adjudicating claims of retaliatory action.

Final Bill Report for Substitute Senate Bill 6321, 1991-1992.
(emphases added).

Petitioner's Standing

- 4.13. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right.
- 4.14. State courts and tribunals may consider federal appellate cases for their persuasive effect. *State v. Barry*, 183 Wash. 2d 297, 311, 352 P.3d 161, 169 (2015).
- 4.15. "A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter." *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007).
- 4.16. In evaluating whether a complaint adequately pleads the elements of standing, courts apply the standard of reviewing a complaint pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim. "Court[s] must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party." *Ballentine*, 486 F.3d at 810 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); see also *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 73 (3d Cir. 2011) ("A dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim.")

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Respondent's Motion to Dismiss is Granted.

- 4.17. In the current matter, Mr. Merz has never been an employee of Cowlitz County. As the legislative history makes clear, a local government whistleblower retaliation complaint may only be brought against an agency for which the complainant is an employee. As such, Mr. Merz lacks standing to bring a local whistleblower complaint or whistleblower retaliation complaint against Cowlitz County, a local governmental agency of which he is not an employee.
- 4.18. Because Mr. Merz does not have standing to bring the local whistleblower retaliation complaint against Cowlitz County, a necessary and threshold element to bring a local whistleblower complaint and whistleblower retaliation complaint, Mr. Merz has failed to state a claim upon which relief can be granted.
- 4.19. For the foregoing reasons, Cowlitz County's Motion to Dismiss will be GRANTED.

Hearing Costs

- 4.20. OAH has billed 9.9 hours of Administrative Law Judge ("ALJ") time in this case.
- 4.21. Under RCW 34.12.039, the local government administrative hearings account shall pay for the first 24 hours of ALJ time billed to this case.
- 4.22. Since the hours billed were less than 24, the local government hearings account shall pay the 9.9 hours of ALJ time billed to this case.

5. FINAL ORDER

IT IS HEREBY ORDERED THAT:

- 5.1. Matthew Merz does not have standing to bring a local government whistleblower retaliation complaint against Cowlitz County.
- 5.2. Cowlitz County's Motion to Dismiss is GRANTED.
- 5.3. Because Cowlitz County's Motion to Dismiss is granted, the status conference scheduled for August 11, 2022 and the evidentiary hearing scheduled for August 16, 2022, are **CANCELLED**.

SIGNED at Tacoma, Washington on the date of mailing.



Dan Gerard
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

FINAL ORDER GRANTING MOTION TO DISMISS
Docket No. 05-2022-GOV-00035
8412-SCP

OAH: (253) 476-6888
Page 5 of 7

PETITION FOR RECONSIDERATION

Within 10 days of the service of this order, any party may file a Petition for Reconsideration with the Office of Administrative Hearings at:

Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98406
253-476-6888 (phone)
253-593-2200 (fax)

A Petition for Reconsideration must be actually received during office hours at the Office of Administrative Hearings at the above address within ten days from the date the order was mailed to the parties. WAC 10-08-110(1)(a). Filing papers with the Office of Administrative Hearings by fax, or electronically via the participant portal, is also permitted under the conditions set forth in WAC 10-08-110. You must serve a copy of any Petition for Reconsideration by delivery or mail to the other parties within the same time periods listed above.

The Petition for Reconsideration must state the specific grounds upon which relief is requested. RCW 34.05.470(1); WAC 10-08-215.

The Petition for Reconsideration will not stay the effectiveness of this order. RCW 34.05.470(2).

PETITION FOR JUDICIAL REVIEW

This order becomes final on the date of mailing unless within thirty (30) days of mailing, a party files a petition for judicial review with the Superior Court. RCW 34.05.542(2). The petition for judicial review may be filed in the Superior Court of Thurston County, of the county where petitioner resides, or of the county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514(1). The petition for judicial review must be served on all parties of record within thirty (30) days of mailing of the final order. Service of the petition for judicial review on opposing parties is completed when deposited in the U.S. Mail, as evidenced by the postmark. RCW 34.05.542(4).

The petition for judicial review must include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the petitioner's attorney, if any; (3) facts that demonstrate that the petitioner is entitled to obtain judicial review; (4) the petitioner's reasons for believing that relief should be granted; and (5) a request for relief, specifying the type and extent of relief requested. RCW 34.05.546.

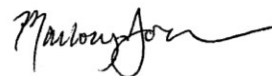
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 05-2022-GOV-00035

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

Matthew Merz PO Box 246 Kalama, WA 98625 Petitioner	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: merzcampaign@gmail.com
Nicole Tideman Cowlitz County Prosecuting Attorney's Office 312 SW 1st Ave Kelso, WA 98626 Respondent	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: tidemann@co.cowlitz.wa.us
Brad Thurman Cowlitz County Sheriff's Office 312 SW 1st Ave Kelso, WA 98626 Respondent	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> E-mail: thurmanB@co.cowlitz.wa.us

Date: Friday, August 05, 2022

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
Legal Assistant 2

CERTIFICATE OF SERVICE

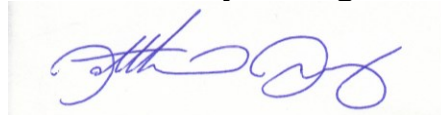
I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of this Amended Petition for Review to be served to the below listed party via email:

ATTORNEY FOR COWLITZ COUNTY

Jason Laurine
Cowlitz Civil Deputy Prosecutor
laurinej@cowlitzwa.gov

Jaqueline Renny
Cowlitz County Legal Specialist
RennyJ@cowlitzwa.gov

Dated this 7th day of August, 2025.



Matthew Merz, Petitioner, PRO SE

MATTHEW MERZ - FILING PRO SE

August 07, 2025 - 9:10 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Matthew Merz, Appellant v. Cowlitz County, Respondent (592665)

The following documents have been uploaded:

- PRV_Petition_for_Review_20250807210837SC257404_7213.pdf
This File Contains:
Petition for Review
The Original File Name was Merz v Cowlitz Amended Petition for Review to Superior Court.pdf

A copy of the uploaded files will be sent to:

- Laurinej@cowlitzwa.gov
- RennyJ@cowlitzwa.gov
- appeals@cowlitzwa.gov

Comments:

This is the Amended Petition for Review as requested by the Court. The Certificate of Compliance is on Page 25.

Sender Name: Matthew Merz - Email: merzcampaign@gmail.com

Address:

PO Box 246

Kalama, WA, 98625

Phone: (360) 355-4709

Note: The Filing Id is 20250807210837SC257404