



Welcome to the Administrative Law Section's E-Newsletter!

Please feel free to forward our newsletter to your colleagues, and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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Fall Administrative Law Survey CLE

The WSBA and the Administrative Law Section are co-sponsoring a CLE program on September 29th: **Administrative Law Survey: Case Law, Practice Areas and Public Records**. An excellent faculty will present on numerous topics of interest to both public- and private-sector practitioners.

Review Judge Brian Watkins, Board of Industrial Insurance Appeals, will open the program with a review of recent leading court cases impacting administrative hearing procedures. Other topics in the morning session are: Administrative Investigations, presented by Kathryn McLeod and Michael Hall, Office of the Attorney General; Interstate Compact Law, presented by Jeffrey Litwak, Columbia River Gorge Commission, and Kristen Mitchell, AAG (Mr. Litwak is also author of a chapter on Interstate Compacts to be added to the Washington Administrative Law Practice Manual later this year). Following the lunch break, Pamela Anderson, AAG, will review several pertinent rules of professional conduct, and Scott Missall, Short Cressman & Burgess, and Mill Creek City attorney, will present an Overview of Local Administrative Law. The CLE program concludes with a panel presentation regarding Public Records Act developments, including

legislation and recent case law. Panel members are: Greg Overstreet, Allied Law Group; Kristal Wiitala, DSHS Public Records/Policy Officer; Timothy Ford, AAG for Government Accountability; and Ramsey Ramerman, Assistant City Attorney, Everett.

This program is intended to enhance day-to-day practice and provide intellectually interesting information to attorneys of every experience level.

When: **Wednesday, September 29, 2010, 8:30 – 4:15**

Where: **Greater Tacoma Convention and Trade Center**

CLE credits: **6.0 (5.5 general, .5 ethics)**

Tuition: **\$225**

Reception and Annual Meeting to Follow CLE

The Administrative Law Section invites program attendees to join us for a reception with complimentary hors d'oeuvres and wine immediately following the CLE program. Section members are also encouraged to attend the Administrative Law Section's Annual Meeting immediately following the CLE.

For more information, and to register, [click here](#):

Notice of Annual Meeting

The Administrative Law Section's annual meeting will be held on **Wednesday, September 29, 2010**, starting at 4:15 pm at the Tacoma Convention Center. The agenda will include election of new trustees,

committee reports, an outline of Section plans for the next year, and installation of Kristal Wiitala as section chair. Complimentary hors d'oeuvres and wine will be provided. Please join us!

Spring CLE Wrap-up

The Administrative Law Section held a mini-CLE on June 17th at the University of Washington School of Law. Law professors William Andersen and Kathryn Watts were the featured speakers. Professor Andersen spoke on the subject of judicial deference to agency legal interpretations, a timely discussion as the U.S. Supreme Court's decision in *Free Enterprise Fund v. PCAOB* (see summary below) was issued just eleven days later.



Professor Andersen and Section Chair John Gray

Professor Andersen reviewed the "Chevron two-step," referring to the formula for judicial deference to agency decisions articulated in *Chevron v. NRDC*, 467 U.S. 837 (1984). Professor Andersen also reviewed Washington cases, noting that although the state's Administrative Procedures Act (RCW 34.05) articulates the standard of review of agency determinations, recent cases reflected a lesser inclination by the Washington Supreme Court to defer to agency interpretations.

Professor Watts focused on two recent administrative law cases: *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) and *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009). In *Fox*, the FCC's finding
(continued on next page)

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The Administrative Law Section also welcomes other articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

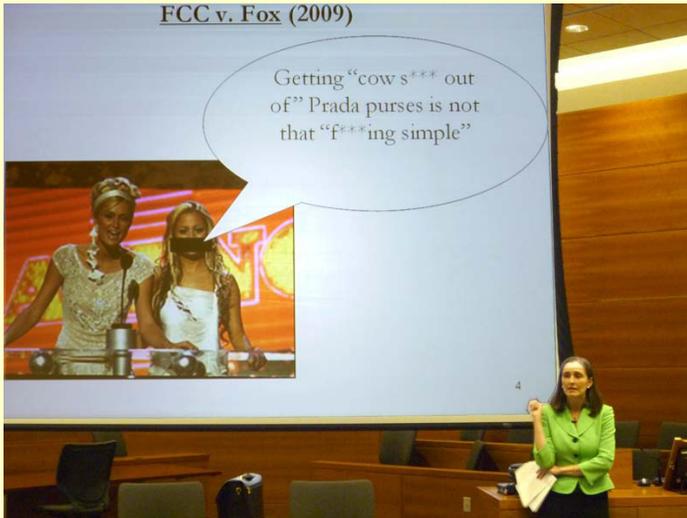
Send submissions to: Merrilee Harrell (mharrell@rtwgc.com).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

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Spring CLE Wrap-up continued

that two live broadcasts that had contained “fleeting expletives” were indecent reflected a change in FCC policy. Fox challenged the FCC’s ruling as arbitrary and capricious, but Justice Scalia, writing for the majority, disagreed, up-



Professor Watts discusses *FCC v. Fox*

holding the FCC ruling. The Justices differed on the level of justification or explanation an agency must offer in order to change course from an existing policy in a decision that Prof. Watts noted was “badly splintered” but “packed with interesting administrative law issues,” in particular, the role politics plays in administrative decisions. *Coeur Alaska*, examined the “Auer deference,” named for *Auer v. Robbins*, 519 U.S. 452 (1997), which gives significant deference to administrative interpretation of a regulation.

The CLE was followed by complimentary wine, snacks and socializing. Keep an eye out for future mini-CLEs hosted by the Administrative Law Section.

- Merrilee Harrell

Message from the Section Chair Regarding Section Dues

The Section is considering whether to raise the annual fee for Section membership. For many years, the fee has been \$20. What you may not realize is that not all of that \$20 goes to the Section. The WSBA charges each section a “per-member” charge as part of the overhead incurred by the WSBA in providing services to the sections. For the current fiscal year (Oct. 1, 2009 – Sept. 30, 2010), the per-member charge is \$12. For the 2011 fiscal year, the per-member charge will be \$13.25. The WSBA per-member charge has been steadily increasing. The charges since 2008 (drawn from WSBA data) are as follows: 2008 - \$8; 2009 - \$10; 2010 - \$12; 2011 - \$13.25. The WSBA provides useful services to the sections, such as CLE production, assistance to the Board, list serve operation, contracts administration and Section web page maintenance.

In addition to its portion of the section dues, our Section also receives a portion of any profit realized on the CLE programs we sponsor. The Administrative Law Section uses its income to provide member benefits such as CLE programs focused on administrative law issues, opportunities to attend select CLE programs at no cost to members, contribution to projects related to administrative law or access to justice generally, reviewing and responding to legislative activity, and publication of this newsletter. For more details, see the 2008-2009 Annual Report posted on the [Administrative Law Section website](#).

The Section’s Board and officers are committed to providing benefits to its members. We have already voted to hold the line on membership dues for now, as we have a healthy fund balance, but the fund balance will be decreasing as we continue to fund the member benefits that we have provided in the past and plan to provide next fiscal year.

I welcome your thoughts on membership dues and the benefits of membership. If the fee increased to \$25, would you continue to be a member? What benefits are most important to you? What benefits would you like to see added? Please let me know what you think.

- John Gray, Section Chair

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and would like to contribute a summary (approx. 250 – 500 words), please contact Merrilee Harrell: mharrell@rtwccg.com.

Case Summaries

Federal Dual “Good Cause” Removal Provision in Sarbanes-Oxley is Unconstitutional

Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. ___ (2010),

The U.S. Supreme Court held that the removal provisions for members of the Public Company Accounting Oversight Board violated the President’s constitutional role to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, Sec. 3.

The 2002 Sarbanes Oxley Act created the Board, which has five members appointed by the Securities and Exchange Commission. The SEC oversees the Board, but the SEC can only remove members of the Board “for good cause shown.” As well, the President can remove the SEC Commissioners only for cause. The case was a question of first impression; in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and subsequent decisions, the Court had upheld one level of “good cause” removal. The question before the Court here was whether this dual “good cause” arrangement was constitutionally permissible.

The Court noted that the most important way that the President ensures that laws are faithfully executed is through choosing, supervising, and removing primary and inferior officers. Here, the Court reasoned, because the President could not supervise a decision of whether good cause exists to remove a Board member, the President could not ensure the laws are faithfully executed.

This case garnered significant attention. Amici in support of petitioners urged the Supreme Court to reach broad separation of powers issues in Sarbanes-Oxley. The Supreme Court, however, issued a very restrained decision. It expressly declined to address the broader issues in the amici briefs and considered only dual “good cause” removal question. The Court’s remedy was similarly restrained—it severed the “good cause” removal provision for Board members. The result is that the Board continues to operate, just without “good cause” protection.

Justice Breyer’s lengthy dissent suggested that experience within the government should have led the Court to uphold the concept of dual “good cause” removal. In support of this, he provided tables identifying 48 stand-alone agencies and other boards that have statutory for-cause removal provisions, 573 career appointees, 1,584 administrative law judges that are inferior officers subject to two layers of for-cause removal, and 29 other agencies that

do not specifically have for-cause removal provisions, but contain other indicia of independence.

- Jeffrey B. Litwak, Counsel,
Columbia River Gorge Commission

Agency Provision of Interpreter Services

Kustura v. Dept. of Labor & Indus., 81478-3, 81480-5, 81481-3, 81758-8, 81759-6 (WASC) (June 17, 2010).

Kustura concludes that discretionary provision of interpreter services to non-indigent, limited English proficiency (LEP) individuals under a Board of Industrial Insurance Appeals (BIIA) regulation cannot be limited in scope, once invoked. The Petitioners in this consolidated case were Bosnian-speaking workers who had each filed a workers’ compensation claim with the Department of Labor & Industries (L&I). The L&I decisions had been appealed to BIIA, where interpreters were provided, though the services did not extend to communications with counsel or, in one case, translation of witness testimony.

RCW 2.43.040(2) provides that “in all legal proceedings in which the non-English-speaking person is a party ... the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.” Thus, the court noted, to qualify for interpreter services at government expense, the action must 1) be initiated by the government entity, and 2) be a “legal proceeding.” Petitioners argued that L&I initiates a legal process by sending workers information about their rights. But the court disagreed, noting that no further action is taken by L&I until the worker files a claim, thus the legal process is initiated by filing a claim. Further, the Petitioners had appealed to BIIA, thus the Board action was also initiated by the Petitioners. Because the Petitioners rather than the government entity had initiated the proceedings, the Petitioners did not qualify for mandatory appointment of an interpreter under RCW 2.43.040.

However, the Court found that WAC 263-12-097, which governs the appointment of interpreters for BIIA proceedings, offers discretionary appointment of an interpreter to assist an LEP party or witness throughout a BIIA proceeding. This regulation, together with RCW 2.43.030(1), which provides that when an interpreter is provided, the interpreter shall be provided “throughout the proceedings,” precludes the department from limiting the scope of interpretive services once the discretionary appointment has been

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Case Summaries *continued*

made. In this case, once the Board had appointed the interpreter, it was required to provide the interpreter for all aspects of the hearing, and could not bar services for attorney-client communications or translation of witness testimony that were part of the proceeding. The court limited such services to the hearing itself, noting that the Board was not required to extend the services to hearing preparation activities.

- Merrilee Harrell

Interpretation of Interstate Compact on the Placement of Children Focuses on Uniformity

In re Dependency of D.F.M., Alyce Fabian Miller v. Department of Social and Health Services, 63624-3-1 (WACA) (August 2, 2010).

This case involves the question of whether the Interstate Compact on the Placement of Children (ICPC) applies to parental placements. The ICPC was drafted in the 1950s to address problems associated with providing services to children that were placed in other states. All 50 states and several territories have enacted the Compact. Washington joined the ICPC in 1971 by enacting RCW 26.34.010 (the compact text) and associated statutes (RCW 26.34.020-080).

What makes this case interesting is the Court of Appeals grafted additional considerations to its typical method for statutory construction. The court first noted that an interstate compact is both a statute and a contract, and as such, stated, "uniformity of interpretation is important." Authority for the importance of uniform interpretation is found in many compact cases. Here, the Court of Appeals looked to *McComb v. Wambaugh*, 934 F.2d 474, 479 (3rd Cir 1991) (also involving the ICPC). To achieve that uniformity, the court considered numerous decisions from many other states and the *McComb* decision, which also considered numerous state court decisions. Ultimately, all of these other decisions only showed the court that the states nearly evenly split as to whether the ICPC applies to parental placements. Then, resorting to familiar statutory construction methods, the court concluded that the ICPC does not apply to parental placements.

Oregon state courts also use this approach of looking at other states' decisions when construing a compact. See, e.g., *Atlantic Richfield Co. v. Department of Revenue*, 300 Or. 637, 646-47, 717 P.2d 613 (1986) (involving the Multistate Tax Compact). Because the goal of an interstate compact is to create uniform action between the states, seeking a uniform interpretation is an important adjunct to a standard statutory construction analysis when construing compacts.

- Jeffrey B. Litwak

Agency Opinion Letter not "Agency Action"

Teamsters Local Union No. 117 v. State of Washington Human Rights Commission, 39328-0-II (WACA) (July 20, 2010).

The Court of Appeals held that an agency's opinion letter is not an agency action, and thus does not give rise to a justiciable cause of action, after the Washington Department of Corrections (WDOC) sought an opinion letter from the Human Rights Commission about whether it could depart from the Washington Law Against Discrimination (RCW 49.60), which, among other categories, prohibits discrimination based on gender. WDOC sought an opinion as to whether the female gender could be considered a "bona fide occupational qualification" (BFOQ) for certain positions at a correctional facility that houses female inmates. The Commission issued an opinion letter that gender may constitute a BFOQ for certain positions at the facility in question. The Teamsters' petition for judicial review of the opinion was dismissed by the Superior Court as the opinion was deemed an interpretive statement under the Administrative Procedures Act, rather than an agency action. The court relied on *Washington Educ. Ass'n v. Washington State Public Disclosure Comm.*, 80 P.3d 608 (2003), which held that a justiciable controversy must involve direct and substantial interests rather than "potential, theoretical, abstract or academic" interests. The court found that the Commission's letter did not meet this test, noting that under RCW 34.05.010(8) of the APA, "(a)n agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only." The Court further noted that the APA defines "interpretive statement" as "a written expression of the opinion of an agency..." The Court of Appeals upheld the Superior Court's dismissal of the Teamsters' petition as the opinion letter was an interpretive statement under the APA.

- Merrilee Harrell

Failure to Comply with APA Service Requirements Results in Dismissal with Prejudice

Sprint Spectrum, LP v. Department of Revenue, 64943-4-I (WACA) (July 19, 2010).

Holds that the service requirements for judicial review under the APA (RCW 34.05.542(2)) must be complied with fully. In 2001, the Department of Revenue assessed Sprint Spectrum for various taxes, of which the disputed amount was almost \$2.8 million plus applicable interest and penalties. Sprint filed a notice of appeal with the state Board of Tax Appeals. In February 2009, the Board issued a final order affirming the Department's tax assessment. The next month, within the APA's 30-day deadline, Sprint filed a petition for judicial review, timely serving copies of its petition

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Case Summaries *continued*

on the Department and the office of the attorney general. But Sprint failed to serve a copy of the petition on the Board. Upon the Department's motion, the Superior Court dismissed the petition with prejudice for failing to comply with service requirements.

The Court of Appeals evaluated the language of RCW 34.05.542, which requires that a petition for judicial review be filed with the court and served on the agency, the office of the attorney general, and all parties of record within 30 days after service of the final order. The Court determined that the statutory language is plain and unambiguous. The Board of Tax Appeals is "the agency" whose order is the subject of the petition. Likewise, timely service on the Department was also required, as the Department is within the class "parties of record." The court upheld the Superior Court's dismissal of the petition with prejudice.

- Katy A. King

"Local Circumstances" Should Guide Growth Management Act Decisions

The Suquamish Tribe, et. al. v. Central Puget Sound Growth Management Hearings Board, 39017-5-II (WACA) (July 7, 2010).

Several parties challenged Kitsap County's comprehensive growth management plan. The Growth Management Hearings Board, for the most part, validated the County's plan, and the Superior Court affirmed the Board's decision. On further appeal, the Court of Appeals noted that Growth Management Hearings Boards must engage in a case by case analysis and cannot apply bright line rules. The court also addressed under what circumstances a court should remand to the administrative agency pursuant to RCW 34.05.570(3)(f).

Bright line rules: In *Thurston County v. Western Washington Growth Management Hearings Board*, 190 P3d 38 (2008), the Washington Supreme Court explained that, pursuant to the structure of the Growth Management Act, counties must base their actions on local circumstances, and Growth Management Hearings Boards must review local decisions by engaging in a focused, factual inquiry based on the specific circumstances of each case. The Boards cannot create bright line rules of general applicability because they do not have the authority to make public policy. Where a Board has expressly or impliedly applied a bright line rule, the court must remand to the Board for a case-specific analysis.

Applying these principles, the *Suquamish Tribe* court reasoned that the Board could not rely on a decade-old Board decision to establish appropriate urban density without a fresh analysis of local circumstances. Nor could the Board use a bright line rule to delineate between urban and rural densities or subject certain densities to increased scrutiny. Instead the Board must "reevaluate local circumstances

in each instance to account specifically for the inevitable changes occurring over time." Thus, this case serves as a reminder of the essential nature of individualized review, given the limited authority that the Legislature granted to Growth Management Hearings Boards.

RCW 34.05.570(3)(f): Under the WAPA, a court may grant relief "from an agency order in an adjudicative proceeding" where "(t)he agency has not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(f). The Court of Appeals has interpreted this provision to require that the agency decide an issue before a reviewing court can reach the merits of a legal question or position. The Suquamish Tribe court pointed out that §570(3)(f) did not exist in the original APA provisions. The senate added the provision and the house passed the amended bill, but the proceedings and the final legislative report offer no explanation of the purpose underlying this provision.

However, according to the commentary to the 1981 Model Act, the provision was intended to establish that where an issue is in the primary jurisdiction of the agency, it must first be decided by the agency; the court's role is one of review. (In contrast, some issues must be decided only by the courts, such as the constitutionality of the agency's enabling statute.) Thus, the court concluded that under §570(3)(f), where an agency has failed to address an issue but the issue remains relevant to the challenged action, the appropriate remedy is remand to the agency. The court applied this analysis to various issues and concluded that the Board did not decide all of the relevant issues that the Citizens had raised. Thus, the court made it clear that on remand, the Board must address these issues.

- Rebecca Glasgow

PRA Statute of Limitations Not Necessarily Triggered by Agency's Last Response

Tobin v. Worden, 156 Wn. App. 507 (2010).

The Court of Appeals concluded that the one-year statute of limitations in the Public Records Act (RCW 42.56.550(6)) did not bar the Tobins' Public Records Act claims against King County, as the County never made a claim of exemption and did not provide records in installments.

In April 2005, Susan Tobin requested a public record from King County concerning complaints filed with the County regarding real property owned by Tobin and her husband. In response, the following month the County provided a partially redacted record, but provided no exemption log explaining and justifying the redactions. In June 2005, Tobin requested a different public record. The County sent a non-responsive record. Tobin again requested the second record and explained that what she had been sent was not responsive. The County sent Tobin the same, partially redacted record that it had sent in response to her first request, again without an exemption log. The re-

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Case Summaries *continued*

cord sent was not responsive to the second request. The County subsequently found a code violation against the Tobins, which the Tobins appealed. During discovery, the County stated that both records that had been sought by Tobin under the Public Records Act had been lost. As a sanction against the County for having lost these records, the hearing examiner dismissed the County's notice and order against the Tobins.

In August 2007, the Tobins filed a complaint against King County alleging violations of the Public Records Act. The trial court granted King County's motion for summary judgment on the ground that the Tobins' action was time-barred under RCW 42.56.550(6). The Court of Appeals reversed and remanded, finding that the Public Records Act's one-year statute of limitations "is only triggered by two specific agency responses—a claim of exemption and the last *partial* production—not simply the agency's 'last' response. Had the legislature determined that the agency's last response would suffice, it would have expressly so stated." (Emphasis supplied.) *Tobin* at 515.

- Suzanne L. Mager

Statutory Construction: "Good Reason" v. "Good Cause"

Puget Sound Medical Supply v. DSHS, 39169-4-II (WACA), May 25, 2010.

Puget Sound Medical Supply (PSM) argued that the DSHS Board of Appeals (BOA) erred in finding PSM had no "good reason" for filing a request for review one day late pursuant to WAC 388-02-0580. The Washington State Court of Appeals affirmed the DSHS BOA decision.

PSM filed a request for review of an initial DSHS order one day after the 21-day deadline under WAC 388-02-0580. After a Notice of Late Request for Review and Deadline to Give Explanation, the DSHS BOA denied PSM's petition for review, concluding PSM failed to provide a good reason for its late filing. On appeal, PSM argued that DSHS BOA erroneously interpreted the statutory phrase "good reason" as being synonymous with "good cause." Since "good reason" was not defined within WAC 388-02 like "good cause" was, the Court held the phrase "good reason" was ambiguous, and applied a statutory construction analysis. The Court held the meaning of a statutory phrase could be derived from an interpretation given to that phrase in other statutes, provided the other statutes were *in pari materia* (relating to the same matter), and the integrity of both statutes was maintained. The Court concluded that the phrase "good reason" within WAC 388-02-0580 was *in pari materia* with other regulations in the same chapter that used the phrase "good cause." The Court noted that a party arguing "good reason" under WAC 388-02-0580 could avoid a harsh result if, under a CR60 analysis, it can be shown it had a *prima facie* defense to the other party's claims, and that it failed to timely respond due to "excusable neglect." The Court

found PSM did not show excusable neglect, thus it did not have good reason for its delay in filing for review.

- Lisa Malpass

Complainants Lack Standing to Appeal Veterinary Board Decision

Newman v. Veterinary Board of Governors, 231 P.3d 840 (May 17, 2010).

The Newmans filed a complaint against two veterinarians with the Veterinary Board of Governors (Board). After an investigation, the Board determined that there was no cause for disciplinary action against the veterinarians and closed the case. The Newmans requested an adjudicative hearing on the merits. The Board denied the request for a hearing, stating that the applicable administrative rules did not provide for hearing rights for cases closed without disciplinary action. The Newmans sought reconsideration, which again the Board denied. The Newmans sought judicial review of the Board's decision by filing a petition for a statutory writ of review and a constitutional writ of certiorari. Later, after the expiration of the 30-day filing deadline in the Washington Administrative Procedure Act (APA), the Newmans sought review through an action under the APA. The Superior Court denied the Newmans' petition on all grounds. The Court of Appeals affirmed the Superior Court, holding that the Newmans lacked standing.

First, the Court found that there was no basis for a statutory writ of review because the Board's decision whether or not to issue a statement of charges was a prosecutorial function, not a judicial or quasi-judicial function. Second, the Court held that there was no basis for a constitutional writ of certiorari. The Newmans lacked standing to challenge the governmental action because they did not suffer from any legally cognizable injury caused by the Board's decision not to prepare charges against the veterinarians and because they had no legal interest in compelling a disciplinary proceeding. The Court noted that even if the Newmans had standing to seek the constitutional writ, the petition still should have been denied because the Board's decision was neither illegal nor arbitrary and capricious. The Court found no exception to the rule that the APA's 30-day filing requirements for judicial review are jurisdictional, require strict compliance, and cannot be extended.

Initially, the Newmans conceded to the trial court that they did not have standing to file for judicial review under the APA because they failed to meet the mandatory 30-day filing deadline. But later, the Newmans argued that the 30-day period never commenced because the Board failed to serve them with the notice of the Board's decision to deny reconsideration. The Court held that the Newmans were not a "party" to the agency proceeding and, therefore, not entitled to service of the letter denying reconsideration. Furthermore, the letter was not a "final order" determining the legal rights or interests of the New-

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Case Summaries *continued*

mans. Additionally, the 30-day judicial review period did not toll pending reconsideration, because reconsideration rights belong only to parties. The Court's opinion is silent as to whether the Newmans would have had standing to challenge the Board's decision under the APA if they had complied with the 30-day filing deadline for judicial review under the APA.

- Katy A. King

Kilb v. First Student Transportation, 39564-9-II (WACA) (August 3, 2010).

Kilb alleged First Student Transportation fired him because, as a supervisor, he refused to fire pro-union employees or engage in other anti-union tactics. Kilb sued in state court for wrongful discharge, but the trial court dismissed, concluding that Kilb's claim was preempted by the National Labor Relations Act (NLRA), as interpreted in *San Diego Building Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). On appeal, the issues were whether (1) as a supervisor Kilb was covered under the NLRA; (2) whether Kilb's state claim was distinct from claims that he could bring under the NLRA; and (3) whether exceptions to *Garmon* applied to preclude preemption.

The NLRA preempts a state law claim that is based on conduct arguably subject to sections 7 or 8 of the Act. Section 7 of the NLRA guarantees employees the right to organize and collectively bargain. Section 8 prohibits employer interference with employee organization and collective bargaining. Even a state action that is potentially related to union organizing or collective bargaining is preempted. The burden is on the party asserting preemption

to set forth specific evidence to show that the employer conduct is potentially subject to the NLRA.

The Court recognized that there are grounds for NLRA preemption of state law if an employer discharges a supervisor for refusing to commit an unfair labor practice. Turning to recognized exceptions to the preemption doctrine, the court explained that for the *Garmon* preemption doctrine to apply, the controversy presented in state court must be identical with that which could be presented to the NLRB. The court noted two exceptions to preemption under *Garmon*: "(1) when the regulated activity under state law is merely a peripheral federal concern of the Act; or (2) when the regulated activity touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, there is no inference Congress intended to deprive the states of the power to act." See *Garmon*, 359 U.S. at 243-44. The peripheral concern exception applies only in cases where the underlying conduct, even if arguably related to the NLRA, is a peripheral federal concern. Here, the court recognized an inextricable link between the discharge of supervisors for refusal to commit unfair labor practices and the rights of employees under the NLRA. Thus, discharges of supervisors under these circumstances are not peripheral concerns. With regard to the issue of local concern, when it is clear or may fairly be assumed that the activities at issue are protected by section 7 of the NLRA, or constitute an unfair labor practice under section 8, the NLRA must govern. Because Kilb's challenge to federal preemption failed, the Court of Appeals affirmed the trial court's dismissal.

- Rebecca Glasgow

Disclaimer

The Administrative Law newsletter is published as a service to the members of the Administrative Law Section of the WSBA. The views expressed herein are those of the individual contributing writers only and do not represent the opinions of the writers' employers, WSBA, or the Administrative Law Section.

In Memoriam – Peter Harris

It is with regret that we report the passing of Section member and former Section Trustee Peter Harris. Peter was a staff attorney for the Washington State Department of Health, Medical Quality Assurance Commission, and served on the Board of Trustees of the Administrative Law Section from 2006-2009. He was admired for his tenacity and passion for his work.

In lieu of flowers, donations may be made for Peter's children to the Peter Harris Memorial Fund, Washington State Employees Credit Union, 2302 Harrison Avenue NW, Olympia, Washington 98512.

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include reduced tuition at Section-sponsored CLEs, a subscription to this newsletter, and networking opportunities in the field of administrative law. Click [here](#) to join!

The Section also has seven committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. committee chairpersons are listed on page 2 of this newsletter, and on the Section's website.

WASHINGTON WOMEN LAWYERS EVENTS

WWL 40th Anniversary Celebration

Move over Florence Ballard, Mary Wilson, Diana Ross, and Betty McGlowen – the Washington Supremes are taking stage!

On October 8th, Washington Women Lawyers (WWL) welcomes Washington Supreme Court Chief Justice Barbara Madsen, and Justices Susan Owens, Mary Fairhurst and Debra Stephens to our Annual Event. The Washington Supremes will discuss how we can promote equal rights and opportunities for women, how to further the full integration of women in the legal profession and other issues related to supporting women in the law. This year's theme, Female Faces of Justice, underscores the Washington Supremes' strength and solidarity, and celebrates their success as Justices on the Washington Supreme Court bench.

This year's annual event is especially exciting as it not only welcomes the Washington Supremes, but also celebrates WWL's 40th anniversary. We hope you will join us for an exciting evening of discussion, company, and dining.

When: **October 8th, reception at 5:30 pm followed by dinner at 6:30 pm**

Where: **The Davenport Hotel, Spokane**

Cost: **\$50 (members), \$65 (non-members)**

For more information, or to register:
www.wwl.org/events/annual/index.html

Washington Women Lawyers CLE

We also hope you will join us on the morning of October 9th for a two-hour CLE sponsored by WWL, Gonzaga University and the WSBA Administrative Law Section titled "Justice for All: The promise and potential of RPC 8.4(g) and (h)." Beginning with a history of RPC 8.4(g) and (h), this CLE will examine the caselaw and technical issues related to the prosecution and enforcement of the ban on discriminatory conduct in a one-hour panel moderated by Jeanne Marie Clavere, WSBA professional responsibility counsel. For the second hour, a panel of speakers will discuss the broader ethical framework for confronting discrimination in courts, government and the private workplace, and how to create an environment that welcomes diversity.

When: **October 9th, 10:00 am - noon**

Where: **Gonzaga University School of Law, Spokane**

CLE: **2.0 ethics credits**

Cost: **\$15 for WWL members, \$25 for non-members, free to law students**

For more information, or to register, [click here](#).

Public Service Committee

On recommendation by the Section's Public Service Committee, the Board unanimously approved a grant of \$750 to Washington Women Lawyers for their 40th Anniversary Celebration event in Spokane on October 8, 2010 (see sidebar on page 9 for more information about the event).

Library Corner

Where can I find?:

Washington's Administrative Procedure Act: Ch. 34.05 RCW <http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05>

Regulatory Fairness Act: Ch. 19.85 RCW <http://apps.leg.wa.gov/RCW/default.aspx?cite=19.85>

Open Public Meetings Act: Ch. 42.30 RCW <http://apps.leg.wa.gov/RCW/default.aspx?cite=42.30>

Rule-making: Ch. 1-21 WAC <http://apps.leg.wa.gov/WAC/default.aspx?cite=1-21>

Washington State Register
http://www.leg.wa.gov/CodeReviser/Pages/Washington_State_Register.aspx

Published biweekly, includes notices of proposed and expedited rules, emergency and permanently adopted rules, public meetings, requests for public input, notices of rules review, executive orders of the governor, court rules, summary of attorney general opinions, juvenile disposition standards, the state maximum interest rate.