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STATE OF WASHINGTON

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No. 711571

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

ROGER L. SKINNER,

Appellant,

v.

CITY OF MEDINA,

Respondent.

MEDINA'S RESPONSE BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

The Respondent (“Medina”) does not seek review and makes no assignment of error.

Issues Pertaining to Appellant Skinner’s Assignments of Error

1. Regarding the requirements for a writ of review.

Where a police civil service commission established under the provisions of RCW 41.12 issues a final decision adverse to the employer following an investigation and hearing under RCW 41.12.090, does the employer have a right to appeal or other plain, speedy and adequate remedy at law disqualifying the employer from meeting the requirements of RCW 7.16.040 for a statutory writ of review?

2. Regarding the legality of the Commission’s remedial award of back pay and benefits.

Where a dismissed police department employee is reinstated by the Medina Civil Service Commission to a lower position classification and pay grade following a 60-day suspension, does the Commission have the statutory authority to award the demoted employee back pay and benefits?

3. Regarding the need for the court to issue an actual writ.

Where a superior court judge approves a writ application under RCW 41.12, and in reaching that decision has decided a question of law allowing the court to order the ultimate relief requested by the applicant and leaving no contested factual issue or legal issue dependent upon contested facts not before the court for resolution of the issue, is the court required to issue a writ for a complete record of the proceedings before the lower tribunal, board or officer, and set the matter on its trial calendar, in order to allow an aggrieved party opportunity to reargue the issue on summary judgment?

B. STATEMENT OF THE CASE

The Medina Civil Service Commission (“the Commission”) following a second investigation and hearing with regard to the appeal by Appellant (“Skinner”) of the disciplinary termination of his employment from the Medina Police Department on February 15, 2006 (CP 9)¹, issued written “Findings, Conclusions and Order” dated December 21, 2012 (CP 1-22) (“the Commission’s Decision”). The Commission originally heard

¹ The civil service commission appeal of Roger Skinner is back before this court for the third time. CP 9:10-14. See *Skinner v. Medina*, No. 66120-5-1 (unreported opinion), review denied 173 Wn.2d 1031, 274 P.3d 374 (2012) (Table); and *Skinner v. Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008), affirmed at 168 Wn.2d 845, 232 P.3d 558 (2010).

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and affirmed the discharge of Skinner almost seven years earlier on September 1, 2006 (CP 9:7-9). The Commission, chaired by Commissioner Jorgensen the only remaining commissioner from 2006 (CP 8:15-18), concluded that there was **no evidence of** religious or political motive for the termination. The Commission further concluded that **Medina acted in good faith** in imposing discipline on Skinner (CP 13:1-6). The Commission also concluded **there was just cause for discipline**. The Commission however, also concluded that upon application of standards for progressive discipline, different (meaning less severe) discipline was warranted (CP 13:13-16).

The Commission set aside the discharge (CP 20: 24-25). The discipline ordered by the Commission was to: 1) **suspend** Skinner for sixty (60) days; and 2) **demote** Skinner in rank and pay from that of a lieutenant to that of a patrol officer. The Commission further ordered that **Skinner was “entitled” to back pay and benefits** as a patrol officer at the mid-level of the police officer pay scale, until he would otherwise have been unable to serve as a result of his health condition (CP 21:3-8).

Medina made a timely motion for **reconsideration** by the Commission of the order for back pay and benefits (CP 24:14-15). The Commission in its “Order Denying City Motion for Partial

Reconsideration” stated that “[T]he Commission is fully authorized under chapter 42.12 RCW and the City’s enabling ordinance to establish remedies upon determination that a discharged employee should be partially reinstated.” In support of this statement, the Commission cited to *Poole v. City of Omak*, 36 Wn.App. 844 (1984) (affirming a commission’s authority to increase the penalty imposed by the employer) and *Dunaway v. Social and Health Servs.*, 90 Wn.2d 112 (1978) (authorizing suspensions longer than 30 days) (CP 24:19-21).²

Medina then made timely application with the King County Superior Court for a writ of review to allow for the judicial review of the inclusion of the back pay and benefits remedy in the Commission’s Decision and the Commission’s denial of Medina’s motion for partial reconsideration (CP 1-31). The application for writ of review included as exhibits the Affidavit of the Medina City Attorney (CP 5-6), the Commission’s Decision and Order Denying the City’s Motion for Partial Reconsideration and was supported by a Supplemental Legal Memorandum (CP 32-41).

² The Commission’s citation to *Dunaway v. Social and Health Servs.*, is curious; a point more fully developed in the Argument made in this Response Brief, because the employee’s claim for back pay and benefits was denied by the court when the employee was not fully exonerated of all charges on appeal to the State Personnel Board.
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Skinner served and filed briefing in opposition to Medina's application for writ of review (**CP 42-44**). Medina filed reply briefing (CP 49-54) and a supplemental reply (**CP 55-56**), to which briefing Skinner filed a "sur-sur-reply" (CP 65-66). The court scheduled a hearing to hear oral argument on the merits of the application. Skinner's counsel appeared at the hearing and gave oral argument by telephone (**CP 67**).

The Superior Court entered a MEMORANDUM OPINION granting Medina's application for a writ of review and ordering that the Commission's decision be modified to remove the portion of the Commission's remedy entitling Skinner to back pay and benefits (**CP 68-72 and 105-109**). The court's analysis at CP 106-109 is incorporated herein by this reference. The court followed up the memorandum opinion by a written ORDER (**CP 73**). Skinner responded with a motion for reconsideration providing the court with additional briefing (**CP 74-81**). Medina responded to the motion (**CP 82-90**). The superior court denied the motion for reconsideration (**CP 101 and 103**). Skinner timely filed a notice of appeal of both the order granting the City's writ application and the order denying Skinner's motion for reconsideration (**CP 102**).

C. SUMMARY OF ARGUMENT

1. Medina's entitlement to judicial review under RCW 7.16.

Medina was entitled to judicial review of the Commission's remedial order entitling Skinner to back pay and benefits by statutory writ of review under RCW 7.16 and to the relief requested. Medina provided the superior court with the grounds for the writ under RCW 7.16.040. First, it is not disputed by Skinner that the Commission made a quasi-judicial decision. Second, Skinner's argument that the Commission acted legally and within the remedial authority provided for in RCW 41.12 and in Medina Municipal Code Ch. 2.20 is neither supported by the statutory criteria for entitlement to back pay and benefits in RCW 41.12.090, nor by the language of the enabling authority for the establishment of the Commission. No rule adopted by the Commission providing for the remedy of back pay and benefits in cases where a termination is modified to a suspension or the length of a suspension is lessened has been argued by Skinner to either the superior court or to this Court in his opening brief. The Commission acted illegally and outside its statutory authority in making the back pay and benefits remedy under the circumstances here, that is, Skinner's demotion by the Commission following an unpaid suspension.

Third, Medina, contrary to the argument in the Opening Brief, had no plain, speedy and adequate remedy at law. RCW 41.12.090 authorizes an appeal only by *the accused* after the Commission enters its written decision. The Commission also is not an agency subject to the Administrative Procedures Act in RCW 35.34. Judicial review of the Commission's Decision by statutory writ under RCW 7.16 was the only avenue for judicial review available to Medina. The three requirements for judicial review by statutory writ of review as set out in RCW 7.16.040 have been met.

2. The modifications made by the Commission to the discipline of Skinner did not give the Commission the discretion to award Skinner back pay and benefits.

RCW 41.12.090 gives the Commission authority after investigating the discharge of an employee to:

- a. affirm the discharge; or
- b. order the immediate reinstatement of the employee in the office, place, position or employment from which such person was discharged, but only if it finds the discharge was for political or religious reasons, or not made in good faith for cause; or

c. in lieu of affirming the discharge, modify the discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay.

Consistent with its authority described in c. above, the Commission in lieu of affirming the discharge of Skinner, directed a suspension without pay, and a demotion in rank and pay. Only with respect to b. above, does RCW 41.12.090 give the Commission the discretion to make the reinstatement retroactive and to entitle the employee *to pay or compensation from the time of such...discharge.*

The superior court's analysis of Commission authority under the provisions of RCW 41.12.090 is spot on correct (CR 105-109).

3. Issuance of an actual writ before judgment was unnecessary.

The actual issuance of a writ to bring before the reviewing court the record of the Commission proceedings it needed for review of the claimed illegality and entry of judgment was unnecessary. The authenticity of the Commission's Decision and Order Denying Medina's Motion for Reconsideration attached as exhibits to the writ application was and remains undisputed. The City's claim that the Commission exceeded its jurisdictional authority and acted illegally by including a remedy of entitlement to back pay and benefits in the Decision presented a

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question of law that did not require the burden of preparation of the hearing record. It would not have added anything to any party's argument or to the court's decision making and there is no claim by Skinner that the issuance of a writ was necessary for anything but additional time for briefing the same legal issues already decided by the court, a second time. Skinner, by written responses to the City's claim prior to oral argument, the making of oral argument and the additional briefing in support of his motion for reconsideration, had ample opportunity to argue against the merits of Medina's claim and fair hearing on the matter. The Orders of the Superior Court should be affirmed and Skinner's appeal dismissed.

D. ARGUMENT

1. Medina had no right of direct appeal under any statute or other plain, speedy and adequate remedy at law.

Medina had no right of appeal under RCW 41.21.090, the statute under which the Commission exercised authority to hear Skinner's appeal of his dismissal from employment and modify the discipline. Only the accused is allowed an appeal under the statute. Even Skinner does not dispute this point (**CR 58**). Case law has clarified that the Administrative Procedures Act in RCW 35.34 is not applicable to a police civil service commission. The Act is limited to "state agencies" and a local civil service

commission is not a state agency. *Dumage v. Seattle*, 19 Wn. App. 935, 578 P.2d 875 (1978); and RCW 34.04.010(1). So what right of appeal or other plain, speedy and adequate remedy at law is there?

Skinner for the first time in his opening brief (“OB”) argues that Medina had appeal rights under RCW 2.06.030 and the Rules of Appellate Procedure (OB 7). He mistakenly asserts that the Commission’s Decision would be reduced to an appealable judgment under RCW 2.06.030 and the RAPs once the Commission determined the specific amount of *damages* to which Skinner is entitled pursuant to the Commission’s Decision. This argument is without merit.

Although RCW 2.06.030 and the RAPs would provide this Court with jurisdiction to review any decision of the superior court reducing the amount of a back pay remedy determined by the Commission to a judgment, the statute and RAPs provide no direct appeal from the Commission’s Decision at issue, nor do they provide any plain, speedy and adequate remedy at law to Medina. Moreover, the superior court could not enter a judgment based upon the back pay amount determined by the Commission unless the back pay remedy amount was due and payable by the City. The statute and RAPs do not provide Medina with any direct right to appeal the Commission’s determination of the amount

of back pay and benefits to which Skinner in the view of the Commission was entitled.

The City sought direct review of that portion of the Commission's Decision entitling Skinner to back pay and benefits. A statutory writ was the City's single avenue for seeking judicial review of that determination.

2. A Civil Service Commission after modifying the dismissal of an employee under the provisions of RCW 41.12.090 by imposing a suspension and demotion in rank and pay rate, does not have the authority to award back pay and benefits to the employee.

a. RCW 41.12.090 provisions and analysis.

RCW 41.12.090 is the enabling authority for the Commission. It provides authority to review a disciplinary action against a Medina police department employee and to enter an order affirming the disciplinary action, or modify the discipline in lieu of affirming the discipline as imposed by the employer, or to fully reinstate the employee with the discretion to award back pay if and only if it shall find that the removal was made for political or religious reasons, or was not made in good faith for cause.

Here, the Commission issued an order modifying the discipline after a finding of good faith cause for discipline of the employee, in lieu of the employee's discharge from employment. So far, so good; however, the

Commission went beyond its jurisdiction acting illegally by requiring back pay and benefits to be paid to the demoted employee. See Section 6.3 of the Commission's Order. The modification of discipline by the Commission did not "...order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted or discharged." Thus, the suspension and demotion at issue is key to the analysis and means that the Commission lacked discretion to award back pay and benefits to Skinner.

Unfortunately, there is no reported decision under RCW 41.12.090 on the issue of whether or not an employee not fully exonerated and not fully reinstated to their prior employment is entitled to an award of back pay and benefits. There is however a reported case under a different statute (RCW 41.06.220(2)) interpreting that statute as to whether or not a state civil service employee was entitled to back pay and benefits after the state personnel board returned a terminated employee to his position following a period of unpaid suspension imposed by the board. The case is *Dunaway v. Social and Health Services*, 90 Wn.2d 112 (1978). After rejecting the employee's argument that the board lacked authority to modify the discipline, the State Supreme Court then rejected the

employee's argument that he was entitled to back pay and benefits even though the board imposed a period of suspension. RCW 41.06.220(2) provides that:

Any employee, when *fully reinstated* after appeal, shall be guaranteed all employee rights and benefits, including back pay, sick leave, vacation accrual, retirement and OASDI credits.

(Italics added)

The term "fully reinstated" is not defined in the statute, but the State Supreme Court had no difficulty interpreting the statute to disqualify the employee from an award of back pay and benefits:

The Board carefully and specifically did not "fully reinstate" plaintiff but only "reinstated him" to his former position.

Furthermore, we believe that there is a more reasonable meaning to RCW 41.06.220(2) than that asserted by plaintiff. We believe its purpose is to guarantee that employees who are exonerated after appeal and retain their former positions are thus fully reinstated will, without further action before the Board, receive all employee rights and benefits to which they would have been entitled from the date of the original disciplinary action. Thus, the validity of the disciplinary action by the appointing authority and the entitlement to back pay as well as other rights and benefits can be resolved in a single action.

Dunaway v. Social & Health Servs., supra at 117.

Although RCW 41.12.090 does not use the words “fully reinstated” it uses words which essentially define a full reinstatement and exoneration:

...or, if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was remove, suspended, demoted or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of removal, suspension, demotion or discharge.

Here, Skinner was not fully reinstated as stated in the explicit language in RCW 41.12.090. The language of the statute does not authorize the Commission the discretion to award back pay and benefits except in cases of full reinstatement without any break in service.

The analysis of the superior court at CR 107:15-109:10 of the Commission’s authority and the legislative intent of the provisions RCW 41.12.090 at issue is clear and consistent with rules of statutory interpretation:

This provision does not grant the Commission the power to retroactively reinstate the accused and grant them back pay and benefits the way the proceeding sentence does for full reinstatement. The legislature was clearly aware of the back pay as a potential remedy in these cases, having included it

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in the previous sentence, and chose not to expressly grant that power when the Commission modifies the City's disciplinary actions. In the average case, of course, the entire process takes a matter of months; here the issue is thrown into sharp relief because six years worth of back pay and benefits are at stake. The Commission therefore exceeded its power under RCW 41.12.090 when it ordered that the City pay back pay and benefits to Mr. Skinner thus fulfilling the second prong of the test under RCW 7.16.040.

A copy of RCW 41.12.090 and the superior court's entire memorandum opinion are attached in the Appendix to this brief as Exhibits A and B, respectively, for the convenience of the court.

- b. Skinner's arguments are without support in the statute and the case law cited in his Opening Brief.

Despite being suspended and demoted and not fully reinstated to his Lieutenant position, Skinner argues that the Commission properly interpreted RCW 42.12.090 to allow the Commission the discretion to order back pay and benefits even though the Commission failed to find that the removal of Skinner was made for political or religious reasons, or was not made in good faith for cause.³ Skinner argues that the

³ As noted by the Court at p. 4 of its Memorandum Opinion (CP 108), the statute (RCW 41.12.090) specifically grants the Commission the discretion to make a reinstatement retroactive and to award an employee back pay or compensation **only if** the Commission finds that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, and order an immediate reinstatement or reemployment of the employee in the office, place position or employment from which the employee was removed, suspended, demoted or discharged.
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Commission has the same discretion to award back pay and benefits under the specific grant of authority to *modify* an order of removal,⁴ despite the absence of any language giving the Commission the discretionary authority to make the employee whole or to award back pay and benefits when modifying discipline *in lieu of affirming the removal*. Therefore, according to Skinner, the Commission acted legally within its statutory authority, and the trial court did not have authority under Chapter 7.16 to modify the Commission's decision by removal of the provision entitling Skinner to back pay and benefits.

None of the cases cited by Skinner in support of his argument is on point to the issue decided by this Court. *Greig v. Metzler*, 33 Wn. App. 223, 653 P.2d 1346 (1982), concerned the rule making authority of a Civil Service Commission and its authority to provide by local rule for demotion for reasons other than misconduct. The *Greig* case is factually distinguishable from the case at bar. No Commission rule has been relied upon by Skinner or cited as reason for the Commission to provide a back pay and benefits remedy. Although *Greig v. Metzler* and other cases cited by Skinner, *i.e.*, *Crippen v. Bellevue*, 61 Wn. App. 251, 810 P.2d 50

⁴ As further noted by the Court at p. 4 of its Opinion (CP 108), the statute also has language stating that: "The commission upon such investigation, in lieu of affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay." {GAR1148428.DOCX;1/00093.050019/ }

(1991), and *Pool v. Omak*, 36 Wn. App. 848, 678 P.2d 343 (1984), do recognize the judicial deference to be given the construction of legislation by those charged with its enforcement, those cases also recognize that the court is not bound to the Commission's interpretation and that the interpretation cannot be contrary to – or exceed – the statutory authority granted to the Commission. *Crippen v. Bellevue*, *supra* at 260. Additionally, an administrative agency cannot determine the scope of its own authority, nor does a court give deference to such determination when made. *National Electrical Contractors Association v. Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999). Nor did the court in any of the cases that Skinner (or Appellant) cited consider the actual issue before this court of whether or not a Civil Service Commission has authority to award back pay and benefits outside of an employee's immediate reinstatement to their position when determined by the Commission to have been discharged or removed from their position for political reasons or in the absence of good faith and cause.

Here, the Commission agreed with the City that removing Skinner from his Lieutenant position was done in good faith and for cause. Rather than remove Skinner from City service altogether and uphold his discharge, the Commission instead decided to modify the level of

discipline to a demotion along with a suspension. Under these undisputed facts set forth in the Commission's December 21, 2012, Decision, Skinner is **not** entitled to a back pay award under RCW 41.12.090 because he was not exonerated nor immediately restored to his prior position. The court correctly applied the RCW to these undisputed facts.

Contrary to the superior court's actual analysis of RCW 41.12.090 at pp. 4 and 5 of its Opinion (**CP 108-109**), Skinner argues that the superior court analyzed two sentences of the statute in a way that suggested an ambiguity that needed to be resolved (OB at 14). To the contrary, the superior court found no ambiguity between the two sentences cited. The superior court read and applied these provisions as written and in a harmonious and complementary manner. Because the Court determined the Commission's statutory authority for a discretionary award of back pay is limited to circumstances where the employee is exonerated of any of the misconduct on which the discharge is based, and is not authorized when the Commission exercises its alternative authority to modify the discipline to a different level of discipline, no disharmony between the two statutory provisions is created. The wrong suffered by an employee who is wrongfully terminated due to religious reasons or for reasons lacking good faith and cause prompted the legislature to give the

Commission discretion to award back pay to correct the greater wrong. When simply disagreeing with the employer as to the level of discipline to be imposed for misconduct, the legislature did not give the Commission such discretion. The same legislative policy and statutory interpretation was applied by the court in *Dunaway v. Social & Health Servs.*, 90 Wn. 2d 112, 116-117, 579 P.2d 362 (1978).

Pool v. Omak, supra, is also not persuasive and is limited to its facts. There, the court decided that the statutory authority of the Omak Commission to *modify* discipline was authority to either increase or decrease the discipline imposed by the employer by imposing one of the levels of discipline set out in the statutory provision. Back pay, unlike a suspension or demotion in rank, is not a level of discipline. It is a remedy limited by the legislature to situations where discipline is imposed without cause and for improper reasons.

Skinner erroneously argues that *Snoqualmie Police Association v. City of Snoqualmie*, 165 Wn. App. 895, 273 P.3d 983 (2012), a grievance arbitration case arising out of the collective bargaining obligations in RCW 41.56 supports his position. RCW 41.56.122 allows for agreement between the union representing public employees and a public employer in a labor contract to binding arbitration as a means to resolve disputes

arising out of the contract. Unlike the authority of a labor arbitrator that arises out of a negotiated labor contract between the parties, the authority of a civil service commission in a disciplinary appeal is constrained by RCW 41.12.090. The case has no relevance to civil service law.

Likewise, *Hayes v. Trulock*, 51 Wn.App. 795, 755 P.2d 830 (1988), and the other cases involving a wrongful termination claim, have no relevancy to the authority of the Commission in this matter. Skinner brought a civil action and was unsuccessful. *Skinner v. Medina*, 172 Wn.2d 1009, 259 P.3d 1108 (2011). This is not a civil action for wrongful termination, and the Commission has no jurisdiction to hear such claim. The authority a court may have in a civil action for wrongful termination is irrelevant. The Commission does not act as a judge in a wrongful discharge case brought for the purpose of seeking damages. The Commission, unlike a judge in a civil tort case for wrongful discharge, can simply substitute its judgment as to what is the appropriate discipline for the proven misconduct of the employee. For the same reasons, the breach of employment contract cases such as *Kloss v. Honeywell*, 77 Wn. App. 294, 890 P.2d 480 (1995) cited by Skinner, are not pertinent to the authority of the Commission under RCW 41.12.090.

In sum, the case law advanced by Skinner arises from other contexts and is not helpful to analyze this case. Skinner's argument that the Commission acted legally in awarding back pay and benefits is erroneous under the circumstances and in conflict with the controlling statute, RCW 41.12.090.

3. The Superior Court complied as necessary with RCW 7.16 and provided Skinner with fair opportunity to brief the merits of the appeal.

Skinner argues the superior court did not comply with the requirements of RCW 7.16. The superior court issued its Opinion, including final judgment to strike the back pay and benefits remedy from the Commission's Decision, after a hearing in which the parties' oral arguments were received and after sufficient briefing on the merits of the Commission's authority to award back pay and benefits had been submitted for the court's consideration. Skinner specifically complains that a writ should have been issued and the matter scheduled for trial, allowing for twenty-eight day summary judgment motions under CR 56. The superior court's failure to take these actions, according to Skinner, prevented him from having a fair hearing. However, Skinner's assertion that he should have been entitled at minimum to respond to a 28-day summary judgment motion on the same issue of law that the Court was

required to decide in granting the application for Writ of Review is not supported by statute or judicial policy.

RCW 7.16.110 does not specify a specific hearing procedure before the Court enters judgment, either affirming or annulling or modifying the proceedings below. Since the purpose of the Writ of Review procedure is to create an avenue for review of matters that were not contemplated by any existing rules, a wide variety of issues may come before the court on a petition for writ of review, and the court needs flexibility to determine the appropriate manner to review such issues. Skinner cites to King County Local Court Rule (“LCR”) 98.50, which states that “[W]hen the court has found adequate cause for issuance of a writ, the filing party shall obtain a trial date and a case schedule from the clerk who will also assign the case to a Judge.” But the issue here was one of law, which did not involve any factual dispute. The legal issue of whether the Commission had authority to award back pay where it found cause for severe discipline, found that discipline was imposed in good faith and not for any improper reason, and implemented severe discipline in the absence of the employee’s full reinstatement; was briefed, argued and decided in connection with the petition for review. Consequently, LCR 98.50’s procedure for setting a trial date is inapplicable.

Because the superior court was able to decide the ultimate legal issue on its merits in determining whether or not the City was entitled to a writ, issuance and service of an actual writ was not necessary to a fair hearing. The court entered judgment following a hearing in which Skinner's attorney participated by telephone (at his request) and following a full and fair opportunity for briefing on the merits of the pure question of law presented by Medina's writ application. LCR 98.40(f) providing a procedure for scheduling a fact finding trial has no application to this proceeding. There are no disputed factual issues to be contested and requiring resolution. Skinner's claim that he did not get a fair hearing because he was entitled to the issuance of a case schedule and at least a summary judgment proceeding under CR 56 has no merit. The court had everything it needed to enter judgment on the purely legal issue of whether or not the Commission had jurisdiction to include within its remedy entitlement to back pay and benefits. Additional procedures in RCW 7.16 were unnecessary and not required under the doctrine of substantial compliance. *Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1996); and *Allen v. Public Utility District No. 1*, 55 Wn.2d 226, 347 P.2d 539 (1959).

Skinner had ample and fair opportunity to make his arguments to the superior court. Issuance of an actual writ for a record unnecessary to the legal issue before the court was not required by statute or sound judicial policy.

E. CONCLUSION

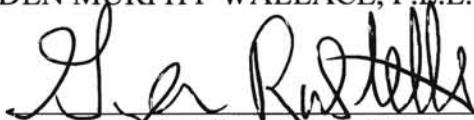
This court should affirm the decision of the trial court and dismiss the appeal.

RESPECTFULLY SUBMITTED this 26th day of February, 2014.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By




Greg A. Rubstello, WSBA #6271
Attorneys for Respondent

DECLARATION OF SERVICE

I certify that on February 25, 2014, I emailed and also mailed via US First Class Mail, Postage Pre-Paid, copies of the foregoing document to the following counsel of record:

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Charolette Mace
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APPENDIX

Exhibit A - RCW 41.12.090

Exhibit B - Memorandum Opinion

EXHIBIT A

RCW 41.12.090

Procedure for removal, suspension, demotion or discharge — Investigation — Hearing — Appeal.

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended, demoted or discharged except for cause, and only upon written accusation of the appointing power, or any citizen or taxpayer; a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended, demoted or discharged may within ten days from the time of his or her removal, suspension, demotion or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal, suspension, demotion or discharge was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may affirm the removal, or if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. The commission upon such investigation, in lieu of affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay; the findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be had by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his or her defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days after the filing of such notice, make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner: PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

[2007 c 218 § 14; 1937 c 13 § 9; RRS § 9558a-9.]

Notes:

Intent -- Finding -- 2007 c 218: See note following RCW 1.08.130.

EXHIBIT B

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THE CITY OF MEDINA, WA,)
)
)
Plaintiff,)
)
v.)
)
ROGER SKINNER; and the MEDINA)
CIVIL SERVICE COMMISSION)
)
Defendants.)

NO. 13-2-05722-1 SEA

MEMORANDUM OPINION

Before the Court is an application for writ of review allowing judicial review of an order issued by the Medina Civil Service Commission ("the Commission") ordering demotion and back pay and benefits for Roger Skinner. The City of Medina, argues that the order issued by the commission exceeds the statutory authority of the commission under RCW 41.12.090. The City further argues that a writ of review is appropriate because there are no available avenues for appeal. Mr. Skinner contends that Court should consider the merits of the writ until the Commission has fully concluded its proceeding with regards to Mr. Skinner. For the reasons set forth below, the writ is granted and the order of the Commission is overturned in part.

FACTS

The defendant Roger Skinner is a former member of the Medina Police Department. On February 15, 2006, Mr. Skinner was terminated by the City of Medina for reasons that are

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1 unimportant to the current action. Following his termination, Mr. Skinner appealed his termination
2 to the Commission. The Commission initially upheld Mr. Skinner's termination on September 1,
3 2006. After multiple appeals the matter came before the Commission again on November, 14,
4 2012 for a new hearing. Following this second proceeding the Commission issued the order at
5 issue in the present case. In this order the commission found that Mr. Skinner's actions warranted
6 substantial discipline, but not termination. The Commission ordered that the Mr. Skinner be
7 demoted and suspended without pay and benefits for sixty days, effective for the period February
8 16, 2006 through April 16, 2006. The Commission further ordered that, beginning April 17, 2006,
9 Mr. Skinner was entitled to back pay and benefits. The Commission then set a schedule for
10 implementing its decision. On January 29, 2013, the Commission denied the City's motion for
11 partial reconsideration. The City of Medina filed this application for writ of review specifically with
12 respect to the order of the commission granting back pay and benefits to Mr. Skinner.
13

14 ANALYSIS

15 The Court's evaluation of the City's application for a writ requires the Court to resolve two
16 statutory issues. First, the Court must determine if the time is ripe for granting a writ of review
17 under RCW 7.16.040. Second, if a writ may be considered at this time, the Court must determine if
18 the Commission exceeded its statutory grant of authority under RCW 41.12.090.
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20 Mr. Skinner argues that the time is not ripe to grant a writ of review because no final order
21 has been entered by the commission. However, Mr. Skinner does not point to any statutory
22 language under RCW 7.16 that prohibits granting a writ of review until a final order has been
23 issued. Furthermore, the Commission's order granting back pay and benefits is a final order as to
24 that issue. The remedy the Commission ordered has not been implemented by the parties yet, but
25 the remaining question is only as to the amount of back pay and benefits and not to whether back
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1 pay and benefits are appropriate at all. The Commission has already denied reconsideration of
2 this question. The Court is disinclined to wait to consider the application for writ of review until after
3 the parties have spent considerably more money contesting the amount of back pay and benefits
4 when the point of this writ of review is to challenge whether back pay may be awarded at all.

5 The second issue in this case is whether the Court should grant the writ and provide relief
6 to the plaintiff. Under RCW 7.16.40 the Court may grant a writ if (1) an inferior tribunal exceeds its
7 jurisdiction or acts illegally; and (2) there is no appeal or adequate remedy at law. *Commanda v.*
8 *Cary*, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001).

9
10 In the present case, the City has no ability to appeal the decision. RCW 41.12.090 provides
11 the procedure for hearings by the Commission. RCW 41.12.090 expressly allows the accused to
12 appeal from a decision of the Commission, but provides no such remedy for the City. Mr. Skinner
13 has not put forth any other right to appeal that the City might have and the Court is aware of none.
14 The Court's inquiry then turns to the first prong of the test under RCW 7.16.040.

15 The Commission exercises its authority under RCW 41.12.090. RCW 41.12.090 grants the
16 Commission the authority to review the decisions of the City of Medina to remove, suspend,
17 demote, or discharge a member of the classified civil service. The Commission can uphold,
18 overturn, or modify such decisions made by the City. The City contends that the language of the
19 statute grants the Commission the authority to grant back pay and benefits only if it overturns the
20 disciplinary action taken by the City. The City argues that because the Commission merely
21 modified the disciplinary action it has no such authority to order back pay and benefits. From the
22 City's point of view, modification indicates approval of the decision to discipline the employee,
23 particularly because here the Commission explicitly found that the discipline was not for political or
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1 religious reasons and was not in bad faith. Mr. Skinner responds that without the power to order
2 back pay the ability to modify the disciplinary actions taken by the City is meaningless.

3 When interpreting a statute the court's objective is to determine legislative intent. *State v.*
4 *Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The surest indicator of legislative intent is the
5 language enacted by the legislature, so if the meaning of a statute is plain on its face, the court will
6 give effect to that plain meaning. *Id.* at 820. In determining the plain meaning of a provision, we
7 look to the text of the statutory provision in question, as well as the context of the statute in
8 which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* at
9 820.

10
11 After examining the statute the Court is persuaded that the statute does not grant the
12 Commission the power to order back pay and benefits. The statute states that,

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14 "if it [the Commission] shall find that the removal, suspension, or demotion was
15 made for political or religious reasons, or was not made in good faith for cause,
16 shall order the immediate reinstatement or reemployment of such person in the
17 office, place, position or employment from which such person was removed,
18 suspended, demoted or discharged, which reinstatement shall, if the commission
19 so provides in its discretion, **be retroactive, and entitle such person to pay or
20 compensation from the time of such removal, suspension, demotion or
21 discharge.**"

22 In the present case the Commission did not overturn the actions of the City under this provision.
23 Instead the City modified the discipline imposed by the City under the immediately following
24 provision:

25 "The commission upon such investigation, in lieu of affirming the removal,
26 suspension, demotion or discharge may modify the order of removal,
suspension, demotion or discharge by directing a suspension, without pay, for a
given period, and subsequent restoration to duty, or demotion in classification,
grade, or pay."

1 This provision does not grant the Commission the power to retroactively reinstate the accused
2 and grant them back pay and benefits the way the proceeding sentence does for full
3 reinstatement. The legislature was clearly aware of the back pay as a potential remedy in
4 these cases, having included it in the previous sentence, and chose not to expressly grant that
5 power when the Commission modifies the City's disciplinary actions. In the average case, of
6 course, the entire process takes a matter of months; here the issue is thrown into sharp relief
7 because six years worth of back pay and benefits are at stake. The Commission therefore
8 exceeded its power under RCW 41.12.090 when it ordered that the City pay back pay and
9 benefits to Mr. Skinner thus fulfilling the second prong of the test under RCW 7.16.040.

11 Now, therefore, it is hereby ORDERED that the plaintiff's application for writ of review is
12 granted. It is further ORDERED that the Commission's decision is modified to remove the
13 portion of the remedy entitling Mr. Skinner to back pay and benefits.

16 DATED: July 25, 2013.

17 
18 Judge Susan J. Craighead