

91265-3

No. 711571

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

ROGER L. SKINNER,

Appellant,

v.

CITY OF MEDINA, WA.,

Respondent.

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STATE OF WASHINGTON
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CITY OF MEDINA'S PETITION FOR REVIEW

Greg A. Rubstello, WSBA #6271
Attorneys for Respondent
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

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COURT OF APPEALS
STATE OF WASHINGTON
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A. IDENTITY OF PETITIONER

The City of Medina, Washington, a municipal corporation (“the City”), hereby respectfully seeks review by the Supreme Court of portions of the published Court of Appeals opinion identified in Part B.

B. COURT OF APPEALS DECISION

Division One of the Court of Appeals filed its opinion granting the City’s request for a constitutional writ of review on November 3, 2014 (“the Opinion”). The Court of Appeals’ slip opinion is in the Appendix at pp. A-1 to A-11. The Opinion appropriately concluded under the standard for a constitutional writ¹ that the Medina Civil Service Commission *exceeded its authority under RCW 41.12.090 when it attempted to determine and award back pay and benefits.*² The Medina Civil Service Commission’s Order of December 21, 2012 (“the Commission’s Order”) is attached hereto in the Appendix at pp. A-12 to A-26.

¹ The Court of Appeals vacated the statutory writ granted by the trial court but came to the same conclusion regarding the illegality of the Commission’s attempt to entitle Skinner to back pay and benefits and to retain jurisdiction to determine the amount. Judge Craighead’s memorandum opinion is included in the Appendix hereto at pp. A-52.

² Slip Opinion at pp. 1-2.

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The Court of Appeals however, did more than simply vacate those portions of the Commission's Order requested by the City³. The Court of Appeals exceeded the standard of review for a constitutional writ by unnecessarily and improperly reviewing the issue of whether or not RCW 41.12.090 (Appendix at p. A-53) precludes retroactive reinstatement when discipline imposed by an employer in good faith is only modified. The Court of Appeals also affirmed the unchallenged portion of the Commission's order of a sixty day suspension and a reduction in rank and pay grade ("effective April 17, 2006" according to the Commission's Order), but added that it was affirming Skinner's reinstatement on April 17, 2006.⁴

The City timely moved for partial reconsideration of the Opinion and for modification of the Opinion to vacate the unnecessary and improper dicta and the attempted affirmation of Skinner's reinstatement of employment on April 17, 2006 from the Opinion. The City's Motion for Reconsideration is included in the Appendix hereto at pp. A-27 to A-35. The modification of the Opinion requested by the City is set forth in the Appendix hereto at pp. A-36 to A-46.

³ Those portions of the Commission's Order requested to be vacated by the City in its Petition for Writ of Review to the Superior Court and as the basis for a constitutional writ at the Court of Appeals were ¶ 6.3, except the first two sentences, and ¶ 6.4,

⁴ The Commission's Order is absent of any statement that Skinner was "reinstated" on April 17, 2006.

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The Court of Appeals denied the City's motion for reconsideration on December 16, 2014 ("the Order on Reconsideration"). The Order on Reconsideration is in the Appendix at A-47. The entire Appendix is incorporated herein as if specifically set forth.

C. ISSUES PRESENTED FOR REVIEW

1. On review by constitutional writ, did the Court of Appeals improperly attempt to modify a portion of the Medina Civil Service Commission's Order identified by the Court of Appeals in the Opinion *as clearly within the Commission's authority?*⁵

2. On review by constitutional writ, did the Court of Appeals improperly include in the Opinion a determination of the specific date of Skinner's reinstatement and dicta concerning Skinner's possible entitlement to pursue back pay and benefits under contract and tort remedies?

3. Should the Court of Appeals Opinion be modified by the Supreme Court as set forth at pp. A-36 to A-46 of the Appendix hereto?

D. STATEMENT OF THE CASE

1. Background/Introduction. The relevant factual and procedural history of this case is covered in Section B above and in the

⁵ See the Opinion at A-7.
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Published Opinion. See Appendix at pp. A-2 to A-3. This Petition for Review arises out of the inclusion in the Opinion a determination that the Commission retroactively reinstated Skinner to employment on April 17, 2006 entitling Skinner to *pursue back pay and benefits under both contract and tort remedies in court actions*.⁶ The Opinion properly granted the City a constitutional writ of review⁷ and appropriately vacated the Commission's order attempting to entitle Skinner to back pay and benefits and to maintain jurisdiction to determine the amount thereof.

The City seeks discretionary review by the Supreme Court to prevent the appeals court from abusing its constitutional authority on review of an agency decision by constitutional writ. The City requests those portions of the Opinion be modified and stricken as identified by the City in the Appendix hereto at pp. A-36 to A-46.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court is familiar with the criteria governing the acceptance of review of a Court of Appeals' opinion. Here, the Opinion of the Court of Appeals satisfies all four of these standards: RAP 13.4(b) (1), (2), (3) & (4).

⁶ See fn. 5 at p. 8 of the Decision.

⁷ The Court of Appeals first vacated the statutory writ of review granted the City by the trial court.

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1. The Opinion involves a significant question of law under the Constitution of the State of Washington and an issue of substantial public interest.

This petition for review seeks the Supreme Court's review for clarification to the lower courts of the limits of a court's inherent review authority by constitutional writ and also seeks to provide a remedy when, as here, the Court of Appeals exceeds the standards and scope of review by constitutional writ. Without review by the Supreme Court, a party has no remedy when the court of appeals exceeds its constitutional authority for review of a decision of a lower tribunal. The City is not requesting the Supreme Court's discretionary review of the merits of the Court of Appeal's determination that the Commission ordered reinstatement of Skinner April 17, 2006.⁸ Rather, the City requests the Supreme Court review the propriety of Court of Appeals including such determination in their Opinion. The Opinion properly granted the City a constitutional writ, but the Opinion should have been limited to a determination of whether the Commission had the authority to entitle and determine the amount of back and benefits to be received by Skinner. The determinations by the Court of Appeals that the Commission retroactively reinstated Skinner on

⁸ The Slip Opinion at p. 11.
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April 17, 2006 and that Skinner could pursue back pay under contract and tort theories were outside the standard of review by constitutional writ.

Saldin Securities, Inc., v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370 (1998) and the more recent decision of the Supreme Court in *Federal Way School District No. 210 v. Vinson*, 172 Wn.2d 756, 261 P.3d 145 (2011) establish clear restrictions on the scope of judicial review by constitutional writ. Citing to *Saldin v. Securities, Inc.*, at 292, and other prior cases, the Supreme Court stated in *Federal Way School District No. 210 v. Vinson* at 769 the following:

The Washington State Constitution recognizes the right to seek discretionary review of an administrative agency decision under the court's inherent constitutional power (also known as constitutional or common law certiorari). CONST. art. IV, § 4; 6. "The scope of review is limited to whether the hearing officer's actions were arbitrary, capricious, or illegal, thus violating a claimant's fundamental right to be free from such action." (Citations omitted) ... "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." (Citation omitted) Thus, a court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. *Pierce County*

Sheriff, 98 Wash.2d at 693-94, 658 P.2d 648.

The scope of review should be very narrow ... and one who seeks to demonstrate that action is arbitrary or capricious must carry a heavy burden.” (Citation omitted) ...

The portion of the Commission’s Order imposing a 60-day period of suspension and a reduction in rank and pay classification effective April 17, 2006 were never alleged to be arbitrary, capricious, or illegal. The Court of Appeals acting on its own initiative went beyond the authorized scope of review by constitutional writ. It is in the public interest that this constitutional error be reviewed and corrected by the Supreme Court.

2. The Court of Appeals’ decision conflicts with existing precedent.

As argued above, inclusion in the Opinion of a review and interpretation of a portion of the Commission’s Order that was not illegal or arbitrary and capricious went beyond the scope of review by constitutional writ established in existing precedent. *See Saldin Secs., Inc. v. Snohomish County, supra; Federal Way School Dist. v. Vinson, supra; Pierce County Sheriff v. Civil Serv. Comm’* 98 Wn.2d 690, 693-694, 658 P.2d 648 (1983); and *Foster v. King County*, 83 Wn.App. 339, 346-347, 921 P.2d 552 (quoting *Kerr-Belmark Constr. Co. v. City Council*, 36 Wn.App. 370, 373, 674 P.2d 684 (1984)). Only the determination by the


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Commission to entitle Skinner to back pay and benefits and to retain jurisdiction to determine the amount of the award was within the scope of review by constitutional writ. Under existing precedent, the review, interpretation and decision by the Court of Appeals that the Commission reinstated Skinner's employment as of April 17, 2006 and that he could pursue contract and tort remedies to recover back pay and benefits was outside the scope of review and improperly included in the Opinion.

F. CONCLUSION

The Supreme Court should grant review of the portions of the Opinion identified for modification in Appendix A to the City's Motion for Reconsideration to the Court of Appeals (A-36 to A-46 hereto). Whether the relief originally sought by the City in the trial court is granted by a statutory writ or a constitutional writ, the opinion from the court of appeals on the merits of the Commission's authority, should have been limited to the review and analysis excellently made in the trial court's memorandum opinion (Appendix at pp. A-48 to A-52).

RESPECTFULLY SUBMITTED this 15th day of January, 2015.
OGDEN MURPHY WALLACE, P.L.L.C.

By 
Greg A. Rubstallo, WSBA #6271
Attorneys for Respondent

DECLARATION OF SERVICE

I certify that on the date below, I sent copies of the foregoing document to the following counsel of record via first class mail, postage pre-paid:

William J. Murphy
Law Office of William J. Murphy
4216 N. Mississippi AVE #402
Portland, OR 97217

P. Stephen DiJulio
Foster Pepper PLLC
1111 Third AVE #3400
Seattle, WA 98101-3299

DATED this 15th day of January, 2015, at Seattle, Washington.



Charolette Mace
Legal Assistant

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Appendix 12-26	Finding, Conclusions and Order
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Appendix 47	Order Denying Motion for Reconsideration
Appendix 48-52	Memorandum Opinion
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF MEDINA,)	
)	No. 71157-1-I
Respondent,)	
	)	DIVISION ONE
v.)	
	)	PUBLISHED OPINION
ROGER L. SKINNER, and the CITY CIVIL)	
SERVICE COMMISSION,)	
)	
Appellant.	)	FILED: November 3, 2014

APPELWICK, J. — Skinner appeals the trial court’s order granting the City a statutory writ of review to challenge the award of back pay by the Medina Civil Service Commission. He argues that the City was not entitled to seek a statutory writ of review. Although the City did not apply for a constitutional writ of review, Skinner preemptively argues that the City was not entitled to one. The City stipulated at oral argument that if a constitutional writ of review rather than a statutory writ of review was available, the appeal should be resolved as if a constitutional writ of review had been sought. The City contends that the Commission exceeded its authority when it modified Skinner’s discipline and awarded him back pay as a remedy. We conclude that the legislature did not intend for the employer to have a right of appeal under RCW 41.12.090, and therefore a statutory writ of review is unavailable. We reverse the trial court and vacate the statutory writ of review. However, a constitutional writ of review is available to the employer. Under the standard for a constitutional writ of review, we conclude that the Commission exceeded its authority

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under RCW 41.12.090 when it attempted to determine and award back pay and benefits. The constitutional writ of review is granted. The Commission's order is vacated as to back pay and benefits, but otherwise affirmed.

FACTS

Lieutenant Roger Skinner was terminated from his position with the City of Medina (City) Police Department on February 15, 2006 for a violation of department standards. Skinner timely appealed his dismissal to the Civil Service Commission (Commission) of the City. On December 21, 2012, the Commission found that the City acted in good faith and with just cause when it disciplined Skinner. But, it found that the City did not have cause to terminate Skinner. The Commission ordered that Skinner's discharge be set aside. Instead of discharge, the Commission ordered that Skinner be suspended without pay and benefits for the period of February 16, 2006 through April 16, 2006. Additionally, it ordered that Skinner be demoted to patrol officer effective February 16, 2006.

Further, the Commission ordered that Skinner was entitled to back pay and benefits as a City patrol officer beginning April 17, 2006 until the date his health precluded his return to work. The Commission said that it would set a hearing at which it would receive evidence as to the implementation of the remedy if the parties could not resolve it via stipulation. Finally, it ordered that it would retain jurisdiction over the matter until resolution of the "remedy phase." The City moved for partial reconsideration challenging the Commission's award of back pay and benefits. The Commission denied the City's motion stating that any issues regarding the offset of Skinner's wages or earnings after his suspension ended would be addressed during the remedy phase of the proceeding.

The City applied for a statutory writ of review under chapter 7.16 RCW on February 15, 2013. The City argued that the Commission exceeded its authority in ordering back pay and benefits to Skinner, because he was not fully reinstated to his old position. The trial court granted the City's writ on October 1, 2013.

Skinner appeals.¹ At oral argument the court noted that if it decided the wrong writ had been obtained, the parties would be free to start over and seek the proper writ. However, given the length of the litigation, the court inquired whether the parties wished a ruling on the merits of the Commission's authority under either writ. The parties agreed the record is complete and that the underlying issue is a question of law. Skinner had already addressed the constitutional writ on the merits in his reply brief. The City had not specifically addressed the constitutional writ in its brief. However, it had briefed how the Commission exceeded its authority. The City orally argued that those same arguments satisfied the constitutional writ analysis. The City stipulated that if a constitutional writ rather than a statutory writ was applicable on these facts, that the court should reach the underlying issue as if the proper writ had been sought.

¹ The City moved to strike Skinner's reply brief, because it raises new arguments and authority in violation of RAP 10.3(c). The City argues that Skinner raises a new argument in his reply brief that is not responsive to the earlier briefing. Skinner's reply brief is responsive to an argument made in the City's briefing. He rebuts the City's argument that a statutory writ was available. Additionally, he asserts that this court could still find that the City had a constitutional writ available to it. Skinner then asserts the standard for evaluating a constitutional writ of review, as outlined in Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 769, 261 P.3d 145 (2011), and addresses the merits of a constitutional writ analysis. Although the City did not have the opportunity to respond to Skinner's reply brief, it stipulated at oral argument to this court reaching the merits of the constitutional writ issue. We deny the City's motion to strike.

DISCUSSION

I. Statutory Writ

The extent of a superior court's authority to grant a writ of certiorari² is a question of law. Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wn.2d 756, 764-65, 261 P.3d 145 (2011). This court reviews the superior court's decision to issue a writ de novo. Commanda v. Cary, 143 Wn.2d 651, 654, 23 P.3d 1086 (2001).

Skinner argues the trial court erred in granting the City's application for a statutory writ of review, because granting one would circumvent the legislature's directive set forth in RCW 41.12.090—the statute that provides the disciplinary procedures for police civil servants. He asserts this is so, because RCW 41.12.090 provides for an appeal only by the disciplined police officer, and not for an appeal by the city. RCW 41.12.090 states, "If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom." RCW 41.12.090 (emphasis added).

In Federal Way, the Supreme Court analyzed authorizing a writ of review in the context of RCW 28A.405.320. 172 Wn.2d at 766. RCW 28A.405.320 provides teachers, principals, supervisors, superintendents, and other certificated employees with the right to appeal an adverse employment action. But, it does not provide the school board with a right to appeal a hearing officer's decision. See RCW 28A.405.320. The Federal Way court framed the issue as how to reconcile the legislature's grant of review by statutory writ with the legislature's denial of review to the school district in RCW 28A.405.320. 172 Wn.2d at 768. The court reasoned that allowing the school district to seek review via statutory writ undermines the legislative intent. Id. It reasoned this was so, because the

² RCW 7.16.030 states that a writ of certiorari may be referred to as a writ of review.

legislature created a procedure for appeal and gave only one party the right to appeal. Id. Seeking a review via statutory writ is a procedure nearly identical to an appeal. Id. In finding the statutory writ unavailable to the district, the court said that a writ of certiorari is clearly not meant to be a substitute for an appeal and cannot be used to circumvent the legislature's clear directive. Id.

The statutory conflict in Federal Way is also present in this case. Here, RCW 41.12.090 grants review only to the accused employee. It does not provide the City with a right to an appeal of the Commission's decisions. While RCW 41.12.090 is a different statute than the statute under consideration in Federal Way, the reasoning in Federal Way is on point. Allowing the City to seek a statutory writ of review under chapter 7.16 RCW would effectively provide the City with a right to appeal. This undermines the legislature's intent in RCW 41.12.090 to provide only the employee with a right of appeal. Therefore, the City is precluded from seeking review via statutory writ. We reverse the trial court and vacate the statutory writ of review.

II. Constitutional Writ

The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority. Saldin Sec., Inc. v. Snohomish County, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). A court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. Federal Way, 172 Wn.2d at 769. In the constitutional certiorari context, illegality refers to an agency's jurisdiction and authority to perform an act. Id. at 770.

Here, the Commission found that the City acted in good faith and for cause when Skinner was terminated. However, even though there was just cause to impose discipline on Skinner, it found that the City did not have cause to terminate Skinner from employment altogether. As a result, the Commission set aside Skinner's discharge and ordered suspension without pay and benefits for 60 days (February 16, 2006 through April 16, 2006) instead. Further, the Commission demoted Skinner to patrol officer, and it ordered that Skinner was entitled to back pay and benefits at the level of patrol officer effective the day after his suspension ended until he would otherwise have been unable to serve as a result of his health.³ The Commission retained jurisdiction over the implementation of the remedy phase and planned to hold an evidentiary hearing if the parties were unable to implement the order by stipulation.

In determining whether the Commission exceeded its authority, we first look to the plain language of RCW 41.12.090. When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. Id. at 9-10.

RCW 41.12.090 provides the Commission with the authority to review a disciplinary action against a The City police department employee. See RCW 41.12.090. Specifically, it says:

[I]f [the Commission] shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith

³ Skinner admitted to the Commission that he had serious health issues that precluded his return to City employment.

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.

RCW 41.12.090 (emphasis added).

The portion of the Commission's order that is in dispute states:

6.3 Remedy. Employee is suspended without pay and benefits for a period of sixty (60) days, effective for the period of February 16, 2006 through April 16, 2006. Effective February 16, 2006, Employee is demoted to the rank and classification of patrol officer. Beginning April 17, 2006, Employee is entitled to back pay and benefits as a The City 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. The Commission understands that implementation of this remedy will require analysis and discussion between the Parties. The Parties shall have until the next regularly-scheduled Commission meeting in February 2013 to implement this decision by stipulation. Failing that, the Commission will at its February meeting set a hearing at which it will receive evidence as to the implementation of the Commission's remedy.

6.4 Further Proceedings. The Commission retains jurisdiction over this matter until resolution of the remedy phase of the proceedings.

The Commission clearly acted within its authority by suspending Skinner in lieu of removal, setting the 60 day period of suspension without pay, and then demoting him to patrol officer at a lower level of pay. RCW 41.12.090. This much is not disputed. What is in dispute is whether as part of the modified discipline the Commission could reinstate Skinner retroactively, to a date prior to its order, and whether it could award back pay.

No case law interpreting RCW 41.12.090, or other similar civil service statutes,⁴ has decided this question.

The City contends that, because RCW 41.12.090 specifically authorizes the Commission to retroactively reinstate the employee and grant back pay when the employee is removed for political or religious reasons or not in good faith for cause, the legislature did not intend to authorize the Commission to do the same when the discipline is only modified. We disagree with the premises of this contention. The statute neither precludes retroactive reinstatement nor explicitly authorizes the Commission to grant back pay. See id.

If the discipline was imposed for religious or political reasons or not in good faith for just cause, the Commission has discretion to set the date for reinstatement. The date is either retroactive to the date of original discipline or immediately as of the date of the Commission's order.⁵ If the discipline was imposed in good faith for just cause, the Commission has the discretion to set a period of suspension with subsequent restoration to duty. Id. Nothing in the statute prohibits retroactive restoration to duty. See id. Depending on the length of the suspension and the time elapsed before the Commission enters its order, restoration to duty may be either retroactive or prospective. Whether reversing or modifying a termination or suspension, the Commission exercises statutory

⁴ RCW 41.14.120 (Sheriff's Office); RCW 41.08.090 (Firefighters).

⁵ Why the legislature did not make reinstatement of a wrongfully disciplined employee automatically retroactive is not disclosed in the statute nor in any legislative history. See LAWS OF 1937, ch. 13, § 14. This provision has survived substantively unchanged since at least 1937. See LAWS OF 2007, ch. 218, § 14. The statute is silent as to back pay if the Commission merely reinstates the employee effective immediately. Nothing suggests that the employee is not entitled to such back pay merely because the Commission did not reinstate the employee retroactively. Apparently, the employee is left to pursue both contract and tort remedies in court actions.

discretion to set the date of reinstatement. For the retroactively reinstated employee, the statute mandates the employer to pay compensation back to the time of the original discipline. Id. For the suspended employee, it prohibits pay during the period of suspension.⁶ Id.

The Commission has only the authority granted by statute. The statute provides the Commission with the authority to affirm, modify, or reverse discipline. Id. It does not expressly authorize the Commission to award damages or other remedies. See id. We reject Skinner's contention that the Commission has implicit authority to award back pay. Entitlement to pay or compensation from reinstatement, after a period of suspension without pay, flows from the employment contract and any modification to the employee's classification, grade, or pay, not from this statute. Here, the employer's original discipline

⁶ The City relies on Dunaway v. Soc. & Health Servs., 90 Wn.2d 112, 579 P.2d 362 (1978) for the assertion that an employee is entitled to back pay only when fully reinstated. In Dunaway, the Washington Supreme Court considered the distinction of allowing back pay only for full reinstatement in the context of another statute. Id. at 113. RCW 41.06.220(2) was enacted by initiative in 1961. LAWS OF 1961, ch. 1, § 22. It guarantees back pay and benefits to employees terminated by the state personnel board when "fully reinstated." Dunaway, 90 Wn.2d at 116. The statute enables the exonerated employee to receive all employee rights and benefits and back pay in a single action—without placing the onus on the wronged employee to claim back pay in a separate action. See id. at 117.

On appeal, the employee was suspended without pay for a five month period rather than terminated. Id. at 113. Presumably his salary and benefits resumed as of his reinstatement, because he sued only for back pay and benefits during the period of suspension. Id. at 116-17. The court reasoned that the clear purpose of the statute and the "fully reinstated" designation was to protect employees who are exonerated after appeal. Id. There, the employee was not exonerated. Id. Consequently, he was not entitled to back pay and benefits during the period of suspension. Id. at 117.

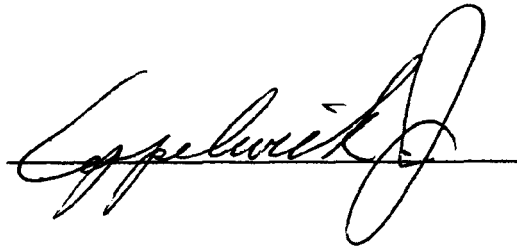
Unlike Dunaway, Skinner has not argued he is entitled to pay and benefits during the period of his 60 day suspension. Nothing in that decision addresses pay and benefits owed for employment occurring after reinstatement from suspension. Nothing in Dunaway supports a theory that an employer does not owe the employee the benefits of his employment effective as of the date of his reinstatement.

was effective February 16, 2006. The Commission correctly noted that the 60 day suspension ended on April 16, 2006. On April 17, 2006 Skinner was reinstated just as if the City had imposed only a 60 day suspension and demotion in the first place. He was entitled from that point forward to the benefits of his employment, not by virtue of an award of back pay by the Commission, but by virtue of his employment agreement, albeit at a lower rank and pay grade set by the Commission.⁷

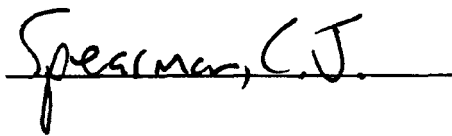
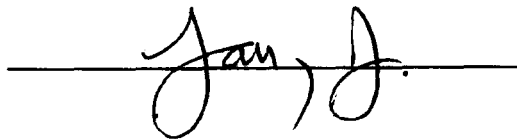
However, after setting the period and dates for Skinner's suspension without pay, the Commission still explicitly ordered that Skinner was entitled to back pay and benefits until the time he would otherwise have been unable to serve as a result of his health condition. The Commission asserted that it would retain jurisdiction over the matter until the remedy phase of the proceedings were resolved. It reserved the right to hold an evidentiary hearing retaining the implementation of the remedies if the parties were unable to resolve it themselves. Then, in denying the City's motion for reconsideration, the Commission stated, "Any issues regarding the remedy, including offset of Appellant's wages or earnings during the period following April 16, 2006 may be addressed in the remedy phase of this proceeding." Once the Commission asserted authority to control the determination of Skinner's remedy and damages flowing from the City's conduct, it exceeded the authority provided to it under RCW 41.12.090. If the City does not honor its employment compensation obligations to Skinner, his remedy is in court, not before the Commission.

⁷ We do not address whether the pay and benefits on reinstatement are otherwise subject to limitation under other legal theories not presented to us.

A statutory writ of review is not available to the City. The trial court's grant of a statutory writ of review is vacated. The City is granted a constitutional writ of review. The Commission acted illegally to the extent it purported to retain jurisdiction to award back pay. The portion of the Commission's order entered December 21, 2012 consisting of paragraph 6.3, except the first two sentences, and paragraph 6.4 are vacated. Skinner's 60 day suspension with reinstatement on April 17, 2006, at reduced rank and pay grade is otherwise affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Spessman, C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Jan, J.", written over a horizontal line.

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CITY OF MEDINA

CIVIL SERVICE COMMISSION

In the matter of the appeal of
ROGER L. SKINNER

FINDINGS, CONCLUSIONS AND
ORDER

1. INTRODUCTION

THIS MATTER came before the Civil Service Commission (“Commission”) of the City of Medina on the appeal of Roger L. Skinner (“Employee”). Employee challenges his termination from City employment.

2. APPEARANCES

2.1 Commission. Peter E. Jorgensen, Chair, Commissioner; Anthony Shapiro, Commissioner; Roger Ngouenet, Commissioner; and, P. Stephen DiJulio, Foster Pepper PLLC, Special Counsel and Hearing Officer to the Commission.

2.2 Employee. Employee appeared and was represented by William Murphy, Attorney at Law.

2.3 Department. The City was represented by Greg Rubstello, Ogden Murphy Wallace PLLC.

2.4 Witnesses. Doug Schultz; Brianna Beckley; Linda Crum; Employee; Dan Yourkoski; and, Jeffrey Chen.

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1 **3. PROCEEDINGS**

2 **3.1 Employee Termination.** On January 13, 2006, then Police Chief Jeffrey Chen
3 issued pre-disciplinary notice to Employee. Exhibit (“Ex.”) 11. A “Loudermill” hearing was
4 conducted on February 1, 2006. See Ex. 14. On February 8, 2006, then City Manager,
5 Douglas J. Schultz, issued his Notice of Termination to Employee, effective February 15, 2006.
6 Ex. 15.

7 **3.2 Appeal to Commission.** Employee timely filed an appeal with the Commission
8 on February 14, 2006. Ex. 17. Following hearing in August 2006, the Commission entered its
9 Findings, Conclusions and Order (September 1, 2006), upholding the employment termination.

10 **3.3 Subsequent Appellate Proceedings.** The matter is back before the Commission
11 after multiple appeals. See Supreme Court Cause Nos. 82306-5 and 86865-4; Court of Appeals
12 Cause Nos. 60868-1-I and 66120-5-I; and, King County Superior Court Cause No. 06-2-33267-
13 9SEA (Superior Court remand order of September 17, 2010, and Court of Appeals Mandate of
14 June 6, 2012).

15 **3.4 Pre-hearing and Schedule.** The hearing date of November 14, 2012 was
16 announced at a pre-hearing conference of August 21, 2012. An *Order on Procedural Matters*
17 was entered at the pre-hearing conference.

18 **3.5 Pre-hearing Motions.** The Commission previously considered the *Employer’s*
19 *Motion in Limine; Skinner’s Motion in Limine;* and, *Skinner’s Motion to Exclude Witnesses.* The
20 parties were advised of the Commission’s rulings on the motions in a telephone conference on
21 October 26, 2012. We confirm those rulings, as follows.

22 **3.5.1 Employer’s Motion in Limine.** This motion sought to exclude any
23 reference to the “Lenhart Report.” The Lenhart Report (dated March 23, 2011) related to an
24 investigation of then Medina Police Chief Jeffrey Chen. While denying the Employer’s motion,
25 the Commission noted that the Lenhart Report, coming five years after the Skinner termination,
26 would likely be of little use to the Commission. Nevertheless, should it be presented for

1 impeachment or other purposes, the Commission would consider the matter at that time. The
2 Lenhart Report was not referred to in the hearing on November 14, 2012.

3 **3.5.2 Skinner's Motion in Limine.** Skinner's motion to limit evidence to the
4 monkey comment and Asians comment (as discussed in greater detail below) was denied by the
5 Commission. There was sufficient notice (of other issues with Employee's performance) in the
6 City's pre-termination communications with Employee, in addition to the discussion of the two
7 referenced comments.

8 **3.5.3 Skinner Motion to Exclude Witnesses.** It appeared that certain witnesses
9 were identified by the City in response to the potential use of the Lenhart Report. The
10 Commission denied the Motion to Exclude Witnesses, for the most part, while cautioning that
11 evidence offered to counter impeachment evidence would be given little consideration by the
12 Commission. The Commission did note that it would not hear testimony from a former Civil
13 Service Commissioner, Mary Odermat. The Commission notes that none of the witnesses sought
14 to be excluded by Skinner were called to testify at the November 14, 2012 hearing.

15 **3.5.4 Motion Regarding Exhibits.** In the course of responding to Employee's
16 motions, the City attached certain documents to its pleadings. This is common practice for
17 motions. The consideration of documents does not mean the documents will be admitted as
18 exhibits or what weight such documents may have if admitted. As a result, the motion was
19 denied.

20 **3.6 Commissioner Challenge.**

21 **3.6.1** Employee challenged Commissioner Knowlton (Motion for Recusal, filed
22 October 30, 2012). Ms. Knowlton had been appointed to serve as an interim commissioner. Ms.
23 Knowlton did not believe that there was a foundation for her recusal or disqualification. She
24 believed she could fairly consider the case before the Commission. However, she determined
25 that it was in the better interest of the City to resign from the Commission so that there was no
26

1 basis for questioning the Commission's proceedings. Mr. Ngouenet was appointed to fill that
2 vacant Commission position.

3 **3.6.2** During the course of the hearing, the City's counsel, Mr. Rubstello, called
4 to the Commission's attention an email chain from January 2009. The email chain is between
5 Drew Blazey and Karen Sparks. The emails express dissatisfaction with Chief Chen; The
6 Chief's compensation; and, compensation levels in the Medina Police Department. Karen
7 Sparks is the spouse of Civil Service Commissioner Anthony Shapiro. Mr. Shapiro disclosed on
8 the record that he knew nothing about the emails, was previously unaware of them, had not
9 discussed them with his wife, and would not be influenced by them in the consideration of the
10 matter before the Commission. No party challenged Commissioner Shapiro's continuing service
11 on the Commission. Independently, the Commission finds no basis for Commissioner Shapiro's
12 recusal.

13 **3.6.3** Following the November 14, 2012 hearing, the Commission was made
14 aware of communications among Commissioner Ngouenet and City Councilmember Pat Boyd
15 and a City resident, Wilma Edmonds. Commissioner Ngouenet is an acquaintance of Ms.
16 Edmonds and knows Mr. Boyd. The Commission addresses the communications, as follows.

17 Both Mr. Boyd and Ms. Edmonds were in the audience during the course of the hearing.
18 Commissioner Ngouenet, new to the Commission, had called Ms. Edmonds prior to the hearing
19 for her suggestion as to the attire for the proceeding as he had no experience with such
20 proceedings. During the initial stages of the November 14 proceedings, he made a similar
21 comment about his lack of experience to Commissioner Shapiro. Commissioner Shapiro assured
22 Commissioner Ngouenet that he would be able to get through the hearing, as the other
23 Commissioners were familiar with process. At the mid-day break, in small talk with Mr. Boyd
24 and Ms. Edmonds in the parking lot outside of City Hall, Commissioner Ngouenet made a
25 statement that after the morning's proceedings, and discussion with Commissioner Shapiro, the
26 Commission would be able to get through the proceedings. Mr. Boyd reported that Ms.

1 Edmonds and he heard Commissioner Ngouenet say words to the effect of "Tony [Commissioner
2 Shapiro] and I have already made up our minds." To that point in the proceedings,
3 Commissioner Ngouenet and Commissioner Shapiro had met only briefly, and had not even
4 discussed the case. Neither Commissioner had formulated an opinion on the case. It appears to
5 the Commission that Commissioner Ngouenet's accent may have contributed to the
6 misunderstood or misheard statement. In any event, the Commissioners find not prejudgment,
7 bias or other basis for disqualification of Commissioner Ngouenet.

8 **3.7 Hearing and Closing Argument.**

9 **3.7.1** The Commission heard the matter in public hearing on November 14,
10 2012, at Medina City Hall. There were no objections to the hearing date, or motions to continue
11 or for additional hearing.

12 **3.7.2** At the conclusion of the receipt of evidence, the Commission directed that
13 closing argument be submitted in writing (initially by November 19, and then set over until
14 November 26). The parties submitted written closing argument on November 26, 2012 and the
15 hearing was closed. The Commission took the matter under advisement upon receipt of the
16 closing arguments. We do not restate the Parties' arguments in this decision.

17 **3.7.3** Appellant objected to the City's references in its closing argument to the
18 Commission's earlier decision in this matter (September 1, 2006). That objection is overruled.
19 The Commission cannot ignore its own record in this matter. However, the earlier decision is no
20 more controlling on this Commission than on the appellate courts. The record of that earlier
21 proceeding is insufficient as a matter of law. The Commission was required to rehear the matter,
22 and consider all of the evidence as set out in the more recent proceeding.

23 **3.8 Full Opportunity to Parties.** There was no limitation on the parties in the
24 presentation of their cases. The parties were given full opportunity to express their positions and
25 offer evidence.

1 **3.9** Witnesses. The Commission has considered the appearance and demeanor of the
2 witnesses and assessed the credibility of testimony in light of the entire record.

3 **3.10** Exhibits. We have taken under advisement particular offers of testimony and
4 documentary evidence not otherwise admitted at the hearing. See Commission Rule 18.23. A
5 Record of Exhibits is attached as Appendix A. A 2000 report of the Seattle Police Department
6 (Ex. 24, as marked and identified) was not admitted by the Commission. All other exhibits and
7 testimony have been considered and given weight as judged by the Commission.

8 **3.11** Commission Decision. Having considered the record before the Commission and
9 the arguments of the parties, the Commission summarizes the positions of the parties and enters
10 the following Findings, Conclusions and Order.

11
12
13 **4. FINDINGS**

14 **4.1** General. Unless otherwise stated, these finding and facts relate to the period
15 through Employee's termination in early 2006.

16 **4.2** City. The City of Medina is a non-charter code city operating under a council-
17 manager form of government, pursuant to chapter 35A.13 RCW. The Civil Service operates in
18 the City under Chapter 41.12 RCW. The City Manager position is responsible for all
19 employment matters. RCW 35A.13.080, .100.

20 **4.3** Department. The City operates a Police Department ("Department") consisting of
21 a chief, lieutenant, corporal and a limited number of patrol officers. In addition, the Department
22 employed an administrative specialist, Brianna Beckley, and records manager, Linda Crum. The
23 Department operates out of cramped quarters in the basement of City Hall. Most space is shared,
24 with common interaction among personnel when in the Department offices.

25 **4.4** Department Command. In 2001, the City created a position and rank of captain.
26 One of the purposes of creating the captain position was to provide for the hiring and transition

1 of command staff upon the departure of then police chief, Michael Knapp. Knapp was chief of
2 the City under a five year contract (December 1998 through December 2003). Jeffrey Chen was
3 appointed to fill the captain position in June 2001. He served as interim chief following
4 expiration of Chief Knapp's contract. Chen was appointed Police Chief, effective
5 February 1, 2004.

6 **4.5** October 18, 2005 – Monkey Comment. On October 18, 2005, Employee and
7 Brianna Beckley attended a training session at the north campus of Bellevue Community
8 College. In the course of the lunch break, Employee and Beckley had certain conversations.
9 Beckley reported that Employee stated the Chief had said that Beckley and records manager
10 Crum were just “monkeys at a keyboard. And, that any monkey could do your job.”

11 Ex. 1 (the “monkey comment”).

12 **4.6** October 18, 2005 – Asians Comment.

13 **4.6.1** In or around the time that Beckley recalled Employee making the
14 monkey comment, she also reported Employee stating

15 “One thing I’ve noticed is that even though there are a lot of Asian people in
16 Seattle there aren’t a lot of Asians as supervisors at Seattle. I think Asians don’t
17 make good managers because people don’t like them.”

18 (“Asians comment”). See Ex. 1. The monkey comment and Asians comment were significant to
19 Beckley. Employee disputes the accuracy of Beckley’s reported quote. Employee later claimed
20 he said

21 “I’ve met a lot of Asians throughout my police career, particularly from large
22 cities such as Seattle, and they’ve all been intelligent people. I was curious why I
23 didn’t see more in the high-ranking positions.”

24 Ex. 14.

25 **4.6.2** Following her return to City Hall on October 18, 2005, Beckley recorded
26 a script of Employee’s comments. She also discussed the monkey comment and Asians
comment with Linda Crum. In that discussion, Crum reported to Beckley that Employee had

1 recently said nearly the same monkey comment to Crum. Employee said to Crum that the Chief
2 had said that "any monkey could do your and Brianna's job." See Ex. 1.

3 **4.7** October 20, 2005 Memos. Both Beckley (Ex. 1) and Crum (Ex. 2) reported the
4 incidents by separate memos dated October 20, 2005. Beckley's memo followed from her initial
5 notes on the October 18 comments. The memos were addressed to acting Chief Dan Yourkoski.
6 Both Beckley and Crum reported how hurt and disturbed they were by Employee's conduct.
7 Crum further reported that she believed that Employee's comments regarding the potential
8 elimination of her or Beckley's position caused additional disruption in the Department among
9 the civilian personnel. Crum reported that Employee's comments, whether true or not, made for
10 an "unhealthy work environment." Ex. 2. There is no basis to question the accuracy of Beckley
11 and Crum's recollection of contemporaneous events as reported in their October 20 memos.

12 **4.8** Acting Chief. In the Fall of 2005, Jeffrey Chen attended the FBI Academy in
13 Quantico, Virginia. During his absence, he designated Dan Yourkoski to be acting Chief. At the
14 time of his designation as acting Chief, Yourkoski held the rank of corporal. Yourkoski served
15 as acting Chief until Chief Chen's return from the FBI Academy (approximately December 17,
16 2005).

17 **4.9** Investigation.

18 **4.9.1** Doug Schultz, City Manager, began his investigation of Employee in
19 late-October 2005. He interviewed Linda Crum on October 28, 2005. Ex. 4. He separately
20 interviewed Dan Yourkoski and Brianna Beckley on October 31, 2005. Exs. 3 and 5. Schultz
21 conducted a telephone interview with Chief Chen on November 1, 2005. Ex. 7. On
22 November 3, 2005, Schultz issued to Employee a Notice of Internal Investigation, including
23 notice of a scheduled interview. Ex. 8. Schultz met with Employee, as scheduled, on
24 November 9, 2005. The City Manager's notes of his meeting are at Ex. 9.

25 **4.9.2** On December 29, 2005, the Chief provided his analysis to the City
26 Manager. He expressed his belief that Employee's conduct had "caused great concerns and I

1 have lost total trust and confidence in his ability to carry out his responsibilities as an employee
2 and a senior officer to effectively serve this City and community.” Ex. 10. A pre-disciplinary
3 notice was issued by the Police Chief on January 13, 2006. Ex. 11. The Lauderhill hearing was
4 conducted on February 1, 2006. Ex. 16. Employee was also placed on administrative leave with
5 pay that evening. Ex. 15. By memorandum dated February 2, 2006, the Chief recommended to
6 the City Manager that Employee be terminated.

7 **4.10 Notice of Discharge.** The City Manager, by correspondence dated
8 February 8, 2006, reviewed the background for the investigation and the basis for his decision.
9 Employee’s service with the City of Medina was terminated effective February 15, 2006.
10 Ex. 17.

11 **4.11 Unrelated Matter.** In his December 29, 2005, memorandum to the City Manager,
12 the Police Chief made reference to a complaint against Employee by Department Officer
13 Shannon Gibson. See Ex. 10. However, no reference is made to Gibson’s complaint in any of
14 the pre-disciplinary notices or in the City Manager’s Notice of Termination. The Commission
15 has not considered any such complaint by Officer Gibson.

16 **4.12 Employee Performance.**

17 **4.12.1** Under Chief Chen, Employee’s performance evaluations (Exs. 23 and 24)
18 were at or above “benchmark standards” (3 on 5 point scale), and in some cases “exceptional” (4
19 on a 5 point scale). The Commission is not persuaded by the argument that the evaluations
20 should be discounted because they were for compensation purposes.

21 **4.12.2** However, Employee is viewed as disruptive and not a Department leader.
22 He liked the Department under the “old” regime, apparently when reporting and standards were
23 more relaxed.

24 **4.13 Employee’s Discontent.**

25 **4.13.1** From the record before the Commission, it is evident that Employee did
26 not readily accept the initiatives of Chief Chen. Employee disputed certain statements reported

1 or attributed to Employee by the City Manager in his November 9th interview. But the record of
2 Employee's discontent and search for other jobs is clear. See Ex. 9. There is no question that he
3 was disappointed and felt slighted by the Chief's determination to bypass Employee and to
4 appoint a subordinate (Corporal Yourkoski) to the acting Chief position.

5 **4.13.2** The Commission need not decide whether the Chief actually made the
6 monkey comment attributed to him by Employee. Employee's mere recitation of the comment
7 was sufficient in and of itself to justify serious disciplinary action.

8 **4.14** Asians Comment. Similarly, the Commission need not determine whether
9 Employee was intentionally racially motivated in his derogatory comments regarding Chief
10 Chen's racial heritage, or of the lack of Asian managers generally in law enforcement. There
11 appears to be no purpose for the comment, other than to undermine the Chief's standing as
12 supervisor of the Department. Employee's suggestion that the Asians comment or the monkey
13 comment were innocent, small talk among Department personnel is not persuasive. Rather, the
14 statements can be seen in only one light. The Employee sought to discredit the Chief with
15 subordinate personnel. The Commission need not make a determination regarding intentional or
16 other racial aspects of the Asians comment. Whether racist or not, it constituted disrespectful,
17 discourteous and insubordinate conduct.

18 **4.15** Communication of Expectations.

19 **4.15.1** The Commission is not persuaded that Employee was unaware that his
20 conduct was inappropriate. Employee has been with the Department for many years and has
21 sufficient knowledge of requirements for behavior and conduct. In consideration of both the
22 appropriateness for discipline as well as the level of discipline, the Commission addresses the
23 Department's Code of Conduct in relation to the charges against Employee.

24 **4.15.2** The Code of Conduct ("Code") "describe[s] expectation of behavior and
25 conduct, both on duty and off duty for all commissioned police personnel..." Ex. 18; Code, at
26 26.1.1 II. "Unsatisfactory performance" includes an employee's failure to conform to work

1 standards established for the officer's rank, rate or position. Code, at 26.1.1 IIIJ. As a
2 lieutenant, Employee has particular responsibilities for understanding and implementation of
3 Department standards.

4 The Lieutenant shall be responsible for developing and conducting in – service
5 training for police department employees...the training should foster positive and
6 constructive techniques for **improving employee productivity, effectiveness and
morale....**

7 Code, at 26.1.4 IIIA(d) (emphasis applied). Employee was specifically responsible (beyond his
8 status as second in command of the Department) for improving employee morale. His conduct
9 in undermining employee morale is directly contrary to the specific standards of the Department,
10 as well as common expectations in a quasi-military organization.

11 **4.16 Progressive Discipline.** The Code also provides that discipline will “generally be
12 administered in a progressive fashion.” Code, at 26.1.4 III. The Code also provides that

13 The seriousness of the incident will dictate at what level of the progressive
14 discipline continuum the incident will fall. The following will all be taken into
15 consideration in the administration of discipline; [sic] the seriousness of the
16 incident, the circumstances surrounding the incident, the employee's past
disciplinary records, the employee's past work performance, the overall negative
impact on the organization the incident caused, and the prognosis for future
similar problems.

17 Code, at 26.1.4 III (emphasis added). Here the Commission finds negative impact arising from
18 Employee's conduct. We find credible and persuasive the testimony of civilian employees
19 Beckley and Crum. Rather, they came forward directly and without pressure in October 2005 to
20 identify serious concerns regarding Employee's conduct. Additionally, from the record before it,
21 the Commission finds no evidence of remorse or recognition of the impropriety of the conduct.
22 As a result, the potential for “future similar problems” remains present should Employee remain
23 in a command position.

24 **4.17 Termination not Warranted.** As Chief Chen recognized, Employee had not
25 previously “crossed the line” of inappropriate behavior. Ex. 6. Employee's comments and
26

1 efforts to undermine Chen warranted substantial discipline, but not termination. Employee's
2 conduct demonstrated his admitted interest in levels of responsibility as a patrol officer, only.
3 Ex. 9. There is cause for Employee's suspension and demotion to the rank of patrol officer.

4 **4.18** Return to Employment. Employee admitted before the Commission to serious
5 health issues that appear to the Commission to preclude Employee's return to City employment.
6 This must be addressed in the remedy phase of this proceeding.

7
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9 **5. CONCLUSIONS.**

10 **5.1** Merit System. Civil Service is a balanced, merit system of employment. It
11 provides for selection on the basis of merit, tenure for employment, and the Commission's
12 independent review of certain employment actions. It protects civil service employees and the
13 public from political or unjustified actions. A sound civil service system must allow for the
14 removal of personnel, when cause is shown, for the good of the public. RCW 41.12.080 ("the
15 tenure...shall be only during good behavior...").

16 **5.2** Good Faith and for Just Cause. The Commission recognizes the standards set
17 forth in chapter 41.12 RCW and its own Rules. We look to the standard of cause or just cause,
18 as identified to us by the parties. The commission requires that the City have just cause and
19 satisfy procedural and substantive standards. The City's right to discipline (including discharge)
20 must be in good faith and for just cause. And, this Commission is charged with assuring that
21 personnel actions are not based on political or religious grounds. RCW 41.12.090. In
22 considering the record before it, the Commission has independently reviewed the conduct for
23 which notice was given and upon which proper grounds for discipline rested. We measure good
24 faith by considering the evidence of both the City Manager's and Chief's procedural actions and
25 the substantive information upon which the Employee's termination was based. The evidence
26 includes our observation of the witnesses and the assessment of their credibility.

1 **5.3** No Evidence of Religious or Political Motives. There is no evidence of religious
2 or political actions or motivations in these proceedings relating to the termination of Employee.

3 **5.4** Good Faith. The City acted in good faith in imposing discipline on Employee.
4 The actions by the City in this matter were not taken for religious or political grounds and were
5 not taken in retaliation against Employee as a result of Employee's assertion of Employee's
6 rights or benefits.

7 **5.5** Due Process. The Employee was provided all process due prior to disciplinary
8 action. The Commission concludes that there was a thorough investigation with full opportunity
9 for the Employee to respond early and late in the course of the investigation.

10 **5.6** Standards Violated. The conduct of Employee, as found above, was in violation
11 of Department standards; and were below the standards that would be expected of a police
12 lieutenant of his standing, experience and capabilities.

13 **5.7** Discipline. The Commission may affirm, reverse or modify the Employee's
14 termination. RCW 41.12.090. There is just cause for the imposition of discipline by the City.
15 But, upon application of standards for progressive discipline, the City in 2006 did not have cause
16 for Employee's termination from City employment.

17 **5.8** Conclusions – Findings. Any conclusion in this Section 5 that is appropriately
18 determined to be a finding shall be considered as such and, any finding in Sections 3 and 4 that is
19 appropriately determined to be a conclusion is incorporated herein.

20 **5.9** Independent Decision. This decision is the independent, quasi judicial decision of
21 the Commission, having weighed the evidence and considered the record before it as presented
22 by the parties.

23 **6. ORDER**

24 **6.1** Discharge Set Aside. The Commission sets aside the discharge of Employee, and
25 orders restoration of certain employment benefits consistent with this decision.

**CITY OF MEDINA
CIVIL SERVICE**

**Skinner Hearing
November 14, 2012**

RECORD OF EXHIBITS

1. Admitted 10/20/05 – Memo from Beckley to Yourkoski
2. Admitted 10/20/05 – Memo from Crum to Yourskoski
3. Admitted 10/31/05 – Schulze interview notes from interview of Yourkoski
4. Admitted 10/31/05 - Schulze interview notes from interview of Crum
5. Admitted 10/31/05 - Schulze interview notes from interview of Beckley
6. Admitted 11/01/05 – Email from Chen to Schulze
7. Not admitted 11/01/05 - Schulze interview notes from phone interview of Chen
8. Admitted 11/03/05 – Schulze and Yourkoski internal investigative notice to Skinner
9. Admitted 11/09/05 – Schulze interview notes from interview of Skinner
10. Admitted 12/29/05 – Chen Memo to Schulze
11. Admitted 01/13/06 – Letter from Chen to Skinner re pre-disciplinary notice
12. Admitted 01/27/06 – Memo from Skinner to Schulze
13. Admitted 02/01/06 – Chen Memo to Skinner re Administrative leave
14. Admitted 02/01/06 – Chen memo to Schulze re Loudermill hearing
15. Admitted 02/08/06 – Schulze letter to Skinner re employment termination
16. Admitted Code of Conduct for Department Members
17. Admitted 02/14/06 – Notice of Appeal
18. Not admitted Discipline and Discharge from Medina Civil Service Rules
19. Admitted 02/09/06 – WSCJTC Notice of Skinner Termination
20. Not admitted 10/01/07 – WSCJTC Notice of Crum Termination
21. Not admitted 11/20/06 – WSCJTC Letter to Chen
22. Admitted 2004 - Skinner performance evaluation
23. Admitted 2005 – Half year Skinner performance evaluation
24. Not admitted 2000 Seattle Police Department Internal Investigations Report

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No. 711571

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

ROGER L. SKINNER,

Appellant,

v.

CITY OF MEDINA, WA.,

Respondent.

RESPONDENT MEDINA'S MOTION FOR
RECONSIDERATION

Greg A. Rubstello, WSBA #6271
Attorneys for Respondent
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

A. IDENTIFICATION OF MOVING PARTY

The Respondent City of Medina is the moving party.

B. STATEMENT OF THE RELIEF SOUGHT

Medina requests the Court reconsider and modify certain portions of the Court's "PUBLISHED OPINION" filed November 3, 2014 ("the Court's Opinion"), at pp. 2, 7, 8, 9, 10 and 11. The portions of the opinion Medina requests be modified all address subject matter not raised by Medina in its application for a writ of review or necessary to this Court's granting the City a constitutional writ of review determining that the Medina Civil Service Commission acted illegally to the extent it purported to retain jurisdiction to award back pay and benefits in the Commission's Order of December 21, 2012 (the Commission's Order"). The modifications to the Court's Opinion requested by Medina are shown on Appendix A to this motion where the Court's Opinion is edited in *track changes* format. Appendix A is incorporated by this reference herein, as if specifically set forth.

C. PARTS OF RECORD RELEVANT TO MOTION

The Notice of Appeal and other Clerks Papers, as well as the Opening, Response, and Reply Briefs filed with this Court are relevant to this motion.

{GAR1256114.DOCX;2/00093.050019/ }

by this Court. Not even Skinner in his assignments of error and identification of issues raised by his assignments of error sought review by this Court of anything other than the superior court's decision that the Commission had exceeded its authority in ordering back pay and benefits to Skinner. The only substantive claim of error asserted by Skinner in his Opening Brief to this Court was whether the trial court erred in "[o]verturning the decision of the Medina Civil Service Commission with respect to the back pay component of the award to Skinner." The only substantive issue asserted by Skinner in his Opening Brief was "[D]id the Medina Civil Service Commission have the authority to award Skinner back pay?"

On appeal from only part of a judgment or agency order, the court may not review rulings which do not affect the part of the judgment or order appealed. *Hackler v. Hackler*, 37 Wn. App. 791, 796, 683 P.2d 241, review denied, 102 Wn.2d 1021 (1984).

2. The Court's inherent constitutional authority to review the Commission's Order is limited to the facts alleged which establish that the Commission's Order was in some respect illegal or arbitrary and capricious.

The portions of the Commission's Order not illegal or arbitrary and capricious are not subject to review by constitutional writ. *Pacific Rock*

Envtl. Enhancement Group v. Clark County, 92 Wn.App. 777, 782 n. 3, {GAR1256114.DOCX;2/00093.050019/ }

964 P.2d 1211 (1998) (quoting *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998)). The opinion of this Court exceeds the scope of review allowed in review of a lower tribunals order by constitutional writ by: (1) reviewing the effective date of Skinner's reinstatement; (2) by reviewing whether or not the Commission had authority to order retroactive reinstatement prior to the date of its Order modifying the discipline given Skinner; and (3) by "affirming" "Skinner's 60 day suspension with reinstatement on April 17, 2006, at reduced rank and pay grade." Medina did not seek review of those portions of the Commission's order concerning the length of the period of suspension or the reduction in classification, rank and pay grade. Both the City and Skinner (by his appeal to this Court) sought review only of the Commission's authority to order back pay and benefits set out in the sentences of paragraphs 6.3 and 6.4 of the Commission's order that were properly ordered stricken by this Court by constitutional writ.

This Court correctly recognized at p. 7 of its opinion that, "[T]he Commission clearly acted within its authority by suspending Skinner in lieu of removal, setting the 60 day period of suspension without pay, and

then demoting him to patrol officer at a lower level of pay. RCW 41.12.090. **This much is not disputed.**” (emphasis added).²

The Court’s Opinion is incorrect in making the statement at p. 7, to wit:

“What is in dispute is whether as part of the modified discipline the Commission could reinstate Skinner retroactively, to a date prior to its order, and whether it could award back pay.”
(emphasis added)

Only the issue of whether the Commission exceeded its authority by ordering back pay was brought in dispute by Medina’s application for review and Skinner’s subsequent appeal. The issue of whether as part of the modified discipline the Commission could reinstate Skinner retroactively although raised from the bench at oral argument, was not an issue raised by either party. Medina made no allegation or argument in its briefing or in its application to the superior court for review that the Commission exceeded its authority by reinstating Skinner on April 17, 2006; nor did Skinner in his briefing for this appeal.

If this Court’s inherent power of constitutional review is limited to a determination of whether the proceedings below were within the lower

² It is also of note that RCW 41.12.090 provides that when modifying discipline, the Commission has authority to direct a suspension, “... without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay ...” The Commission chose specifically to order the demotion in classification, grade or pay, rather than to order a subsequent restoration to duty. CP 21.

{GAR1256114.DOCX;2/00093.050019/ }

tribunal's jurisdiction and authority and the Court will only accept review if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious as stated by this Court at p. 5 of the Court's Opinion, all the dicta in the opinion regarding the effective date of reinstatement is unnecessary to a determination of the Commission's authority to order back pay and benefits.

The last sentence of the Court's opinion affirming "Skinner's 60 day suspension and reinstatement on April 17, 2006, at reduced rank and pay grade" is not only unnecessary, but beyond the scope of the requested review and the Court's limited review of a lower tribunal's judgment or order when exercising the court's inherent power of constitutional review. The portions of the Commission's Order at paragraph 6.3 not illegal or arbitrary and capricious are not subject to review by constitutional writ. *Pacific Rock Envtl. Enhancement Group v. Clark County*, 92 Wn.App. 777, 782 n. 3, 964 P.2d 1211 (1998) (quoting *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998)).

E. CONCLUSION


The Court should reconsider its opinion and modify it by correcting its characterization of Medina's dispute with the Commission's

order of December 21, 2006, and by striking unnecessary dicta and review of portions of the Commission's decision not illegal or arbitrary and capricious. *See* Appendix A for all requested modifications to the Court's Opinion, including the last sentence of the Court's Opinion at p. 11, which should be modified as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 21st day of November,
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 November 21, 2014, I mailed via US First Class Mail, postage pre-paid, copies of the foregoing document to the following counsel of record:

William J. Murphy
Law Office of William J. Murphy
4216 N. Mississippi AVE #402
Portland, OR 97217

P. Stephen DiJulio
Foster Pepper PLLC
1111 Third AVE #3400
Seattle, WA 98101-3299

DATED this 21st day of November, 2014, at Seattle, Washington.



Charolette Mace
Legal Assistant

Appendix A
Medina's Proposed Modifications to Court's Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF MEDINA,)	
	)	No. 71157-1-I
Respondent,)	
	)	DIVISION ONE
v .)	
	)	PUBLISHED OPINION
ROGER L. SKINNER and the CITY CIVIL)	
SERVICE COMMISSION,)	
)	
Appellant.	)	FILED: November 3, 2014
)	

APPELWICK, J. — Skinner appeals the trial court's order granting the City a statutory writ of review to challenge the award of back pay by the Medina Civil Service Commission. He argues that the City was not entitled to seek a statutory writ of review. Although the City did not apply for a constitutional writ of review, Skinner preemptively argues that the City was not entitled to one. The City stipulated at oral argument that if a constitutional writ of review rather than a statutory writ of review was available, the appeal should be resolved as if a constitutional writ of review had been sought. The City contends that the Commission exceeded its authority when it modified Skinner's discipline and awarded him back pay as a remedy. We conclude that the legislature did not intend for the employer to have a right of appeal under RCW 41.12.090, and therefore a statutory writ of review is unavailable. We reverse the trial court and vacate the statutory writ of review. However, a constitutional writ of review is available to the employer. Under the standard for a constitutional writ of review, we conclude that the Commission exceeded its authority

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No. 71157-1-1/2

under RCW 41.12.090 when it attempted to determine and award back pay and benefits.

The constitutional writ of review is granted. The Commission's order is vacated as to

back pay and benefits, but otherwise affirmed.

FACTS

Lieutenant Roger Skinner was terminated from his position with the City of Medina (City) Police Department on February 15, 2006 for a violation of department standards. Skinner timely appealed his dismissal to the Civil Service Commission (Commission) of the City. On December 21, 2012, the Commission found that the City acted in good faith and with just cause when it disciplined Skinner. But, it found that the City did not have cause to terminate Skinner. The Commission ordered that Skinner's discharge be set aside. Instead of discharge, the Commission ordered that Skinner be suspended without pay and benefits for the period of February 16, 2006 through April 16, 2006. Additionally, it ordered that Skinner be demoted to patrol officer effective February 16, 2006.

Further, the Commission ordered that Skinner was entitled to back pay and benefits as a City patrol officer beginning April 17, 2006 until the date his health precluded his return to work. The Commission said that it would set a hearing at which it would receive evidence as to the implementation of the remedy if the parties could not resolve it via stipulation. Finally, it ordered that it would retain jurisdiction over the matter until resolution of the "remedy phase." The City moved for partial reconsideration challenging the Commission's award of back pay and benefits. The Commission denied the City's motion stating that any issues regarding the offset of Skinner's wages or earnings after his suspension ended would be addressed during the remedy phase of the proceeding.

The City applied for a statutory writ of review under chapter 7.16 RCW on February 15, 2013. The City argued that the Commission exceeded its authority in ordering back pay and benefits to Skinner, because he was not fully reinstated to his old position. The trial court granted the City's writ on October 1, 2013.

Skinner appeals.¹ At oral argument the court noted that if it decided the wrong writ had been obtained, the parties would be free to start over and seek the proper writ. However, given the length of the litigation, the court inquired whether the parties wished a ruling on the merits of the Commission's authority under either writ. The parties agreed the record is complete and that the underlying issue is a question of law. Skinner had already addressed the constitutional writ on the merits in his reply brief. The City had not specifically addressed the constitutional writ in its brief. However, it had briefed how the Commission exceeded its authority. The City orally argued that those same arguments satisfied the constitutional writ analysis. The City stipulated that if a constitutional writ rather than a statutory writ was applicable on these facts, that the court should reach the underlying issue as if the proper writ had been sought.

¹ The City moved to strike Skinner's reply brief, because it raises new arguments and authority in violation of RAP 10.3(c). The City argues that Skinner raises a new argument in his reply brief that is not responsive to the earlier briefing. Skinner's reply brief is responsive to an argument made in the City's briefing. He rebuts the City's argument that a statutory writ was available. Additionally, he asserts that this court could still find that the City had a constitutional writ available to it. Skinner then asserts the standard for evaluating a constitutional writ of review, as outlined in Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 769, 261 P.3d 145 (2011), and addresses the merits of a constitutional writ analysis. Although the City did not have the opportunity to respond to Skinner's reply brief, it stipulated at oral argument to this court reaching the merits of the constitutional writ issue. We deny the City's motion to strike.

DISCUSSION

I. Statutory Writ

The extent of a superior court's authority to grant a writ of certiorari² is a question of law. Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wn.2d 756, 764-65, 261 P.3d 145 (2011). This court reviews the superior court's decision to issue a writ de novo. Commanda v. Cary, 143 Wn.2d 651, 654, 23 P.3d 1086 (2001).

Skinner argues the trial court erred in granting the City's application for a statutory writ of review, because granting one would circumvent the legislature's directive set forth in RCW 41.12.090—the statute that provides the disciplinary procedures for police civil servants. He asserts this is so, because RCW 41.12.090 provides for an appeal only by the disciplined police officer, and not for an appeal by the city. RCW 41.12.090 states, "If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom." RCW 41.12.090 (emphasis added).

In Federal Way, the Supreme Court analyzed authorizing a writ of review in the context of RCW 28A.405.320. 172 Wn.2d at 766. RCW 28A.405.320 provides teachers, principals, supervisors, superintendents, and other certificated employees with the right to appeal an adverse employment action. But, it does not provide the school board with a right to appeal a hearing officer's decision. See RCW 28A.405.320. The Federal Way court framed the issue as how to reconcile the legislature's grant of review by statutory writ with the legislature's denial of review to the school district in RCW 28A.405.320. 172 Wn.2d at 768. The court reasoned that allowing the school district to seek review via statutory writ undermines the legislative intent. *Id.* It reasoned this was so, because the

² RCW 7.16.030 states that a writ of certiorari may be referred to as a writ of review.

legislature created a procedure for appeal and gave only one party the right to appeal. *Id.* Seeking a review via statutory writ is a procedure nearly identical to an appeal. *Id.* In finding the statutory writ unavailable to the district, the court said that a writ of certiorari is clearly not meant to be a substitute for an appeal and cannot be used to circumvent the legislature's clear directive. *Id.*

The statutory conflict in Federal Way is also present in this case. Here, RCW 41.12.090 grants review only to the accused employee. It does not provide the City with a right to an appeal of the Commission's decisions. While RCW 41.12.090 is a different statute than the statute under consideration in Federal Way, the reasoning in Federal Way is on point. Allowing the City to seek a statutory writ of review under chapter 7.16 RCW would effectively provide the City with a right to appeal. This undermines the legislature's intent in RCW 41.12.090 to provide only the employee with a right of appeal. Therefore, the City is precluded from seeking review via statutory writ. We reverse the trial court and vacate the statutory writ of review.

II. Constitutional Writ

The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). A court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. *Federal Way*, 172 Wn.2d at 769. In the constitutional certiorari context, illegality refers to an agency's jurisdiction and authority to perform an act. *Id.* at 770.

Here, the Commission found that the City acted in good faith and for cause when Skinner was terminated. However, even though there was just cause to impose discipline on Skinner, it found that the City did not have cause to terminate Skinner from employment altogether. As a result, the Commission set aside Skinner's discharge and ordered suspension without pay and benefits for 60 days (February 16, 2006 through April 16, 2006) instead. Further, the Commission demoted Skinner to patrol officer, and it ordered that Skinner was entitled to back pay and benefits at the level of patrol officer effective the day after his suspension ended until he would otherwise have been unable to serve as a result of his health.³ The Commission retained jurisdiction over the implementation of the remedy phase and planned to hold an evidentiary hearing if the parties were unable to implement the order by stipulation.

In determining whether the Commission exceeded its authority, we first look to the plain language of RCW 41.12.090. When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. Id. at 9-10.

RCW 41.12.090 provides the Commission with the authority to review a disciplinary action against a The City police department employee. See RCW 41.12.090. Specifically, it says:

[I]f [the Commission] shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith

³ Skinner admitted to the Commission that he had serious health issues that precluded his return to City employment.

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.

RCW 41.12.090 (emphasis added).

The portion of the Commission's order that is in dispute states:

6.3 Remedy. Employee is suspended without pay and benefits for a period of sixty (60) days, effective for the period of February 16, 2006 through April 16, 2006. Effective February 16, 2006, Employee is demoted to the rank and classification of patrol officer. Beginning April 17, 2006, Employee is entitled to back pay and benefits as a The City 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. The Commission understands that implementation of this remedy will require analysis and discussion between the Parties. The Parties shall have until the next regularly-scheduled Commission meeting in February 2013 to implement this decision by stipulation. Failing that, the Commission will at its February meeting set a hearing at which it will receive evidence as to the implementation of the Commission's remedy.

6.4 Further Proceedings. The Commission retains jurisdiction over this matter until resolution of the remedy phase of the proceedings.

The Commission clearly acted within its authority by suspending Skinner in lieu of removal, setting the 60 day period of suspension without pay, and then demoting him to patrol officer at a lower level of pay. RCW 41.12.090. This much is not disputed. What is in dispute is whether as part of the modified discipline the Commission could reinstate Skinner retroactively, to a date prior to its order, and whether it could award back pay.

No case law interpreting RCW 41.12.090, or other similar civil service statutes,⁴ has decided this question.

The City contends that, because RCW 41.12.090 specifically authorizes the Commission to retroactively reinstate the employee and grant back pay when the employee is removed for political or religious reasons or not in good faith for cause, the legislature did not intend to authorize the Commission to ~~do the same grant back pay~~ when the discipline is only modified. We disagree with the premises of this contention. The statute neither precludes retroactive reinstatement nor explicitly does not authorize the Commission to grant back pay when discipline is only modified. See *id.*

~~If the discipline was imposed for religious or political reasons or not in good faith for just cause, the Commission has discretion to set the date for reinstatement. The date is either retroactive to the date of original discipline or immediately as of the date of the Commission's order.⁵ If the discipline was imposed in good faith for just cause, the Commission has the discretion to set a period of suspension with subsequent restoration to duty. Id. Nothing in the statute prohibits retroactive restoration to duty. See *id.* Depending on the length of the suspension and the time elapsed before the Commission enters its order, restoration to duty may be either retroactive or prospective. Whether reversing or modifying a termination or suspension, the Commission exercises statutory~~

⁴ RCW 41.14.120 (Sheriff's Office); RCW 41.08.090 (Firefighters).

⁵ ~~Why the legislature did not make reinstatement of a wrongfully disciplined employee automatically retroactive is not disclosed in the statute nor in any legislative history. See LAWS OF 1937, ch. 13, § 14. This provision has survived substantively unchanged since at least 1937. See LAWS OF 2007, ch. 218, § 14. The statute is silent as to back pay if the Commission merely reinstates the employee effective immediately. Nothing suggests that the employee is not entitled to such back pay merely because the Commission did not reinstate the employee retroactively. Apparently, the employee is left to pursue both contract and tort remedies in court actions.~~

~~discretion to set the date of reinstatement. For the retroactively reinstated employee, the statute mandates the employer to pay compensation back to the time of the original discipline. Id. For the suspended employee, it prohibits pay during the period of suspension.⁶ Id.~~

The Commission has only the authority granted by statute. The statute provides the Commission with the authority to affirm, modify, or reverse discipline. Id. It does not expressly authorize the Commission to award damages or other remedies. See id. We reject Skinner's contention that the Commission has implicit authority to award back pay. Entitlement to pay or compensation from reinstatement, after a period of suspension without pay, flows from the employment contract and any modification to the employee's classification, grade, or pay, not from this statute. Here, the employer's original discipline

⁶~~The City relies on Dunaway v. Soc. & Health Servs., 90 Wn.2d 112, 579 P.2d 362 (1978) for the assertion that an employee is entitled to back pay only when fully reinstated. In Dunaway, the Washington Supreme Court considered the distinction of allowing back pay only for full reinstatement in the context of another statute. Id. at 113. RCW 41.06.220(2) was enacted by initiative in 1961. LAWS OF 1961, ch. 1, § 22. It guarantees back pay and benefits to employees terminated by the state personnel board when "fully reinstated." Dunaway, 90 Wn.2d at 116. The statute enables the exonerated employee to receive all employee rights and benefits and back pay in a single action without placing the onus on the wronged employee to claim back pay in a separate action. See id. at 117.~~

~~On appeal, the employee was suspended without pay for a five month period rather than terminated. Id. at 113. Presumably his salary and benefits resumed as of his reinstatement, because he sued only for back pay and benefits during the period of suspension. Id. at 116-17. The court reasoned that the clear purpose of the statute and the "fully reinstated" designation was to protect employees who are exonerated after appeal. Id. There, the employee was not exonerated. Id. Consequently, he was not entitled to back pay and benefits during the period of suspension. Id. at 117.~~

~~Unlike Dunaway, Skinner has not argued he is entitled to pay and benefits during the period of his 60 day suspension. Nothing in that decision addresses pay and benefits owed for employment occurring after reinstatement from suspension. Nothing in Dunaway supports a theory that an employer does not owe the employee the benefits of his employment effective as of the date of his reinstatement.~~

~~was effective February 16, 2006. The Commission correctly noted that the 60 day suspension ended on April 16, 2006. On April 17, 2006 Skinner was reinstated just as if the City had imposed only a 60 day suspension and demotion in the first place. He was entitled from that point forward to the benefits of his employment, not by virtue of an award of back pay by the Commission, but by virtue of his employment agreement, albeit at a lower rank and pay grade set by the Commission.⁷~~

However, after setting the period and dates for Skinner's suspension without pay, the Commission still explicitly ordered that Skinner was entitled to back pay and benefits until the time he would otherwise have been unable to serve as a result of his health condition. The Commission asserted that it would retain jurisdiction over the matter until the remedy phase of the proceedings were resolved. It reserved the right to hold an evidentiary hearing retaining the implementation of the remedies if the parties were unable to resolve it themselves. Then, in denying the City's motion for reconsideration, the Commission stated, "Any issues regarding the remedy, including offset of Appellant's wages or earnings during the period following April 16, 2006 may be addressed in the remedy phase of this proceeding." Once the Commission asserted authority to control the determination of Skinner's remedy and damages flowing from the City's conduct, it exceeded the authority provided to it under RCW 41.12.090. ~~If the City does not honor its employment compensation obligations to Skinner, his remedy is in court, not before the Commission.~~

⁷ ~~We do not address whether the pay and benefits on reinstatement are otherwise subject to limitation under other legal theories not presented to us.~~

A statutory writ of review is not available to the City. The trial court's grant of a statutory writ of review is vacated. The City is granted a constitutional writ of review. The Commission acted illegally to the extent it purported to retain jurisdiction to award back pay. The portion of the Commission's order entered December 21, 2012 consisting of paragraph 6.3, except the first two sentences, and paragraph 6.4 are vacated. Skinner's 60 day suspension with reinstatement on April 17, 2006, at reduced rank and pay grade is otherwise affirmed. The Order of the Commission is otherwise unchanged.

WE CONCUR:

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

CITY OF MEDINA,)	
	)	No. 71157-1-I
Respondent,)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
)	
ROGER L. SKINNER, and the CITY)	
CIVIL SERVICE COMMISSION,)	
)	
Appellant.)	

The respondent, City of Medina, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied

DATED this 16th day of December, 2014.


Judge

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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.
19

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

14 The Commission exercises its authority under RCW 41.12.090. RCW 41.12.090 grants the
15 Commission the authority to review the decisions of the City of Medina to remove, suspend,
16 demote, or discharge a member of the classified civil service. The Commission can uphold,
17 overturn, or modify such decisions made by the City. The City contends that the language of the
18 statute grants the Commission the authority to grant back pay and benefits only if it overturns the
19 disciplinary action taken by the City. The City argues that because the Commission merely
20 modified the disciplinary action it has no such authority to order back pay and benefits. From the
21 City's point of view, modification indicates approval of the decision to discipline the employee,
22 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
23 In the present case the Commission did not overturn the actions of the City under this provision.
24 Instead the City modified the discipline imposed by the City under the immediately following
25 provision:
26

27 "The commission upon such investigation, in lieu of affirming the removal,
28 suspension, demotion or discharge may modify the order of removal,
29 suspension, demotion or discharge by directing a suspension, without pay, for a
30 given period, and subsequent restoration to duty, or demotion in classification,
31 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.
10

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.
14

15
16 DATED: July 25, 2012.

17 
18 Judge Susan J. Craighead

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.

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