No. 93800-8

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

JONATHAN J. SPRAGUE, a married man,

Plaintiff/Appellant,

v.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; MIKE THOMPSON and LINDA THOMPSON, husband and wife, and the marital community composed thereof,

Defendants/Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF THE RESPONDENTS

This Answer is filed by Respondents Spokane Valley Fire Department ("SVFD") and Mike and Linda Thompson, collectively, through undersigned counsel.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

The issues raised in Jonathan J. Sprague's Petition for Review do not merit review under RAP 13.4(b). However, if review is accepted, the issues before the Court would be:

1. Whether the Court of Appeals properly concluded that the Civil Service Commission made factual findings "concerning the department's true motivation for terminating Mr. Sprague's employment." Appendix at 12.

2. Whether the Court of Appeals correctly concluded that the factual determinations of the Civil Service Commission were "dispositive of all [Mr. Sprague's] claims." Appendix at 12.

3. Whether the Court of Appeals properly ruled that SVFD's policy was constitutional.

III. STATEMENT OF THE CASE

Mr. Sprague held the rank of Captain while employed by SVFD. CP 4. In the year leading up to his termination, Mr. Sprague repeatedly used his official SVFD email account to disseminate personal emails. CP 153-155; 164-166; 172-196; 208-211. This conduct violated Department policies, including S&O #171. *Id.*

In accordance with S&O #171, Mr. Sprague was given orders from his superiors to discontinue the use of SVFD email for personal matters. CP 153-155; 164-166; 172-196; 208-211. Despite this order, Mr. Sprague continued to send personal emails to other firefighters at their business email addresses regarding his Spokane Valley Christian Firefighters Fellowship in violation of S&O #171. *Id.*

Mr. Sprague was offered the opportunity to communicate his Christian message by way of his personal email but declined. CP 147. In response, SVFD utilized progressive discipline to encourage Mr. Sprague to stop violating policy and follow direct orders. CP 153-155; 164-166; 172-196; 208-211. Progressive discipline was unsuccessful, and Mr. Sprague persisted. *Id.* As a result of serial violations of policy and orders, SVFD was forced to recommend termination to the Spokane Valley Board of Fire Commissioners. CP 116-119.

On October 8, 2012, the Board of Fire Commissioners held a public hearing at Mr. Sprague's request. CP 121-131. Mr. Sprague participated in the hearing, was given an opportunity to be heard, and argued against the proposed disciplinary action. *Id.* Counsel for the International Association of Firefighters Local 876 was present and argued on behalf of Mr. Sprague. CP 64-96. Mr. Sprague's arguments included Federal, State, and biblical based contentions for being able to use public

property to promote his personal Christian beliefs. CP 128-130. At the conclusion of the hearing, the Board of Fire Commissioners voted to accept the proposed termination of Mr. Sprague for repeated refusal to follow policy, intentional contravention of orders, and insubordination. CP 130.

Mr. Sprague appealed his termination to the Civil Service Commission. CP 133. On January 14, 2013, the Civil Service Commission conducted a full hearing under the authority of RCW 41.08.090. CP 63-96. The hearing was recorded by a court reporter. CP 63-96. Mr. Sprague was again represented by Union provided counsel. CP 64. Mr. Sprague was present throughout the entire proceeding; his lawyer presented witnesses; cross examined SVFD's witnesses; submitted exhibits; and made evidentiary objections. CP 63-96; 249-294. Further, he was permitted to argue on his own behalf. CP 65-66. At the end of the hearing, Mr. Sprague was given one month to submit a post-hearing brief. CP 95. On February 14, 2013, Mr. Sprague submitted a twelve page post hearing brief, which again advanced his arguments. CP 313-324.

Approximately two months later, on March 21, 2013, the Commission issued its Findings and Decision. CP 98-104. By statute, the Commission was required to decide whether Mr. Sprague's termination by the Board of Fire Commissioners and SVFD was made in good faith, for

cause, and not for religious reasons. RCW 41.08.090. The Commission affirmed that Mr. Sprague was terminated for repeated violations of policy and orders, as well as insubordination. CP 98-104. Mr. Sprague had a right to appeal to Superior Court under RCW 41.08.090; but failed to exhaust this remedy. Instead, the Civil Service proceeding became final on April 22, 2013, and Mr. Sprague filed the instant collateral action.

On February 4, 2014, Mr. Sprague filed this lawsuit against SVFD and Mike and Linda Thompson as a result of his alleged wrongful termination. CP 3-10. On December 19, 2014, SVFD filed a Motion for Summary Judgment arguing that Mr. Sprague's claims were barred by collateral estoppel. CP 325-327. On February 27, 2015, Mr. Sprague filed his own Motion for Partial Summary Judgment seeking declaratory judgment that "SVFD's policy was and remains unconstitutional, and that Mr. Sprague is entitled to an order enjoining its future enforcement." CP 334-344. On May 15, 2015, the trial court granted SVFD's Motion for Summary Judgment and dismissed Mr. Sprague's lawsuit in its entirety. CP 492-495. The trial court also entered an order denying Mr. Sprague's Motion for Partial Summary Judgment. CP 489-491.

Following extensive briefing and oral argument, on September 21, 2016, the Washington State Court of Appeals, Division Three issued its decision and affirmed the trial court's ruling. Appendix at 1-52. In the

Court of Appeal's opinion, Judge Korsmo analyzed the constitutionality of SVFD's policy and determined that SVFD's application of the policy in an allegedly discriminatory manner was an issue of fact barred by collateral estoppel. Appendix at 6, 11. Judge Korsmo found that SVFD's policy was constitutional as "[i]t would destroy the concept of a nonpublic forum to hold that limiting the use of a government computer system to government business was not reasonable." Appendix at 8. As for collateral estoppel, Judge Korsmo reasoned that Mr. Sprague "is collaterally estopped by the findings made in the unappealed administrative proceedings [, which] makes it unnecessary to consider the challenge to the policy that he believes the department actually followed." Appendix at 9. Judge Korsmo reasoned that collateral estoppel applied as:

> The issue presented to the civil service commission—whether SVFD discriminated against Mr. Sprague because of religion—is the same issue presented at the heart of this action. The civil service commission action did end in a final decision. The parties are identical. There is no injustice in applying collateral estoppel in this circumstance. Mr. Sprague was the one who presented the issue to the commission; he had a full opportunity to present his case.

Appendix at 10-11. Consequently, Judge Korsmo concluded that the "factual findings concerning the department's true motivation for terminating Mr. Sprague's employment are dispositive of all of his claims

in this action." Appendix at 12 (underlining added) (citing *Shoemaker v. Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987)).

Mr. Sprague filed this Petition for Review on October 21, 2016.

IV. THIS COURT SHOULD NOT ACCEPT REVIEW

RAP 13.4(b) provides:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(Underlining added). Here, none of these factors warrant review of the Court of Appeals' decision.

A. The Court of Appeals' Decision is Not in Conflict With Any Decision of This Court.

Under RAP 13.4(b)(1) review is warranted if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." In the Petition for Review, Mr. Sprague suggests that the decision of the Court of Appeals is in conflict with this Court's decisions in *Nichols v.*

Shohomish Cty., 109 Wn.2d 613, 746 P.2d 1208 (1987), as well as *Kennedy v. City of Seattle*, 94 Wn.2d 376, 617 P.2d 713 (1980).

Petitioner's argument is in error. The Washington State Supreme Court's decision in *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) clearly holds that factual determinations made by a civil service commission can be given preclusive effect under the doctrine of collateral estoppel. In this case, the Court of Appeals correctly applied that standard. In applying *Shoemaker*, the Court of Appeals explained that that when addressing the doctrine of collateral estoppel in an administrative action, the court should consider: (1) whether the agency, acting within its competence, made a factual decision; (2) procedural differences between the agency and the court, and (3) policy considerations. Here, each of the elements supporting the application of collateral estoppel are satisfied: (1) the issues presented to the civil service commission regarding whether Mr. Sprague was discriminated against on account of religion was the same as presented to the Court of Appeals; (2) the civil service commission proceeding did end in final judgment; (3) the parties are identical; and (4) no injustice occurred because Mr. Sprague had the opportunity to present his case to the civil service commission and he failed to appeal their findings. *See Shoemaker*, 109 Wn.2d at 508 (listing factors).

1. The Civil Service Commission's Conclusion Regarding the Reasons for Mr. Sprague's Discharge Were Properly Characterized as Findings of Fact By the Court of Appeals' Decision in Accord with Previous Decisions By This Court.

The Supreme Court of Washington has held collateral estoppel applies to factual findings by a civil service commission regarding the reason for a public employee's demotion. *Shoemaker*, 109 Wn.2d 504. In *Shoemaker*, a police officer participated in a civil service commission administrative proceeding after he alleged that he was demoted in bad faith for testifying before the Bremerton Civil Service Commission regarding alleged irregularities in the grading of the police department's performance evaluations. *Shoemaker*, 109 Wn.2d at 505-06. The *Shoemaker* Court reasoned that "the procedures employed by the Bremerton Civil Service Commission in hearing Shoemaker's claim are sufficient to justify giving preclusive effect to the Commission's decision on the issue of retaliation." *Id.* at 509. The court noted that during the hearing:

> Each side called witnesses, introduced documentary evidence and cross-examined the other's witnesses, thereby satisfying the requirement of a fair opportunity to present and rebut evidence. Counsel's opening and closing statements and hearing memoranda permitted a formulation of the legal issues

> raised by the facts and an application of the law to those facts. There was a final adjudication on the record in the form of findings of fact and conclusions of law. Other procedural safeguards were provided in the taking of testimony on oath and the right of Shoemaker to move for reconsideration and to appeal the Commission's decision to superior court, even though he chose not to pursue the latter remedy in favor of suing in federal district court on a federal claim.

Id. at 510. Consequently, regarding the same issue Mr. Sprague claims now warrants review, the *Shoemaker* Court applied collateral estoppel when the civil service commission decided the factual issue of "whether there was any retaliation at all; whether a bad faith motive played any substantial part in the demotion." *Id.* at 512.

Judge Korsmo correctly applied *Shoemaker* as follows:

> *Shoemaker* involved a similar finding by a civil service commission. There a demoted deputy police chief contended that his demotion was the result of retaliatory action. The commission found otherwise. 109 Wn.2d at 505-07. Our court concluded that the finding was factual in nature and should be given preclusive effect due to collateral estoppel. *Id.* at 507-13.

Appendix at 12 n. 5.[1] Notably, the Petition for Review does not even mention *Shoemaker*, a case directly on point.

In the situation at hand, RCW 41.08.090 provides that the Civil Service Commission "may affirm the removal, or 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." In Mr. Sprague's case, the Commission exercised its statutory authority and made required factual findings that Mr. Sprague was terminated in good faith, for cause, and not for religious reasons. CP 98-104.

In the Petition for Review, Mr. Sprague claims *Kennedy* supports his position that "[t]he Court of Appeals decision below purported to give collateral estoppel effect to 'findings' of the civil service commission that are, in effect, conclusions of law." Pet. for Review at 14. However, *Kennedy* is a factually distinguishable case dealing with the

[1] Division Three has also previously correctly applied collateral estoppel based on consideration of whether application of the doctrine would work injustice on the plaintiff. In a 2008 opinion authored by Judge Korsmo, Division Three held that a decision by the Department of Corrections' Personnel Appeals Board did not collateral estop an employee's discrimination claim. *See Carver v. State*, 147 Wn. App. 567, 574-75, 197 P.3d 678 (2008). Judge Korsmo reasoned that application of the doctrine would work injustice as the plaintiff "represented herself after DOC itself had concluded that she suffered from dementia to the extent that she could not even perform basic office work and that there was no position in the entire department she could hold." *Id.* at 575.

constitutionality of a houseboat ordinance. In *Kennedy*, the plaintiffs brought an action seeking declaratory judgment that the ordinance was unconstitutional. *Kennedy*, 94 Wn.2d at 378. Prior to the declaratory judgment action, the City of Seattle had previously prosecuted one of the plaintiffs, Mr. Kennedy, for a criminal violation of the ordinance, but "[t]hat prosecution was dismissed because the Municipal Court judge ruled that the ordinance was unconstitutional." *Id.* The plaintiffs argued that the defendants were "collaterally estopped from denying that the ordinance is unconstitutional." *Id.* In determining that collateral estoppel did not apply, the court only considered whether the application of the doctrine would work an injustice, concluding that "[i]t would be manifestly unjust not only to litigants Kennedy and McGuire but to other houseboat and moorage owners for the constitutionality of the houseboat ordinance to be determined by a Municipal Court ruling unappealed by the City." *Id.* at 378-79 (underlining added). The *Kennedy* Court's decision had absolutely no bearing on whether a civil service commission's factual findings are subject to collateral estoppel.

Consequently, the Court of Appeals' decision does not conflict with *Kennedy*, and follows *Shoemaker*, as the reason behind Mr. Sprague's discharge was clearly a factual finding in the underlying civil

service commission proceeding and no injustice has resulted to Mr. Sprague individually from application of collateral estoppel.

2. The Court of Appeals' Decision Correctly Held the Civil Service Commission Had Authority to Determine the Reason for Mr. Sprague's Discharge.

According to Mr. Sprague, the Court of Appeals' decision is in conflict with *Nichols* because "a civil service commission decision upholding an employee's termination does not give rise to collateral estoppel with respect to issues that the commission had no authority to hear or determine." Pet. for Review at 13-14. Mr. Sprague seems to suggest that the Civil Service Commission's finding of fact regarding the reason for his discharge was a conclusion of constitutional law. *Id.* Mr. Sprague's reliance on *Nichols* is misplaced as that case is factually distinguishable from the circumstances present here. In *Nichols*, the Court held "since the Commission had no authority to hear or determine rights under the Veterans' Reemployment Rights Act," collateral estoppel did not apply to any determination regarding the veterans' reemployment rights. *Nichols*, 109 Wn.2d at 618.

However, analogous to this case, the *Shoemaker* Court was presented with the same argument Mr. Sprague now makes here—"that the Commission could not have determined the same issue as that presented in the civil rights suit because the Commission had no authority

to consider the constitutionality of the City's actions." *Shoemaker*, 109 Wn.2d at 512. The *Shoemaker* Court reasoned that "[w]hile the Commission could not have adjudicated the section 1983 claim, . . . it may have decided an issue of fact that is common to both Shoemaker's petition for reinstatement before the Commission and to his section 1983 claim." *Id.* In reaching the conclusion that collateral estoppel applied, the *Shoemaker* Court dismissed this argument because "[t]he fact that the issue is also a central element in the federal civil rights claim does not mean that giving preclusive effect to that determination is an improper application of claim preclusion or that the Commission has acted beyond its competence." *Id.* at 512-13.

Contrary to Petitioner's argument, the decision of the Court of Appeals does not conflict with *Nichols* because the opinion found that it was the factual determinations, not the legal determination, which warranted dismissal. Appendix at 9. The Court of Appeal's opinion further aids in distinguishing *Nichols*, stating "[w]e agree with Mr. Sprague that the commission's legal conclusions, such as its determination that its rulings complied with the First Amendment, are not subject to estoppel." Appendix at 10. However, as Judge Korsmo explicitly stated in the Court's opinion:

> Mr. Sprague's argument is somewhat misfocused. He correctly takes issue with the civil service commission's legal conclusions, but they are not what cause him problems here. Instead, it is the unchallenged factual determinations concerning the reasons for termination that doom this appeal.

Id. (underlining added).

The Court of Appeals' decision clearly applied *Shoemaker*, and does not conflict with either *Kennedy* or *Nichols*. Therefore, review is not appropriate under RAP 13.4(b)(1) and should be denied.

B. Mr. Sprague Fails to Identify Any Court of Appeals Decision Conflicting With the Decision Below.

Under RAP 13.4(b)(2) review is warranted if "the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals." *Id.* While Mr. Sprague cites RAP 13.4(b)(2) as a basis for review, he offers no authority or argument in support of his citation. In fact, Mr. Sprague's Petition for Review does not cite any appellate decisions from any division of the Washington State Court of Appeals. Consequently, review is not warranted under RAP 13.4(b)(2).

C. The Court of Appeals Decision Does Not Pose a Significant Constitutional Question.

Under RAP 13.4(b)(3) review is warranted if "a significant question of law under the Constitution of the State of Washington or of the

United States is involved." Mr. Sprague suggests that review is appropriate because "[t]he lack of a controlling opinion regarding the constitutionally of the official-but-unwritten policy creates uncertainty for lower courts." Pet. for Review at 12. Without providing any authority, Mr. Sprague essentially argues that he can conduct a facial challenge of some type of alleged unwritten policy.

The Court need not address Mr. Sprague's constitutional claims as his claims are barred by the doctrine of collateral estoppel. Under Washington law, "courts will not reach constitutional issues when a case can be decided on other grounds." *State v. Labor Ready, Inc.*, 103 Wn. App. 775, 782, 14 P.3d 828 (2000); *accord Pitzer v. Union Bank of California*, 141 Wn.2d 539, 543, 9 P.3d 805 (2000). Because the issues raised by Mr. Sprague were previously determined by the Civil Service Commission, the Court need not evaluate the constitutionality of SVFD's policy; his claims are barred in their entirety based upon collateral estoppel.

Even so, the Court of Appeals' decision is in accordance with well-established case law regarding the First Amendment. "'The constitution allows the regulation of protected speech in certain circumstances.'" *Herbert v. Washington State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 259, 148 P.3d 1102 (2006) (quoting *City of Seattle v. Huff*, 111 Wn.2d

923, 926, 767 P.2d 572 (1989)). "If the forum is determined to be nonpublic, the restriction is constitutional if it is reasonable in light of the purposes of the forum and is viewpoint-neutral." *Herbert*, 136 Wn. App. at 263, 148 P.3d 1102; *accord Knudsen v. Washington State Executive Ethics Bd.*, 156 Wn. App. 852, 864, 235 P.3d 835 (2010). A governmental agency's "e-mail system [is] a nonpublic forum." *Knudsen*, 156 Wn. App. at 866, 235 P.3d 835. Under the nonpublic forum analysis, a restriction on speech must be "reasonable and viewpoint-neutral." *Herbert*, 136 Wn. App. at 265, 148 P.3d 1102.

Consistent with these cases, Judge Korsmo correctly reasoned "[i]t would destroy the concept of a nonpublic forum to hold that limiting the use of a government computer system to government business was not reasonable." Appendix at 8. Judge Korsmo also correctly noted:

> [SVFD's] policy of not permitting private use of the nonpublic forum was reasonable. Mr. Sprague lost his ability to claim that there was an alternative policy when he failed to appeal the civil service commission determination to the contrary.

Id. at 12-13. Further, Acting Chief Judge Lawrence-Berrey's concurrence correctly stated: "[i]f we had to reach the issue, I would hold that here, SVFD successfully navigated between the Scylla of not respecting Mr. Sprague's free speech right and the Charybdis of exposing it to

Establishment Clause liability by appearing to endorse a particular religious view." *Id.* at 17.

As the Court of Appeals correctly applied the precedent in this area, review is not warranted under RAP 13.4(b)(3)

D. The Court of Appeals Decision Does Not Involve an Issue of Substantial Public Interest.

Under RAP 13.4(b)(4), review is warranted if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." A Court of Appeals decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

As explained above, the Court of Appeals' decision cannot create any lower court confusion, or other adverse consequences, as it correctly applied well-established law. Further, no public interest is at stake as the civil service commission's determination dealt solely with Mr. Sprague's employment, and has no effect on any person other than Mr. Sprague. Review is inappropriate under RAP 13.4(b)(4).

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V. CONCLUSION

Based upon the foregoing argument and authority, Spokane Valley Fire Department and Mike and Linda Thompson respectfully request this Court deny Mr. Sprague's Petition for Review.

RESPECTFULLY SUBMITTED this 18th day of November 2016.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

By: _____

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DECLARATION OF SERVICE

I, Kristie M. Miller, declare and say as follows:

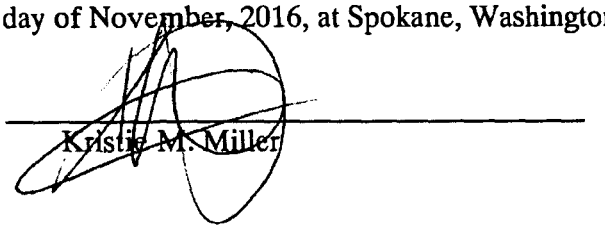
1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

2. On November 18, 2016, I caused to be served ANSWER TO PETITIONER'S PETITION FOR REVIEW on the individuals named below in the specified manner indicated.

Matthew C. Albrecht David K. DeWolf Albrecht Law, PLLC 421 W. Riverside Ave., Suite 614 Spokane, WA 99201	___ U.S. Mail _X_ Hand-Delivered ___ Overnight Mail ___ Facsimile _X_ Email
George M. Ahrend Ahrend Law Firm, PLLC 100 East Broadway Avenue Moses Lake, WA 98837	_X_ U.S. Mail ___ Hand-Delivered ___ Overnight Mail ___ Facsimile _X_ Email

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 18th day of November, 2016, at Spokane, Washington.



Kristie M. Miller