No. 333523

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JONATHAN J. SPRAGUE, a married man,

Plaintiff-Appellant,

vs.

SPOKANE VALLEY FIRE DEPARTMENT, a fire district; et al.,

Defendants-Respondents,

BRIEF OF APPELLANT JONATHAN J. SPRAGUE

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I. INTRODUCTION

Plaintiff-Appellant Jonathan J. Sprague ("Sprague") was employed as a firefighter by Defendant-Respondent Spokane Valley Fire Department ("SVFD") from 1995 to 2012. He was promoted to the rank of captain. Prior to the dispute over his speech which included his religious viewpoints, he had never been disciplined and was described by SVFD as an excellent firefighter. In the course of department-wide electronic communication system[1] discussions of topics such as suicide prevention, Sprague expressed personal views including references to religious viewpoints on those topics. SVFD informed Sprague, initially, that communications citing explicitly to the Bible were prohibited by SVFD policy. SVFD later justified this policy as being "content-neutral," but in fact was enforcing a policy creating a "religion-free zone" at the workplace. SVFD further explained later that not only biblical citations but in fact communicating *any religious viewpoint* over its systems violated SVFD policy. Believing that SVFD was imposing

[1] Because the SVFD policy was applied equally to both SVFD's email and intranet "bulletin board" systems, this brief will describe both of those systems cumulatively as the SVFD internal electronic communication systems. To understand what the SVFD bulletin board system was, imagine a type of "Craig's list" where only SVFD employees (not the public) can post on everything from fundraisers to general discussions of broad ranging topics to selling hay or children's bikes. In fact, the ONLY speech prohibited from the bulletin board system was speech which included religious viewpoints. It was described by various SVFD personnel as a type of electronic substitute for the old-fashioned cork-board bulletin board.

restrictions that were contrary to constitutional guarantees of neutrality toward religion, Sprague continued expressing his constitutionally protected views. SVFD treated his behavior as insubordinate and initiated employee discipline.

When first advised of the new speech policy, Sprague lodged a complaint with SVFD's governing board, which authorized an investigation. This investigation was conducted by SVFD's longstanding contract attorney who concluded SVFD's policies did not violate the constitution. In reliance on its belief in the constitutionality of its policy, SVFD then fired Sprague for being insubordinate by violating the policy that prohibited religious viewpoints in SVFD internal electronic systems. Sprague then asked the Civil Service Commission (the "Commission")[2] for an administrative review of SVFD's decision seeking reinstatement of his employment, but the Commission upheld SVFD's decision to terminate Sprague, concluding that SVFD's policy was lawful.[3]

Sprague next filed suit in Superior Court seeking damages for his wrongful termination and injunctive relief from SVFD's unconstitutional

[2] The Commission is a panel of three non-lawyers appointed by the governing board of SVFD to hear administrative appeals of SVFD personnel and human resource decisions.

[3] There is no dispute that SVFD's policy on insubordination acknowledges, as it must, that insubordination occurs **only** when a firefighter fails to follow a **lawful** command.

policy. SVFD defended its policies and its termination of Sprague by asserting the affirmative defense of collateral estoppel. Both SVFD and Sprague sought summary judgment from the trial court: Sprague sought injunctive relief based upon the undisputed evidence regarding the unconstitutional nature of SVFD's policy, while SVFD argued that Sprague was collaterally estopped from challenging the constitutionality of SVFD's policy because that issue had been determined at the Civil Service Commission hearing.

The trial court heard both motions on the same day. The trial court ruled that collateral estoppel prevented Sprague from challenging either the constitutionality of SVFD's policy or SVFD's decision to terminate him. The trial court then dismissed all of Sprague's claims with prejudice. This appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that a government agency is allowed to single out religious speech for exclusion from otherwise open discussion of personal views addressing value-laden subjects such as suicide prevention and leadership.

2. The trial court erred by giving preclusive effect under the doctrine of collateral estoppel to a legal conclusion reached by an administrative commission that lacked both subject matter jurisdiction and competence to decide a legal issue—the constitutionality of SVFD's policy.

3. The trial court erred in dismissing claims for injunctive relief and retaliation based on collateral estoppel where the previous adjudication was limited to the internal administrative appeal of Sprague's termination.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it lawful for a government agency to single out speech because it contains a religious viewpoint for exclusion from the same forum in which the agency is otherwise participating and allowing an open discussion of issues such as suicide prevention and leadership?

2. Should a legal conclusion reached by an administrative body regarding the constitutionality of a governmental restriction on free speech

be given preclusive effect under the doctrine of collateral estoppel to bar subsequent review of the constitutionality of that government restriction?

3. Should a trial court dismiss all claims, including declaratory and injunctive relief, based upon an administrative agency's findings regarding wrongful termination?

IV. STATEMENT OF THE CASE

Sprague began his employment with SVFD in 1995. His initial rank was "firefighter." He was promoted to captain in 2005. CP 26. As an employee of SVFD Sprague was given access to the email system and an electronic bulletin board that was available for use by all employees. CP 26. Employees were also allowed to access the internet using SVFD computers. CP 26. In 2010 Sprague and others formed the Spokane Valley Christian Firefighter Fellowship ("Fellowship"). CP 82. Sprague used the email system to alert fellow employees to the existence of the Fellowship and its activities. In 2010 SVFD installed an internet filter that prevented employees from accessing religious websites. CP 26. At the same time, employees were able to access other types of websites. CP 26.

SVFD turned next to prohibiting expression of religious viewpoints in its internal electronic systems, justifying the prohibition under SVFD Policy 171, which states "the use of the electronic mail system is reserved solely for SVFD business and should not be used for personal business." CP 373. However, according to Valerie Biladeau, the CR 30(b)(6) representative designated by SVFD, employees were permitted to use the email system for personal business so long as the personal business was "linked to SVFD business." CP 351. For example, if an employee needed to stay past normal working hours and needed to make arrangements to take

care of the employee's dog, that would be a permissible use because of "could be linked to SVFD business." CP 351. SVFD later shifted this explanation again, admitting the policy as implemented was focused on preventing expression of religious viewpoints rather than preventing communication of all "personal business":

> He could send an e-mail that said the Spokane Christian firefighter fellowship is going to meet on Monday at six p.m. at such and such a place for fellowship. He could have done that all day long if he wanted to. **It was because he was using religious signs and Scripture that was the problem.**

CP 481 (SVFD 30(b)(6) Depo.).[4] The policy was enforced in this manner as well, focusing explicitly on religious viewpoints rather than "personal business." CP 361. SVFD admitted Sprague had been told his communication was inappropriate under the policy and would need to be edited because:

> He had quoted Scripture at the bottom of his e-mail, and I had said, "The content of the who, where, what, why and when is okay, **but please remove the Scripture.**"

CP 362 (emphasis added).

In this litigation, SVFD has denied having a policy prohibiting the sending communication with religious content using SVFD internal

[4] Valerie Biladeau was SVFD's Human Resources Manager at all relevant times and was the sole individual designated by SVFD to testify on its behalf on **all** topics related to this lawsuit.

communication systems, CP 485. However, before the present lawsuit was filed every description by SVFD reprimanding or disciplining Sprague described his violation of its policy as being the sending of communications "of a religious nature":

1. SVFD's April 20, 2012 letter disciplines Jon for "the use of language and written content that was of a religious nature, specifically quotation of scripture." CP 379.
2. SVFD's May 2, 2012 letter of reprimand disciplines Jon for "written content that was of a religious nature, including religious symbols." CP 382.
3. SVFD's June 13, 2012 letter proposing to suspend Jon describes prohibited behavior as "written content that was of a religious nature." CP 392.
4. SVFD's September 6, 2012 letter proposing to terminate Jon's employment describes his prohibited behavior as including "written content that was of a religious nature." CP 397.

SVFD believed that it was justified in singling out religious expression for exclusion from the personal uses that were otherwise permissible because it claimed to be applying a "content-neutral" restriction. CP 362. As will be discussed below, SVFD misunderstood what it means to apply a "content-neutral" restriction on speech. SVFD

understood it to mean that SVFD could impose a policy that would create in effect a "religion-free" zone in the workplace.

Sprague believed that SVFD was imposing an unconstitutional limitation on his communication and that he was entitled to continue to alert his fellow employees of activities of the Fellowship as well as to express his views on topics, such as suicide prevention or leadership, that were being discussed by other employees, including SVFD management, by way of email. CP 80.

As part of its official business, SVFD employees discussed topics such as suicide prevention or leadership that were relevant to the tasks to which Sprague and other employees were assigned. CP 84. In the course of a discussion on suicide prevention, Sprague expressed viewpoints that reflected his religious beliefs. CP 84. Chief Thompson then directed Sprague to discontinue any reference to religious beliefs because doing so constituted "personal use" of the email system that was prohibited by SVFD policy. When Sprague continued to exercise what he thought were his constitutional rights, SVFD viewed his conduct as insubordination. Sprague explained through testimony that the focus of his last several newsletters and emails which led to his termination focused on suicide prevention and leadership topics identical to SVFD-sponsored training and emails, but of course this speech from his perspective was informed by his

religious viewpoint. CP 84. He was first reprimanded, then suspended, and finally terminated from employment.

Sprague appealed to the Civil Service Commission to reverse SVFD's termination. Although he knew that the Commission had limited ability to recognize his constitutional claims, he believed that he should pursue the more expeditious path to his reinstatement. A hearing was conducted on October 8, 2012. On March 21, 2013 the Commission entered its decision, finding that Sprague's termination was justified because, they concluded, the policy being violated was a lawful policy.

On March 21, 2014 Sprague filed suit in Superior Court seeking an injunction against further enforcement of SVFD's policy, reinstatement, damages for wrongful termination, and ancillary relief. CP 3-10.[5] SVFD answered and subsequently filed a motion for summary judgment of dismissal based upon collateral estoppel. CP 37-48. In addition to responding to SVFD's motion for summary judgment for dismissal (CP 407-419), Sprague filed a motion for partial summary judgment, asking the court to determine the constitutionality of SVFD's policy, and to enter an order enjoining future enforcement of SVFD's policy. CP 334-343.

[5] An amended complaint was filed on July 22, 2014. CP 13-23.

The trial court heard both motions in a consolidated hearing on May 8, 2015. The trial court ruled that although the Commission "would not have the competence to make a legal conclusion about constitutionality," RP 50, the Commission was nonetheless a forum which

> can make factual findings, including factual findings which may support or not support a constitutional finding. It is just the constitutional finding they cannot make. But they made all the necessary findings to support one and the issue was argued to them. This case was not appealed and therefore the decision of the Civil Service Commission collaterally estops re-litigation of any of the matters before them, including whether or not the fire department rule in question here is unconstitutional.

RP 50-51.

V. SUMMARY OF ARGUMENT

Jonathan Sprague's employer, a government agency, imposed restrictions on employee speech that it claims were "content neutral" but in fact singled out religion for adverse treatment compared to all other viewpoints which were allowed. SVFD mistakenly believed that this policy was not only constitutionally permitted, but actually required by the principle of "separation of church and state." Sprague presented evidence to the trial court establishing that there was no genuine issue of material fact concerning the nature of the policy, and cited applicable case law that would render the policy unconstitutional as a matter of law.

SVFD sought to avoid an evaluation of the policy by claiming that a prior proceeding before the Civil Service Commission should be given collateral estoppel effect, precluding a reconsideration of the constitutionality of SVFD's policy. The trial court mistakenly adopted this reasoning, ignoring the limitations on the subject matter jurisdiction of the Commission (as distinguished from the Superior Court) to grant injunctive relief, as well as the Commission's lack of competence to decide legal issues such as the constitutionality of an agency policy.

VI. ARGUMENT

A. SVFD's policy was not "content-neutral" because it placed unconstitutional restrictions on speech containing religious viewpoints while allowing other viewpoints on the same topics.

This case arises out of a basic misunderstanding of what it means to impose a content-neutral restriction on speech. "[R]estrictions on speech are content neutral if they do not regulate on the basis of viewpoint or classify speech in terms of subject matter." *Catsiff v. McCarty,* 167 Wn. App. 698, 274 P.3d 1063 (Div. 3 2012) (city's size and height restrictions on billboards were content neutral and therefore constitutional); *Collier v. City of Tacoma,* 121 Wn.2d 737, 854 P.2d 1046 (1993) (ban on signs containing political messages was not content neutral and could not be justified by compelling state interest).

SVFD disciplined Sprague for including religious content and a religious viewpoint in his email messages and in his use of the SVFD electronic bulletin board. Although SVFD claimed to rely upon Policy 171, which prohibited the use of the email system for personal use, it is clear from the record that Policy 171 was understood to permit the use of the email system for personal use so long as it was "linked to SVFD business." CP 351. Thus, according to SVFD's CR 30(b)(6) representative, Valerie Biladeau, it was permissible to use the email system to make arrangements

for taking care of one's dog if such were necessary to facilitate working past normal business hours. CP 351. On the other hand, SVFD required that any email communications would have to remain "content-neutral," by which SVFD meant they must refrain from expressing religious viewpoints or addressing otherwise relevant topics others were discussing from a religious perspective.

It is clear from reading the record that SVFD did not apply a policy that was "content neutral," but instead imposed a "religion-free zone" in the workplace. Such a policy is not *required* by state or federal law; rather, it violates state and federal law prohibiting governmental agencies from treating religion with more hostility than other viewpoints or topics.

1. There is no genuine dispute regarding the content of SVFD's policy, and thus Sprague is entitled to judgment as a matter of law.

As the Statement of Facts makes clear, there is no genuine dispute as to the policy that SVFD followed. By their own description of the policy, SVFD permitted a wide variety of "personal uses" of the email system and the electronic bulletin board, so long as they were "linked to SVFD business." Despite this wide latitude, SVFD disciplined Sprague for making use of the electronic bulletin board to promote the activities of the Fellowship, and expressed viewpoints in email exchanges that reflected his

religious beliefs. SVFD freely admits that it singled out Sprague's expression of religious views—for example, his citation of Scripture—for adverse treatment. CP 361-62.

Moreover, in its Findings and Decision, the Civil Service Commission explicitly stated that Sprague was disciplined because he included religious messages and religious viewpoints in both his emails and his use of the electronic bulletin board:

> The facts relating to this matter are, for the most part, undisputed. Chief Thompson had engaged in progressive discipline of Sprague for violating direct orders not to use the Spokane Valley Fire Department's property, in this case, internal electronic bulletin board and electronic mail system to express to other fire fighters his Christian views on a number of topics, both arguably of a religious and secular nature, including quoting scripture from the Bible.

CP 51.

It would be one thing if the policy adopted by SVFD were truly content neutral. If, for example, SVFD had forbidden the use of the email system or the electronic bulletin board for any personal use, or had restricted use of the email system for communication about the actual operation of the Department, then the expression of personal views might be subject to discipline. But the facts in this case are quite the opposite. SVFD sent out emails, and invited follow-up discussion by employees, concerning a wide variety of topics, including information concerning "marital counseling,

depression, drug issues, family issues, health issues, alcohol issues, a whole bunch of mental health issues . . . ."[6] A quarterly newsletter was sent out inviting employees to explore ways to deal with such issues, including meditation. CP 353. When Sprague entered into the discussion of these issues and offered his own perspective, he was addressing the same topic that SVFD had held out the email system to address; the only difference was that his point of view included religious beliefs, and those were viewed by SVFD as being a violation of SVFD's "content neutral" policy:

> Q Under your view of the department's policy, the e-mails and newsletters that Jon sent specifically with his newsletters, were they in some way categorically different from the EAP newsletters? [Objection omitted].
> A I think they were substantially different than the EAP newsletters
> Q (By Mr. Albrecht) Okay.
> A -- in that they were not content neutral.
> Q What was not content neutral about them?
> A They were -- if you're talking about his newsletter, they were driven to his belief as he sees his studies in Christ. That's not content neutral.
> Q Okay. And they were offering tips often **on the same exact topics** as EAP newsletters?
> A **Only from his individual perspective** of his interpretation of what he had read in the Bible.

[6] Deposition of Valerie Biladeau, CP 352. In addition, the Employee Assistant Program emails sent out by SVFD's HR Department in February 2012 dealt with suicide prevention and the July 2012 newsletter addressed leadership goals like helping a team avoid gambling and binge drinking problems. CP 88-89.

CP 354-54 (emphasis added). Although Ms. Biladeau described SVFD's policy as being "content neutral," it is in fact the exact opposite of content neutrality. Sprague was admittedly addressing the same topics as the EAP newsletters (such as suicide prevention or leadership), but SVFD objected because his communications were "driven [by] his belief as he sees his studies in Christ." That's not content neutral.

There is no genuine dispute with regard to the nature of the policy. Thus, the issue was ripe for determination on summary judgment.

2. SVFD's Alleged "Content Neutral" Policy Violated (and Violates) both State and Federal Constitutional Protections.

SVFD presumably intended to rely upon the law that applies to a limited public forum – one in which a governmental entity creates a forum for discussion that is focused on particular issues or topics. However, SVFD misunderstands what a content neutral restriction is. A state may limit speech with respect to time, place or manner so long as it is content (or viewpoint) neutral. *Collier*, 121 Wn.2d at 737 (trial court properly found that municipal ordinance restricting political signs was content-based and thus violated state and federal constitutions); *Catsiff v. McCarty*, 167 Wn. App. 698, 274 P.3d 1063 (Div. 3 2012) (ordinance regulating size and height of painted signs was permissible because it was content-neutral).

Restrictions on speech are content neutral "if they do not regulate on the basis of viewpoint or classify speech in terms of subject matter." *Catsiff*, 167 Wn. App. at 706, 274 P.3d at 1067. Thus, it is constitutional for a municipality to restrict the size of signage so long as it makes no differentiation as to the content of the message being communicated. *Id*. A *policy* that regulates speech must be content neutral. Instead, SVFD erroneously believed it could require *employee communications* to be "content neutral," by which SVFD meant that employee communications had to avoid expressing a religious viewpoint or making reference to a religious authority. CP 353. SVFD's policy clearly was based upon a misunderstanding of what it means for a policy to be "content neutral."

Cases decided by the United States Supreme Court have addressed the question of whether a governmental institution, such as a school, may open a forum for purposes of discussing topics relevant to the institution's purposes, but exclude from that forum groups or individuals who address the topic from a religious perspective. For example, in *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), the school district permitted after-school clubs that promoted the discussion of moral and character development. However, it denied approval of the Good News Club, because its discussion of these issues was from a religious perspective. The Supreme Court rejected this distinction.

"[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 111-12. More recently, the Supreme Court considered whether a state law school could impose a policy that required all student groups to accept members regardless of their beliefs:

> [T]his Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. [Footnote omitted]. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (internal quotation marks omitted), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, e.g., *Rosenberger*, 515 U.S., at 829, 115 S.Ct. 2510.

SVFD's policy in this case clearly fails the test set forth in the relevant cases. Having permitted use of the email system for the expression of personal views (so long as those views were "linked" to SVFD business, such as a discussion of mental health and suicide prevention issues), SVFD cannot, in the guise of protecting the separation of church and state, categorically exclude religious viewpoints. This is the exact opposite of a "content neutral" policy. It is analogous to the attempt by the City of

Tacoma to exclude "political signs" from those that could be erected on residential property. *Collier*, 121 Wn.2d at 737. The fact that the policy might be directed against *all* religious views—not just those that SVFD disagreed with—could no more save the policy from constitutional attack than the exclusion of *all* political messages in *Collier* could avoid a finding that Tacoma's policy was unconstitutional.

B. Collateral Estoppel does not preclude Sprague from seeking relief in Superior Court.

When Sprague brought this action in Superior Court, SVFD sought to avoid consideration of the merits of Sprague's constitutional claims by invoking the doctrine of collateral estoppel. "Collateral estoppel 'has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.'" *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 721-22, 346 P.3d 771, 774 (Div. 1 2015), quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

> Before a court will invoke collateral estoppel, the party asserting the doctrine must prove: "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice."

In re Estate of Hambleton, 181 Wn.2d 802, 834, 335 P.3d 398, 415 (2014), quoting *Nielson v. Spanaway Gen. Med Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998). With respect to the first criterion, a later section of this brief points out that in addition to the wrongful termination claim, Sprague claimed retaliatory discharge based upon his assertion of constitutional rights, and also sought injunctive relief. Even if the "issue" of wrongful discharge was decided adverse to Sprague by the Civil Service Commission, the "issues" of retaliatory discharge and injunctive relief were not subject to preclusion based upon collateral estoppel. Nonetheless, the trial court dismissed Sprague's claim in its entirety. CP 494. But the central flaw in the trial court's application of collateral estoppel is its failure to recognize that the fourth criterion—whether the application of collateral estoppel would work an injustice—was not met. This factor hinges on whether there was a "full and fair hearing" on the issue being litigated. *State Farm v. Ford* , 186 Wn. App. at 715; *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001). There are several reasons that the "full and fair hearing" test was not met.

1. The Civil Service Commission lacked subject matter jurisdiction to rule on Sprague's constitutional claims.

Essential to a full and fair hearing is that the prior adjudication be conducted by a tribunal that had subject matter jurisdiction over the issue now being litigated. In this action Sprague seeks in part to enjoin the enforcement of a policy that violates both the first amendment to the United States Constitution and its Washington State equivalent, Art. I, § 11. The trial court below found that the constitutionality of SVFD's policy was decided adverse to Sprague by the Civil Service Commission in the process of refusing to reinstate Sprague after his termination. Yet it is clear that the Civil Service Commission lacked subject matter jurisdiction to enter such a judgment. The Civil Service Commission's jurisdiction was limited to deciding personnel issues governed by the Civil Service rules. It had no authority to determine the constitutionality of SVFD's policies, much less to enter injunctive relief based if it found SVFD's policies to be unconstitutional. Thus, the trial court's determination that Sprague had received a "full and fair hearing" of his claims regarding the constitutionality of SVFD's policy was erroneous and must be reversed. Consequently, there was no "full and fair hearing" of the issue as would be required for the doctrine of collateral estoppel to apply.

2. The Civil Service Commission lacked the competence to evaluate the constitutionality of SVFD's policy.

Another requirement for a "full and fair hearing" is the institutional competence to decide the issue that is litigated in the second tribunal. The interpretation of the provisions in the federal and state constitutions regarding free speech and religion are admittedly complex and quite contentious even among members of the United States Supreme Court. By contrast, the members of the Civil Service Commission are not qualified as attorneys; they lack both the resources and the training to apply the complex doctrines that often confound trial and appellate courts. In assessing whether an agency's decision making should be given preclusive effect in a subsequent proceeding, the Washington Supreme Court has directed that consideration should be given to "procedural differences" in the way that the agency and the later court operate. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 958 (1987). Because the Civil Service Commission lacks the ability to weigh and decide legal issues such as the constitutionality of the policy in dispute here, its determination of the issue should not be given preclusive effect in a subsequent proceeding.

It is true that in his hearing before the Civil Service Commission Sprague asked the Commission to respect his constitutional rights and therefore reinstate him, but in making that argument Sprague did not (and

could not) confer upon the Commission members a competence that they lacked—namely to determine whether SVFD's policy satisfied constitutional standards.

3. Collateral estoppel applies *only* to the *facts* found by the Commission.

Sprague agrees that the Commission was competent to decide *factual* issues relating to Sprague's termination. In fact, as the Commission itself noted, "The facts relating to this matter are, for the most part, undisputed." While the Commission lacked both subject matter jurisdiction and competence to decide the issue of whether SVFD's policy was constitutional, the Commission's findings regarding the reasons for Sprague's termination are undisputed:

> Chief Thompson had engaged in progressive discipline of Sprague for violating direct orders not to use the Spokane Valley Fire Department's property, in this case, internal electronic bulletin board and electronic mail system to express to other fire fighters his Christian views on a number of topics, both arguably of a religious and secular nature, including quoting scripture from the Bible.

CP 99 (Commission Findings and Decision).

Sprague also concedes that an administrative agency is competent to decide *factual* issues presented to it that relate to the agency's competence. While the traditional description of collateral estoppel speaks of "issues" rather than "facts" as such, it is clear that, particularly in

reference to the decisions of administrative agencies, it is the agency's factual determinations, rather than legal analysis, that bar subsequent relitigation: "Collateral estoppel means that when an issue of ultimate *fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Northwest Wholesale, Inc. v. PAC Organic Fruit, LLC,* 183 Wn. App. 459, 334 P.3d 63 (Div. 3 2014) (emphasis added).

This limitation is even more pronounced when the previous tribunal is an administrative agency rather than a court whose competence extends more broadly than that of an administrative agency. When considering whether to give preclusive effect to an administrative agency's decision, courts should consider "(1) whether the agency acting within its competence made a *factual* decision; (2) agency and court procedural differences; and (3) policy considerations." *Shoemaker*, 109 Wn.2d at 508 (emphasis added). An illustration of the distinguishing which must be undertaken between a factual determination (which may have preclusive effect) and a legal determination (which does not have preclusive effect) can be found in *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818 (2011). In that case the plaintiff had filed a tort claim against a general contractor. The contractor asked the trial court to apply the doctrine of collateral estoppel, arguing that the plaintiff had received worker's compensation benefits from

Idaho, and by doing so deprived Washington courts of jurisdiction. The trial court agreed, and the dismissal was affirmed by the Court of Appeals. However, the Supreme Court reversed, granting preclusive effect to the previous tribunal's factual determinations, but not its legal conclusions:

> The Court of Appeals may have been understandably confused by the Idaho courts' apparent conflation of the term "jurisdiction" with factual issues relevant to whether a tort action is barred. [Citation omitted]. However, it is not the issue of subject matter jurisdiction that the Idaho courts have held precludes a tort claim, but rather the factual issue of whether the injury occurred in the "course of employment."

Williams, 171 Wn.2d at 733, 254 P.3d at 822.

By contrast to the present case, an example of the proper application of collateral estoppel to an agency's factual findings is in the *Shoemaker* case, *supra.* Shoemaker was a police officer who sued the City of Bremerton, claiming that he had been demoted in retaliation for testifying about irregularities in the departmental evaluation process. The Civil Service Commission held a hearing and subsequently determined that the reason the Department gave for his demotion—a reduction in force—was in fact the reason for his demotion. Shoemaker subsequently filed a civil rights suit in federal court, again claiming that his demotion was retaliatory rather than a reduction in force. The City asked the trial court to give preclusive effect to the Commission's findings regarding his demotion. The

Ninth Circuit certified the question to the Washington Supreme Court, and the question was answered in the City's favor. Because Shoemaker had received a full and fair hearing on the factual question of the true reason he was demoted, that disputed issue of fact could not be relitigated in his federal case

But in this case, the Commission purported to consider the constitutionality of SVFD's policy. Sprague provided legal authority to the Commission in support of his claim that the policy was unconstitutional. CP 89; 317-18. In turn, SVFD provided cases to the Commission supporting its position. CP 306-310. In its Findings and Decision the Commission ruled in favor of SVFD (CP 56), but it is clear that in doing so it decided a *legal* question rather than a factual question. Consequently, under the criteria established in *Shoemaker* for giving preclusive effect to decisions made by an administrative agency, only the facts decided by the administrative agency qualify, and the constitutionality of SVFD's policy is not one of them.

The trial court expressed the belief that while the Commission could not decide legal issues, it was competent to decide the factual issues that would support a finding of constitutionality. RP 50-51. Such a distinction is theoretically possible, but it has no application here. For example, in *Catsiff*, the plaintiff objected to the city's restrictions on billboards. If the

parties had disputed whether the restrictions were limited to size and height, and an administrative agency had determined facts upon which it could be concluded that there were no restrictions on content, then the agency's findings with respect to whether or not the restriction was content neutral could be given collateral estoppel effect to determine whether the city's restrictions were constitutional.

By contrast, in this case the Commission made no "necessary findings to support" a finding of constitutionality. RP 51. Quite the contrary. The Civil Service Commission did not find that SVFD's policy was content neutral. The decision of the Commission does not even discuss the term. Instead, the Commission seems to approve of the SVFD's decision to ban religious views altogether. In answer to Sprague's claim that he was subject to unjust discrimination, the Commission wrote, "There was no evidence presented at the investigation and hearing that the rules were applied unevenly and with discrimination based upon Sprague's expression of his Christian views. *No other departmental employees were allowed to express similar religious views using department property*." CP 55 (emphasis added). In other words, there was a consistent policy of excluding religious views.

In *Collier*, the city sought to justify its exclusion of political signs by pointing out that it excluded *all* political signs, not just the ones it

disagreed with. "Tacoma contends that since the ordinances serve a purpose unrelated to a sign's content, the ordinances are content-neutral." *Id.* at 751. The court rejected that approach, finding that by singling out political speech for adverse treatment, the city had imposed an unconstitutional restriction on free speech. Similarly, here SVFD (with the Commission's blessing) thought that by excluding *all* religious speech—not just the speech it disagreed with—it acted constitutionally. While the trial court might have applied collateral estoppel principles with regard to disputed factual issues that were decided by the previous tribunal, it mistakenly viewed the determination of constitutionality as a factual rather than a legal matter.

C. Collateral estoppel has no application to Sprague's claim for injunctive relief.

In his complaint Sprague asked not only for remedies to redress his wrongful termination under the WLAD and related federal statutes, but he also requested an injunction to prevent the continued application of a policy that is unconstitutional under both state and federal constitutions. Such a request for injunctive relief is not subject to preclusion under the doctrine of collateral estoppel. [7]

[7] Sprague's complaint also sought damages and other relief based on retaliatory discharge, since Sprague was discharged because of his assertion of his constitutional rights. CP 21-22. Sprague did not seek summary judgment on this claim, or the wrongful discharge claim, because both would require additional fact-finding. However,

The Federal Civil Rights Act, 42 U.S.C. § 1983, provides for injunctive remedies in the event that the plaintiff is deprived "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Section 1983 claims may be brought in state court as well as in federal court. *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (Div. 1 1993).

A policy that unconstitutionally burdens the exercise of first amendment rights gives rise to an action for an injunction. The ordinary remedy in the case of a successful challenge to a governmental action that infringes upon free speech rights is to enjoin the governmental action. *Washington State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245, 4 P.3d 808 (2000). If, as the prior section of this brief demonstrates, SVFD's policy unconstitutionally restricted Sprague's religious speech, Sprague is entitled to an injunctive remedy. This claim is cognizable, and Sprague has standing to assert it, because Sprague was harmed by the enforcement of SVFD's unconstitutional policy. *State v.*

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in rejecting Sprague's claim based upon collateral estoppel, the trial court erroneously dismissed not only Sprague's claim for wrongful discharge, but granted summary judgment dismissing "each of Jonathan J. Sprague's causes of action . . . in their entirety." CP 494. Even if collateral estoppel should apply to Sprague's claim for wrongful discharge, the trial court erroneously dismissed claims that were independent of the wrongful discharge claim, including the claim for injunctive relief and retaliatory discharge.

Immelt, 173 Wn.2d 1, 267 P.3d 305 (2011) (defendant convicted of violating vehicle horn ordinance had standing to challenge constitutionality of statute). Thus, it was error for the trial court to dismiss Sprague's claim for injunctive relief along with his claim for wrongful termination.

VII. CONCLUSION

For the foregoing reasons, Appellant Jonathan J. Sprague requests that the Court of Appeals (1) reverse the judgment below applying collateral estoppel to dismiss Sprague's employment claim; (2) reverse the judgment below dismissing Sprague's claim for injunctive relief; and (3) remand the case to the trial court with instructions to enter partial judgment in Sprague's favor that the policy adopted by SVFD violates both state and federal constitutions, along with further proceedings consistent therewith.

Submitted this 9th day of November 2015.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On November 9, 2015, I served the document to which this is annexed pursuant to written stipulation between the parties as follows:

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