Case No. 99264-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JEREMY VAHLE,

Plaintiff/Appellant,

v.

CITY OF LAKEWOOD,

Defendant/Respondent.

ANSWER OF RESPONDENT CITY OF LAKEWOOD TO APPELLANT JEREMY VAHLE'S PETITION FOR REVIEW

Michael Bolasina, WSBA No. 19324
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104-2682
(206) 676-7000

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. IDENTITY OF RESPONDENT

Respondent City of Lakewood is a municipal corporation located in Pierce County, Washington. Respondent employs Appellant Jeremy Vahle as a patrol officer in its police department.

II. INTRODUCTION

Appellant filed his lawsuit against Respondent seeking to prevent Respondent's police department and Civil Service Commission from using the Rule of 5 in its promotional selection process. Respondent is aggrieved that he was not selected for a promotion to sergeant, and seeks to compel Respondent's police chief to select the candidate with the lowest number on the eligibility list (e.g., No. 1), and not be able to choose from among a list of five qualified candidates.

Appellant raised a number of arguments that were rejected by the Superior Court and the Court of Appeals. As to the primary issue, there is a Washington Supreme Court case directly on point that authorizes city police departments to use the Rule of 5 in its promotional processes. There is no intervening case law or legislative action that calls into question the validity of the Supreme Court's decision. In 2020, the legislature unanimously voted to jettison the Rule of 3 and adopt the Rule of 5 for promotions for sheriff's deputies throughout Washington State. Appellant failed to cite any decision of the Supreme Court, or decisions of

other appellate courts, that conflict with the decision for which he seeks review.

Appellant also seeks review of the decision affirming the dismissal of his related claims for breach of contract, promissory estoppel, and negligence. The Court of Appeals affirmed the dismissal of these claims on the ground that Appellant failed to present supporting facts or legal analysis to demonstrate he could bring such claims after not being selected in a civil service promotional process. While Appellant asks this Court to disregard or distinguish all the cases cited by the Court of Appeals in support of its decision, the cases are on point and Appellant presents no basis to overrule them.

Finally, Appellant argues that his petition presents issues of constitutional and public importance. Appellant raised no constitutional issues in his claims, and none were addressed—even tangentially--by Respondent, the Superior Court, or the Court of Appeals in its decision. At the heart of Appellant's lawsuit is his grievance that other experienced officers with exemplary performance records and no disciplinary histories were selected for promotion, and not him. As a consequence, Appellant wishes to obtain a promotion by stripping Respondent's police chief of any discretion in choosing among qualified candidates. This is the classic example of a private dispute for which little to no public interest exists.

III. STATEMENT OF THE ISSUES

1. Is the decision of the Court of Appeals in conflict with a decision of the Washington Supreme Court?

2. Is the decision of the Court of Appeals in conflict with a published decision of the Court of Appeals?

3. Does the decision of the Court of Appeals involve a significant issue of federal or state constitutional law?

4. Does the decision of the Court of Appeals involve an issue of substantial public interest?

IV. STATEMENT OF THE CASE

A. Procedural History

On October 30, 2017, Appellant filed a complaint in Pierce County Superior Court seeking relief and/or damages on three claims: (a) declaratory judgment to void Respondent's use of the Rule of 5 for available positions and promotions in its police department, (b) breach of contract/promissory estoppel, and (c) negligence. CP 1-24. On February 14, 2019, Respondent filed a motion for summary judgment seeking dismissal of all Appellant's claims. CP 46-73. On March 15, 2019, 2019, the Superior Court granted Respondent's motion for summary judgment and dismissed all of Appellant's claims. CP 953-956.

On March 21, 2019, appellant filed a notice of appeal. CP 957-964. On October 27, 2020, the Court of Appeals issued its unpublished decision affirming the Superior Court's order granting summary judgment in favor of Respondent and dismissing Appellant's case with prejudice.

B. Statement of Facts

Respondent focuses on presentation of the facts that are most relevant to Appellant's petition for review.

Respondent has used the Rule of 5 since 2004 when its Civil Service Commission adopted the Rule of 5 in its original enactment of Civil Service Rules. CP 310 at ¶ 2. Although Respondent's City Council originally adopted a Rule of 3 by ordinance in 2003, the City Council replaced the Rule of 3 with the Rule of 5 in 2006 when it executed its first collective bargaining agreement ("CBA") between Respondent and the Lakewood Police Independent Guild (the "LPIG"). CP 301, 527, and 530 at ¶¶ 3, 4. Every CBA between Respondent and the LPIG executed since 2006 has re-affirmed Respondent's use of the Rule of 5. CP 527, 530 at ¶¶ 3, 5.

The Civil Service Commission organizes a testing and evaluation process for patrol officers who wish to have their names place on an eligibility list for promotion to sergeant. CP 311 at ¶ 10. Per the Rule of 5, the police chief can recommend for promotion any candidate from Nos.

1 through 5 on the eligibility list. CP 122 at ¶ 5. When Respondent's police chief views the list of the top five candidates for an opening, he does not consider No. 1 on the list to be more qualified than No. 3 or No. 5. CP 122 at ¶ 6. Instead, he sees them all as equally qualified based on the fact that they all possess the necessary qualifications (*i.e.*, years of experience) to serve, and all passed the required tests with sufficient knowledge and competency to be included within the top five places on the list. CP 122 at ¶ 6. In making recommendations for promotion, Respondent's police chief considers such factors as the applicant's performance history, conduct history, disciplinary history, use of judgment, and demonstrated possession of supervisory skills. CP 122 at ¶ 7.

In late 2015, Appellant tested for and received a spot on the eligibility list for a promotion to sergeant. CP 263 at ¶ 7, 267. When the list was in effect, Respondent's police chief recommended the promotion of Nos. 1, 6,[1] 5, 3, and 7, in that order. CP 263 at ¶ 7, 267, CP 124 at ¶ 12. Respondent's police chief did not recommend No. 2 (Appellant), or No. 4, or No. 8. CP 124 at ¶ 12. All of the candidates who received

[1] When a promotion is made off the list, every candidate on the eligibility list behind that person moves up one spot. Once a candidate moves into the No. 5 spot, he or she becomes eligible to receive a promotion.

promotions off the list were experienced officers who had been with the Respondent's police department since its creation in 2004. CP 124 at ¶ 13. All had excellent performance evaluations and were well regarded by their peers. CP 124 at ¶ 13. All had clean disciplinary histories. CP 124 at ¶ 13. Respondent's police chief was not friends with, nor did he socialize outside of work with any of them. CP 124 at ¶ 13.

Unlike the officers who were promoted, Respondent's police chief had reservations about Appellant's judgment, maturity, and ability to lead. CP 124 at ¶ 14. For example, Appellant had been disciplined for getting involved with a victim of domestic violence while he was simultaneously involved in the arrest and prosecution of her former boyfriend. CP 124 at ¶ 14. He also found that Appellant had trouble with exercising discretion when there is no bright line rule telling him what to do. CP 124 at ¶ 14. Respondent's police chief also had questions about Appellant's judgment, an example of which was when Appellant wore pink shoes while on patrol to win a bet with a coworker. CP 124 at ¶ 14.

V. ARGUMENT

Appellant must demonstrate that one or more of the following factors are present for the Supreme Court to grant review:

(a) The decision of the Court of Appeals conflicts with a decision of the Washington Supreme Court; or

(b) The decision of the Court of Appeals conflicts with another published decision of the Court of Appeals; or

(c) The decision of the Court of Appeals involves a significant issue of federal or state constitutional law; or

(d) The decision of the Court of Appeals involves an issue of substantial public interest.

RAP 13.4 Appellant argues that all of the four factors are satisfied. Appellant's brief, however, reveals that none of the required factors is present that would justify the granting of review.

(a) The decision of the Court of Appeals does not conflict with a decision of the Washington Supreme Court.

Appellant cited no case law from the Washington Supreme Court that conflicts with the decision of the Court of Appeals. The only case that Appellant cited and discussed, *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (2004), expressly approves of a municipality using the Rule of 5 for promotional decisions. In *Seattle Police Officers Guild*, plaintiffs challenged Seattle's use of the Rule of 5, independent of and combined with a percentage-based rule. In that case, candidates on the list were eligible to be selected for promotion if they were in "the top twenty-five (25) percent of the eligible register, or the top (5) candidates, whichever number is larger." Thus, if there were 100 candidates on the list, anyone in the top 25 could be chosen. If there were

10 candidates on the list, anyone in the top 5 could be chosen. The union and individual officers who had been passed over challenged Seattle's rule as failing to accomplish the purpose of RCW 41.12.

First, the Court affirmed the Court of Appeals' decision striking the portion of Seattle's rule allowing promotion of the top 25%. The Court of Appeals held:

> Although *Walla Walla* did authorize a certain amount of discretion, it did not authorize unlimited discretion. Appellants cite to no authority that a rule of 25% substantially accomplishes the purposes of the state civil service law. Nor did any Washington city use a rule of percent prior to the enactment of the state civil service law. We therefore rely on the guidance of *Walla Walla* in finding no historical basis exists for allowing the possibility for such a noticeable increase in discretion.

Seattle Police Officers Guild v. City of Seattle, 113 Wn. App. 431, 439 (2002. The Court then endorsed the Rule of 5 for <u>all</u> municipal police departments. The Court stated:

> Lastly, [plaintiff] asserts that if we find that the "rule of five" substantially accomplishes the purpose of chapter 41.12 RCW there will be no limit on an appointing authority's discretion. However, we do not make this decision without legislative guidance. As noted above, the legislature has determined that certification of "six or more names than there are vacancies to be filled" satisfies the purpose of ensuring that state appointing authorities promote on the basis of merit. RCW 41.06.150(2). **Thus, we hold that *cities* will substantially accomplish the purpose of chapter 41.12 RCW so long as the established civil service system provides for appointment by certification of no greater than "six or**

more names than there are vacancies to be filled.

Seattle Police Officers Guild, 151 Wn.2d at 836-837 (emphasis supplied.) The Court's holding expressly referenced all Washington cities, and not just Seattle. There are no subsequent decisions that overrule, distinguish, or limit the Court's decision in the *Seattle Police Officers Guild* case.

Appellant argues there is currently no legislative authority for Respondent to use the Rule of 5. This statement is incorrect on both the Respondent and State-wide levels. At the municipal level, Respondent's City Council adopted the Rule of 5 when it executed collective bargaining agreements between Respondent and the LPIG six times beginning in 2006. In each of these collective bargaining agreements, the Respondent's City Council agreed that Respondent would use the Rule of 5 called for in the Civil Service Commission's rules. At the State-wide level, the Washington State legislature, voting unanimously in favor of House Bill 1750 in 2020, replaced the Rule of 3 with the Rule of 5 for filling entry level and promotional positions in sheriff's departments. *See*, RCW 41.14.130.

Appellant claims that *Seattle Police Officers Guild* only approves use of the Rule of 5 when the scope of consideration involves fewer than 25% of the candidates on the eligibility list. According to Appellant, a municipality can only use the Rule of 5 when there are at least 20

candidates on the eligibility list. The Court of Appeals correctly rejected Appellant's argument on the basis that there is no support for it to be found in *Seattle Police Officers Guild* or any other decision. In *Seattle Police Officers Guild*, the Court examined 12 different certification lists requested by the chief from the period of 1995-2000 to fill 86 promotional vacancies. 151 Wn.2d at 828. Each of these certification lists was based on the Rule of 5. *Id*. At no point did the Court examine the total percentage of certified names relative to those eligible for placement on the list. *Id*. If the Court was concerned about the percentage of names relative to total candidates eligible, the Court would have included such a limitation in its holding. It did not. Instead, the Court's rejection of the rule of 25% was based on a lack of any authority or history that justified a percentage-based rule. *Id*. at 839. What the Court clearly held is this: for municipal police departments, the Rule of 5 is acceptable and a percentage-based calculation allowing the top 25% is not. Contrary to what Appellant alleges, there is no interaction between the two tests.

Appellant implies that Respondent is too small of a police department to use the Rule of 5. There are approximately 250 city police departments in Washington State, and Respondent's police department (100 officers) is within the top 20 in size. CP 122 at ¶ 1. RCW 41.14.030 now specifies a Rule of 5 for recruitment and promotions in county

sheriff's departments. The population of Respondent (60,000) would place it in the middle of the population for Washington's 39 counties. If the Legislature is content with counties such as Garfield (population 2,000), Columbia (population 4,000) and Wahkiakum (population 4,500) using the Rule of 5, there is no reasonable argument that Respondent is too small to use the Rule of 5.

To be granted review on this factor, Appellant must demonstrate that the decision of the Court of Appeals contradicts a decision of the Washington Supreme Court. Instead, Appellant cited and discussed a decision of the Washington Supreme Court relied upon by the Court of Appeals because it is directly on point and controls the issues in this case.

(b) The decision of the Court of Appeals decision does not conflict with a published decision of the Court of Appeals.

The standard set forth in RAP 13.4 can be satisfied if the Court of Appeals' decision conflicts with another published Court of Appeals decision, thereby creating a conflict to be resolved by the Supreme Court. Here, Appellant cites no published decisions of the Court of Appeals that the Court of Appeals did not follow. Instead, Appellant encourages the Court to overrule or distinguish the published decisions relied upon by the Court of Appeals to affirm the dismissal of Appellant's breach of contract, promissory estoppel, and negligence claims.

Regarding the breach of contract and promissory estoppel claims, the Court of Appeals affirmed the dismissal based on legal and factual deficiencies in Appellant's case. In essence, Appellant claimed that Respondent breached a contract or violated a promise to promote him based on merit when he was not selected for promotion. The foundation of Appellant's argument, which is unsupportable given the Court's approval of the Rule of Five, is that promotions based on merit occur only when the Rule of One is used. According to Appellant, Respondent breach a contract or violated a promise when it passed over Appellant for any candidate with a higher number on the eligibility list.

In rejecting this argument, the Court of Appeals relied on published decisions that rejected both contract and promissory estoppel claims in the realm of public employment governed by the civil service process. The Court of Appeals stated:

> Washington courts have consistently held that the terms and conditions of employment do not give rise to contractual rights. *Wash. Fed'n of State Emps. v. State*, 101 Wn.2d 536, 541-42, 682 P.2d 869 (1984); *Weber v. Dep't of Corr.*, 78 Wn. App. 607, 610-11, 898 P.2d 345 (1995); *Greig v. Metzler*, 33 Wn. App. 223, 230, 653 P.2d 1346 (1982). Rather, civil service employment is grounded on a "statutorily-controlled employment relationship." *Riccobono v. Pierce County*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998).

Decision at p. 25. The Court of Appeals then pointed out that the case that Appellant purports to rely on, *Seattle Police Officers Guild*, characterized

plaintiffs' contract claims as being insufficient to withstand summary judgment. *Seattle Police Officers Guild*, 151 Wn.2d at 839. Although Appellant criticized the Court of Appeals' reliance on the above cases, Appellant failed to cite a single published decision that rules in Appellant's favor and created a conflict necessary for the Court to grant his petition for review.

The Court of Appeals also affirmed the dismissal of Appellants' contractual claims as factually deficient. Here, Appellant argued that he was somehow misled by Respondent's use of the Rule of Five over the Rules of One or Rule of Three, even though Respondent used the Rule of Five consistently for filling all Civil Service protected positions since 2004. The Court of Appeals also recognized that Appellant failed to identify any contract provision or specific promise that he would receive a promotion simply because he had a lower number on the eligibility list.

Appellant also objects to the Court of Appeals' decision to affirm the dismissal of his negligence claim. Here, Appellant attempts to characterize Respondent's promotion of other candidates on the eligibility list as acts of negligence. The Court of Appeals affirmed dismissal of the negligence claim on two grounds. Citing *Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 237 (1998), the Court of Appeals held that Appellant was required to utilize remedies set forth in the civil service

statutes and regulations before turning to the superior court for relief. Appellant indisputably failed to do so. *Riccobono*, 92 Wn. App. at 264. Appellant cited *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), as support for his negligence claims. The Court of Appeals distinguished *Kirby* on the ground that the plaintiff in *Kirby*, unlike Appellant, sued for unlawful discrimination, which expressly allows for relief in the superior courts. The Court of Appeals saw no logical basis for overruling *Riccobono* and applying *Kirby* to Appellant's claim for negligence.

Second, the Court of Appeals held that Appellant offered no support for his theory that his being passed over for promotion could satisfy the four elements of a negligence claim: (a) legal duty, (b) breach of the duty, (c) injury resulting from the breach, and (d) proximate cause. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006). There was simply no basis for a negligent claim when Respondent could choose any candidate in the top 5 and did so, but did not choose Appellant. The Supreme Court and Court of Appeals have narrowly prescribed what claims are available to a candidate who was not selected from an eligibility list, and negligence is not one of them.

For this factor to be satisfied, Appellant must show that the Court of Appeals' decision conflicts with another published decision. Appellant

cited and discussed a number of published decisions, but always in the context of why those cases should be distinguished or overruled to grant him the relief he seeks. Appellant cites no truly conflicting authority because none exists.

(c) The Court of Appeals' decision does not involve a significant issue of federal or Washington State constitutional importance.

In his petition for review, Appellant raises for the first time First Amendment and Fourteenth Amendment issues. There are no federal or state constitutional issues raised in Appellant's complaint, or in Respondent's answer, or in the briefing before the Superior Court, or in the Court of Appeals' decision. In sum, there is nothing for this Court to review regarding constitutional issues, because no constitutional issues have been raised, discussed, or adjudicated at any time in connection with the case.

(d) The Court of Appeals' decision does not involve an issue of substantial public interest.

Law enforcement's use of the Rule of Five for promotional decisions has been approved by the Supreme Court and, more recently, by the legislature in amending RCW 41.14.130. There have been no court decisions or legislative developments in the last 25 years that have undermined the legitimacy of the Rule of Five as a means of selecting among qualified candidates. Respondent submits that public interest in a

longstanding practice recently reinforced by the Legislature with a unanimous vote is minimal.

Here, Appellant is aggrieved because he was not selected for promotion when the other Top 5 candidates, all of whom either surpassed or were equivalent to Appellant in seniority and performance history, received promotions. In Appellant's opinion, he had the most merit and therefore he should have been promoted to sergeant. In essence, Appellant is asking the Court to substitute its judgment for Respondent's in determining who should have received promotions off an eligibility list. What Appellant presents here is a private dispute of interest only to the five employees on the eligibility list competing for the next promotional opportunity.

VI. CONCLUSION

For the foregoing reasons, Respondent requests that the Court deny Appellant's petition for review.

DATED this 28th day of December, 2020.

Respectfully submitted,

SUMMIT LAW GROUP PLLC
Attorneys for Respondent

By: *s/ Michael Bolasina*
Michael Bolasina, WSBA #19324
mikeb@summitlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused the foregoing document to be served upon the following, via electronic service:

Joan K. Mell, Esq.
III Branches Law, PLLC
1019 Regents Blvd., Ste 204
Fircrest, WA 98466
joan@3brancheslaw.com

Eileen McKain, Esq.
City of Lakewood
6000 Main Street SW
Lakewood, WA 98499
emckain@cityoflakewood.us

DATED this 28th day of December, 2020.

s/ Suzy Windes
Suzy Windes, Legal Assistant
suzyw@summitlaw.com

SUMMIT LAW GROUP

December 28, 2020 - 12:50 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99264-9
Appellate Court Case Title:	Jeremy Vahle v. City of Lakewood
Superior Court Case Number:	17-2-12665-4

The following documents have been uploaded:

- 992649_Answer_Reply_20201228124504SC751240_8898.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2020-12-28 Lakewood Vahle SCT opposition brief.pdf

A copy of the uploaded files will be sent to:

- emckain@cityoflakewood.us
- joan@3brancheslaw.com
- suzyw@summitlaw.com

Comments:

Sender Name: Suzy Windes - Email: suzyw@summitlaw.com
Filing on Behalf of: Michael Charles Bolasina - Email: Mikeb@summitlaw.com (Alternate Email: meghana@summitlaw.com)

Address:
315 Fifth Avenue So.
Suite 1000
Seattle, WA, 98104
Phone: (206) 676-7000

Note: The Filing Id is 20201228124504SC751240