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Court of Appeals  
Division I  
State of Washington

No. 74329-5

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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JAMES WOODBURY,

Appellant,

v.

CITY OF SEATTLE, STATE OF WASHINGTON,  
and OFFICE OF ADMINISTRATIVE HEARINGS

Respondents.

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT IN REPLY ..... 4

    A. For purposes of RCW 34.05.461(3), it is a “material issue of fact” whether the ultimate decision-maker (Chief Dean) knew that Woodbury filed an SEEC complaint. .... 4

    B. The evidence presented at the hearing established as a matter of law that Dean knew of Woodbury’s protected activity. .... 8

    C. Even if the Assistant Chiefs were ignorant of the protected activity – and they were not – such fact would be irrelevant. .... 11

    D. Even if the Assistant Chiefs’ knowledge were relevant, the Assistant Chiefs *did* know about the ethics complaint. .... 14

    E. Dean’s contacts with Labor Relations is material for purposes of RCW 34.05.461(3), as it confirms that Dean desired, and sought, to demote Woodbury before his subordinates made a “recommendation” to that effect; significant evidence of pretext. 16

    F. The Order lacks substantial evidence to find that Dean made comments critical of anyone other than Woodbury. .... 20

III. CONCLUSION ..... 24

## TABLE OF AUTHORITIES

### Washington State Cases

<u>Boyd v. State, Dep’t of Soc. &amp; Health Servs.</u> , 187 Wn. App. 1, 349 P.3d 864 (2015).....	11
<u>Currier v. Northland Servs., Inc.</u> , 182 Wn. App. 733, 332 P.3d 1006 (2014), <i>review denied</i> , 182 Wn.2d 1006, 342 P.3d 326 (2015) .....	6
<u>Dumont v. City of Seattle</u> , 148 Wn. App. 850, 200 P.3d 764 (2009).....	19
<u>Heinmiller v. Dep’t of Health</u> , 127 Wn.2d 595, 903 P.2d 433 (1995) .....	2, 20
<u>Johnson v. Chevron U.S.A., Inc.</u> , 159 Wn.App. 18, 244 P.3d 438 (2010).....	22
<u>Johnson v. Dep’t of Soc. &amp; Health Servs.</u> , 80 Wn. App. 212, 227, 907 P.2d 1223 (1996).....	23
<u>Rickman v. Premera Blue Cross</u> , 184 Wn.2d 300, 358 P.3d 1153 (2015) .....	17, 18
<u>Ryan v. Dept. of Social and Health Services</u> , 171 Wn. App. 454, 287 P.3d 629 (2012).....	22
<u>Schoonover v. Carpet World, Inc.</u> , 91 Wn.2d 173, 588 P.2d 729 (1978) .....	6
<u>Scrivener v. Clark Coll.</u> , 181 Wn.2d 439, 334 P.3d 541 (2014) .....	17, 18
<u>Weyerhaeuser v. Pierce County</u> , 124 Wn.2d 26, 873 P.2d 498 (1994) .....	17, 20

### Federal Cases

<u>Cohen v. Fred Meyer, Inc.</u> , 686 F.2d 793 (9th Cir. 1982).....	7
---	---

<u>Dennis v. Columbia Colleton Med. Ctr., Inc.</u> , 290 F.3d 639 (4th Cir. 2002) .....	20
<u>Gifford v. Atchison, Topeka &amp; Santa Fe Ry. Co.</u> , 685 F.2d 1149 (9th Cir. 1982) .....	16
<u>Gee v. Principi</u> , 289 F.3d 342 (5th Cir. 2002) .....	20
<u>Gordon v. New York City Bd. of Educ.</u> , 232 F.3d 111 (2000) .....	12
<u>Int’l Bhd. of Teamsters v. United States</u> , 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) .....	23
<u>Porter v. California Dep’t of Corr.</u> , 419 F.3d 885 (9th Cir. 2005) .....	23
<u>Price Waterhouse v. Hopkins</u> , 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) .....	19
<u>Raad v. Fairbanks N. Star Borough Sch. Dist.</u> , 323 F.3d 1185 (9th Cir. 2003) .....	4
<u>Universal Camera Corp. v. NLRB</u> , 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) .....	22
<b>Statutes</b>	
RCW 34.05.461(3) .....	4, 7, 16, 17, 19
RCW 34.05.570(3)(e) .....	22
RCW 42.41 .....	16
Washington Law Against Discrimination .....	12
<b>Ordinances</b>	
SMC 4.20 .....	16
SMC 4.20.810 .....	6

## I. INTRODUCTION

Based upon the evidence presented at the administrative hearing, the “material facts” of Woodbury’s claim include but are not limited to the following. Chief Dean learned that Woodbury filed a whistleblower complaint with the SEEC concerning Lt. Footer and the F&G billing issues. Shortly thereafter, Dean stated his desire to demote Woodbury. Dean asked Labor Relations if he could demote Woodbury based upon stale allegations involving conduct for which Dean had never previously expressed any need to discipline Woodbury. Labor Relations advised Dean against demoting Woodbury for performance reasons, but did pass along to the union that “Woodbury” is the name of the person who Labor Relations heard that Chief Dean was looking to demote.

Subsequently, Chief Dean met with his subordinates to ask for their recommendation regarding the demotion, which Woodbury alleges was simply a pretext to cover up Dean’s predetermined decision to demote Woodbury. The discussions with his subordinates about who to demote were unusual in that Dean singled out only Woodbury for criticism. Both Chief Dean and A.C. Tipler admit that Dean making critical comments in these meetings about potential candidates for demotion would be “improper” and “inappropriate” under the circumstances. During this same time period, Dean notified the Assistant Chiefs that a whistleblower

complaint had been filed and the Assistant Chiefs “guessed” as to who may have filed the complaint.

After they met with Dean about the demotion decision, heard him offer criticisms related to just Woodbury, and learned of the fact that a whistleblower complaint had been filed, the subordinates recommended to Dean that Woodbury be selected for the demotion. One of the subordinates (A.C. Tipler) gave as his reason for selecting Woodbury, in part, precisely the same criticism of Woodbury that Chief Dean described in his demotion discussions with Tipler and the other Assistant Chiefs.

Still, the subordinate Assistant Chiefs’ recommendation was superfluous, as the demotion decision ultimately rested entirely with Chief Dean. He had the authority to reject the Assistant Chiefs’ recommendation that he tainted with his improper comments and could have elected to demote any of the 11 deputy chiefs, notwithstanding the recommendation solicited from his subordinates. Dean kept with the decision he originally expressed to Labor Relations and selected Woodbury for demotion.

Following Woodbury’s presentation of evidence supporting the foregoing material facts, the ALJ engaged in “willful and unreasoning decision making, in disregard of facts and circumstances.”<sup>1</sup> The ultimate decision-maker (Chief Dean)’s knowledge of Woodbury’s protected

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<sup>1</sup> See Heinmiller v. Dep’t of Health, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

activity was established by Woodbury as a matter of law, but the ALJ declined to make any finding on this material issue of fact. Similarly, Dean's communications with Labor Relations, showing that Dean expressed an interest in demoting Woodbury well before he secured his subordinate's input, was proven by Woodbury. Such fact tended to show that the outcome of the decision was predetermined; thus, it was material to Woodbury's presentation of retaliatory animus, yet it was entirely disregarded and left unacknowledged in the ALJ's Order and analysis of the evidence. The finding in the Order that Dean commented on the "pros and cons" of each of the 11 deputy chiefs and that Dean made critical comments, not only about Woodbury, but also about D.C. Oleson, lacked substantial evidence when viewed in light of the whole record. It was material that Dean had offered criticisms about only D.C. Woodbury. Also, while the ALJ found that Dean made critical comments to his subordinates about Woodbury—in spite of Dean's unequivocal denials to the contrary—the ALJ disregarded Dean and Tipler's admissions that it would be "improper" and "inappropriate" for Dean to have done so.

For the reasons stated here and those outlined in Woodbury's opening brief, the Court should find that the Order constituted arbitrary and capricious decision-making and further find that Chief Woodbury

established that his protected report to the SEEC was among the substantial factors in Chief Dean’s selection of Woodbury for demotion.

## II. ARGUMENT IN REPLY

### A. **For purposes of RCW 34.05.461(3), it is a “material issue of fact” whether the ultimate decision-maker (Chief Dean) knew that Woodbury filed an SEEC complaint.**

The ALJ erred in not deciding whether Chief Dean knew or suspected that Woodbury filed a whistleblower complaint. Incredibly, in a case alleging whistleblower retaliation, the City argued below, “Whether Dean knew or suspected that Woodbury had filed a whistleblower complaint at that time is insignificant.” *See* CP 556; *cf.* Br. of Resp’t at 42 (“Whether Dean knew or suspected . . . is not determinative. The ALJ did not need to decide what Dean knew or suspected about the complaint”). Typically, Defendant-employers argue to the contrary, that a plaintiff may not establish an inference of retaliatory animus absent proving the decision-maker’s knowledge of the complaint, and courts agree. *See, e.g., Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (affirming summary judgment as to retaliation claim based on lack of any evidence that “particular principals who made the allegedly retaliatory hiring decisions, in fact *were aware* of her complaints”).

Here, Chief Dean was the ultimate decision-maker. He possessed absolute and “sole discretion” in deciding whom to demote. *See* AR 3467-

68 (Dean Dep., 117:23-118:6) (Q. “[F]rom a responsibility perspective, it was your decision to make, correct? A. At the end of the day it was my decision. Q. And you could have disagreed with the group [of Assistant Chiefs], correct? A. Yes, I could have. Q. And you could have -- you could have selected any of the 11 to be demoted to battalion chief, right? A. Yes, I could have.”). *Accord* AR 1194 (Ex. 212, Collective Bargaining Agreement, Art. 20.5); AR 4704 (R690:15-17). There was no rule or procedure that required Dean to submit the question of who to demote to his subordinates for their input. Rather, Chief Dean, in his discretion, could have utilized any process that he elected, so long as his decision was not based on discipline. *See* AR 2075 (34:15-19); AR 2630-31 (38:24-39:1); AR 4565 (R550:25-551:15).

The material facts in this case that Woodbury alleged in his presentation to the ALJ included: (1) Dean initially sought to demote Woodbury with Labor Relations; (2) when that effort was unsuccessful, Dean sought a perfunctory “recommendation” from his subordinates, and during meetings with them to discuss the demotion decision, Dean made “inappropriate” comments to his subordinates (*see infra*, at 12-13), critical of Woodbury—and only Woodbury; (3) Dean then exercised his discretion and demoted Woodbury, claiming that he was acting upon his subordinates’ “recommendation” that he improperly tainted. *See* Post-

Hearing Brief, AR 464-66, 489, 491-92, 496. Given Woodbury’s allegations, the question of whether Dean “knew” or suspected of Woodbury’s protected activities at the time of these events is unquestionably relevant and material to the ultimate question of whether retaliation was a substantial factor in Dean’s demotion decision. Dean’s knowledge of Woodbury’s protected activity, coupled with the close timing of his seeking to demote Woodbury via Labor Relations and his ultimate decision to demote Woodbury, is evidence “suggesting retaliation.” Currier v. Northland Servs., Inc., 182 Wn. App. 733, 747, 332 P.3d 1006 (2014), *review denied*, 182 Wn.2d 1006, 342 P.3d 326 (2015).

While the ALJ’s Order “focus[ed] ... on the three meetings between the Fire Chief and the Assistant Chiefs that resulted in Woodbury’s selection for downgrade,” Br. of Resp’t at 44; the “theory of recovery that the plaintiff pleaded and sought to establish” was that, among other things, his “outspoken comments to ... Ken Tipler ... clearly identified [Woodbury] to Chief Dean as the most likely person to have submitted the ‘Whistleblowers Complaint,’”<sup>2</sup> and that Dean subsequently sought to demote Woodbury in retaliation for such protected activity. *See Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978) (“[A] trial court must make ultimate findings of fact on material

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<sup>2</sup> AR 1340 (Ex. 260, Woodbury’s Complaint of Retaliation under SMC 4.20.810).

and pivotal issues,” including the issues relevant to Plaintiff’s “theory of recovery”); *and see* RCW 34.05.461(3) (requiring the ALJ’s Order to “include a statement of findings and conclusions, and the reasons and basis therefor, on **all the material issues** of fact, law, or discretion **presented on the record...**”). In cases alleging retaliation, the question of whether the relevant decision-maker was “aware that the plaintiff had engaged in protected activity” is a material and determinative issue of fact. *See, e.g., Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (“Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.”) Even assuming *arguendo* that knowledge is “not determinative,” as the City alleges, *see* Br. of Resp’t at 42; the City cites no case or other authority interpreting RCW 34.05.461(3)’s requirement that findings be made “on all the *material* issues of fact ... presented on the record,” as being limited to “determinative” issues. Under Woodbury’s theory of recovery, Dean’s knowledge of the complaint was clearly “material.”

Thus, the ALJ erred in not deciding whether Dean, the ultimate decision-maker, knew of Woodbury’s complaint at the relevant times: *i.e.*, (1) when Dean inquired of Labor Relations about demoting Woodbury; (2) when he made negative comments about only Woodbury during the

demotion discussions with the Assistant Chiefs, and (3) when he exercised his “sole discretion” to demote Woodbury.

**B. The evidence presented at the hearing established as a matter of law that Dean knew of Woodbury’s protected activity.**

The City claims “Dean was not aware that Woodbury was a whistleblower complainant when he asked the Assistant Chiefs to recommend a Deputy Chief for downgrade or when he accepted their recommendation.” Br. of Resp’t at 29. Such claim is contradicted by Chief Dean’s sworn declaration and deposition testimony. *See* AR 762 (¶¶ 9-10) (“I was told that Woodbury would be one of the persons who would sign the complaint. Chris Greene told me in September that Woodbury either had filed or intended to file a complaint regarding the Footer discipline.”). *Accord* AR 3470 (Dean Dep., 120:17) (“I knew that he [Woodbury] had filed with ethics.”) The City’s claim is also inconsistent with the admissions Dean made during cross-examination at the hearing. *See* AR 4565-66 (Q. “And at that time you had no reason to believe that anyone other than Woodbury had filed a complaint? A. I did not know of anybody else, no.”) *and* AR 4458 (“Q: Okay. It’s true, is it not, that the only person who was the rank of deputy who you had heard had filed an SEEC complaint as of November 2008 was Woodbury. A: Yes.”).

The City’s position that Dean “did not know the nature of the complaint or the identity of the complainant until January 2009,” Br. of

Resp't at 20, also defies logic. Dean admits to having two conversations with Capt. Greene in September 2008.<sup>3</sup> In the first conversation, Dean learned that "someone was getting ready to complain to the ethics board" related to Lt. Footer.<sup>4</sup> Then, in the second conversation, Dean learned that "Woodbury was [allegedly] trying to pressure [Greene] into signing the ethics complaint."<sup>5</sup> In his deposition, Chief Dean was asked, "After you learned that Woodbury was basically, you've said, that Greene said, 'pressuring Greene to sign the complaint,' at that point you realized that when Greene was talking about people going to the ethics organization in the first conversation you had on the street, at that time you caught on that it was Woodbury, right?" Dean answered, "I was aware that Woodbury was one of the signers, going to be one of the signers, correct."<sup>6</sup> Given the repeated admissions of Dean in his sworn declaration, deposition, and hearing testimony, the ALJ could have reached only one conclusion, had he decided the issue: Chief Dean *knew* that Woodbury signed the complaint that was filed with the SEEC.

The City's contention that Dean did not know the nature of Woodbury's complaint is equally without merit. Greene's report about an imminent complaint prompted Dean to preemptively reach out to Wayne

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<sup>3</sup> See AR 761 (Dean Decl., ¶ 7).

<sup>4</sup> See AR 3370-71, 3453 (Dean Dep., 20:18-21:19, 103:17).

<sup>5</sup> AR 3470-71 (Dean Dep., 120:24-121:3).

<sup>6</sup> AR 3440 (Dean Dep., 90:14-15).

Barnett at the SEEC. *See* AR 3369-70; *accord* AR 1860 (Ex. 313, Barnett Dep.) (“[I]n September, I received a call from Chief Dean that there was, that he suspected that I was going to get a whistleblower complaint.”). On November 20, 2008, Barnett confirmed for Dean that the SEEC had received the whistleblower complaint and that the agency was investigating. *See* AR 1331 (Ex. 253). Dean admits that, by that time, he knew that Chris Santos, the Finance Director who was investigating Lt. Footer’s financial misconduct, had been questioned by the SEEC about billing issues. *See* AR 4544-45 (Dean Test., R530-31); *and* AR 1331 (Ex. 253) (Dean’s November 20th email to Barnett: “I had heard you were doing some follow-up and will await your investigation determination.”).<sup>7</sup> Thus, at the time of the demotion meetings, Chief Dean knew that (1) the SEEC had received a whistleblower complaint, (2) Woodbury was a signatory on the complaint; and (3) the complaint related to Lt. Footer and F&G’s billing issues. The fact that Tipler, who testified to learning of the ethics complaint being filed from Dean,<sup>8</sup> admits that he knew “while the discussions [about demotion] were going on” that the complaint “pertained to Footer and F&G” is further proof that Dean knew not only

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<sup>7</sup> Though the City claims “Santos told Dean in December 2008 that SEEC was asking some questions about billing. AR 4591,” Br. of Resp’t at 29; the November 20, 2008 email, Ex. 253, which Dean explained in the hearing, at AR 4544-45, proves beyond any doubt that the SEEC questioning of Santos had already occurred by November 20, 2008.

<sup>8</sup> *See* AR 4643; AR 4647; AR 4650.

that Woodbury signed the complaint that had been filed, but also that he knew the complaint pertained to Footer and F&G. *See* AR 4649-50.

**C. Even if the Assistant Chiefs were ignorant of the protected activity – and they were not – such fact would be irrelevant.**

The alleged ignorance of the Assistant Chiefs regarding Woodbury’s SEEC complaint filing is irrelevant for two reasons. First and foremost, Chief Dean was the ultimate decision-maker, who exercised absolute and “sole discretion” to decide who to demote, regardless of what was recommended to him. *See* AR 3467-68 (Q. “[Y]ou could have disagreed with the [Assistant Chiefs], correct? A. Yes, I could have. Q. And you could have -- you could have selected any of the 11 to be demoted to battalion chief, right? A. Yes, I could have.”). *Accord* AR 1194 (Collective Bargaining Agreement, Art. 20.5). Thus, there is no question the ultimate decision-maker for the demotion knew about Woodbury’s protected activity. *See supra*, section II.B.

Additionally, to the extent Chief Dean made “improper” comments critical of only Woodbury during the demotion meetings, which naturally influenced his subordinates’ suggestion about who to demote, the subordinates’ alleged lack of knowledge regarding Woodbury’s protected activity is unimportant. *See Boyd v. State, Dep’t of Soc. & Health Servs.*, 187 Wn. App. 1, 10, 349 P.3d 864 (2015) (“If a supervisor performs an act motivated [in part] by retaliatory animus that is intended by the supervisor

to cause an adverse, employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation.”) (analyzing WLAD retaliation claim ); *see also, e.g., Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2000) (“A jury... can find retaliation even if the agent denies direct knowledge of a plaintiff’s protected activities, for example, so long as ... the jury concludes that an agent is acting explicitly or implicit[ly] upon the orders of a superior who has the requisite knowledge.”)

The City writes, “The ALJ credited the testimony of the Assistant Chiefs who stated that references to Deputy Chiefs by name, if any, did not influence their decision.” Br. of Resp’t at 47. However, the Assistant Chiefs did not so testify—how could they, where they mostly denied that Chief Dean gave any input. *See* AR 4642-43 (Tipler denied Dean made comments and testified only that Dean’s “presence” did not influence him); AR 4691-92 (Nelsen denied “input” by Dean and testified that Dean’s “presence” did not influence him);<sup>9</sup> and AR 4713 (Hepburn asked if Dean’s “presence” signaled anything about who to downgrade).

Chief Dean knew of Woodbury’s SEEC complaint and knew that his making negative comments about Woodbury—and *only* Woodbury—

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<sup>9</sup> *But see* AR 4697-99 (Woodbury’s counsel impeaching Nelsen with his prior testimony that Dean had criticized Woodbury, with no follow-up by the City’s counsel as to whether such comments influenced him); *accord* AR 2839-40 (Nelson testifying that of the 11 deputies, Dean criticized only Woodbury).

in the context of the demotion meetings would be “improper” and likely to be construed as an indirect order that Woodbury should be the individual recommended for demotion. *See* AR 4562-63 (Dean Test., R548:16-549:10) (Q: “Would you agree with me that it would be *improper* for you to criticize Chief Woodbury at a meeting where there’s discussions about demotion? A: Or any other chief, also.”); *id.* (Q: “[W]ouldn’t you agree with me that if you were to suggest at one of those meetings that Chief Woodbury had performance problems and not talk about other people’s performance problems that your [Assistant Chiefs] would treat that as an indirect order to select Woodbury? [Objection and ruling omitted] A: It’s possible.”). Assistant Chief Tipler agreed that “it would be *inappropriate* for Chief Dean to input on the relative qualifications of the deputies” if the Assistant Chiefs were to come up with their own recommendation. AR 4670. Though the ALJ found, contrary to Dean’s repeated denials in his deposition, that Dean *did* provide input to his subordinates about who to demote, the Order disregards the admissions by Dean and Tipler that such input would be improper and inappropriate.

As the ALJ recognized, the Seattle Fire Department “operate[s] as a paramilitary organization.” AR 574 (Finding of Fact ¶ 4.5). Chief Dean did not tell the Assistant Chiefs to “‘ignore my comment’ or words to that effect,” and his Assistant Chiefs are accustomed to following his orders.

AR 4734. Thus, the negative comments Chief Dean made, singling out Woodbury for criticism in the discussions about the demotion, guided Dean's subordinates to recommend Woodbury for the demotion.

The City's brief does not attempt to distinguish Boyd v. State, Dep't of Soc. & Health Servs, which Woodbury discussed in his opening brief. *See* Br. at 46. Under the substantial factor analysis, showing that a biased individual's "influence" affected the decision-making process creates liability, even if the decision-maker is unaware of the plaintiff's protected activity. *See Boyd*, 187 Wn. App. at 7-8 (noting that though there was "no evidence that the decision makers were aware of the sexual harassment claims ...[The] additional investigations are not supervening causes[,] [as they]... relied on facts provided by the biased supervisor"). Thus, regardless of whether the Assistant Chiefs knew about Woodbury's complaint, liability can be established by showing that Chief Dean knew and influenced the process; *or* that Dean knew and he was the ultimate decision-maker with absolute and "sole discretion" to decide who to demote, regardless of what was recommended to him. *See* AR 3467-68.

**D. Even if the Assistant Chiefs' knowledge were relevant, the Assistant Chiefs *did* know about the ethics complaint.**

The City maintains that "[t]he Assistant Chiefs were not aware of Woodbury's complaint at the time they recommended him for downgrade." Br. of Resp't at 27. The testimony of Assistant Chiefs

Hepburn and Tipler confirm that the Assistant Chiefs knew—during the time of the demotion meetings—that an ethics complaint was filed about issues in the Fire Marshall’s office. *See* AR 4714 (R700:8-16). A.C. Hepburn recalled “conversation at work about that.” *Id.* A.C. Tipler similarly testified that Chief Dean told the Assistant Chiefs that a complaint was filed, and that the Assistant Chiefs were “guess[ing] about who it might have been.” *See* AR 4642. Tipler also testified that he understood the complaint pertained to Lt. Footer and F&G. AR 4649-50. Like Hepburn, Tipler testified unequivocally, “Yes. At some point I did know that *while the discussions [‘the three meetings ... regarding who should be demoted’] were going on, yes.*” AR 4650 (R636:4-5); *accord* AR 4647 (R633:9-11); *compare* AR 4714 (R700:13).

As for who the Assistant Chiefs would suspect had filed the complaint, Woodbury would be the prime candidate. “[I]n the context of what was going on with Footer,” Woodbury in September 2008 had placed copies of the Seattle Municipal Code’s ethics provisions on Chief Tipler’s desk. AR 3061 (51:5-19); AR 4173 (R159). “[T]hrough[out] this time period Chief Woodbury was advocating for some type of discipline and rotation of Footer.” *Id.* Woodbury also told Tipler that someone would file an ethics complaint, “or maybe even go[] to the FBI.” *See* AR 3061-62 (51:5-52:24); AR 4649 (R635); *see also* AR 3063-64 (Tipler Dep., 53:24-

54:5) (“Q. And how did your staff react in this second meeting. A. They let me know that they didn’t like it and that they might go to ethics. Q. And Chief Woodbury was one of the people who told you that? A. Yes.”). Tipler even told Chief Dean that he believed Woodbury was “going to go to ethics.” (AR 3062, Tipler Dep., 52:17-20). *See, e.g., Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155-56, n.3 (9th Cir. 1982) (“We see no legal distinction to be made between the filing of a charge which is clearly protected ... and threatening to file a charge.”).

**E. Dean’s contacts with Labor Relations is material for purposes of RCW 34.05.461(3), as it confirms that Dean desired, and sought, to demote Woodbury before his subordinates made a “recommendation” to that effect; significant evidence of pretext.**

The City writes, “Woodbury was unable to produce evidence that [the Assistant Chiefs’ reasons for recommending his demotion] were a pretext for retaliation.” Br. of Resp’t at 38-39. It further states, “Woodbury failed to meet his burden of proof on the issue of pretext because he failed to show that the bases for the decisions of the Assistant Chiefs were anything other than genuine.” *Id.*, at 41. The Order includes no such finding. Rather, ¶ 5.11 states simply that, “Here, based on the foregoing findings of fact, Claimant’s evidence as to all claims of retaliation was unpersuasive. Claimant has not met his burden of proof by a preponderance as to any his claims of retaliation in violation of chapter 42.41 RCW ... or chapter 4.20 SMC, and is not entitled to relief under

either chapter.” AR 610. No explanation is given for how the ALJ considered Woodbury’s proof of pretext and retaliation, despite the fact that the WAPA provides that “[f]indings [that are] set forth in language that is essentially a repetition or paraphrase of the relevant provision of law *shall* be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.” RCW 34.05.461(3). “[A] summary of the evidence presented, with findings which consist of general conclusions drawn from an ‘indefinite, uncertain, undeterminative narration of general conditions and events’, are not adequate.” Weyerhaeuser v. Pierce Co., 124 Wn.2d 26, 35-36 (1994).

Even if the ALJ’s Order had found “that Woodbury failed to meet his burden of proof on the issue of pretext because he failed to show that the bases for the decisions of the Assistant Chiefs were anything other than genuine,” such conclusion would be erroneous as a matter of law. “An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable.” *See* Scrivener v. Clark Coll., 181 Wn.2d 439, 447, 334 P.3d 541 (2014). Proof of causation in a whistleblower retaliation case is “not an all or nothing proposition.” Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015). Thus, Woodbury is not required to “disprove each of the [City]’s articulated reasons” for the demotion. *See* Scrivener, 181

Wn.2d at 447. Instead, his burden is to show that his protected reporting to SEEC was “*a cause,*” or “substantial factor,” in Dean’s exercise of discretion in selecting Woodbury for demotion. *See Rickman*, 184 Wn.2d at 314 (italics in original); *see also Scrivener*, 181 Wn.2d at 447.

The fact that Dean was aware of Woodbury’s complaint **and** contacted Labor Relations expressing his desire to demote Woodbury—*before his subordinates allegedly provided him a recommendation to that effect*—are material facts relevant to proving “either (1) that the defendant’s reason is pretextual *or* (2) that although the employer’s stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.” *See Scrivener*, 181 Wn.2d at 441-42.

In a phone call that occurred before November 18, 2008, Chief Dean told Labor Relations that he was interested in selecting Woodbury to be the person to be demoted. *See AR 2629, 2631, 2652 (37:21-25, 39:6-13, 60:11-16); see also AR 1938 (31:1-33:9)*. At the time Dean told Labor Relations of his desire to demote Woodbury, Dean had not yet begun the series of discussions with his subordinates about the demotion. *AR 3435-36 (85:20-86:4)*. Following Dean’s discussion with Labor Relations, Labor Relations met with the union representatives on November 18, 2008, and told the union that “Chief Dean was interested in selecting Woodbury to be ... demoted.” *AR 2646 (54:1-6); accord AR 3974 (testifying that*

Braciliano in Labor Relations told the union representatives on November 18th that Woodbury was “*the name we heard*” for the deputy who would be chosen for demotion), *and* AR 2662, 2668 (70:17-21; 76:9-24) (testifying that the first note McCarty wrote about the meeting was “‘Deputy Chief reduced,’ and then it says ‘*Woodbury*’”).<sup>10</sup>

The fact that Dean had pre-determined the outcome of the demotion decision before seeking input from his subordinates on the matter is clearly a “material issue” for purposes of RCW 34.05.461(3). As an initial matter, “[w]hen the employer’s explanations ‘change over the course of an action... courts may consider this as evidence that the employer’s proffered explanation is pretextual.” Dumont v. City of Seattle, 148 Wn. App. 850, 869, 200 P.3d 764 (2009). Additionally, “[a]n employer may not... prevail ... by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.” Price Waterhouse v. Hopkins, 490 U.S. 228, 252, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). Thus, evidence showing that Woodbury’s demotion was pre-determined before the event that purportedly caused the demotion (*i.e.*, the recommendation of the Assistant Chiefs) - and therefore, that he was not actually demoted for the stated reason - is evidence for the fact-finder to find that stated reason was pretextual. *See*,

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<sup>10</sup> While the City at page 47 of its brief claims, without citation to support its claim, that the conversation between Dean and Braciliano was “regarding Olsen [sic] *and* Woodbury”, that assertion is not supported by the record. *See id.*

*e.g.*, Gee v. Principi, 289 F.3d 342, 348 (5th Cir. 2002) (finding pretext where decision not to hire the plaintiff had already been made before the end of a key meeting, rather than at the later date when the employer chose a different applicant); Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 647 (4th Cir. 2002) (holding that a “jury could reasonably have concluded that Hiott never gave Dennis fair consideration because he had already decided for other reasons not to promote her, and that his proffered explanations for his choices were merely post-hoc pretexts covering a predisposition favoring [another candidate]”).

For these reasons among others, the evidence regarding Dean’s communications with Labor Relations, evincing his predisposition to demote Woodbury even before receiving any “recommendation” from his subordinates, ought to have been evaluated by the ALJ and findings of fact regarding the same should have been entered so that “the appellate court ‘may be fully informed as to the bases’” of the ALJ’s decision. *See Weyerhaeuser*, 124 Wn.2d at 35-36. The ALJ’s deliberate disregard of such important facts, which were prominently presented in the administrative hearing, rendered the administrative decision arbitrary and capricious. *See Heinmiller*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

**F. The Order lacks substantial evidence to find that Dean made comments critical of anyone other than Woodbury.**

Woodbury has assigned error to the ALJ’s “finding that Chief

Dean made comments critical of persons other than Woodbury and that Dean ‘gave ‘pros and cons’ about each Deputy Chief.’” *See* Br. at 6 (citing Order, ¶ 4.52, ¶ 4.75); *and see, e.g.* AR 4732 (Hepburn testifying Dean “didn’t give any ‘cons’ about anyone other than Oleson and Woodbury”). Unlike the response submitted to the Superior Court, the City’s response on appeal fails to address Assignment of Error No. 6 at all. *See generally*, Br. of Resp’t; *compare* CP 561 (arguing “[t]he ALJ apparently relied on the testimony of Hepburn to conclude that Dean gave ‘pros and cons’ about each Deputy Chief” and that “[t]he other Assistant Chiefs did not recall Dean’s comments, if any”); *contra* CP 590 (“The truth, of course, is that Nelsen gave testimony about clearly recalling the comments Dean made in the meetings and Nelsen’s testimony ‘fairly detracts’ from Hepburn’s testimony...”).

Woodbury’s brief described in detail the testimony from all of the relevant actors about the comments Chief Dean is alleged to have made in the series of discussions with his Assistant Chiefs regarding the demotion decision. *See* Br. at 47-48. As described in Woodbury’s brief, the testimony of (1) Dean, (2) A.C. Tipler, (3) A.C. Vickery, and (4) A.C. Nelsen do not support the ALJ’s finding (¶ 4.52) that Dean “gave ‘pros and cons’ about each Deputy Chief” and specifically made “comments critical of Deputy Chief Oleson.” *See id.* Only A.C. Hepburn’s testimony

could support that finding, but the testimony from A.C. Nelsen, explaining that Dean in fact spoke up *on behalf of Oleson* (not to criticize him) when it was *A.C. Nelsen* who was speaking critically of Oleson, is evidence that “fairly detracts” from Hepburn’s testimony and undermines the sole source of support in the record for the ALJ’s finding that Dean made critical remarks about anyone other than Woodbury. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Thus, the ALJ’s finding the Dean “had comments critical of Deputy Chief Oleson” and “gave ‘pros and cons’ about each Deputy Chief” is “not supported by evidence that is substantial when viewed in light of the whole record before the court;” and the record is “[in]sufficient to persuade a fair-minded person of the truth” of the finding made. RCW 34.05.570(3)(e); Ryan v. Dept. of Social and Health Services, 171 Wn. App. 454, 465, 287 P.3d 629 (2012).

While the City claims that “[w]hether Dean mentioned Woodbury at the 2008 meetings is not important,” Br. of Resp’t at 47, the fact that Chief Dean in the demotion meetings with his Assistant Chiefs singled out D.C. Woodbury—and **only** Woodbury— for criticism is a material fact relevant to proving retaliation. See Johnson v. Chevron U.S.A., Inc., 159 Wn.App. 18, 33, 244 P.3d 438 (2010) (stating in WLAD case alleging race discrimination that “[p]roof of different treatment by way of

comparator evidence is relevant and admissible”); *and Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996) (“The purpose of showing disparate treatment is to create an inference of discriminatory animus because direct evidence of discrimination is rarely available. ... ‘Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.’”) (*quoting Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)).

The fact that Dean singled out Woodbury for criticism in the demotion meetings is especially relevant to proving retaliation where Dean agreed on cross-examination that his criticizing *any* Deputy Chief in the meetings would be “improper,” and if limited to just one person, may be taken as an indirect order. AR 4562-63; *and see, e.g., Porter v. California Dep’t of Corr.*, 419 F.3d 885, 896 (9th Cir. 2005) (“deviations from the CDC’s protocol ... [and] irregularities in the process permit an inference of pretext with regard to the retaliation claim”).

In his opening brief, Woodbury charged that “Dean mendaciously denied that he criticized Woodbury’s performance at the demotion meetings and he even admitted that to do so would be ‘improper.’” Br. at 47; *accord* CP 104. Similar to the ALJ’s Order, the City’s brief on appeal offers nothing to explain how the testimony of A.C. Hepburn and A.C.

Nelsen, acknowledging that Dean did in fact make critical remarks about Woodbury, can be reconciled with Dean’s 2010 deposition testimony, in which he three times unequivocally denied talking about Woodbury’s alleged performance issues in the meetings with his subordinates. *See* Br. of Resp’t at 47; *compare* AR 2840 (Nelsen Dep., 68:6-8), *and* AR 4732 (Hepburn Test., R710), *with* AR 3456 (Dean Dep.) (testifying *not* that he did not recall speaking critically about Woodbury—but instead testifying “I did not” do it; “I didn’t personally talk about any of the candidates. I sat and listened...”). Dean denied having done it, knowing that it was improper for him to do so. *See* AR 4562. Despite Dean’s outright denials, the ALJ found Dean did in fact criticize Woodbury (and allegedly Olesen), but ignored Dean and Tipler’s admissions that doing so would be improper. *See* AR 591, ¶ 4.52. Where the testimony of the Assistant Chiefs, as well as the ALJ’s findings in ¶ 4.52, directly contradicted the repeated denials by Dean, it was error to find that Woodbury’s “contention of witness untruthfulness [was] unsubstantiated.” *See* AR 574, ¶ 4.3.

### III. CONCLUSION

For all of these reasons and those outlined in the opening brief, this Court should find that the Order of the ALJ constitutes “willful and unreasoning decision making, in disregard of facts and circumstances.” The Court should decide that reasonable minds may not differ about the

fact that Chief Dean met with Labor Relations administrators in November 2008—when Dean already knew of Woodbury’s SEEC complaint and knew that SFD’s Finance Director, Chris Santos, who was investigating Lt. Footer’s failure to invoice F&G, had been questioned by the SEEC—and that during the meeting with Labor Relations, Dean expressed his interest in demoting Woodbury, before he had even conferred with the Assistant Chiefs for their input and recommendation on the topic.

The Court should further find that, reasonable minds could not differ about the fact that Labor Relations advised Dean against demoting Woodbury for performance reasons; that Dean failed to share this information with the Assistant Chiefs; and that Dean met with the Assistant Chiefs about who to demote, during which meetings he made “improper,” “inappropriate,” and critical comments about Chief Woodbury, and only Chief Woodbury. Based on such facts, as well as Dean’s demonstrated mendacity, denying that he criticized Woodbury in the discussions with his subordinates, the Court should find that Woodbury established that his report to the SEEC was among the “substantial factors” in his selection for demotion. This case should be remanded for further proceedings consistent with such findings and for a determination of Woodbury’s reasonable attorney’s fees and costs.

Respectfully submitted this 6th day of May, 2016.

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CERTIFICATE OF SERVICE

I, Mark Rose, certify that, on May 6, 2016, I served the foregoing pleading on the parties listed below in the manner shown.

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