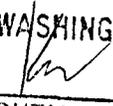


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STATE OF WASHINGTON

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ants. First, th, DIVISION II,
OF THE STATE OF WASHINGTON

DAVID S. DIVIS,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Sergeant Divis was improperly demoted by the Washington State Patrol (“WSP”) from Sergeant to Trooper without “cause” as required by RCW 43.43.070. RCW 43.43.070 entitles a Sergeant to have a Trial Board, consisting of two WSP Captains and one WSP Sergeant, hear a disciplinary case and decide whether there was “cause” for demotion. The Trial Board’s factual findings are binding.

In this case, the Trial Board cleared Sgt. Divis of most of the allegations levied and recommended a 20 day suspension, not a demotion. WSP Chief John Batiste disregarded this recommendation and demoted Sgt. Divis anyway. The first demotion order was vacated by the Superior Court and remanded to the Chief. The Chief again demoted Sgt. Divis, this time by impermissibly re-writing the Trial Board’s findings. The second demotion order was upheld and this appeal followed.

There is no “cause” for Sgt. Divis’ demotion for five reasons. First, the second demotion order improperly finds “facts” contrary to WSP procedures, RCW 43.43.080, and the evidence presented. Second, a demotion sanction for the conduct found by the Trial Board is neither “proportionate” nor “comparable” to the WSP’s actions in substantially similar cases. Third, the proposed demotion does not comply with the Collective Bargaining Agreement (“CBA”) in multiple ways. Fourth,

multiple breaches of WSP procedure in the investigation of this matter show that the investigation was not “fair” and thus this element of “cause” is not met. Included in these breaches was the intentional destruction by WSP Troopers of critical evidence central to this case. Fifth, Chief Batiste improperly pre-judged this case and his insistence on a demotion sanction violates the appearance of fairness doctrine.

For any and all of these reasons, the proposed demotion is not for “cause.” Because the demotion is not for “cause,” it is contrary to law, namely RCW 43.43.070. Because the demotion is contrary to law, the demotion is a violation of the APA, under RCW 34.05.570. Sgt. Divis asks this Court to vacate the demotion order and restore him to his position as a Sergeant in the WSP.

II. ASSIGNMENT OF ERROR

1. Did the Superior Court err when it refused to reverse the Final Order demoting Sergeant Divis to a Trooper position notwithstanding the Trial Board’s decision clearing him of most of the alleged misconduct and recommending a 20 day suspension? In particular, did the Superior Court err in failing to find that:

a. The Final Order improperly made factual findings contrary to WSP procedures and applicable law.

b. The Final Order improperly relied on a prior settlement agreement.

c. The Final Order's demotion sanction was not proportional or comparable to sanctions for substantially similar misconduct.

d. The WSP did not comply with the CBA in that even the conduct found by the Trial Board was materially different than the conduct alleged and no complainant was identified.

e. The WSP investigation was not conducted fairly.

f. The appearance of fairness doctrine was violated by the demotion order.

g. The demotion order was without cause.

III. STATEMENT OF THE CASE

A. Background.

Sgt. David S. Divis is a 21-year veteran of the WSP. He was hired on November 27, 1989. Sgt. Divis was promoted to Sergeant on March 2, 2006. *Transcript Vol. 5, 134-35.*¹

Prior to his promotion, Sgt. Divis was a Trooper in the Colville Detachment and a long term Trooper in Charge. As a Trooper in Charge,

¹ The Administrative Record was filed with this Court in the same format as filed in the Trial Court. RAP 9.1(a). Therefore, citations to the hearing transcript are in the form "TR" and then the applicable volume (1-6) and page numbers. Each day of testimony is in a new volume starting with page 1. Citations to the Administrative Record are to "Record" and the applicable page number. Citations to the Clerk's Papers are by "CP" and page number.

Sgt. Divis was responsible for a Detachment and essentially performed Sergeant duties. While in Colville, he received two commendations, one for helping the detachment turn around so they were functioning in a productive manner and one for helping the WSP to obtain new office space for the Colville Detachment. *Id.* 135-37.

Following his March 2006 promotion, Sgt. Divis' initial assignment was to supervise Detachment 7, District 2, located in King County, Washington. His immediate Supervisor was Lieutenant David Scherf. Captain Steven Burns was in charge of District 2.

There were serious performance problems of the Troopers in Detachment 7 prior to Sgt. Divis' arrival. The performance issues included overtime abuse, low productivity and a lack of accountability. *TR Vol. 4, p. 81.* The Troopers in Detachment 7 had broken down into several cliques within the attachment. *Id. p. 84.* Indeed, Detachment 7 was the workgroup with the greatest number of performance issues in District 2 prior to Sgt. Divis' arrival. *Id. 93:22 – 94:5; see also TR Vol. 4, 5 – 19 (testimony of Captain Burns).*

After being assigned to Detachment 2, Sgt. Divis was given direction by Lt. Scherf and Captain Burns as to changes they wanted in the Detachment. *Id. 94 – 100.* Specifically, he was directed to hold the members of the Detachment accountable, apply the same standards to all

Detachment members, and to build a team in the Detachment. *See TR Vol. 4, 4 – 19 (Burns); 86 – 101 (Scherf); see also TR Vol. 5, 188 – 217 (Divis).*

Captain Burns and Lt. Scherf testified that Sgt. Divis excelled in these assignments. *TR Vol. 4, 30-32 (Burns) Vol. 4, 99-100, 118 – 121 (Scherf).* Sgt. Divis' performance evaluations are outstanding and comment positively on the successes in Detachment 7. *Record 504 – 531. See also TR Vol. 4, 118-121.* In just two years under Sgt. Divis' leadership, Detachment 7 had moved from the worst performing to the best performing detachment in District 2. *TR Vol. 4, 151:16-18.* Even witnesses called by the WSP acknowledged that after Sgt. Divis' arrival, the Detachment worked as a team and the prior cliques were broken up. *E.g., TR Vol. 3, 19 – 21 (Trooper Laeuger), Id. 46 – 49 (Trooper Leifson).*

B. The Charges.

On January 15, 2006, however, two officials of the Trooper's Association approached Captain Burns to relay secondhand information about Sgt. Divis. *TR Vol. 4, 22-23.*² No Trooper in Detachment 7 ever raised these complaints directly. *Id. 23:5-7 (Burns); Vol. 5, 154 – 156 (Divis).* The Union's complaint was recorded on an Internal Incident

² The Union's motivation is shown by the following statement from Union official Latham to Lt. Scherf, "Dave is a f---ing Mormon, and they don't even allow blacks in their church." *TR Vol. 4, 128:1-6.* Lt. Scherf went on to explain that while Sgt. Divis was holding Troopers accountable in the way he wanted, the Union, including Latham, didn't like it. *Id. 128:7-25.*

Report (“IIR”). *Record p. 500*. The IIR alleges that Sgt. Divis said, “the three laziest Troopers in this Detachment happen to be black” and that he referred “to someone as an Aunt Jemima during a conversation with one of his Troopers.” These two allegations are based on events that were six to ten months old and about which no complaint was ever lodged at the time.

In fact, the Union’s allegations appear to be prompted by Sgt. Divis’ efforts to hold Detachment members accountable, including Trooper Ronald Tuggle. *TR Vol. 4, 129*. See, *TR Vol. 4, 132*.³ Trooper Tuggle was a long term Trooper with substantial performance problems. Tuggle would not patrol the areas of primary responsibility for the Detachment (*TR Vol. 4, 86*), would not assist other Troopers in taking calls but instead would spend most of his work time processing drivers arrested for DUI by county or local law enforcement officers. *TR Vol. 4, 13-19*. To compound the problem, Tuggle’s processing of drivers arrested by other agencies often put him in an overtime status such that Tuggle had the highest overtime usage in District 2. *Id. 87 - 88*. Burns and Scherf

³ The Union went so far to get Captain Burns removed from the case because they did not like his response. *Id. 126 – 172*.

directed Divis to address these problems. *Id.* 88 – 89, *See also TR Vol. 5, 204.*⁴

But when Divis attempted to address these problems, Tuggle, who is African American, complained to his Union that the efforts to hold him accountable were because of his race. *See, TR Vol. 4, 19 – 20.* The Union supported Tuggle and forwarded the secondhand information leading to the IIR.⁵

Upon receiving the IIR, the WSP's Office Administrative Standards ("OPS") began an investigation into these allegations. The OPS investigation lasted nearly six months. The OPS investigator violated the WSP's own regulations in many material respects during the course of the investigation. *See Section IV G(4) infra.*

Based on the results of the investigation, the WSP issued its preliminary decision, known as an Administrative Insight. *Record 2670 – 2682.* Sgt. Divis responded to that Insight in his Loudermill hearing. That hearing resulted in additional follow up investigation by OPS and later the formal notice of disciplinary charges dated August 27, 2008. *Record 532 – 558.*

⁴ Captain Burns' testimony about these issues is at *TR Vol. 4, 5 – 21.* Captain Burns testified that Tuggle was defying the direction from Sgt. Divis. *TR Vol. 4, 19:2-6.* Trooper Tardiff, the other long term member of the Detachment also confirmed these problems and Sgt. Divis' efforts to correct them. *TR Vol. 3, 71 – 82.*

⁵ Tuggle also filed a complaint against Lt. Scherf and Captain Burns accusing them of discrimination. *See, TR Vol. 4, 19-20 (Burns), 129, 159 (Scherf).*

Sgt. Divis appealed these charges to a Trial Board. The Trial Board consisted of two WSP Captains and one WSP Sergeant. The Trial Board held six days of hearing and received many exhibits.

C. The Trial Board's Decision.

On April 6, 2010, the Trial Board issued a 30 page Interoffice Communication containing the Trial Board's unanimous findings. *CP 174-204*. The Trial Board concluded that the WSP had levied eleven separate charges against Sgt. Divis even though such charges were not detailed in the IIR. The Trial Board found that five of those allegations (allegations 5, 6, 9, 10, 11) were "unfounded." The Trial Board "exonerated" Sgt. Divis on two additional allegations (allegations 2, 8). One allegation (allegation 9) was found to be "undetermined," with the Trial Board finding, in part, that "Sgt. Divis was not asked about this allegation during his interview with OPS."⁶ Under RCW 43.43.090 the findings dismissing the eight foregoing allegations are "final."

The Trial Board found that only three allegations (allegations 1, 3, 7) were "proven." What the Trial Board found to be "proven," however, was different than what the IIR alleged. The Trial Board also found substantial mitigating factors as to each of these remaining allegations.

⁶ Under the WSP internal regulations, one requirement of "cause" is that "[a]n employee has the right to know what the offense is and to have an opportunity to defend his actions/inactions." *Record 657*.

With respect to Allegation 3, the Trial Board did not find that Divis “referred to someone as an Aunt Jemima,” as alleged in the IIR. *Record 500*. Instead, the Trial Board wrote that “it is more likely than not that an insensitive comment by Sgt. Divis did occur.” *CP 179*. What the “insensitive comment” was is not identified in the Trial Board’s report.

With respect to the Allegation 1, the Trial Board did not find that the word “lazy” was used. Two participants in the conversation (Divis and Tardiff) testified that the word “lazy” was never used.⁷ *TR Vol. 3, 81 – 82 (Tardiff); TR Vol. 5,161 – 165 (Divis)*. Because the specific allegation in the IIR was a reference to “laziest Troopers,” the Trial Board did not find the specific allegation to be proven.

The Trial Board was quite clear that Divis did not violate the WSP harassment/discrimination regulation. “The Board unanimously agreed that Sgt. Divis did not violate this WSP regulation.” *CP 199*. Thus, whatever the two comments may have been, the Trial Board found that they were not discriminatory. In this way, the Trial Board found that what was alleged in the IIR was not proven.

⁷ Tardiff testified that it was OPS (LeBlanc) who put the word “lazy” into this conversation. *TR Vol. 3, 82:13-15*. The third person in the conversation (Berghoff) first told OPS that Divis said, “Why is it that the only problem – the only people I have problems with are my three black guys.” *TR Vol. 1, 55 – 56*. The word “lazy” was interjected only in the re-telling of the story.

The Trial Board also found a violation regarding allegation 7 (open forum), but this allegation is no longer at issue.⁸

The Trial Board next reviewed the WSP Regulations Sgt. Divis was alleged to have violated. The Trial Board found that Sgt. Divis **DID NOT** violate the WSP Regulations prohibiting discrimination/ harassment, regarding ethics and regarding courtesy. *CP 198-200*. The thrust of the two specific allegations in the IIR was that Divis engaged in racial discrimination. These allegations, if true, would be conduct violating the discrimination/harassment and/or ethics work rules. When the Trial Board specifically found that Sgt. Divis **DID NOT VIOLATE ANY** of these work rules, the Trial Board cleared Sgt. Divis of the specific allegations in the IIR.

The Trial Board also found numerous mitigating factors. With respect to Rules of Conduct, the Trial Board found that "... context and intent learned during proceedings provided background and did mitigate each comment and incident ...". *CP 197*. The Trial Board concluded that "the evidence indicated that a number of employees had demonstrated performance shortcomings." *CP 202*. "Sergeant Divis made many

⁸ By Order dated July 22, 2011, the Thurston County Superior Court modified the Trial Board's findings, and dismissed the Trial Board's finding that Sgt. Divis impermissibly engaged in an "open forum" discussion of personnel matters holding that this finding was not adequately alleged in the IIR as required by the CBA. *CP 349*.

decisions, often in consultation with his Lieutenant, in a correct fashion.”

Id.

The Trial Board report notes several times that the charges against Sgt. Divis were based on an extraordinary volume of hearsay. Due to the volume of hearsay, “the Trial Board unanimously agreed that statements were taken out of context and repeated [which] added to the negative atmosphere in the detachment.” *CP 203*. Finally, the Trial Board concluded that “the evidence presented demonstrated that the Sergeant had taken a poorly functioning detachment and created a much better performing team.” *Id.*

Based on the limited allegations found to be proven and the above mitigating factors, the Trial Board recommended a 20 day suspension (which may be served with accumulated vacation days), not the demotion sought by the WSP. *CP 204*.

This is the first case in the history of the WSP in which a Trial Board did not support the sanction sought by the WSP.

D. Chief Batiste’s Initial Final Order.

On May 7, 2010, Chief Batiste issued his first “Final Order” in this case.⁹ In that Order, Chief Batiste declined to “accept the Trial Board’s

⁹ Petition for Judicial Review, May 13, 2010, Ex. F, to be included in Supplemental Clerk’s papers.

recommended disciplinary action” and instead demoted Sgt. Divis to the rank of Trooper. No explanation or rationale for this decision was offered. Indeed, Chief Batiste’s “analysis” was limited to the following single 12-word sentence: “Having reviewed the Trial Board’s findings, conclusions and recommended disciplinary action, I decline to accept the Trial Board’s recommended disciplinary action.”

E. The First Trial Court Decision.

Sgt. Divis appealed his demotion to the Thurston County Superior Court. On June 7, 2011, the Superior Court heard the appeal, and then vacated the demotion order and remanded the matter to the Chief. *CP 348-350*. Specifically, the Superior Court determined that the Final Order failed to include a statement of findings and conclusions and the reasons therefore as required by RCW 34.05.461(3). *Id.*¹⁰

F. The Second Final Demotion Order.

On December 2, 2011, Chief Batiste issued his Second Final Order again demoting Sgt. Divis to a Trooper position. *CP 17-30*. In this Order, Chief Batiste impermissibly engaged in his own findings of fact and materially changed the Trial Board’s findings. Chief Batiste also made his own factual findings on matters which Sgt. Divis was never charged with

¹⁰ The Superior Court did not accept Sgt. Divis’ other challenges to the disciplinary order. Given the remand, those decisions were not then appealable.

and which were never presented to the Trial Board. Based on these new factual findings, Chief Batiste again demoted Sgt. Divis.

G. The Second Superior Court Decision.

Sgt. Divis sought review of the Second Demotion Order. *CP 4-13*. The parties stipulated to consolidate the record with the prior case to avoid re-filing and re-arguing the issues previously litigated. *CP 33-35*.

On July 11, 2012, the Superior Court entered an Order Affirming the Second Final Order demoting Sgt. Divis. *CP 239-41*. This appeal followed. *CP 242*.

IV. ARGUMENT

A. Standard of Review

The action being appealed is the Second Final Order demoting Sgt. Divis to a Trooper position. This appeal is based on both specific defects in that Order (e.g. impermissible fact finding, lack of comparability, etc.) and facts showing an absence of “cause” for any discipline. RCW 43.43.070 requires that any discipline, including demotion, be for “cause.” The WSP requires proof of 11 elements for there to be “cause” for discipline/demotion.¹¹ If any of the 11 elements are not proven, there is no “cause” for a discipline/demotion.

¹¹ The WSP Administrative Investigation Manual provides for 11 elements of just cause; namely: (1) Have the allegations against the employee been factually proven? (2) Is the discipline considered proportionate to the offense? (3) Was the investigation conducted

Judicial review of an administrative order is governed by RCW 34.05.570(3). That statute provides nine grounds to invalidate an agency action. Under multiple grounds, if “cause” for discipline/demotion is not present, the demotion order must be set aside.

In this appeal, the Court applies the standards under RCW 34.05.570(3) (the requirement that discipline/demotion may only occur for “cause”) directly to the administrative record. *Chandler v. Ins. Commissioner*, 141 Wn. App. 637, *rev. den.*, 168 Wn.2d 1056 (2007). Under this standard, this Court must decide whether each element of the statutory term “cause” is met based on the record presented to the Trial Board.

B. The Second Final Order Improperly Engages in Fact-Finding.

1. The Chief Lacks Statutory Authority to Make New Findings of Fact.

Throughout the Second Final Order, Chief Batiste makes his own findings of fact. Under RCW 43.43.080, however, the facts as found by the Trial Board are binding on the Chief. The Chief has no authority to

fairly? (4) Is the discipline contemplated non-discriminatory or similar to what another employee in a comparable situation would receive? (5) Is it the employee who is at fault? (6) Have mitigating circumstances been considered? (7) Has the employee’s complete work record been considered? (8) Is the discipline progressive? (9) Is the discipline free from anti-union sentiment? (10) Can the employee be rehabilitated? (11) Was the accused employee afforded procedural due process? *Record 656-659*. If any of these elements are not satisfied, there is no cause for Sgt. Divis’ demotion.

engage in independent fact-finding. The WSP has explained the statutory process as follows:

The Trial Board process works like a jury trial. While the Trial Board is hearing the matter, the Trial Board members sit as the jury to ascertain the facts and determine guilt or innocence. The ALJ sits as the Judge ruling on evidentiary and procedural issues. Once the Trial Board issues its decision, the findings are binding upon the Chief who imposes the discipline as a Judge would do in the sentencing phase of a criminal trial.

Respondent's Response to Petitioner's Trial Brief at 10 (emphasis added).

This description follows directly from the statutory language and the WSP's Regulation Manual. RCW 43.43.090 designates the Trial Board as the fact-finding body. The Trial Board's findings "shall be final if the charges are not sustained." RCW 43.43.090. Although the statute allows the Chief to determine the proper disciplinary action if a violation is found by the Trial Board, the statute contains no language allowing the Chief to make new and separate factual determinations on the merits of the allegations.

The WSP's Regulation Manual makes it clear that the Trial Board is the fact-finding body. Section 13.00.030(a) provides that "the purpose of the Trial Board is to determine ALL relevant facts." *Record at 3101 (emphasis added.)* Section 13.00.080(h) describes the two phase Trial Board process and states that "fact-finding is the first part of the Trial

Board ...” *Record, 3104*. There is no provision in Chapter 13 of the WSP Regulation Manual which grants the Chief the authority to conduct an independent fact-finding process. *Record, 3101-07*.

Before the Trial Board, the WSP explained the Trial Board process as follows:

The Trial Board process and procedures are further delineated in Chapter 13 of the WSP Regulation Manual. A complete copy of Chapter 13 is attached as Exhibit A. A Trial Board hearing is conducted before an administrative law judge. WSP Regulation 13.00.010(I)(B)(1). The regulation further identifies as policy that the hearings are fact-finding hearings to appraise all of the information accumulated concerning a given situation. The Board’s purpose is to determine all relevant facts. WSP Reg. 13.00.030(I)(A)(1).

Record 3092 (emphasis omitted from original, added above).

As described below, the Final Order engages in an extensive fact-finding process. Most of the “facts” newly determined in the Final Order are inconsistent with the Trial Board’s findings. But the Trial Board is the fact-finding body in this process. The Chief has no statutory authority to independently engage in fact-finding. Because the Final Order is based on the new “facts” purportedly found by the Chief, the Order must be reversed under RCW 34.05.570(3).

2. The Final Order Makes Factual Findings Regarding “Lazy Trooper.”

The Final Order first re-writes the Trial Board’s findings on the “lazy trooper” allegation. For example, the Final Order omits from the Trial Board’s findings the phrase that Trooper Jackson “testified after refreshing his memory with the OPS transcript.” *Compare CP 21-23 with CP 178.* The fact that Trooper Jackson’s deposition testimony was inconsistent with his OPS statement is important to assessing his credibility. Assessing witness credibility is the exclusive province of the Trial Board.

The Final Order then completely re-writes the Trial Board’s finding on this allegation. The Trial Board did **NOT** find that the word “lazy” was used in this context. *CP 179.* The Chief makes a new and contrary finding that “Sergeant Divis made a statement to the effect, ‘The three laziest troopers in the detachment happen to be black.’” *CP 22.* The new Final Order “finds” that what was alleged in the IIR was proven while the Trial Board did not so find. Allowing this new finding to stand would make the Chief, not the Trial Board, “the ultimate fact-finder within the WSP.” *Record, 3120.* The Chief bases this finding on “credible testimony.” Plainly, the Trial Board found the change in Trooper Jackson’s testimony after he reviewed his OPS statement relevant to his

credibility. Chief Batiste improperly alters the credibility findings of the Trial Board to support his new factual conclusion that the word “lazy” was used in this situation.

3. The Final Order Makes Factual Findings Regarding “Aunt Jemima.”

The Final Order also re-writes the Trial Board’s finding on the second incident. Although the text of the two “findings” is only slightly different, it is clear that the Final Order is finding conduct of a racially discriminatory nature that would by definition violate the WSP regulation prohibiting discrimination. This is clear throughout the Final Order’s repeated references to racial and discriminatory conduct. The Trial Board, however unanimously found that Sgt. Divis did NOT violate this regulation and **DID NOT** engage in any discriminatory conduct. *CP 199*. The Chief lacks any statutory authority to make any contrary factual finding.

4. The Final Order Makes Factual Findings Regarding the Regulatory Violations.

Finally, throughout the Final Order, Chief Batiste re-characterizes the two violations in a manner very different than the Trial Board’s findings. The Trial Board made very specific and limited findings. With respect to the “Rules of Conduct” violation, the Trial Board found that “Sergeant Divis made comments that were insensitive and that he should

have known would be perceived as such.” *CP 197*. The Trial Board’s findings on the “Unacceptable Conduct” violation appear to relate to the now dismissed “open forum” allegation. *See, CP 197-98*.

The Trial Board also determined that Sgt. Divis **DID NOT** violate the “Courtesy” regulation, **DID NOT** violate the harassment/discrimination regulation and **DID NOT** violate the ethics regulation. *CP 198-200*.

The Trial Board **DID NOT** find that Sgt. Divis made any “racially charged” statement or that he made any statement of a racial nature.

Instead, the Trial Board concluded:

... the evidence presented demonstrated that the sergeant had taken a poorly functioning detachment and created a much better performing team. Although his intent was to provide for an open and light-hearted dialogue in the group, the impact was eventually perceived in a negative manner.

CP 204.

The Final Order makes completely different factual findings, which cannot be reconciled with the Trial Board’s findings. The Final Order finds the comments to be “racially charged.” *CP 24*. The Final Order finds that Divis’ comments “communicated intolerance, scorn and disdain for his three African-American troopers.” *CP 25*. The Final Order finds “egregious comments [that] had significant relevance to his three African American troopers, as he was critical of African Americans

specifically.” *Id.* The events are called “egregiously unacceptable” in the Final Order. *CP 26.*

Each of these statements in the Final Order is a factual finding, however it may be labeled. These factual findings are the basic premise of the Final Order; namely, that Sgt. Divis made racially discriminatory comments and is demoted as a result. But that factual premise is **NOT** what the Trial Board found. Either the Trial Board or the Chief is the finder of facts because their respective findings are diametrically opposite. But it is clear (and undisputed) that the Trial Board is the fact finding body. In essence, the Final Order (and the resulting demotion) is based on what Sgt. Divis was charged with, not the facts the Trial Board found. In this way, the demotion is improper.

5. The Final Order Improperly Relies On a Prior Settlement.

The Final Order also makes factual findings regarding a prior situation resolved by a Settlement Agreement. *Record 2819-20.* Although not labeled as a “factual finding,” the Final Order concludes that a 2006 allegation made by Trooper Moate was true and that “Sergeant Divis repeat[ed] this type of misconduct within two years when he made the . . . inappropriate, racially insensitive remarks.” *CP 28.* The Final Order then seeks to connect the two situations by finding “a deeply troubling trend”

based on the factual finding that Sergeant Divis' "comments were reported because employees 'finally started getting fed up with the comments . . . it's becoming more of a habit' and 'it started to get progressively worse.'" But each of these findings are statutorily improper and are also without any substantial evidence.

First, RCW 43.43 and the WSP regulations do not authorize the Chief to make his own independent factual findings. The Trial Board is the fact-finding body.

Second, the Chief's factual findings are not supported by substantial evidence. The Final Order relies on the premise that the underlying factual allegation by Trooper Moate was true. *See CP 27*. Trooper Moate did not testify and Sgt. Divis was not asked about this incident either in the investigation or before the Trial Board.¹² The only testimony about the Moate matter was from Captain Hattel who testified only that this prior settlement was "reviewed" by OPS. *Record at 346*. There was absolutely **NO** testimony about the "facts" from this prior case.

The Settlement Agreement itself provides no information about what actually occurred. The Settlement Agreement states that there is a "proven" violation of the "unacceptable conduct" regulation but does not

¹² Sgt. Divis was questioned about a related issue in an expanded allegation that the WSP then withdrew and which was excluded from the record. *See, Record at 2659*. Even in that process, Sgt. Divis was never asked about the truth or falsity of Moate's allegation.

indicate what conduct Sgt. Divis engaged in to support this conclusion. *Record 2819*. The Settlement Agreement also states that the allegation that Sgt Divis violated the regulation regarding harassment/discrimination was “**UNFOUNDED.**” *Id.* Therefore, whatever conduct was settled in this case, and the record does not allow one to determine what that conduct is, it did **NOT** violate the WSP regulation regarding harassment/discrimination.

But the Final Order is based on the premise that Sgt. Divis did violate the WSP discrimination regulation in this situation. Thus, the Final Order refers to this situation as involving the “same reprehensible behavior” as the “egregious conduct [with] significant relevance to his three African American Troopers.” *CP 25*. This finding can be true only if the Moate situation involved some discriminatory behavior, notwithstanding that such allegation was “unfounded.” Similarly, on page 11, the Final Order refers to this situation as “similar conduct” that concerns “matters of race and gender.” *CP 27*. Again, this conclusion is inconsistent with the actual agreement and is unsupported by **ANY** evidence in the record.

The WSP Regulation Manual required the WSP introduce evidence about this situation for it to be considered in this process. Chapter 13.00.080(H)(2)(b)(1) provides that at the Trial Board hearing the WSP is

to “present evidence which shows the disciplinary history of prior actions, both of the accused and/or other employees whose conduct was sustained for the same or similar actions.” *Record 3104*. The WSP chose to offer no evidence as to what actually occurred with Trooper Moate. Accordingly, there is no record evidence sufficient to support the Chief’s new factual finding of what happened in this prior situation.

Third, there is no substantial evidence to support the conclusion in the Final Order that this prior situation “suggests a deeply troubling trend.” Initially, given that the record contains no evidence of what actually occurred in this prior situation, the conclusion that there is a “trend” cannot be supported by substantial evidence. Moreover, the Settlement Agreement itself contains a remedy for a “violation similar in nature.” Paragraph 3 of the 2008 Settlement Agreement provides that for a “violation similar in nature” the suspension would revert back to two days. *Record 2819*. But the WSP has never sought to impose such disciplinary action presumably because there was no determination that the matters were “similar in nature.”

Fourth, by relying on this prior settlement, the Final Order seeks to resurrect an allegation withdrawn from the charges in this case and thus excluded from this record. The Administrative Insight refers to “additional information alleging that in 2006 Divis [stated] why women

should not be troopers.” *Record at 2659*. This “additional information” was related to the Moate situation. The WSP **WITHDREW** this allegation and the evidence related to this “additional information” was **EXCLUDED** from the record. *Id.* It is improper for the WSP to now use the withdrawn allegation and the excluded evidence to support the sanction.¹³

Fifth, the Final Order improperly makes factual findings about why matters were reported and uses that finding to assert a connection between the two situations. The witness testimony cited was offered in the now dismissed “open forum” allegation. The Final Order uses testimony on this dismissed allegation to conclude that Sgt. Divis failed “to exercise more appropriate judgment.” This is simply a re-phrasing of the “open forum” allegation dismissed from this case. Moreover, there is **NO** evidence in the record connecting the testimony in the now dismissed “open forum” allegation with the prior (un-described) situation with Trooper Moate.

¹³ The Final Order also takes inconsistent positions with respect to the effect of a Settlement Agreement. The Final Order assumes the fact of settlement is an admission that the allegation presented by Trooper Moate was true. But in the comparability analysis, the Final Order asserts that “the nature of settlement agreements makes for imperfect ‘comparables’ analysis,” because the settlement agreement occurs before “the full extent of wrongdoing may be proven.” *CP 26*. In other words, as to Divis, a settlement agreement is sufficient to conclude all the allegations are true (despite what the agreement says and the requirement under the Regulation Manual to present evidence to the Trial Board) but as to other WSP employees and when a comparability analysis is involved, the WSP cannot determine what happened because there was only a settlement.

The demotion order improperly relies on this prior situation. Therefore, for this reason alone, the demotion should be reversed.

C. The Discipline Is Not Proportionate to the Offense or Comparable to Prior Sanctions.

“Cause” for discipline requires that the sanction be proportionate to the offense and comparable to sanctions for similar misconduct. The WSP record is undisputed that the process to evaluate these proportionality and comparability requirements is to compare the facts found by the Trial Board with the facts contained in the OPS history book and then to compare the discipline imposed in cases of similar severity with the discipline imposed in this case. *See WSP Reg. Manual 13.080(1)(H)(1)(h), Record 3104; and Record 351-54 (Hattel testimony).* There was no testimony to support any other method of completing the required proportionality analysis.

The Final Order, however, does not follow this analytical approach. The Final Order makes no effort to compare the severity of this proposed sanction (demotion) with the much lesser sanctions imposed in cases of far more serious conduct.

In this way, the Final Order is both arbitrary and capricious and lacks substantial evidence. It is arbitrary and capricious because it does not follow the procedure the record establishes that the WSP follows. *Id.*

It lacks substantial evidence as the record is clear that more serious offenses have been given lesser discipline.

1. Demotion is Not Proportionate to the Trial Board's Findings.

The argument in the Final Order on proportionality is unsustainable for four additional reasons. First, the argument as to proportionality is premised on the new facts the Chief finds in the Order. But these findings are improper as described above.

Second, the proportionality argument is premised on the allegations against Sgt. Divis that were dismissed by the Trial Board. The WSP alleged that Sgt. Divis' conduct destroyed the working relationship between himself and his subordinates (*see, Record 2664* (Disciplinary Charges at 6 – “The method Divis used ... resulted in an atmosphere of fear and retaliation and intimidation among members of his detachment.”)). Although this allegation was dismissed by the Court, the substance of this allegation reappears in the proportionality rationale. Thus, the Chief argues that Sgt. Divis' demotion is proportionate because the Chief finds that Sgt. Divis “completely destroy[ed] the faith, respect and confidence employees should and otherwise would have in their supervisor and for one another.” There is no support for this assertion in any sustained finding of the Trial Board. Instead, this is simply a variant of the

allegations the WSP levied that were dismissed. By justifying the proportionality requirement based on allegations dismissed by the Court and/or Trial Board, the Chief exceeds his statutory authority and acts arbitrarily and capriciously.

Third, the proportionality argument improperly relies on the prior settlement. For the reasons described above, this is inappropriate.

Finally, the Final Order does not explain how Sgt. Divis' conduct, even including the prior settlement, compares to the other more egregious behavior which resulted in lesser discipline. *See, CP 295-305; 307-310; 328-31.*

2. The Proposed Demotion is Not Comparable to Other Similar Situations.

The Final Order also contends that Sgt. Divis' demotion meets the comparability standard. This determination is unsupportable for six separate reasons.

First, the record is clear that the comparability analysis involves a comparison of the facts in a given situation with the facts in the OPS record history book. *WSP Regulation Manual §13.00.080(H)(1)(b)(1), Record 351-54.* The only testimony comparing the allegations in this case with the proven misconduct in similar cases was from Mr. Ravenscraft who testified that more serious offenses received lesser discipline than

demotion. *See, Record 441-446, CP 295-305.* In the Final Order, however, Chief Batiste makes no effort to conduct the comparability analysis which the record is undisputed was required. The findings on comparability cannot be sustained because the Final Order makes no effort to follow the process the WSP requires.

Second, Chief Batiste justifies the comparability by making another unsupported factual finding that no other WSP Sergeant has “got this particular behavior this wrong before.” But the Chief makes no effort to square this statement with the evidence in the record. For example, Sgt. Whalen had proven violations of four WSP Regulations including the discrimination and ethics regulations the Trial Board found not violated here.¹⁴ *Record 1748.* These violations were based on his engaging in unwanted sexual harassment of a Deputy Prosecuting Attorney and then making 43 telephone calls to the victim after being instructed to stop. *See, Record 1747-2760.* Clearly, such conduct violates the WSP discrimination regulation (and the Agreement has a “proven” violation of this regulation) and is much “more wrong” than anything the Trial Board found that Sgt Divis had done. Sgt. Whalen received a 45 day suspension, not a demotion. *Record 1748.*

¹⁴ The Whelan Settlement Agreement lists “Proven” violations of the WSP Regulations for “rules of conduct,” “employee conduct,” “harassment/discrimination/sexual harassment” and “code of ethics.”

Similarly, in OPS Case 2000-0984, the Sergeant had a “proven” violation related to “unbecoming conduct” for responding to a question about a Cadet with the statement, “Fire the fucking bitch.” *Record 725*. This proven violation involves the same WSP regulation at issue here and is much “more wrong” than anything the Trial Board found that Sgt Divis had done. This Sergeant, however, received no disciplinary sanction whatsoever.

These two cases are clear examples of conduct by a Sergeant which was more serious than that found here but which received a lesser sanction.¹⁵ Sgt. Whalen agreed to a proven violation of the WSP’s harassment/discrimination prohibition as well as three other WSP regulations violations. Sgt. Divis, by contrast, was cleared of the allegation that he violated the discrimination and ethics regulation. Given the conduct by Sgt. Whalen (and by the Sergeant in Case 2000-0984), the Chief’s assertion that no WSP Sergeant has “gotten this particular behavior (discriminatory conduct) this wrong before” is simply not supportable on this record.

Third, the Chief’s comparability analysis is again based on the Chief’s new factual findings. In this section, the Final Order refers to Sgt.

¹⁵ Additional more serious disciplinary situations that received a lesser sanction are collected in Table A to Petitioner’s August 9, 2010 Trial Brief. *CP 328-31*.

Divis' conduct as "his egregious comments" with "significant relevance to his three African-American Troopers, as he was critical of African-Americans specifically." This section goes on to reference diversity training, further underscoring the Chief's "finding" that Sgt. Divis engaged in conduct which violated the WSP's regulation regarding discrimination. But these findings in the Final Order are inconsistent with the Trial Board's findings, including the statutorily binding finding that Sgt. Divis **DID NOT** violate the harassment/discrimination regulations, and are therefore unsupportable.

Fourth, Chief Batiste improperly relies on Sgt. Divis' prior settlement for the reasons described above. The Final Order notes that absent the [unsupported] findings with respect to the prior settlement a less severe sanction would be imposed. *CP 28*. The improper reliance on the prior settlement alone requires reversal of the demotion.

Fifth, the justification for failing to follow the comparability analysis which the record undisputedly shows is required is unsupportable. The record is undisputed that "comparability" within the WSP is determined by comparing the situation at issue with the information in the OPS record history book. *See, Record 351-54*. Chief Batiste tries to justify his refusal to complete the required analysis by arguing that "there are no true 'comparable' employees" because the OPS record history book

involves settlement agreements. Such a conclusion is inappropriate for two reasons.

First, the record is undisputed that the comparability analysis requires just what Chief Batiste refused to do; namely, a comparison of the facts in the pending matter with the proven violation in the OPS record history book. When Chief Batiste refuses to engage in that analysis, he fails to follow the process the WSP has created and therefore the law requires.

Second, the comparability analysis is based on evidence outside the record. Chief Batiste comparability analysis is significantly based on his information and belief (“To my knowledge, the WSP has not involuntarily demoted other employees in a supervisory role ...”). Chief Batiste’s “knowledge” is not part of the record. It is not part of the comparability process established in the record. By considering matters outside the record, Chief Batiste has exceeded his statutory authority.

As the record demonstrates, the comparability analysis is straightforward. It is a comparison of the facts in Sgt. Divis’ case and the proposed sanction with the proven violations and actual sanction in prior cases. That comparison plainly demonstrates that a demotion sanction is not comparable and certainly not comparable to the Whelan case. Therefore, the demotion sanction cannot stand.

D. There is No Cause for Demotion.

Beyond the defects in the Second Final Order, which warrant reversal of the demotion order, there is no cause for any disciplinary action. Among other elements, “cause” requires that the WSP comply with the CBA and that the investigation be fairly conducted. Neither of these propositions are true. Thus, independent of the Second Final Order and the Trial Board’s decision, the failure to follow the CBA and the failure to conduct a fair investigation each mean that no disciplinary action may be imposed.

1. The Proposed Demotion is Contrary to the CBA.

The WSP must comply with the applicable CBA to have “cause” to discipline Sgt. Divis. RCW 34.05.570(3)(c) requires reversal of the demotion decision if the WSP “engaged in unlawful procedure or decision making process, or has failed to follow a prescribed procedure.” Taking a disciplinary action that does not follow the provisions of the CBA would be an unlawful procedure and a failure to follow a prescribed procedure. An action taken in violation of the CBA would also be arbitrary or capricious and thus subject to reversal under RCW 35.04.570(3)(i).

a. The Trial Board did not find that any specific charge alleged in the IIR was proven.

The CBA imposes an obligation on the WSP to provide specific notice of the allegations against the employee. Article 19.3 requires the

WSP to “continue to use an internal incident report (IIR) form.” The CBA requires that the IIR must contain “the specific allegations against the employee.” *Record 596, CBA Article 19.3C.*

With respect to the remaining issues in this case, the IIR alleges that Sgt. Divis said, “The three laziest Troopers in this detachment happen to be black,” and that he referred “to someone as an Aunt Jemima.”

The Trial Board did **NOT** find that **EITHER** of these two specific allegations had been proven. With respect to the “Aunt Jemima” comment, the Trial Board generally found that Sgt. Divis referred to a physical resemblance between a baseball player and the Aunt Jemima character used as a corporate logo. This remark occurred in the context of a detachment that often joked on the physical resemblance between detachment members and famous persons. *See TR Vol. 3, 15 – 16 (Laeuger); Vol. 3, 55 (Leifson); Vol. 2, 142 (Pierce).* Divis only knew Aunt Jemima as a corporate logo (*TR Vol. 5, 152*) as did at least two other detachment members. *TR Vol. 3, 15 (Laeuger); Vol. 3, 55 – 56 (Leifson).*

What the Trial Board found is very different than referring to “someone as an Aunt Jemima.” Referring to a person as “an Aunt Jemima” is clearly targeted to an individual in a negative way. The statement is unquestionably a racial slur. By contrast, commenting on a

general physical resemblance does not have the same connotation and was consistent with other joking behavior in the detachment. When the Trial Board found that Sgt. Divis did not violate the WSP discrimination regulation, it found that he did not make a racial slur and thus found the allegation that he referred to “someone as an Aunt Jemima” to be unproven.

The Trial Board also did not find that Sgt. Divis said that “the three laziest Troopers in this detachment happen to be black.” Again, this statement is plainly racial in nature as it is connecting specific individuals to stereotypical behavior. The Trial Board merely found an undescribed “insensitive comment by Sgt. Divis did occur.” *CP 179*. The Trial Board did not find the word “lazy” was used. *Id.* Again, the Trial Board found that Sgt. Divis did not violate the WSP discrimination policy, thereby finding the allegation in the IIR that would be a racial slur to be unproven. Therefore, the Trial Board did not find that the specific allegation in the IIR was true.

Once the Trial Board found that the “specific allegations against the employee” (*Record 596*) had not been proven, the CBA required dismissal of the disciplinary charges. This is true because any discipline based on conduct other than what was specifically alleged would violate the notice requirement in Article 19.3(c) of the CBA. By violating the

CBA, the WSP would fail to follow a prescribed procedure and thus any discipline would be contrary to RCW 34.05.570(c)(3). Therefore, once the specific allegations in the IIR were found not proven, a dismissal of the disciplinary charges was required.

b. The IIR failed to identify the complainant in violation of the CBA.

The IIR also fails to identify a complainant as required by the CBA. Again, Article 19.3 is specific. Article 19.3A requires that the IIR “shall contain ... the complainants name and address.” *Record 596*. The IIR, however, lists the complainant as the “Department” and provides no address. On its face, therefore, the IIR does not comply with Article 19.3A.¹⁷

At the Trial Board hearing, the WSP suggested that the CBA allowed the Department to be listed as the complainant. The Trial Board appeared to accept this argument, writing that “the agency often indicates ‘Department’ within the box in the form labeled ‘Complainant.’” *CP 202*. What the WSP “often” does is irrelevant. Compliance with the CBA

¹⁷ The requirement that a complainant be provided is important to many aspects of the investigation. The WSP Administrative Investigation Manual requires that the investigation inquire as to the motives of the complainant. *AIM 3-1, Record 625*. It is clear from the record that one Trooper motivating these charges was Trooper Tuggle. The record is also clear that Tuggle brought these charges forward because Sgt. Divis was holding him accountable and because Tuggle did not receive a Field Training Officer assignment he wished. Thus, had a complainant been identified and had the motivation of the complainant been inquired into, the WSP would have learned that a subordinate filed a charge against his supervisor because the supervisor was holding the employee accountable for his performance problems as directed and supported by district command.

is required. Article 19.12 of the CBA requires that “if the employer decides to substitute the agency as the complainant, the employer agrees to contact the Association to discuss the reasons for doing so.” *Record 597-98*. There is no evidence in the record that the consultation required by Article 19.12 ever occurred.

Thus, even if the CBA allows the substitution of the Department as the complainant, the WSP did not follow the prerequisites for that substitution. By not listing a complainant in the IIR, and by not complying with Article 19.12, the WSP violated the CBA. Because the CBA was breached, there is no cause for any disciplinary action.

2. The Investigation Was Not Fair.

The third element of the WSP’s definition of cause requires that the investigation be conducted fairly. *Record 657*. Conducting a fair investigation is also a requirement of procedural due process (WSP Cause Element 11). *Record 659*. If these elements are not met, there is no “cause” for any disciplinary action.

The investigation in this case was conducted by OPS Sgt. Charles P. LeBlanc. LeBlanc testified that his investigation was governed by the WSP Administrative Investigation Manual (“AIM”). *Id.* 150.

Both the CBA and AIM contain specific requirements for the investigation process. LeBlanc did not follow these requirements. Several key deficiencies in the investigation are described below.¹⁸

a. **LeBlanc did not inquire about the complainant's motive.**

The AIM provides two specific directives to investigators in interviewing complainants. First, the AIM directs the investigator to “consider potential motives of ... the complainant.” *AIM, p. 3-1, Record p. 625*. Second, the AIM directs the investigator to ascertain the “reason for any significant time delay in making the complaint.” *Id. 3-14, Record 638*.

But LeBlanc did not make either inquiry during his investigation. LeBlanc did not look into the motives of the people who were bringing this complaint forward. *TR Vol. 3, 154:23*. LeBlanc did not investigate why these complaints were coming forward now, and with respect to the Aunt Jemima incident why it was now coming forward 10 months after it allegedly occurred. *Id. 155:1-4*.

Similarly, LeBlanc did not investigate the connection between Sgt. Divis' efforts to hold Tuggle accountable for his unsatisfactory

¹⁸ LeBlanc's testimony regarding his investigation is in Vol. 3 of the Transcript at pages 142 – 191. Sgt. Divis urges the Court to review this testimony to obtain the full flavor of the investigation in this case.

performance and the complaints being lodged. *TR Vol. 3, 154*. Such an inquiry is also required by the AIM.

b. The investigation did not determine what evidence existed and what evidence was destroyed.

The AIM directs investigators “To determine what evidence exists. All pertinent evidence should be collected (evidence that can either prove or disprove the allegation).” *AIM ¶ 3-1, Record 625*. LeBlanc failed to comply with this directive as well.

In his February 18, 2008 interview with LeBlanc, Trooper Purcell provided a typewritten statement alleging that, among other things, the “Aunt Jemima” comment happened “on March 11, 2007 at 2300 hours.” *Record 2770*.¹⁹ Amazingly, LeBlanc never asked Purcell how he knew this date and time almost a year later. LeBlanc never asked Purcell how his typewritten summary came to be.

If LeBlanc had asked, he would have learned that Purcell made contemporaneous handwritten notes that Purcell destroyed once he learned that this investigation had been commenced.²⁰ LeBlanc conceded that such destruction of evidence would be relevant to the investigation because without the original notes, the investigator would have no method

¹⁹ The document also has specific dates and times for other incidents dismissed by the Trial Board. LeBlanc also never asked how Purcell knew this level of detail about those incidents.

²⁰ The destruction of this evidence itself makes any disciplinary action without cause. *See, CP 288-295*.

to compare what was contemporaneously written with the later typewritten summary. *TR Vol. 3, 156 - 158*. LeBlanc further testified that it would always be inappropriate for the Trooper to destroy such handwritten notes when there is an investigation pending. *Id. 158-59*.

A similar omission happened with Trooper Tuggle. As with Purcell, Tuggle brought a typewritten summary of events to his interview with LeBlanc. *Record 2781 – 2788*. Again, LeBlanc never inquired how the summary was prepared or how Tuggle was able to know that level of detail months after the fact. *TR Vol. 3, 160 – 161*. Again, had such inquiry been made, LeBlanc would have learned of Tuggle's destruction of his contemporaneous notes.

c. LeBlanc did not obtain personal knowledge but instead relied on hearsay evidence.

The AIM directs investigators to obtain first hand information in its interviews, "rather than providing rumor or speculation." *AIM 3-4, Record 628*. LeBlanc again failed to follow this directive. Instead, most of the investigation was based on hearsay, as the Trial Board repeatedly noted in its findings. *See, CP 199*.

d. LeBlanc conducted interviews contrary to the AIM.

LeBlanc testified that the preferred practice in interviewing witnesses is to ask questions that start with a "w", who, what, where, when and why and to not use all leading questions. *TR 3, 171:2-5*.

While those were the standards governing LeBlanc's investigation, his actual practice was exactly the opposite. LeBlanc's interview with Sgt. Divis is in the record. *TR Vol. 3, 140 – 41*. Virtually every question was leading and almost no questions that began with a "w" were asked. Sgt. LeBlanc also interviewed Lt. Scherf. Lt. Scherf was perhaps the most important witness in the investigation as he would have personal knowledge of the motives of the Troopers bringing the complaints forward, their performance problems, his discussions with Sgt. Divis about addressing those problems and the other issues in this case. Yet, Sgt. LeBlanc admitted that after reviewing the transcript of Lt. Scherf's interview, he was not able to find a single question asked of Lt. Scherf that started with who, where, what, when or why. *Id. 170:17-23*. Every question was leading and designed to confirm the desired outcome.

The AIM also has specific directives requiring that interviews be conducted in person and not by telephone. *AIM 3-7, Record 631*. The AIM directs investigators to "Conduct telephone interviews only when circumstances make in person interviews difficult, e.g., distance, time." The AIM directs that such interviews be audio recorded. *AIM 3-8, Record 632*. The AIM provides, "Avoid all non-recorded discussions. If this happens, fully recount the discussion as soon as possible on [sic] when

recording resumes.” LeBlanc ignored all these directives in his investigation.

First, his interview with Lt. Scherf was conducted by telephone. The interview occurred with Sgt. LeBlanc sitting in his office at OPS and Lt. Scherf sitting in his office in Bellevue. *TR Vol. 3, 169:21-25 (LeBlanc); Vol. 4, 135 (Scherf)*. LeBlanc could identify no reason why this interview could not have been conducted in person as the AIM requires. *Id. 170:11-13*.

LeBlanc also conducted follow up interviews of the detachment members by telephone. *TR Vol. 3, 171*. These interviews were conducted while all of the Troopers were at work. *Id.* No legitimate reason was offered why the interviews could not be conducted in person as required.

To compound matters further, the follow up telephonic Trooper interviews were not recorded even though the AIM mandates recording. *TR 171:17 – 172:2*. LeBlanc did not even prepare a summary of the non-recorded interviews as the AIM requires. He merely kept one line notes. *Id. 172:3-5*. Even then, LeBlanc did not provide his notes to the appointing authority. *Id. 172:6-9*.

LeBlanc’s decision to have unrecorded follow up telephone interviews is critical for two reasons. First, LeBlanc testified that these follow up interviews lasted approximately two hours. *Id. 172:10-11*.

Thus, LeBlanc confirmed that there was a lot of conversation that was not incorporated into his one line notes that no one now has a method to reconstruct. *Id.* 172:10-18. LeBlanc's process thereby concealed any evidence a detachment member may have provided that did not fit the desired outcome.

Second, LeBlanc's investigation report was directly contrary to the information ascertained in these telephonic interviews in at least one material respect.²¹ One key issue in the investigation was whether Divis apologized for the alleged Aunt Jemima comment. According to the notes of the telephone interviews, Trooper Jackson told LeBlanc: "I do recall that." *Id.* 173:13, Trooper Laeuger's interview note states, "Could have tuned it out", *Id.* 173, and the note of Leifson's interview that states Leifson does not recall whether Divis apologized. In his investigation report, however, LeBlanc wrote: "Jackson, Leifson, Laeuger and Purcell said they did not hear Divis apologize after the Aunt Jemima statement." *Record 2691.* LeBlanc finally admitted in cross examination that this statement in his investigative report was "wrong." *TR Vol. 3, 175:9.*²²

²¹ Because there is no record of these interviews, one cannot ascertain whether other misstatements were made.

²² LeBlanc continued his misrepresentations in a second description of his interview with Trooper Jackson. In his written investigation case log, LeBlanc wrote that Jackson said: "I don't recall Divis making any apology" with respect to the Aunt Jemima incident. *Record 2715, TR Vol. 3, 176:4-16.* Yet, LeBlanc testified (and his notes state) that when LeBlanc asked Jackson whether Divis apologized, Jackson said, "I do recall that." *Id.*

Again, these collective failures are very telling. LeBlanc dismissed Scherf as a witness because he did not want to listen to what Scherf had to say. LeBlanc conducted a perfunctory telephone interview of Scherf asking only leading questions because the information Scherf had to provide (and later provided to the Trial Board) was inconsistent with the conclusion OPS wished to reach. When LeBlanc conducted follow up interviews of the Troopers, he conducted those interviews by telephone and without recording so that the information provided could be shaped to fit the outcome OPS wanted to achieve. When Troopers provided information inconsistent with that desired outcome, LeBlanc simply wrote the opposite in his report.

OPS wanted to achieve a result and designed an investigation to achieve that result, even if it meant misrepresenting the facts.

e. LeBlanc did not interview a single witness identified by Divis.

The AIM directs investigators to give the interviewee the opportunity to provide additional information. *AIM 3-10, Record 634*. Consistent with this directive, LeBlanc asked Divis at the end of his interview whether there were any additional witnesses OPS should interview. Divis listed four witnesses, each of whom would have personal

173:13. Faced with this evidence, LeBlanc finally admitted that his written case log was incorrect. *Id.* *176:23-24*.

knowledge of the history that led to these complaints being brought forward. *TR Vol. 3, 187:17-24*. LeBlanc, however, did not interview a single witness Sgt. Divis identified. Compare *TR Vol. 3, 187* (listing Divis' witnesses) with *Record 2704 -2706* (listing witnesses actually interviewed).

f. LeBlanc did not read Divis' performance reviews.

LeBlanc testified that he obtained Sgt. Divis' annual performance reviews as directed by the investigation procedures. *Id. 188:13-16*. LeBlanc testified that reviews are collected for every investigation. *Id. 188:18*. But, amazingly, LeBlanc testified that he never read any of Sgt. Divis' performance reviews. *Id. 188:19 – 189:1*.

Performance reviews were admitted into the record. *Record 504; 511 – 517; 518 – 523; 525 – 530*. The reviews are uniformly excellent. Sgt. Divis is rated as Meets or Exceeds Expectations in all rating categories. In particular, Sgt. Divis is regularly rated as Exceeds Expectations in the categories of leadership, integrity and problem solving skills, the very attributes questioned in the OPS investigation.

Element 7 of the WSP cause definition requires that the employee's complete work record be considered. *Record 656-659 (emphasis in original)*. How could Sgt. Divis' complete work record be

considered, when LeBlanc never even read Sgt. Divis' performance reviews?²³

For there to be "cause" for any disciplinary action, the investigation must be conducted in a fair and unbiased manner. A fair investigation is one required element of the term "cause." The Second Final Order expressly finds that the investigation was "thorough, fair and complete." But by no stretch of the imagination can this investigation be called "fair" or "complete." But, unless the investigation was "conducted fairly," this element of cause is not met and any disciplinary action is without cause. Accordingly, no discipline can be for "cause" in this case.

E. The Final Order Violates the Appearance of Fairness Doctrine.

The appearance of fairness doctrine applies to judicial review of administrative agencies acting in a quasi judicial capacity. *City of Hoquiam v. Public Employment Relations Commission*, 97 Wn.2d 481, 488 (1982). The appearance of fairness doctrine provides that an Agency not only act fairly but must also do so with the "appearance of fairness." *Tatham v. Rogers*, 283 P.3d 583, 587 (Wn. App. 2012) ("Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that a judge appear to be impartial.").

²³ There are other allegations which were dismissed by the Trial Board but as to which the OPS investigation shows the biased and unfair nature of this investigation. *See, CP 282-84.*

The appearance of fairness doctrine provides that persons conducting fact-finding must do so in a fair and impartial manner and must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. *Narrows View Preservation Association v. City of Tacoma*, 84 Wn.2d 416, 420 (1974). Under the appearance of fairness doctrine, proceedings before a quasi judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing. *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 478 (1983). The rationale for this rule was recently explained by the Court of Appeals in *Tatham v. Rogers*:

Like the protections of due process, Washington's appearance of fairness doctrine seeks to prevent the problem of a biased or potentially biased judge. Under this doctrine, evidence of a judge's actual bias is not required; it is enough to present evidence of a judge's actual or potential bias. . . . [w]here a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating.

Id. at 594 (internal citations omitted).²⁴

²⁴ "Hearing officers are not judges, but we trust and empower them to preside over proceedings, take evidence, make findings of fact, and do other duties analogous to the role of a judge. The presumption of fairness for judges likewise applies to hearing officers . . ." *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 903, 232 P.3d 1095 (2010). In light of the authority granted to Chief Batiste by RCW 43.43.090, he should be held to the same high standards of impartiality as hearing officers.

Prior to the Trial Board hearing, Chief Batiste testified under oath in a related arbitration matter that he was briefed about the allegations in the Notice of Disciplinary Charges, presumably by OPS. Chief Batiste testified that he had concluded that Sgt. Divis could not be left in charge of a detachment based on the unproven allegations. Thus, before the Trial Board hearing was concluded, Chief Batiste had reviewed the file, made a conclusion and decided to demote Sgt. Divis.²⁵ The Arbitrator quoted Chief Batiste's testimony as follows:

Chief Batiste made clear that he was concerned about the Grievant remaining in charge of a detachment. In this regard, he testified as follows:

I was concerned that due to the seriousness of the allegations and the charges and the comments, according to the information that was shared with me and what I read myself, was so harmful in nature to employees, to himself, that it would not be in his best interest. And it certainly wouldn't be in the best interests of that detachment or any detachment to have him in charge until this was fully resolved.

Chief Batiste was asked why the Grievant couldn't have been assigned to another detachment in District 2, and he responded as follows:

Oh, first of all, there was a lot of hurt feelings. That was pretty apparent, a lot of very upset people over their interactions with the sergeant and how he conducted himself, the type of remarks he made.

From what I read, from what I heard, people lost total trust and confidence in him. In my view it would have

²⁵ If Sgt. Divis could not remain in charge of a detachment, demotion is the necessary consequence.

been very detrimental to those folks with regards to their experience and will, in light of what they've been through, to have him as their leader.

And also, him for him. I don't think he could have been successful and efficient and effective in running that detachment or a detachment in District 2 in light of what occurred.

Chief Batiste was also asked why he couldn't simply move the Grievant to another detachment in another District and he testified as follows:

Because it's my belief – that based on the allegations and what's contained in the file, that I lost trust and confidence in his ability to lead another detachment.²⁶

In his testimony in the arbitration hearing, Chief Batiste made it abundantly clear that regardless of what facts the Trial Board found, he had already determined to demote Sgt. Divis. “Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Matter of Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983) (citing *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976)). “For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge.” *In re Application of Borchett*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961).

²⁶ Petition for Judicial Review, May 13, 2010, Exhibit F to be included in Supplemental Clerk's Papers.

RCW 43.43.090 places the Chief in the position to review a Trial Board's recommended sanction. As such, the statute requires the Chief to remain neutral and objective until the Trial Board finds the facts and makes a recommendation. Chief Batiste did not do that. Instead, he reviewed the OPS file and was briefed on the allegations. Based on this review and briefing about the OPS file, Chief Batiste "lost trust and confidence in [Divis'] ability to lead another detachment." Chief Batiste's mind was made up based solely on the allegations which he plainly believed to be true, even though the Trial Board found facts to the contrary.

In reversing the Trial Board's recommended sanction, Chief Batiste simply imposed his predetermined outcome based on his prior review and briefing. Chief Batiste's own testimony shows that he decided this case in December 2009. This prejudgment of the case not only *appears unfair*, it is actually and fundamentally unfair. Sgt. Divis' demotion therefore violates the appearance of fairness doctrine and is necessarily without cause.

V. ATTORNEY'S FEES

If appellant is reinstated to his Sergeant position, he will be entitled to back pay for the time period he has been improperly demoted. The recovery of back pay (wages) triggers a right to attorney's fees and costs

under RCW 49.48.030. Pursuant to RAP 18.1, Sgt. Divis hereby requests such an award should the demotion be overturned by this Court.

VI. CONCLUSION

For the reasons set forth above, the order demoting Sgt. Divis should be reversed and he should be reinstated to his rightful Sergeant position with back pay and benefits.

Dated this 1 day of October, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 

Warren E. Martin, WSBA No. 17235
Attorneys for Appellant

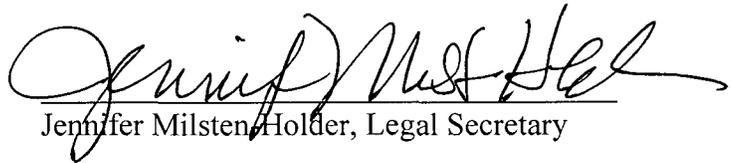
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2012, I filed via ABC/LMI Legal Messenger an original and one copy of the **BRIEF OF APPELLANT** with the Court of Appeals, Division II and caused to be delivered as shown below a copy of the same to:

Attorney for Respondent: VIA EMAIL AND LEGAL MESSENGER

Susan Sackett DanPullo
Assistant Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504
Email: Susand1@atg.wa.gov

Dated in Tacoma, Washington this 1st day of October, 2012.


Jennifer Milsten Holder, Legal Secretary

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