

No. 49631-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO

JOSHUA BILLINGS, individually,

Appellant,

vs.

TOWN OF STEILACOOM, a municipal corporation, RONALD
SCHAUB, individually, and PAUL LOVELESS, individually

Respondents.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENTS TOWN OF STEILACOOM, PAUL
LOVELESS AND RON SCHAUB

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I. INTRODUCTION

This lawsuit arises from the termination of Officer Joshua Billings' ("Plaintiff") employment with the Town of Steilacoom's Department of Public Safety. Officer Billings was terminated on September 25, 2012 based on numerous incidents of misconduct. Over the years, the Town made repeated efforts to counsel Billings regarding his inappropriate behavior, but none were successful. Following his termination, Billings pursued a 10-day arbitration in which he was represented by his Association, testified for days, and presented hundreds documents, and the arbitrator unequivocally found that Billings repeatedly engaged in misconduct that was contrary to the interests of the Town, that he was unrepentant and incorrigible, and that the Town had just cause to terminate his employment. *See, Appendix A* (CP 1398-1454).

Billings then proceeded to sue the Town and its officials for wrongful termination and disability discrimination/retaliation. He later added a claim for First Amendment retaliation pursuant to 42 U.S.C. §1983. These claims were properly dismissed on summary judgment by the trial court, finding that collateral estoppel precluded him from successfully proving the essential elements of each of these claims based on the factual findings established by the arbitration ruling. Billings was never barred from attempting to pursue such civil actions in court; however, application of the arbitrator's findings on certain issues to the elements of each of these claims—which cannot be re-litigated—establishes that he cannot prevail on these claims and that Town defendants are entitled to summary judgment.

II. RE- STATEMENT OF THE CASE

A. Plaintiff Josh Billings' Employment as a Public Safety Officer Was Terminated by the Town of Steilacoom in 2012 As a Result of Findings of Misconduct Following Investigations by Steilacoom and Outside Agencies.

Josh Billings worked as a Public Safety Officer (“PSO”) for the Town of Steilacoom from December 10, 2001 to September 25, 2012 when his employment was terminated. CP 108 (¶3.1). Steilacoom is a Town with a population of approximately 6,100 people located in Western Washington. At the time of Billings’ employment, all PSO’s served dual roles as both police officers and firefighters under supervision of the Director of Public Safety (DPS), commonly referred to as the “Police Chief.” The DPS (Defendant Ron Schaub) reported to the Town’s Administrator (Defendant Paul Loveless), who reported to the Mayor, an elected official. CP 112-114.

On September 25, 2012, following various internal investigations, pre-disciplinary notices, and opportunities to respond, Billings’ employment was terminated by the Town. CP 114-115, (¶¶12-16); 1295-1309 (Termination Letter). This decision was based on findings and recommendations by Chief Schaub. CP 114-115 (¶11-13), 209-224 (IA-12-01 Formal Discipline); 226-266 (IA-12-02 Investigative Report); 268-280 (IA 11-07, IA 12-02 & IA 12-04).

First, IA-11-07, initiated January 17, 2012 (CP 63,1110), stemmed from Billings’ actions during a traffic stop of a citizen, Mr. Johnson and Johnson’s subsequent visit to the Police Department to complain in October 10 of 2011. CP 264. This IA resulted in sustained findings of Billings’

misconduct of “unsatisfactory performance based upon tactics used” and “violation of department rules (courtesy).” CP 265-70.

Second, IA 12-02, initiated April 9, 2012 (CP 63, 896), arose from misrepresentations made to volunteer applicants and refusal to follow directives in March of 2012. CP 270-71, CP 63, 894. It resulted in sustained findings of “insubordination,” “departure from the truth,” “failure to perform,” “unsatisfactory performance”, and “violation of department rules.” CP 271-73.

Third, IA 12-04, initiated June 12, 2012 (CP 63, 1131), arose from a citizen complaint by Mr. Johnson for another incident occurring on or around April 22, 2012. CP 273, 1131. It resulted in sustained findings of “providing assistance outside the Town,” “lack of “compliance with rules of conduct,” “violation of department rules,” “leaving duty post,” “departures from the truth,” “intimidation of persons,” “unbecoming conduct,” and “unsatisfactory performance.” CP 273-77. Two of these investigations were thoroughly underway when Billings alleges he hurt his hand on May 1, 2012 (CP 1649), and the underlying incidents for the third had already occurred. The third investigation was opened in response to a citizen complaint to the Public Safety Department. *Id.*

Billings immediately pursued a grievance arbitration opposing his termination and seeking reinstatement with the assistance of the Steilacoom Officers’ Association (“SOA”). CP 115 (¶16), 141. The arbitration was originally set for June 2013, but was continued by the SOA/Billings’ request to December 4-5, 2013, January 8-10, 2014, and April 9-11, 2014. CP 115

(¶18-19), 134 (¶7-10), 1398-1454. In total, ten days were spent presenting evidence, witness testimony, and oral argument to arbitrator Katrina Beodecker. CP 115-116(¶19-20), 134-136(¶6-19), 1398, 1455-1456. A total of 70 exhibits, consisting of hundreds of pages of documentation, were admitted. CP 135 (¶13-15), 168-1313. Billings was represented by experienced labor attorney, Sydney Vinnedge, and the Town was represented by Town Attorney Larry Hoffman. CP 134(¶6), 1398. Counsel for each party had the opportunity to question and cross-examine each witness, and to present documentary exhibits totaling more than 500 pages. CP 115-116, 134-136, 143-166 (joint exhibits) CP 167-328(Town Exhibits), 329-1316 (SOA/Billings exhibits). The parties submitted legal briefing and had ample opportunity to argue their cases. CP 135(¶17), 1319-1359(Town's Brief), 1362-1395 (SOA/Billings Brief). Billings himself testified for approximately five of the arbitration days. CP 135(¶12), CP 1398-1454.

B. In 2014, The Arbitrator Ruled the Town Established “Just Cause” For Terminating Billings’ Employment After Proving by Clear and Convincing Evidence That Billings Engaged in Multiple Incidents of Established Misconduct.

In examining whether to uphold Billing’s discharge, the burden of proof at arbitration was placed on the Town of Steilacoom. CP 1428. The arbitrator also applied a higher “clear and convincing evidence” standard instead of the “preponderance of the evidence” standard that is applied in civil cases. CP 1428. The arbitrator individually examined 16 violations of department policy stemming from three separate investigations of Plaintiff:

IA 11-07, IA 12-02, and IA 12-04. CP 1433. The arbitrator found that the Town met its burden of proof on eleven of the fourteen claims that were actually analyzed, proving by “clear and convincing evidence” that the Town had “just cause” to terminate Billings’ employment in September of 2012. CP 1446-1499. The arbitrator’s individual factual findings supporting the ultimate “just cause” conclusion are laid out below.

1. Unsatisfactory Police Tactical Performance (Officer Safety).

This allegation stems from Billings’ traffic stop of a citizen, Randy Johnson, where Billings, upon learning that Mr. Johnson had a gun as well as a concealed carry license, reached through the car door window, grabbed Mr. Johnson’s throat and put his gun to Mr. Johnson’s head. CP 1411, 1433; 265 (IA 11-07 – Quote from Billing’s Report.) “*Billings determined to make a kill shot.*” CP 1411, 265. Billings was not disciplined for this decision to use force; however, the City and Schaub did find he violated department policy in the reckless manner that he handled his weapon – ignoring officer-safety issues. CP 266.

At arbitration, the SOA/Billings called firearms/training expert, Jackson Beard, in an attempt to justify Billings’ actions. CP 1433. However, Mr. Beard could not point to any training at the police academy that justified Billings’ tactical decisions and the arbitrator upheld Chief Schaub’s findings that his technique of grabbing Johnson by the throat and then pointing his gun in a manner where Billings would have shot his own hand did not constitute correct police practices; therefore, the Town proved

that Billings had engaged in unsatisfactory performance. CP 1433-1434.¹

2. Insubordination.

In 2009, the Mayor and the Town's Council decided to hire a Fire Operations Chief ("FOC") to enhance the fire side of the Department of Public Safety. CP 114 (¶10), 310-316 (Fire Operations Chief Position Opening and Job Description), 1414. This position was filled by Gary McVay, and it was clearly established that the position would be second in command only to the Director of Public Safety (Chief Schaub), thus making the FOC superior in rank to all other Department staff, including Sgt. Billings. CP 1415. The Town's Mayor even sat down with both Sergeants, including Billings, to explain the hierarchy of the system the Town intended to implement. CP 1415.

After extensive testimony, oral argument, and briefing on this issue, the arbitrator found that:

"[t]he record supports a finding that Billings refused to acknowledge McVay's authority over him as a sergeant/assistant fire chief or volunteer coordinator, even though the Mayor met directly with both sergeants to explain McVay's level of authority. Billings resisted changes McVay attempted to implement. He was confrontational, argumentative and disrespectful to McVay."

CP 1436. The arbitrator also found the Town proved that "Billings

¹ Billings' attempt to introduce the declaration of Glen Carpenter on summary judgment regarding justification for force was properly struck as irrelevant. CP 1834-1839, 1769-1779. Billings was never disciplined for using force. Nonetheless, Carpenter likewise agreed—as did Chief Schaub—that Billings was justified in using force, but confirmed Billings' tactics were "not the best" and not what is "commonly trained." CP 1708.

subverted McVay's authority when he told volunteer fire applicants that the Association would never allow the employer to raise the monthly service standard [from 24 hours a month to 48 hour a month.]" CP 1436. The arbitrator agreed with the Chief's findings that Billings refused to accept anyone's authority but his own and that his actions worked against the mission and values of the agency, and ruled the Town proved he had been insubordinate in violation of Department policies. CP 1437.

3. Departure From the Truth.

Billings was charged with two separate violations for departure from truth (i.e., lying) in two separate internal investigations. CP 1437-1438. The arbitrator ruled that the Town proved that Billings did, in fact, commit both violations. CP 1437-1439. First, Billings contacted volunteer fire fighting applicants despite clear direction from McVay that only McVay could contact these applicants. CP 271-72, 1418-1421, 1437-1438. When Billings was caught violating this order, he falsely claimed that he did not know what the order was. CP 272, 1438. After hearing testimony from Billings and other witnesses, the arbitrator found that the record supported a finding that "*Billings did not like McVay's directions, so he ignored them, only later to deny knowing what they were.*" CP 1437-1438.

The second charge of untruthfulness involved citizen Randy Johnson again. After his earlier violent encounter with Billings, Mr. Johnson reported that Billings subsequently drove slowly by his house and stared him down while he was in the front yard. CP 273, 1413. In response to this citizen complaint to the Police Department, Billings initially insisted

that he did not know where Johnson lived, and then gave three distinctly different excuses for being on Johnson's street while on-duty in his marked patrol car – when the street was outside of the Town of Steilacoom jurisdiction. CP 274-277, 1413-1414, 1438-1439. He first told Chief Schaub during a citizen-complaint inquiry that he was just looking for a quiet place to do paperwork and had just finished getting pizza from a nearby 7-11. CP 276, 1413, 1438. He next told Fife Police Department detectives (outside agency conducting internal investigation) that he was checking on houses belonging to friends and family in the area. CP 276, 1413-1414, 1438. Finally, he told Sgt. Brown at the Lakewood Police Department he was simply there on unrelated business and inadvertently drove past Johnson's house. CP 276, 1438. The arbitrator found that, based on the evidence, Billings had several opportunities to learn Johnson's address and that his inconsistent and contradictory explanations during official investigations lacked credibility. CP 1438-1439. She ruled the Town met its burden in both instances of proving by clear and convincing evidence that Billings' had been untruthful during Internal Investigations. CP1439.

4. Failure to Properly Perform Job Duties.

This misconduct charge arose out of Billings' failure to schedule volunteers for station time and for the March 2012 Fire Academy as required by his position as Volunteer Coordinator. CP 272-73, 1418-1421, 1439-1440. Billings' admitted that, in lieu of actually making the schedule, he simply posted it and allowed the volunteers to sign up for the shifts they

wanted. CP 1420, 1440. He further admitted that, instead of working through the application process with new applicants as required, he waited until the applicants passed their background checks before doing anything else, leaving five applicants unaware of the fire academy they needed to attend in a timely manner. CP 1439. The arbitrator found Billings was aware of and disregarded these responsibilities, and that the Town proved Billings' performance deficiencies by clear and convincing evidence. CP 1439-1440.

5. "Unbecoming Conduct" Violations.

Billings was charged with violations of SPD "unbecoming" conduct standards in two separate internal investigations. CP 1440. The first violation was based on Billings' conduct as Volunteer Coordinator and his misleading the volunteer applicants. CP 273, 1440. The second violation was based on Billings' interactions with Mr. Johnson. CP 277, 1440-1441 (both are detailed above). The arbitrator found the evidence clearly and convincingly established that "*[t]hose facts support the Chief's conclusions that Billings acts as though his own personal opinions on how the department should be run are superior to those with authority over him.*" CP 1441. The arbitrator additionally ruled that the Town met its burden of proving by "clear and convincing evidence" that Billings further violated SPD policies by engaging in conduct unbecoming of a Steilacoom Public Safety Officer. CP 1441.

6. Unsatisfactory Performance Violations.

Billings was charged with two separate violations for unsatisfactory

performance arising out of two separate internal investigations. CP 1441-1443. The first charge consisted of several examples where “Billings was unwilling or unable to perform certain assigned tasks[.]...” as a Sergeant and Volunteer Coordinator. CP 273, 1442. These included (1) refusal to pick up office keys for FOC McVay despite a direct order to do so because he the only one able to at the time, (2) intentionally late response to a time-sensitive email despite it being clearly marked as such, resulting in the Town having to adjust the entry-level Civil Service applicant list, and (3) failure to respond to an email from the Town Administrator (Defendant Loveless) regarding a public records request, exposing the Town to potential risk of a lawsuit and monetary penalties. CP 1419, 1442. The arbitrator found that Billings’ own extensive arbitration testimony established that he “always had an excuse” as to why he did not properly perform his own job duties, often blaming some other unidentified culprit as supposedly responsible for his job duties. CP 1441-1442.

The second unsatisfactory performance charge stemmed from Billings’ repeated “failure or refusal to conform to established work standards.” CP 277, 1442. The arbitrator found Chief Schaub’s findings on this matter was supported by the entire arbitration record. CP 1442. While Billings argued that he did follow all directives given to him, whether oral or written, the arbitrator ruled that evidentiary record proved otherwise – by clear and convincing evidence. CP 1442-1443. Billings conceded his refusals were often because he did not agree with management about the directives. CP 1442. The arbitrator ruled that the Town proved Billings

repeatedly failed or intentionally refused to conform to reasonable work standards established by Town management. CP 1441-1443.

7. Leaving Duty Post Violations.

Billings admitted he frequently drove past the homes of family members and other law enforcement agency members while he was on duty even though they were outside of Town limits. CP 274, 1443-44. Pursuant to Department policy, this constitutes “leaving [your] duty post,” and the arbitrator found that this violation had been clearly established. 274, 1445.

8. Failure to Terminate Billings’ Employment in 2012 Would Damage the Steilacoom Public Safety Department.

In her conclusions, Arbitrator Beodecker ruled that, based on all of the violations proven by the Town by a clear and convincing evidence, the Town had proven it had “just cause” to terminate Billings’ employment in September of 2012 for the reasons stated in its termination letter. CP 1446-1449. The arbitrator found that Billings’ actions, statements, and behavior all reflected a “destructive” attitude that greatly harmed his performance and relationships with his superiors. CP 1449. The arbitrator also found that “[i]t appears that Billings lost sight of the fact that he worked for the Town” and that the evidence supported Chief Schaub’s conclusions that “*Billings had grown into ... [a] self-serving manipulator of the system and disrespectful and resistant to all who dare to suggest change to the system in place.*” CP 1449.

Significantly, when faced with the question of whether a lesser sanction should have been imposed as a means of “progressive discipline,”

the arbitrator ruled that “[t]he record does not show how a lesser punishment would change Billings’ attitude” and upheld termination as the appropriate sanction.” CP 1454. Even as a neutral party hearing the facts for the first time – much of it based on evidence and testimony coming from Billings himself – the arbitrator recognized the pervasiveness of negativity, disruption and insubordination that Billings brought to the Department and acknowledged the need to end it in the best interest of the Town. The arbitrator finally concluded that “[g]iven the continuum of punishment and Billings’ work and disciplinary history, termination is the just and appropriate result” because “[i]f I were to change his termination to a demotion, he could do damage to the department as a PSO who would continue to challenge the directions.” CP 1454. The arbitration award was not appealed. CP 135(¶19).

C. PROCEDURAL BACKGROUND OF LITIGATION.

Three years after his termination, in September of 2015, Billings filed a tort claim with the Town of Steilacoom indicating his intent to file a lawsuit based on his 2012 termination. CP 116, 130-132. Two months later, he filed this action in Pierce County Superior Court. CP 107-111. In Plaintiff’s Complaint, he alleged that “*throughout his employment with Steilacoom, [he was] a conscientious, competent, and dedicated worker,*” that he was “*highly qualified for the position,*” and that he “*was performing satisfactorily.*” CP 108 (¶3.1). However, these issues were already fully and fairly litigated during extensive arbitration proceedings, and the arbitrator’s findings to the contrary preclude re-litigation of the same facts.

In 2015, Billings alleged claims of RCW Ch. 49.60 (WLAD) discrimination/retaliation and wrongful discharge in violation of public policy. CP 109 (¶¶4.1-4.6). In response to the Town Defendants' Motion for Summary Judgment, he amended his Complaint in 2016 to add a 42 U.S.C. § 1983 First Amendment retaliation claim.² CP 1553-1555, 1556-1566, 1832-1833. Applying the arbitrator's factual findings to the substantive elements of each of these claims, it is clear that Billings cannot establish the essential elements necessary to prevail on each of these claims at trial. Thus, Billings' civil claims are barred by collateral estoppel and were properly dismissed by the trial court. CP 1837-1839.³

III. ARGUMENT

A. **Billings concedes his September 25, 2012 termination is the Only Adverse Employment Action at Issue.**

Billings agreed below that claims or damages for employment actions occurring prior to September 25, 2012 would be barred by the statute of limitations. CP 1588. Thus, his termination on that date is the only employment action at issue. Id.

B. **Essential Elements of Billings' Claims Have Already Been Fully and Fairly Litigated, and Therefore the**

² Billings first obtained a two-month continuance of Respondents' summary judgment motion, asserting he needed to conduct discovery to respond. CP 1511-1514, 1551-1552, 1556-1566, 1806-1808, 1811-1815; CP 14-102. However, he never pursued any discovery. CP 1733, 1796-1799, 1780-1795. Instead, he moved to amend his complaint to add the First Amendment claim (CP 1780-1795, 1553-1555), which the court granted on August 12, 2016 (CP 1832-1833); the court then proceeded to enter the order dismissing all of Billings' claims at the same hearing. CP 1837-1839.

³ Billings conceded dismissal of his claims for emotional distress, outrage, negligent supervision/retention, and damages under RCW Ch. 41.56. CP 1588-1589.

Arbitrator's Ruling Collaterally Estops Re-litigation of These Issues.

“The general term *res judicata* encompasses claim preclusion, (often itself called *res judicata*) and issue preclusion, also known as collateral estoppel.” *Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 507, 745 P.2d 858, 860 (1987). In the case of “issue preclusion”, only those issues actually litigated and necessarily determined are normally precluded. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. *Id*; see also *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 228, 588 P.2d 725 (1978).

Billings repeatedly confuses the two doctrines, spending considerable time arguing that his choice to pursue a labor arbitration does not waive his right to later pursue civil “claims” in court. This is not in dispute; Respondents agree Billings was entitled to file civil claims despite the prior arbitration. However, he cannot re-litigate “issues” that have already been decided after a full evidentiary proceeding.

To apply collateral estoppel, the following elements must be present: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Id*.

1. The Claims Billings Pursues Here Are Based on Identical Issues That Were Fully Litigated in Arbitration.

In determining whether successive proceedings involve “identical

issues,” the court considers: (1) whether rights established by the prior judgment would be impaired by prosecution of the second; (2) whether substantially the same evidence is presented in both suits; (3) whether both suits involve infringement of the same rights; and (4) whether the suits “arise out of the same transactional nucleus of facts.” The fourth factor is “the most important,” and may be decisive. *Déjà vu v. City of Federal Way*, 96 Knapp. 255, 262, 979 P.2d 464 (1999), citing *International Union v. Karr, supra*, at 1430 and *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1992).

The lengthy arbitration in 2014 arose out of the exact same nucleus of facts and involved the same evidence that would be presented here to litigate Billings’ claims of discrimination, wrongful discharge and retaliation. During the 10-day arbitration, the Town presented testimony and evidence as to why Billings was terminated, and Billings argued that he did not engage in the alleged misconduct, that others were to blame for his misconduct, and that termination was too harsh a penalty for his misconduct. The same witnesses would testify in a civil suit regarding the reasons for his termination. The same documentary evidence—citizen complaints, warnings, policies, multiple investigations and findings, pre-termination notices, and termination notice would be presented to document the reasons for the Town’s termination decision. Billings fails to identify evidence or witnesses that would be different or would change the outcome of a fact-finder’s decision as to the basis of the Town’s decision to terminate

his employment in 2012.⁴

2. The Arbitration Regarding Billings' 2012 Termination Was a Final Judgment On the Merits.

It is well-established that Washington law assigns preclusive effect to administrative decisions as well as formal court proceedings. For example, in *Shoemaker*, a Deputy Police Chief was demoted in rank after providing negative testimony about departmental practices. He complained that the demotion was unlawful retaliation, and the Civil Service Commission held a hearing on the matter.

Shoemaker was represented by counsel, who was permitted to give an opening and closing statement, to call witnesses and to cross-examine witnesses. All witnesses were placed under oath. Shoemaker had had the opportunity to examine documents of the department, some of which were introduced at the hearing. Shoemaker's counsel prepared and submitted a hearing memorandum, setting forth his legal argument...However, certain other possible procedural safeguards were not present. The hearing examiners were not attorneys. The rules of evidence were not in force. The Commission has not promulgated official rules to govern hearings of this type.

Id. at 506.

The Commission eventually ruled that the demotion was not retaliatory. When the plaintiff subsequently filed a civil rights action in

⁴ The parties already invested significant resources in litigating the issues surrounding Billings' 2012 termination, including spending more than \$30,000 in fees to the arbitrator. That does not include the cost to the Town in staff resources to attend, testify, or prepare for the arbitration hearing, or fees to the Town's attorney for litigating the matter.

federal court, the judge found that the Commission's decision "was binding on the federal court under the doctrine of collateral estoppel," and dismissed the case. *Id.* Plaintiff appealed, claiming the Commission hearing was not a "prior proceeding" for purposes of collateral estoppel under state law, and the Ninth Circuit certified the question to the Washington State Supreme Court. *Id.*

The State Supreme Court held that "Where the prior adjudication took place before an administrative body, collateral estoppel may be proper," and outlined three factors to consider: "(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." *Id.* at 508. Addressing the second factor, the Court also cited the Restatement's position that administrative decisions are to be given preclusive effect "insofar as the proceeding... entailed the essential elements of adjudication," such as notice, opportunity to present arguments and evidence, and a final decision. *Id.*

In *Shoemaker*, the State Supreme Court held that the decision by the Bremerton Civil Service Commission was entitled to preclusive effect, even though (1) the Commission members were not lawyers, (2) no procedural rules had ever been promulgated for such hearings, and (3) basic rules of evidence were not even observed. *Id.* According to the Court, it was sufficient that complainant was allowed to call witnesses, cross-examine adverse witnesses, and generally present evidence to support his claims. *Id.*

The findings of the 2014 Steilacoom-SOA/Billings arbitration

hearing compel application of collateral estoppel to bar further litigation of Billings' civil claims here. During a lengthy arbitration hearing, Arbitrator Boedecker reviewed the same evidence that would be submitted to the court in this litigation and ruled that the Town of Steilacoom had just cause to terminate Plaintiff Josh Billings' employment as a Public Safety Officer based on proven misconduct. CP 1398-1454. Billings was permitted to call witnesses (including at least one expert witness) in support of his case and to testify at length. CP 133-137, 112-117. Billings was also permitted to argue using almost any evidence that he wished, including evidence that likely would not be admissible under the rules of evidence as applied in superior court. CP 133-137. Despite these procedural advantages for Billings, the arbitrator still found that the Town had proven by clear and convincing evidence that Billings engaged in repeated misconduct that established "just cause" to terminate the his employment as a PSO. CP 1398-1454.

In her conclusion, the arbitrator ruled "*I agree with the employer though, that at some point Billings seems to have lost perspective on his job responsibilities.*" CP 1446. For the reasons laid out in the statement of the case, *supra*, the arbitrator further held that "*Billings has forfeited his opportunity to further serve the Town as a Sergeant or officer.*" CP 1449. These findings conclusively establish that the Town had legitimate, non-discriminatory reasons for terminating Billings in September of 2012.

Billings' suggestion that the record is incomplete because it lacks *transcription* of 10 days of arbitration testimony is without merit. He cites

no authority, and none exists, requiring “a transcribed record” to determine whether issues have been fully and fairly litigated. Rather, the proponent [of collateral estoppel] must only provide the reviewing court with a “sufficient record” of the prior litigation to facilitate such analysis. *See, Beagles v. Seattle-First Nat. Bank*, 25 Wash.App. 925, 932, 610 P.2d 962(1980) (declining to apply collateral estoppel only because court did not even have a copy of the pleadings or complete finding entered by prior decision-maker).

Here, Arbitrator Boedecker’s 55-page ruling exhaustively details all of the facts, evidence, and witness testimony that were litigated at the arbitration, and the basis of each of her many findings and conclusions. CP 1398-1454. The evidentiary record alone and exhibits totaling nearly 1,000 pages reflects in writing every document, complaint, internal investigation, witness statement, outside investigation/findings, statement/response by Billings related to the underlying conduct that led to his termination. *See*, CP 112-117, 137-1461, 1398-1454. Many of her findings are based on Billings’ own admissions, testimony, and/or credibility determinations. *See, e.g.* CP 1437-39 (p. 40-42), 1445 (p. 48), 1447-48 (p. 50-51), 1451 (p. 54).

The question posed to the trial court—and this court now-- is not akin to an appellate review or re-evaluation of all of the evidence considered by the arbitrator, but merely to determine whether Mr. Billings had a full and fair opportunity to present evidence and advocate for his position on the issues that prevent him from succeeding on the instant claims in this lawsuit.

See Shoulberg, 169 Wash.App. at 177. (Appellate Courts perform the same inquiry as the trial court.); *Meder v. CCME Corp.*, 7 Wash. App. 801, 803, 502 P.2d 1252, 1254 (1972) (Purpose of res judicata is to bar relitigation of issues already litigated.)

Channel v. Channel, 61 Wash. App. 295, 298-301, 810 P.2d 67, 68-69 (1991) is inapplicable to this case. Billings asserts that an arbitration decision that is not “reduced to a judgment” is not final for the purposes of collateral estoppel. CP 1578 (App., p. 23). *Channel* involved a motor vehicle accident case where one party attempted to use an abandoned arbitration award (the parties settled) to preclude civil claims in state court. *Id.* at 297-98. *Channel* relies on RCW 7.04.010, *et seq.*, which was repealed in 2005 and replaced with the Uniform Arbitration Act, RCW 7.04A *et seq.* RCW 7.04A.030(4) specifically states: “This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.” (Emphasis added.) In contrast, the Steilacoom CBA specifically states in section 8.1 – Step 5: “The arbitrator shall render a written decision, or bench decision if mutually agreeable to the parties, within thirty (30) days of the hearing; which decision shall be final and binding on both parties.” CP 153(Section 8.1-Step 5 Arbitration). Billings concedes *Channel* and RCW 7.04 do not apply to labor arbitrations (App., p. 24).⁵

⁵ Appellant also raises a hearsay issue, at p. 23, but simultaneously admits it was never raised below and should not be considered, so it should be disregarded.

3. Billings Was in Privity with the Association That Vigorously Litigated His Challenge to His Termination at Arbitration.

Billings' suggestion that the parties are not the same because he was represented by the Association is meritless. In *Christensen*, 152 Wn.2d at 328, n.5, the Washington Supreme Court also rejected an argument that a plaintiff-employee is not "in privity" with a union representing him simply because he was represented by union attorneys (because Christensen's interest was represented by his union, he was in privity with the union, citing, *Robinson v. Hamed*, 62 Wash.App. 92, 100, 813 P.2d 171 (1991); *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 202 (5th Cir.1968); *Handley v. Phillips*, 715 F.Supp. 657, 667 (M.D.Pa.1989)).

The undisputed record herein conclusively establishes that Billing's interests were vigorously and effectively represented by the SOA and its attorneys. Every procedural step favored Billings, as the SOA: 1) filed the grievance, demanding reinstatement and back pay, 2) demanded arbitration, 3) pursued discovery, 4) obtained a continuance to conduct further discovery and prepare for arbitration, 5) advocated for Billings through 10 days of arbitration proceedings—calling lay and expert witnesses, conducting direct and cross exams, submitting exhibits, making argument, 6) filed detailed legal briefing advocating Billings' every factual, evidentiary, and legal position. CP 112-117, 137-1461, 1398-1454. In addition to the record of the union's advocacy, the detail of the Arbitrator's written decision itself demonstrates the depth of issues litigated and positions/evidence proffered by the parties. CP 1398-1454. Billings offers

no evidence establishing that he was actually precluded from presenting testimony or evidence during the arbitration that would have actually warranted a different outcome on the material decisions at issue here. CP 1657-58(Billings' Dec.). Plaintiff presented no additional or different evidence in the trial court, nor did he suggest any exists, that he would have presented (either at arbitration or in a civil trial) if his challenges to his termination were based on First Amendment, discrimination, and retaliation grounds.

4. Billings Cannot Establish Injustice Would Result From Application of Collateral Estoppel to Dismiss His Civil Claims Here.

a. *Any Procedural Differences Between Arbitration and a Civil Bench Trial Favor Billings.*

The only procedural differences between the grievance arbitration and this civil litigation significantly favor Billings – not the Town. First, the burden of proof was placed on the Town at arbitration, whereas here Plaintiff Billings would bear the burden to prove each of the elements of his civil claims in this action.⁶ Second, the Town was required to prove the elements of its case at arbitration by “clear and convincing evidence,” a higher standard than the “preponderance of the evidence” standard applied

⁶ At all times, the plaintiff bears the ultimate burden of proof on claims of discrimination. See, *Johnson v. Express Rent & Own, Inc.*, 113 Wash. App. 858, 860 at n.2, 56 P.3d 567, 568 (2002)

in civil litigation of Plaintiff's claim here, and yet the Town still prevailed. Third, Billings was allowed to present five days of testimony, hundreds of pages of documentary evidence, and make any arguments he wanted during the arbitration. He fails to identify a single witness, piece of evidence, or issue he was prevented from presenting to the arbitrator while advocating for himself. It is far more likely some of the extensive evidence Billings was allowed to present at the arbitration in an attempt to make excuses for his own misconduct would not even be admissible in a civil trial; however, the same evidence regarding the Town's decision-making leading to his termination, and the underlying events leading to that decision, would be.

b. *Billings Had Already Waived His Right to a Jury.*

Billings' references to injustice based on his right to have a "jury" decide certain issues (pp. 2, 16-17, 22, 25) are immaterial; Billings had already chosen to waive his right to a jury trial in this matter when summary judgment was granted. The matter would have gone to a bench trial if it had not been dismissed. CP 1796-1797(¶ 4).⁷ Even if he had not waived this right, he still would not be entitled to re-litigate *issues* already decided by the arbitrator in front of the jury. *See, Christensen*, at 962, n.4 (citing *Reninger*) (no state constitutional right to a jury trial on a factual issue that was already resolved in a prior proceeding). Rather, the jury (or judge in this case) would be instructed on findings already made by the arbitrator.

⁷ If the court of appeals reverses the summary judgment decision, the matter would be remanded to Pierce County Superior Court for a bench trial.

Nor is Billings' "disagreement" with the arbitrator's rulings, or his after-the-fact claims that his union was allegedly "poorly funded" evidence of any sort of "injustice" toward him.⁸ Mr. Billings was represented by experienced counsel and was perfectly capable of seeking legal advice and making his own strategic decisions at any time. He fails to identify anything the Association counsel did that he disagreed with or that he claims did not properly represent his interests.

c. *Billings was Still Afforded "Election of Remedies;" Issue Preclusion Only Prevents Him From Proving Elements of His Civil Claims.*

Billings repeatedly confuses "claim preclusion" (*res judicata*) with "issue preclusion" (collateral estoppel), which is the doctrine that applies to require dismissal of Billings' claims here. In Appellants Brief, pp. 35-29, he spends significant time discussing "election of remedies;" Respondents agree employees are afforded such a choice and that Billings was afforded this freedom of choice here.

The Town Defendants never suggested that an arbitrator's "just cause" ruling automatically forecloses a subsequent discrimination or tort claim. Indeed, the arbitrator did not "decide" the substantive legal claims Billings pursues against the Town Defendants here. However, when *applying* the substantive standards of Billings' current civil claims in this matter to arbitration rulings that do constitute a finding of fact or conclusion

⁸ Compare, *Carver v. State*, 147 Wash. App. 567, 575, 197 P.3d 678, 682 (2008) (Court barred application of collateral estoppel on the basis on injustice because Plaintiff had to represent herself at an administrative proceeding and it was established that she suffered from dementia at the time, a significant mental disability.)

of law on certain issues, it becomes clear that Billings cannot overcome the summary judgment standards that apply herein. He simply will not be able to establish all of the required elements of the claims he is pursuing against the Steilacoom Defendants.

Arguments – identical to Billings’ – that collateral estoppel does not apply to discrimination or wrongful termination claims were recently rejected by U.S.D.C. Judge Lasnik when applying collateral estoppel based on issues decided in a grievance arbitration to bar subsequent Washington state law claims in an employment lawsuit:

“Plaintiffs list the elements of each of their causes of action and rely on the fact that none of them mimics the criteria for determining whether just cause for a termination exists. **Plaintiffs misapprehend the identity-of-the-issue prong of collateral estoppel:** the question is not whether the claims raised in both proceedings have identical elements, but rather **whether the claims raised in the subsequent proceeding turn on an issue that was already determined against plaintiffs in the first proceeding.** That is the case here. Plaintiffs can succeed on their state law claims only if the termination was motivated by retaliatory animus rather than by just cause. The arbitrator made findings against plaintiff on that exact issue, and plaintiffs may not relitigate them here in the guise of the state law claims.”

Plancich v. Cty. of Skagit, 147 F. Supp. 3d 1158, 1163 (W.D. Wash. 2015) (emphasis added)(dismissing state law claims of wrongful termination, retaliation, outrage, etc., based on collateral estoppel where a grievance arbitrator concluded that the plaintiff Sheriff’s Deputy had engaged in the

alleged misconduct and that such conduct provided just cause for his termination).

Similarly, while Billings correctly asserts that Washington law does not *require* an employee to “exhaust remedies” by first pursuing a contract grievance arbitration (or civil service or PERC appeal) before filing a wrongful discharge or discrimination lawsuit,⁹ such leeway does not override the long-standing legal doctrine of collateral estoppel or its application here. In fact, the Washington Supreme Court recently confirmed that it is this preclusive effect of factual findings in administrative proceedings on subsequent tort claims that is the reason for affording employees this choice of remedies in the first place. In *Piel v. City of Federal Way*, 177 Wn.2d 604, 615-616 (2013), cited by Appellant to support his wrongful discharge claim, the court explained:

Declaring a wrongful termination tort claim dead on arrival in the face of administrative remedies would likewise unsettle the body of law this court has developed addressing collateral estoppel where wrongful discharge tort claims coexist with administrative remedies. We have on several occasions discussed the interplay between administrative proceedings such as under PERC and wrongful termination tort actions. In *Reninger v. Department of Corrections*, 134 Wash.2d 437, 951 P.2d 782 (1998), we held that an employee who loses in an administrative proceeding (there, a personnel appeals board hearing) may be collaterally estopped from asserting a wrongful discharge claim. In *Smith*,

⁹ See, e.g. *Smith v. Bates Technical College*, 139 Wash.2d 793, 991 P.2d 1135 (2000) (recognizing only that an employee need not exhaust administrative remedies through PERC before filing a common law wrongful termination claim— not addressing collateral estoppel).

we noted that *Reninger* made it “even more compelling” to hold that the **public policy tort does not require first pursuing PERC administrative remedies**. 139 Wash.2d at 810, 991 P.2d 1135. Recognizing the collateral estoppel effect of a prior administrative proceeding, we observed:

...in *Christensen v. Grant County Hospital District No. 1*, 152 Wash.2d 299, 96 P.3d 957 (2004), we examined both *Reninger* and *Smith*, and **held that factual findings in a PERC administrative proceeding have preclusive effect in a later tort action for wrongful discharge. We found it especially important that the plaintiff “chose to litigate in the administrative setting” before bringing a tort claim. *Id.* at 313, 96 P.3d 957; see also *id.* at 318 n. 10, 96 P.3d 957 (noting plaintiff had a choice).**

(Emphasis added). It is worthy to note that, the employer, on the other hand, is *required* to arbitrate a grievance if the employee demands it, even though an adverse ruling may similarly have a preclusive effect on issues in subsequent civil litigation against it.

C. **Collateral Estoppel Precludes Billings From Prevailing on His RCW 49.60 (WLAD) Claims Under the McDonnell- Douglas Test.**

Billings RCW Ch. 49.60 disability discrimination/retaliation claims are based on his allegation that the Town actually decided to terminate him in September of 2012 because he injured his hand and took medical leave while the investigations and disciplinary proceedings regarding his misconduct were pending. CP 1649, 1651(Billings Dec., para 32-33). RCW Ch. 49.60 only applies to claims based on the

protected classes enumerated in the statute.¹⁰ Plaintiff failed to present any argument or evidence below rebutting the Town’s position on this issue.¹¹

1. Election of Remedies Does Not Preclude Application of Collateral Estoppel to WLAD Claims.

Billings continues to confuse the “choice of elective remedies” allowed plaintiff-employees and the preclusive effect of collateral estoppel once the choice is made (App. Brief, pp. 34-39). While a simple “just cause” ruling may not *automatically* bar a subsequent discrimination claim under RCW Ch. 49.60, factual findings in a previously-litigated arbitration cannot be re-litigated. To the extent such findings establish or resolve an *issue* that is material to a discrimination claim, collateral estoppel applies.

In *Carver v. State*, 147 Wash. App. 567, 574, 197 P.3d 678, 681 (2008), the court recognized that collateral estoppel does bar RCW 49.60 discrimination claims where an *issue* central to the claim had been previously litigated in an administrative proceeding. Despite WLAD’s declaration of public policy, the court explained:

[T]he Legislature knows how to bar issue preclusion when it wants to do so. It has not chosen to do so in the WLAD. Accordingly, in light of the authorities

¹⁰ See, *Kilian v. Atkinson*, 147 Wash. 2d 16, 22-23, 28-29, 50 P.3d 638, 644 (2002) (“Protected class” must be specified in RCW 49.60); *Davis v. Fred's Appliance, Inc.*, 171 Wash. App. 348, 359, 287 P.3d 51, 57 (2012) (Plaintiff must be a member of a protected class under 49.60.). The only RCW 49.60 protected class Billings identified is “disability”; claims regarding “union activity” do not fall under RCW Ch. 49.60.

¹¹ See, e.g. CP 1571, 1584 (merely stating he is pursuing disability discrimination/retaliation claims, not citing evidence or legal analysis).

cited, we conclude that collateral estoppel may be applicable to an action brought under our anti-discrimination laws.

Carver, at 574 (distinguishing RCW 50.32.097, in which the legislature chose to expressly preclude admissibility of an unemployment decision in later civil proceedings).

Respondents have never suggested Billings was required to first exhaust CBA remedies before filing RCW 49.60 or other civil tort claims in superior court, therefore the cases cite in Appellant's Brief, pp. 37-40 are inapplicable. *See, Reese v. Sears, Roebuck*, 107 Wn.2d 563, 575-579(1987), *Morales v. Westinghouse*, 73 Wn.App. 367 (1994) (CBA rights are separate from RCW CH. 49.60 rights), *Yakima Cty. v. Yakima Cty. LEOG*, 157 Wn.App. 304 (2010)(considering res judicata, not collateral estoppel).

2. Billings Cannot Meet His Burden to Establish Essential Elements of a 49.60 Disability Discrimination Claim Under the McDonnell-Douglas Test.

The parties agree the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) is used by Washington courts to analyze cases of discrimination claims under RCW Ch. 49.60 (Washington Law Against Discrimination) (WLAD) at the summary judgment state of litigation. Under this test, the plaintiff (Billings) first bears the burden of setting forth a *prima facie* case of discrimination. *Dumont v. City of Seattle*, 148 Wash. App. 850, 862, 200 P.3d 764, 769 (2009). If the plaintiff establishes a *prima*

facie case, the burden then shifts to the defendant (Town) to produce evidence of a legitimate, nondiscriminatory explanation for the adverse employment action “sufficient to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff.” *Id.* (internal quotations omitted).¹² Finally, if the defendant produces evidence of a legitimate reason, “the burden shifts back to the plaintiff (Billings) to show that the defendant’s stated reason is merely pretext.” *Id.* If the plaintiff cannot prove that the defendant’s rationale for the employment decision is really just “pretext” for covering up unlawful discrimination, the defendant is entitled to judgment as a matter of law. *Id.*

a. *Billings Cannot Establish a prima facie case of disability discrimination.*

Here, Billings cannot establish a *prima facie* case of discrimination because he cannot establish the second element--the arbitration rulings established that he was not performing his job satisfactorily. CP 1433-1449. This alone requires affirming dismissal of Billings’ RCW Ch. 49.60 discrimination claims against the Town of Steilacoom, City Administrator Loveless, and Chief Schaub. The court can conclude its inquiry here.

b. *The Town Defendants produced evidence of legitimate, non-discriminatory reasons for terminating Billings’ employment in 2012.*

Nonetheless, Respondents also satisfy the second step in the *McDonnell-Douglas* analysis by producing evidence of legitimate reasons

¹² The burden of the employer is not one of persuasion, but rather a burden of production. *Grimwood*, at 364; *Scrivener*, 181 Wn.2d at 446.

for terminating Billings in 2012. As detailed above, an independent arbitrator not only found that the Town had just cause to terminate Billings' employment because he engaged in misconduct, but she analyzed both parties' arguments and evidence regarding whether the individual reasons for the termination were "legitimate" and reasonable in a 55-page ruling describing the same evidence that would be presented to the court regarding Billings' disability discrimination claim here. CP 1454. The ruling details findings, established by clear and convincing evidence, that Billings did engage in the alleged misconduct for which he was terminated, that the misconduct did violate Town policies and reasonable performance expectations of his employer, and that Billings' conduct did warrant termination. *Id.*¹³ See also, *Hill v. BCTI-Fund*, 144 Wn.2d 172, 23 P.3d 440(2001) (under *McDonnell-Douglas*, employer only need to produce evidence of a non-discriminatory basis for termination), citing *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) (summary judgment factor include strength of plaintiff's *prima facie* case, probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case).

c. *Billings has failed to produce evidence establishing that the Town's legitimate reasons for termination were actually "pretext" for disability discrimination.*

Finally, Billings was afforded the opportunity to produce evidence

¹³ The underlying evidentiary record of exhibits presented to the arbitrator is also included in the record here, separately establishing evidence of legitimate, non-discriminatory basis for the Town's decision to terminate Billings' employment, even in the absence of collateral estoppel. See, CP1295-1309, 209-224, 226-266, 268-280.

that the legitimate reasons given by the Town for his termination were just made up as “pretext” to cover up for what really was unlawful discrimination barred by RCW 49.60 (in this case, disability discrimination). Evidence is sufficient to overcome summary judgment if it creates a genuine issue of material fact that the employer's articulated reason was a pretext for a discriminatory purpose. *Scrivener v. Clark College*, 1818 Wn.2d 439, 446, 334 P.2d 541 (2014); *Grimwood*, 110 Wash.2d at 364, 753 P.2d 517. To establish pretext, an employee must produce evidence that the defendant's articulated reasons (1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances, or 5) by presenting sufficient evidence that discrimination nevertheless was a substantial factor motivating the employer. *Scrivener*, at 447.¹⁴

Billings is collaterally estopped by the arbitrators' ruling from arguing here that 1) he did not actually engage in the misconduct, 2) the identified misconduct was not really the reason the Town terminated his employment in 2012, or 3) that the reasons given were merely pretext for what was actually unlawful discrimination—i.e. that the Town actually “suddenly” decided to terminate him because he took some medical leave while disciplinary proceedings were pending.

¹⁴ For example, *Scrivener*, the plaintiff produced evidence of several age-related comments by the college's President specifically tied to recruiting and hiring that reflected his stated desire to replace older, more experienced faculty with younger professors—solely due to age.

Billings' continued disagreement with the arbitrator does not create a question of fact as to the "pretext" prong of the *McDonnell-Douglas* analysis.¹⁵ Nor does Billings' conclusory statements that he thinks his job performance was superior. *See, Grimwood*, at 360-361 ("[the employee's] perception of himself...is not relevant. It is the perception of the decision-maker which is relevant.")(*quoting Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980)). Here, after thorough review of all the bases for Chief Schaub's termination recommendation and Town Administrator Loveless's termination decision, the arbitrator ruled that—based on the same evidence presented at arbitration that would be presented to a trial judge here—each of the bases did, in fact, occur, did violate policies, and did justify termination for legitimate, business-related purposes.

In fact, the record clearly reflects the incidents and investigations that led to findings of misconduct and ultimately his termination were already ongoing when he was injured and off work for a brief period of time. He presents no evidence whatsoever that his injury had anything to do with the termination decisions. Therefore, Billings' claims of disability discrimination were properly dismissed.

3. Billings Cannot Meet His Burden to Produce Evidence to Establish the Essential Elements of an RCW Ch. 49.60 Retaliation Claim Against the Town Defendants.

¹⁵ See, *Grimwood*, *supra* (plaintiff's conclusory opinions that documented incidents were only "pretext" or exaggerations, that he was "not uncooperative," and that his "job performance was not substandard" are not sufficient to withstand summary judgment); *Kuyper v. State*, 79 Wn.App. 732, 738-739, 904 P.2d 793 (1995)(plaintiff's failed to provide proof of a nexus between her evidence and the adverse hiring decision based on her gender/age); CR 56(e).

Billings appears to assert that he believes he was terminated in retaliation for taking medical leave while investigations and disciplinary proceedings were pending in 2012 (RCW Ch. 49.60). CP 3 (Pltf. Cmpl., p. 3:14-15). “To state a claim for discrimination based on retaliation under RCW 49.60, plaintiff must set forth evidence showing that: (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) there was a causal link between the protected activity and the adverse employment action.” *Calhoun v. Liberty Nw. Ins. Corp.*, 789 F. Supp. 1540, 1547-48 (W.D.Wash. 1992) (citing *Allison v. Housing Authority*, 59 Wash.App. 624, 626-27, 799 P.2d 1195 (1990)).

Billings has produced no evidence of a causal link between the fact he was off work for a time due to injury and the termination decision resulting from the pending investigations and disciplinary proceedings. Although the independent arbitrator did not specifically rule on “claims” involving the Billings’ medical leave, she did definitively rule that the reasons given by the Town for making the termination decision really were the reasons he was terminated, and were wholly supported by the evidence and the law. CP 1446-49. At the 2014 arbitration.”¹⁶ Despite Billings’ repeated efforts to shift blame for his own actions to allegedly improper motivation or conduct by Chief Schaub, FOC McVay, or other Town employees during the arbitration, the arbitrator found that Chief Schaub’s

¹⁶ Appellant concedes that the only disciplinary action at issue in this matter is Billings’ termination on September 25, 2012. Any claims related to employment decisions or action prior or unrelated to the termination decision in September of 2012 are barred by the statute of limitations. CP 1588.

conclusions and the termination decision was fully supported by the evidence established by multiple internal (and external) investigations – many generated by citizen complaints that the Department is obligated to investigate and respond to. The entirety of Billings’ reference to an injury is found at CP 1649, 1651; he presents no evidence of a nexus to the termination decision.

Additionally, when an employee’s conduct—even if in protest of an unlawful employment practice—so interferes with his job performance that it renders him ineffectual in the position for which he was employed, such conduct is not protected by statutory discrimination laws. *See, Selberg v. United Pac. Ins. Co.*, 45 Wash. App. 469, 472, 726 P.2d 468 (1986). While Billings fails to produce any evidence that the termination decision resulting in a timely manner following completion of ongoing investigations and disciplinary proceedings was in any way impacted by his brief absence, the record is replete with evidence of his misconduct and disruption to agency operations.

Billings cannot re-litigate the sufficiency or necessity for the investigations, the conclusions that he did engage in misconduct and policy violations, or that these conclusions properly supported a decision to terminate his employment in September of 2012. Therefore, his claims fail and dismissal was proper. *See, Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418 (2002) (*quoting Reeves v. Sanderson Plumb. Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (When the “record conclusively reveal [s] some other, nondiscriminatory reason for

the employer’s decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination has occurred,’ then summary judgment may be granted.”).

D. Collateral Estoppel Precludes Plaintiff from Prevailing on Public Policy Wrongful Termination Claims Against the Town Defendants.

The parties agree on the elements Appellant must prove in order to prevail on a wrongful termination in violation of public policy claim.¹⁷ Billings’ now he identifies 1) RCW Ch. 49.60 (WLAD) and 2) RCW 41.56 (union rights) as the basis for his “public policy” wrongful discharge claim. In his brief, Appellant devotes one paragraph to his claim of disability discrimination, simply stating he was injured in the line of duty, cleared to return, and fired when he return. He provides no other support of citations to the record.¹⁸ As Appellant provides no support for this claim, the argument has been waived. *Kinderace LLC v. City of Sammamish*, 194 Wash. App. 835, 837 at n. 1, 379 P.3d 135, 136 (2016).

1. Issues Decided by the Arbitrator Preclude Billings from Prevailing on the Merits of a Wrongful Discharge Claim.

Billings argues, at pp. 20-22, that collateral estoppel should not

¹⁷ (1) the existence of a clear public policy (the clarity element)[;] (2) that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element)[;] (3) that the public-policy-linked conduct caused the dismissal (the causation element)[;] (4) the defendant must not be able to offer an overriding justification for the dismissal. *Gardner v. Loomis Armored Inc.*, 128 Wash. 2d 931, 941, 913 P.2d 377, 382 (1996) (internal citations omitted).

¹⁸ The only citation is to his declaration in support of his opposition to Defendants’ Motion for Summary Judgment, which states that same.

apply here because the “issues” are not identical as those in the arbitration. He refers to the arbitrator’s comments, at CP 90-91 of her decision, wherein she declined to rule on the ultimate issue of whether the Town retaliated against him for union activities, stating “a different legal standard is used in those cases than the standard is used to evaluate just cause cases.” However, this again highlights the distinction between “claim preclusion” and “issue preclusion”—though the arbitrator chose not to issue legal ruling on a “union retaliation” claim, to the extent the issues that she *did* rule on work to bar such a claim under the substantive legal and summary judgment standards that apply here, Billings’ claims can and should be barred by collateral estoppel. See *Brownfield*, at 871 (collateral estoppel applies even though the ultimate issues --i.e. legal claims--are different in the two suits).

2. Billings Cannot Establish “Causation” Element.

Billings also cannot establish any “public-policy-linked conduct” was the cause of his 2012 discharge. In the trial court, Appellant merely espoused the potential availability of this tort claim, but never responded to or addressed the Town Defendants’ argument that the arbitrator’s ruling bars him from prevailing on the claim because he cannot establish an evidentiary basis to prove the “causation” element. See, CP 30 (Defendants’ Motion, p. 17), CP 1584-88 (Plaintiff’s Opposition, p. 18-22), CP 1724 (Defendant’s reply brief, p. 9). Therefore he waived this argument, and cannot raise it for the first time on appeal. See *Brower v. Pierce Cty.*, 96

Wash. App. 559, 567, 984 P.2d 1036, 1040 (1999).¹⁹

Again, on appeal, Billings still fails to make any substantive argument as to why collateral estoppel does not prevent him from proving “causation” here. In *Brownfield v. City of Yakima*, 178 Wn.App. 850, 316 P.2d 520 (2014), a police officer was collaterally estopped from pursuing a public policy wrongful discharge claim in state court where a federal court had previously ruled that the officer was clearly terminated for two reasons: insubordination and unfitness for duty. In *Brownfield*, the Court ruled that this finding conclusively precluded the officer from establishing the “causation” element of a subsequent wrongful discharge tort claim, even though the prior federal court decision was only based on summary judgment proceedings as opposed to the full evidentiary hearing that occurred with the Billings arbitration.

As in *Brownfield*, the arbitrator here conclusively determined—after extensive hearings and evidence review—that Billings was terminated for multiple violations of Department policy, including insubordination, dishonesty, and unsatisfactory performance. CP 69-87. She determined the misconduct occurred, that it was a violation of policy, and that termination was appropriate as the only means to effectively address Billings’ ongoing and unrepentant misconduct that was in direct conflict with the best interests of the Town of Steilacoom. CP 87-92. It is undisputed that these reasons

¹⁹ Appellant’s suggestion, at pp. 40-41 that Respondents only raised a CR 12(b)(6)-type public policy argument below is incorrect. See, CP 28-29 (Def. MSJ); CP 1722-23 (Def. MSJ Reply)(causation); CP 29-30(Def. MSJ); CP 1724-25 (Def. MSJ Reply)(overriding justification).

were extensively investigated and outlined in pre-termination and termination memoranda providing Billings notice of the reasons the Town was considering his termination, and ultimately the reasons he was terminated shortly-thereafter. CP 209-280, 388-440, 896-900, 1110-1113, 1131-1138, 1295-1309.

Appellant's Brief, at pp. 40-46, outlines the general legal framework for wrongful discharge claims, but makes no attempt to establish why collateral estoppel would not substantively bar his current claim as it did for Officer Brownfield in Yakima. *See, Brownfield* 178 Wn.App. at 869-70 ("The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element)." *Id.*, citing *Gardner* at 941. Far from establishing an evidentiary or legal basis for reversing the court's decision on this claim, Appellant merely states "Billings concern....implicate his claim of wrongful termination...." (App. Brief, p. 45). However, conclusory statements lacking evidentiary or legal analysis are not sufficient to overcome summary judgement or warrant reversal on appeal. *See Walker v. King Cty. Metro*, 126 Wash. App. 904, 912, 109 P.3d 836, 840 (2005); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash. App. 22, 39, 935 P.2d 684, 693 (1997); RAP 10.10(c).

3. The Town Has Also Established It Had an Overriding Justification for Terminating Billings' Employment.

Further, Billings cannot establish the fourth element of a wrongful discharge claim: "The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element)"—

assuming an employee even establishes “public policy-linked conduct.” *Gardner*, 128 Wn.2d at 947 (emphasis added); *Kastanis v. Educ. Employees Credit Union*, 122 Wash. 2d 483, 493, 859 P.2d 26, 32 (1993), *amended*, 122 Wash. 2d 483, 865 P.2d 507 (1994) (“Since the ultimate burden to prove discrimination rests with the plaintiff, we find that **absence** of this justification is a statutory requirement for proof of marital status discrimination.”) (emphasis added).²⁰

The Town already proved, by clear and convincing evidence, that in his role as Police Sergeant, Billings lied in official proceedings (CP 1437-1439), refused to accept the Police Chief’s, Mayor’s, Town Administrator’s, or Fire Chief’s authority, intentionally worked against the mission and values of the Town and its Public Safety Department (CP 1436), was unwilling to perform his job duties (CP 1440-1442), demonstrated a “destructive” attitude, and “lost sight of the fact he worked for the Town,” (CP 1448-1449). In fact, the arbitrator ruled that failing to terminate his employment would “do damage to the Department” (CP 1451, arb p. 54).

These undisputed facts clearly meet the standard for establishing by a lower standard – “preponderance of the evidence” – that the Town has offered evidence of an overriding justification for terminating Billings’ employment in this civil suit. The importance of this justification is

²⁰ See also, e.g. *Blinka v. WSBA*, 109 Wn.App. 575, 36 P.3d 1094 (2001) (Because the Commission has shown “an overriding justification for the dismissal,” plaintiff’s wrongful termination claim fails as a matter of law) (citing *Selberg v. United Pac. Ins. Co.*, 45 Wn.App. 469, 472, 726 P.2d 468 (1986)).

magnified given the size of the public safety officer's duties and responsibilities. See, CP 289-293. He cannot now argue to the contrary in an attempt to reach a different result by simply making self-serving, conclusory statements. See, *Grimwood, supra*.

E. Plaintiff's First Amendment Retaliation (42 U.S.C. §1983) Were Properly Dismissed as a Matter of Law.

Billings recently-added §1983 First Amendment retaliation claim is also barred by collateral estoppel and was properly dismissed. Here again, Billings merely argues that arbitration rulings can never be applied under the doctrine of collateral estoppel to §1983 claims, but fails to respond to the substance of application of collateral estoppel here.

1. Federal and State Courts Agree That Issues Litigated in Arbitration Can Have Preclusive Effect on Subsequent §1983 claims.

Billings' reliance on *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 285-93, 104 S.Ct. 1799 (1984), to suggest that the doctrine of collateral estoppel cannot be applied to bar a §1983 claim is misplaced. *App. Brief, pp. 27-34*. To the contrary, the U.S. Supreme Court has long since held that it is appropriate "to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity"—even to bar §1983 claims. *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 797, 106 S. Ct. 3220, 3225 (1986) (citing *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545 (1966)). (Emphasis added.) In turn, these established facts prevent Billings from proving he was terminated for some alleged constitutionally-protected speech, or that he would not have been

fired anyway, as required for a First Amendment claim. Similarly, although Respondents bear the burden of showing that Plaintiff would have been fired regardless of his speech in a First Amendment Retaliation case, *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012), Billings cites no evidence (nor does any exist) disputing or suggesting that the Town of Steilacoom would not have fired him in 2012 for his multiple instances of undisputed and uncorrected misconduct. See, CP 1446-1451 (Arb. Award, pp. 49-54).²¹

In *Christensen*, 152 Wash. 2d at 313 (2004), the Washington Supreme more recently confirmed that factual findings in administrative proceedings can have preclusive effect even on Federal civil rights claims, where the issue decided would prevent the plaintiff from establishing the necessary elements of the claim. The court explained:

The United States Supreme Court has held, for example, that findings by a state administrative body will be given preclusive effect in a subsequent 42 U.S.C. § 1983 claim of racially motivated discharge from employment, provided the requirements for issue preclusion are otherwise satisfied. *Elliott*, 478 U.S. at 794–99, 106 S.Ct. 3220. Similarly, under Washington law, preclusive effect can be given in a § 1983 civil rights action to an administrative agency's earlier factual findings that the employee's reductions in rank were not retaliatory. *Shoemaker*,

²¹ Appellant's suggestion, on p. 22, that the Town did not plead the "same decision" defense in its Answer is disingenuous. Billings did not initially plead a First Amendment Claim (CP 1-5); it was not added until the trial court granted his Motion to Amend his complaint (CP 1556-1566) on August 12, 2016, during the same hearing in which the court later dismissed all claim son summary judgment. CP 1832-1833, CP 1837-1839. Defendants never had an opportunity to file an Answer to the Amended Complaint. Nonetheless, the Town Defendants did raise the argument below. CP 1787-1790; CP 1725-1727.

109 Wash.2d 504, 745 P.2d 858. Simply because the tort action rests on public policy does not mean that public policy dictates that collateral estoppel should never be applied.

Id., at 313(emphasis added).

In a companion case to the state case of *Shoemaker v. City of Bremerton*, 109 Wash.2d 504 (1987), the U.S. District court also applied collateral estoppel based on the same Civil Service Commission decision to also dismiss the Plaintiff's §1983 First Amendment retaliation claims, and the Ninth Circuit affirmed the decision. *See, Shoemaker v Bremerton*, 844 F.2d 792 (9th Cir. 1988) (unpublished)(citing *Elliott*, 106 S.Ct. 3220 (1986))(federal courts defer to Washington state to determine which proceedings will be given preclusive effect).

Review of Ninth Circuit case law shows that federal courts focus less on what the prior proceeding is titled and more on whether it meets criteria which would make its findings reliable. *See, White v. City of Pasadena*, 671 F.3d 918 (9th Cir. 2012) (grievance proceeding “conducted in a judicial-like adversarial hearing in front of an impartial arbiter” had the “requisite judicial character” to preclude the plaintiff's § 1983 claims). In 2014, the Ninth Circuit again held that an arbitration, similar to the one in *White* (the Steilacoom/Billings arbitration at issue here), had “sufficient judicial character” to preclude § 1983 claims. *See, Eaton v. Siemens*, 571 F. App'x 620, 621 (9th Cir. 2014).²²

²² In the *Eaton* case, the arbitrator had conducted “a seven-day evidentiary hearing, in which 18 witnesses testified and 100 exhibits were moved into evidence[.]” *See, Eaton v. Siemens*, 2012 WL 1669680, at *2, aff'd, 571 F. App'x 620 (9th Cir. 2014). In a 49-page

McDonald v. City of W. Branch, supra, is further inapplicable because the arbitrator here was not asked to make rulings on Billings' First Amendment retaliation claim. However, she was more than capable of ruling on whether certain factual events did or did not happen after listening to live witness testimony, reviewing documentary evidence, and making credibility determinations. Billings has presented no evidence that the union did not properly protect his interests, or failed to present evidence that would have made a difference in the outcome of the arbitrator's findings.²³

Miller v. County of Glacier, 257 Mont. 422 (1993) is similarly inapplicable. The Court there only reviewed a lower court decision granting a CR 12(b)(6) *motion to dismiss* on the basis of *res judicata* or collateral estoppel and reserved, hold that the Section §1983 claim should have been considered by the trial court. *Miller*, 257 Mont. at 423, 428. Appellant confuses a motion to dismiss with a motion for summary judgment. Here, the trial court did consider Billings' claims but found that he would not be able to establish a prima facie case or overcome the Town Defendants' affirmative defense based on facts established in the arbitration.

2. Billings' Cannot Establish The Essential Elements of a First Amendment Retaliation Claim.

advisory decision, the arbitrator found the plaintiff's violation of six department policies constituted just cause to terminate the plaintiff; after finding the proceeding met the *Utah Construction* requirements, the district court held that the arbitrator's proceeding had preclusive effect even though it had not been reviewed by a state court. *Id.*

²³ Billings concedes he had input into his defense at arbitration and fails to identify any evidence he would have offered that his union attorney failed to offer or that would have changed the outcome. CP 1657-1658. To the extent he disagrees with the arbitrator's evidentiary rulings, that in no way suggests ineffective assistance of counsel.

Courts utilize a sequential five-step series of questions to analyze First Amendment Retaliation claims. *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). A plaintiff first must show he engaged in protected speech activity by proving he:

(1) spoke on a matter of public concern; and (2) spoke as a private citizen and not within the scope of [his] official duties as a public employee. If the plaintiff makes these two showings, we ask whether the plaintiff has further shown that []he (3) suffered an adverse employment action, for which the plaintiff's protected speech was a substantial or motivating factor.

Id. If he successfully proves these elements, the government will still prevail by establishing either: “(4) the state’s legitimate administrative interests outweigh the employcc’s First Amendment rights; or (5) the state would have taken the adverse employment action even absent the protected speech.” *Id.* (Emphasis added.). CP 1784-1785.

a. Billings Cannot Establish He Engaged in Speech of Public Concern Subject to First Amendment Protection.

To support an actionable First Amendment claim, Billings must show he spoke on a matter of public concern and was speaking as a private citizen, not within the scope of his official duties. *Karl*, 678 F.3d at 1068. Whether speech is a “matter of public concern” is a question of law that is determined “by the content, form, and context of a given statement, as revealed by the whole record.” *Id.* at 1069. (citing *Connick v. Myers*, 461 U.S. 138, 147-48 & n. 7, 103 S.Ct. 1684 (1983)). “[S]peech that deals with

'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'" *Id.* at 1069. (citing *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003)). CP 1785-1786.

The arbitrator's summary of Billings' various grievances, at CP 1403, 1417, 1420, demonstrate his complaint were only about his own employment and the Police Chief's operation and hiring decisions. "Complaints over internal office affairs" are not protected by the First Amendment. *Connick*, 461 U.S. at 147. The Supreme Court in *Connick* stated, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.*, at 146. Courts are directed to look at the actual grievance or complaint as it was made at that time (not just as Plaintiff characterizes it now) to see if the speech really touched on a matter of public concern. *Reiber v. City of Pullman*, F.Supp.2d 1091, 1104-05 (2013). Billings submits no evidence, other than conclusory statements, that he raised public concerns regarding the FOC position, much less that any opposition was based on unwarranted expense to the public.²⁴ The fact that Billings personally believed his way of doing things was better than his supervisors,

²⁴ To the extent Plaintiff believes this evidence exists, he surely would have requested it in discovery when provided a continuance of the summary judgment hearing for that purpose.

the Mayor, or the City Council does not make his speech “a matter of public concern.”

b. *The Town’s Interests Outweigh Billings’ Billings’ Speech Rights and Billings’ Employment Would Have Been Terminated Regardless of Protected Speech.*

The arbitrator’s established facts preclude Plaintiff from disputing that the state’s legitimate administrative interests outweighed any First Amendment rights at issue and that Plaintiff would have been fired regardless of whether any speech may have been protected. See, *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). CP 1787 (raised below that, if allowed, First Amendment claim should fail at summary judgement).

When balancing speech interests with the interests of the employer, Courts consider “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.” *Wheaton v. Webb-Petett*, 931 F.2d 613, 618 (9th Cir. 1991) (quoting *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891 (1987)). In *Wheaton*, the Ninth Circuit affirmed summary judgment dismissal of Plaintiff’s First Amendment Retaliation based on the employer’s interest in smooth implementation of a new program the

plaintiff believed would waste tax payer money. 931 F.2d at 614.²⁵ Where the employee occupies a managerial or supervisory role, his speech interests are “tempered” because employers need trust that their supervisors will support their directives. *Id.* at 618. Plaintiff was a Sergeant and acting Volunteer Firefighter Coordinator during this time. Even when he was demoted to a PSO, he was senior among the career staff. The arbitrator acknowledged Billing’s attitude and performance were destructive to the Town’s overall goals. Billings used his position to undermine his superiors. Therefore, his speech interest, if any, is outweighed by the Town’s interest in effective functioning. See also, *Helget v. City of Hayes*, 2017 WL 33525 (10th Cir. 2017) (primary consideration is impact of disputed speech on the effective functioning of public employer’s enterprise)

F. **Absent Collateral Estoppel, Public Policy Wrongful Discharge Claim Would Also be Subject to Dismissal as Duplicative of Billings’ RCW Ch. 49.60 Claim.**

Even if not barred by collateral estoppel, public policy wrongful discharge claims based on RCW Ch. 49.60 have only been allowed where the plaintiff was substantively unable precluded from pursuing the direct

²⁵ The Court in *Wheaton* assumed without deciding that Plaintiff’s speech may be a matter of public concern. 931 F.2d at 614. See also, *Nelson v. Pima Community College*, 83 F.3d 1075, 1080-81 (9th Cir. 1996) (Ninth Circuit affirmed summary judgment dismissal of a plaintiff’s First Amendment Retaliation claim, finding that the “employee’s interest in giving unauthorized and insubordinate orders could rarely if ever outweigh her employer’s interest in promoting the efficiency of public services performed through employees.”).

statutory discrimination claim itself.²⁶ Otherwise, the tort claim would be dismissed as duplicative. *See, Anaya v. Graham*, 89 Wn.App. 588, 950 P.2d 16 (1998) (tort claim premised on underlying RCW 49.60 and based on same facts is duplicative). Here, no procedural or jurisdictional limits prevented Billings from pursuing his disability discrimination claim under RCW 49.60; he simply cannot *prevail* on it because he cannot establish the necessary elements with admissible evidence. He cannot thereafter pursue the same claim dressed up as a wrongful discharge tort claim.

G. Billings Provides No Support for Reversing the Court's Order Striking the Inadmissible Carpenter Declaration.

Billings assigns error to the order striking Carpenter's declaration (*Error A(c)*, p. 3; *Error B(d)*, p. 4), but provides no argument supporting it. Thus, this assignment should be disregarded. *See Kinderace LLC, supra; San Juan Cty. v. Hage*, 54 Wash. 2d 419, 421, 341 P.2d 872, 873 (1959); RAP 10.3(a)(5). If considered, the ruling should be affirmed.

As Billings states, at p. 13, he offered the 2016 declaration of Carpenter in opposition to summary judgment to confirm "Sgt. Billings would have been justified in using deadly force" during the Johnson arrest in 2011. (CP 1706-1709)("Billings would have been legally justified in applying deadly force"). This evidence is irrelevant to Billings claims; Carpenter did not review the incident until two years after the termination decision, and Chief Schaub *agreed* in his 2012 investigative findings that

²⁶ *See, e.g. Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990)(cited by Appellant, p. 44)(public policy tort claim based on age discrimination allowed only because employer was too small to warrant coverage by RCW Ch. 49.60 for a direct statutory claim).

“the potential use of deadly force was justified,” exonerating Billings on this citizen complaint. Billings was never disciplined for choosing to use deadly force. CP 1293-1295. Courts should only consider admissible evidence on summary judgment. *Burmeister v. State Farm Ins. Co.*, 92 Wn.App. 359, 966 P.2d 921, 924 (1988).

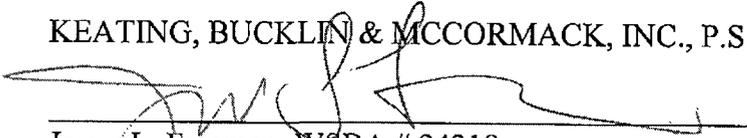
Chief Schaub did find, however, that Billings failed to follow sound defensive tactics training and officer safety considerations under the circumstances and sustained a finding of “unsatisfactory performance” on those grounds. CP 1295. Carpenter’s declaration does not contradict this finding or create any question of fact material to the claims at issue.²⁷ The arbitrator ruled that the Town proved this violation of Department policy because Billings’ own expert was unable to affirm that tactics used were consistent with defensive tactics taught at the police academy. CP 1434.

IV. CONCLUSION

Based on the foregoing, Respondents respectfully request the court affirm the trial court’s order entering summary judgment dismissal of Appellant’s claims.

DATED this 9th day of January, 2017.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.


Jayne L. Freeman, WSBA # 24318

Derek C. Chen, WSBA # 49723

Attorneys for Respondents Steilacoom, Loveless, Schaub

²⁷ In fact, Carpenter agrees Billings’ tactical decisions were “not the best”. CP 1708. His testimony is also cumulative of Jackson Beard, Billings’ firearms expert. CP 1433.

APPENDIX "A"
TO THE RESPONDENTS' BRIEF

BEFORE ARBITRATOR KATRINA I. BOEDECKER

In the matter of the arbitration)
of a dispute between:)
)
TOWN OF STEILACOOM,) ARBITRATION AWARD
Employer,)
and) Josh Billings Demotion
) and Discharge Grievances
)
STEILACOOM POLICE)
OFFICERS ASSOCIATION,)
Union.)
_____)

The Hoffman Law Firm, by Lawrence E. Hoffman,
Attorney at Law, appeared on behalf of the
employer.

Emmal, Skalbania & Vinnedge, by Sydney Vinnedge,
Attorney at Law, appeared on behalf of the union.

JURISDICTION

The undersigned Arbitrator was notified on December 5, 2012, that she had been selected to hear a grievance regarding the demotion, and later discharge, of Public Safety Officer Josh Billings from the Town of Steilacoom's Department of Public Safety. The matter was originally scheduled for hearing June 19 and 20, 2013. On June 12, the union requested a continuance to review materials recently supplied by the employer. The arbitration hearing was rescheduled for December 4 and 5, 2013. Additional days of hearing were held on January 8, 9, 10, 22, and 23, 2014; and April 9, 10 and 11, 2014. All days of hearing were conducted in Steilacoom, Washington.

The arbitration was conducted pursuant to the parties' collective bargaining agreement, which had duration of January 1, 2009 through

December 31, 2011. That agreement's Article 17, Term of Contract, includes "It [the agreement] shall continue in effect from year to year thereafter unless, by written notice delivered by certified mail not less than sixty (60) days prior to its expiration, a party gives notice of its termination."

The parties submitted their post-hearing briefs to the Arbitrator by May 27, 2014.

STATEMENT OF THE ISSUES

The parties stipulated to the statement of the issues as:

1. Whether Josh Billings was demoted in violation of the collective bargaining agreement?
2. If so, what is the remedy?
3. Whether Josh Billings was discharged in violation of the collective bargaining agreement?
4. If so, what is the remedy?

The parties also stipulated that the matter was properly before the Arbitrator, since there were no procedural issues in dispute.

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 - Management Rights

1.1 Subject to the town's recognition of its duty to bargaining pursuant to RCW 41.56 et seq, the Association and its members recognize that Management has the exclusive right to manage and direct all of the Towns' operations. Accordingly, the Town specifically, except as otherwise limited by this Collective Bargaining Agreement, reserves the exclusive right to:

(2) Hire, promote and transfer employees, terminate, demote, suspend or otherwise discipline employees for just and proper cause, layoff, and determine the qualifications of employees;

(4) Determine the starting and quitting time and the number of hours and shifts to be worked, subject to Article 9;

(5) Merge, consolidate, expand or curtail or discontinue temporarily or permanently, in whole or in part, operations whenever in the sole discretion of the Town, good business judgment makes such curtailment or discontinuance advisable.

ARTICLE 6 - Discipline and Discharge

6.1 Employees shall be disciplined for just cause with the exception of employees during their initial trial period, in which case a demonstration of cause is not required. Disciplinary action may include written reprimand, suspension without pay, reduction in rank, or discharge.

6.2 Prior to the imposition of discipline, the employee shall be provided with a copy of the alleged violation and all documents related to the alleged violation Management has in its possession. Management shall hold a pre-disciplinary meeting with the employee. At this meeting, the employee shall be given the opportunity to respond to the alleged violation. Upon request by the employee, he/she may have a[n] Association representative or counsel present at the meeting held by Management with the employee to discuss potential disciplinary action.

6.4 Disciplinary Interviews Procedures:

(3) The employee, upon request, shall be allowed the right to have an Association representative present during the interview. ...

ARTICLE 8 - Grievance Procedure

* * *

Step 5 - Arbitration

... The arbitrator shall have no power to alter, amend or

change the terms of this Collective Bargaining Agreement. **The arbitrator shall retain jurisdiction of the matter until the decision of the arbitrator is implemented.**

8.3 ... The losing party, as determined by the arbitrator, shall pay the expenses of the arbitrator.

[Emphasis by **bold** is added.]

BACKGROUND

The Town of Steilacoom is unique in the State of Washington in the way it delivers police protection and fire suppression services to its citizens. The employees in the Public Safety Department have to be both police officers and fire fighter/emergency medical technicians. These dual employees are called Public Safety Officers (PSO's). In addition, the department is small; it is budgeted for 11 staff (not including the Director, who is usually referred to as the Chief). The Town covers 2.4 square miles.

During the time in question, the department was understaffed, generally only having six to seven PSO's. The department is organized with a Director (Chief), then two Sergeants/Assistant Fire Chiefs, then the PSO's. Since the department requires officers be cross-trained as police, fire and emergency medical technicians, bringing on new staff is not a simple and quick process. Being frequently understaffed resulted in large amounts of overtime hours and schedule changes. The Town has historically depended on volunteer fire fighters to supplement career staff for medical and fire suppression incidents. The Town also has Mutual Aid Agreements with the Lakewood Fire and Police Departments, and the City of DuPont Police Department, to help in responding to calls.

Grievant's Work History

The grievant, Josh Billings, was hired as a PSO on December 10, 2001. He attended both the police academy and the fire academy. After a period of field training, he was assigned to patrol work.

On July 23, 2003, Billings was counseled about work performance deficiencies addressing intimidation of persons and the in-car camera policy. In August, 2003, he was ordered to attend a class entitled How to Become a Better Communicator. Billings was suspended for two days for responding outside the jurisdiction without being dispatched in January, 2004. In that response, he was involved in an accident in a patrol car. The Accident Review Board concluded that his actions resulted in damage in excess of \$10,000.

In May 2004, Billings was recognized for being "instrumental" in assisting a seriously injured patient at the scene of a motor vehicle crash.

In November 2004, Billings received a three day suspension for inappropriate use of force, violation of the in-car camera policy, discourteous behavior, and intimidation of person. On August 31, 2005, Billings was given a one day suspension for violation of the in-car camera policy for not recording a traffic stop on July 7, 2005. The driver had complained that Billings had been rude during their encounter. Billings had not expected to do road work that day; he had forgotten to replace the tape in the in-car camera after his last shift on July 4th, when he had worked for 23 hours. The Association grieved the one day suspension. The Arbitrator denied the grievance finding the investigation was fair and just and that "there was an adequate showing of a progression of penalties and sufficient prior warnings were given to the

grievant."

In October 2006, Billings was temporarily promoted to Acting Sergeant/Assistant Fire Chief for four months, the maximum time allowed by the collective bargaining agreement for a temporary appointment. In 2007, Billings passed the promotional examination for a Sergeant's position. He was permanently appointed Sergeant/Assistant Fire Chief on June 19, 2007.

Scheduling Issues

Officers bid on what shift each wants to work: Day, swing or night. After the shifts are bid, officers are assigned which days of the week they will work their bid shift. As one of the two sergeants in the department, Billings became responsible for scheduling officers to the various shifts. In April 2009, then Chief Robert Drozynski questioned why Billings had scheduled an officer to attend fire arms training, since the officer had not qualified and Drozynski, himself, had changed the officer's schedule a month earlier. Billings responded that he did not know that the officer had not qualified.

The incident prompted Drozynski to issue a memo to both sergeants on April 30, 2009. The memo included: "To avoid confusion and conflict with preplanned and anticipated activities any changes which you make to the schedule will be supported by a memo to me explaining the change made and the circumstances surrounding the change."

When the Chief was on vacation in June, 2009, Billings authorized a change in an officer's schedule to attend a WA-COPS conference instead of a drug seizure hearing that the Chief had assigned. When he learned about the change, the Chief confronted Billings.

Billings advised the Chief that he may want to leave an email with his contact information next time he goes on vacation so that he (Billings) could get a hold of him. On June 8, 2009, Billings filed a complaint with City Administrator Paul Loveless about the Chief's "aggressive unprofessional conduct."

On June 22nd, Billings filed a second complaint with the Town against the Chief for workplace retaliation, insufficient leadership, poor management, and unprofessional conduct. Billings stated in the complaint that the Town had been "unable or unwilling to properly investigate those [previous] incidents." He also alleged that the Town had not followed industry standards in dealing with the Chief. Billings alleged that the Chief was using performance log meetings to "unethically punish me for reporting his inappropriate conduct"; he formally requested that all performance log meetings with the Chief "be immediately stopped."

In March, 2010, Billings received notice from the Town's human resources department that directed him to attend a meeting to discuss his failing to report for duty on time on nine occasions without supervisory approval. Billings interpreted this as the Chief claiming that Billings had committed a policy violation by adjusting his 10 hour work shift start and end times without notifying the Chief prior to the adjustment, or that the Chief was alleging that Billings had committed time card fraud or theft of company time. Billings responded that "I have been adjusting my work shift to meet the needs of my squad without prior director notification on a regular basis since I was promoted to Sergeant on June 19, 2007. ... I will also start and end my shift by calling in service to LESA Dispatch via radio like I have been doing since I starting (sic) my career in 2001." He asked the Chief to "Please provide the date you notified me you decided to change the past practice of allowing the Squad Sergeant to adjust their shift

without prior director approval. Please also provide all instances since my promotion to sergeant in 2007, where you advised me it was not acceptable to modify my shift without prior director/supervisor approval."

Billings was interviewed three times during the investigation for time card fraud. Billings was found to be in compliance; no disciplinary action was taken.

At some point, Billings filed a complaint against Drozynski with Town Administrator Paul Loveless, that Drozynski was creating a hostile work environment. Loveless had a representative from Pierce County investigate the charge. The investigation concluded that the charge was unfounded.

Changes in Chiefs

Drozynski left the department on October 15, 2010. Ronald Schaub was an officer in the Pierce County Sheriff's Department. The Town contracted with Pierce County to have Schaub be the Chief of its Public Safety Department. When Schaub began with the department on October 18, 2010, Billings was senior sergeant; Will Nelson was the other sergeant. In the beginning, Schaub and Billings worked closely together; Billings explained many of the department's policies and procedures.

Billings described how Drozynski had required all changes to the schedule be supported by a memo explaining the change. The men discussed what they labeled as Drozynski's "wacky directives" regarding how to handle schedule changes. Schaub determined that a memo was not necessary. Schaub directed Billings to just text him about any schedule changes. After a period of time, Schaub told Billings he did not need to text or notify him in any other way of

schedule changes. Schaub and Billings had a successful working relationship for nearly a year.

For 2010, Billings assigned bid shift start time was 10:00 AM. For the first half of 2011, his start time was noon; for the second half of 2011, his start time was 11:00 AM. The record contains print outs from LESA of numerous computer communications between Schaub and Billings from January through November, 2011, acknowledging that Billings was at work between 7:00 AM and 8:00 AM. For example, on January 31, 2011, the two men had the following exchange:

7:46 AM JB: Morning Just getting in some school zone
noi's so we can get some \$ from WSTSC.

7:47 AM RS: Excellent!

7:49 AM JB: Whelan needed a vacation day and Sgt
Nelson was going to cover the gap but he
had a family thing to deal with so I am
working days today

7:50 AM RS: Solo until John comes in then?

7:54 AM JB: Him and Rettig switched today so Rettig
will be in around noon.

7:55 AM RS: Gotcha.

Schaub signed off on Billings' time sheets, overtime and compensatory time reports.

Demotion

In autumn, 2011, Schaub heard a sarcastic remark from a PSO about Billings' work schedule, to the effect that "it must be nice to adjust your schedule anytime you want to." At first Schaub did not give the remarks much credence. Later, in December 2011, Schaub

found Drozynski's April 30, 2009, memo about schedule changes. Schaub began to believe that Billings had previously had an issue with working his scheduled bid shift hours. Schaub searched LESA records for Billings' actual log-in times against department records for actual scheduled shift start times. Schaub determined that from July 2010 through December 2011 Billings modified his start time on 50% of his work days. On January 20, 2012 Schaub gave Billings notice that he was under investigation in IA 12-01 for changing his work schedule without prior supervisor approval in violation of department policies and Drozynski's April 2009 directive.

During his first interview in the IA 12-01 investigation, Billings agreed that he did not always work the exact hours of his bid shift: "... I had no idea that you, the, the bid thing was a problem 'cause my bid gets changed whether I like it or not, all the time because you're the swing car." Schaub questioned that the volume of changes were all done for the needs of the department. Billings thought most of them were. The interview ended with all agreeing that if Billings had to make an adjustment to his bid shift in the future, he would email the Chief about the change; officers who reported directly to Billings were to handle changes to their schedules the same way by emailing Billings, as their sergeant.

Schaub conducted a second interview of Billings for the IA 12-01, to get answers to "several clarifying questions." Schaub first scheduled the interview on Billings' day off. Billings filed a grievance. Schaub changed the meeting date. Schaub agreed to review any examples that Billings could produce of other officers changing their schedules. Billings filed another grievance after the meeting alleging that the Chief had introduced a claim of an additional policy violation without 72 hours notice. In his Step 2 response, the Chief wrote, in part: "I offered to schedule another

meeting ... during the interview after Sgt. Billings[s] and Det. Yabe (the SOA representative) objected. You did not exercise my offer to schedule a third interview to address the two additional policies that I had questions about: Policy #6 (Patrol Scheduling Process) and Policy #8 (Unbecoming Conduct)." No arbitration awards addressing either of these grievances were entered into evidence.

Schaub conducted a Lauderhill hearing with Billings for IA 12-01, on April 10, 2012. Billings made the following points during this hearing: The CAD documents would show the exact hours he worked; for over a year he and other officers worked hours outside of their bid shifts; he had 151 different incidents where officers modified their shift without prior authorization from Schaub. During the hearing, Billings stated, "I think there is an issue with, you know, sergeants. You have, you need another position. You're not happy with me, that's obvious to me. And, you know, you would benefit from promoting another person in my place. The problem with that is I don't believe I've done anything warranting, warranting that type of discipline [demotion]... ."

The sergeant problem that Billings alluded to was that on August 31, 2011, Schaub had announced that there would be a promotional test to fill a vacant Sergeant/Assistant Fire position. There were two internal candidates: Rodriguez, vice president of the SOA with six years of experience at the department; and Whelan, the president of the SOA with 25 years of experience in the department. Whelan had higher examination scores; he also served as the Medical Services Officer. Schaub promoted Rodriguez to the sergeant position. Whelan sued. In June 2012, Whelan's claim against Schaub was upheld by the Pierce County Superior Court. Whelan was made a sergeant.

Billings did present Schaub the 151 incidents from calendar year 2011 where a detective or acting sergeant who reported directly to the Chief modified their work schedule without prior authorization from the Chief. Schaub responded that "The alleged instances are beyond the scope of this investigation."

Effective May 8, 2012, Schaub demoted Billings from Sergeant to Public Safety Officer. Schaub concluded:

The evidence is clear and compelling that you knowingly and willfully violated Town policy by routinely reporting late to work and/or adjusted your schedule from your assigned shift start time without authorization. You clearly demonstrated that you are ineffective as a supervisor and leader within the department. You acknowledged that you frequently allow your subordinates to knowingly and willfully violate various Town policies, which sets a poor example of expectations for the Department. You have failed to live out the standard that you demanded out of your subordinates.

Schaub found that Billings had violated certain Steilacoom Department of Public Safety Policy Manual provisions:

- SDPS 16.1.A.23 Reporting for Duty

Members shall report for duty at the time and place required by assignment or orders, and shall be physically and mentally fit to perform their duties.

- 16.1.A.40 Unsatisfactory Performance

Members shall maintain sufficient competency and assume the responsibilities of their positions. Members shall perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the department. Unsatisfactory performance may be demonstrated by a lack of knowledge of or application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards

established for the member's rank, grade or position; failure to take appropriate action on the occasion of a crime, disorder or other condition deserving Public Safety attention; or absence without leave. In addition, unsatisfactory performance includes: repeated poor evaluations or a written record of infractions of rules, regulations, directives or orders of the department.

- 16.1.J.1 Reporting Absences

Members shall report for duty at the time and place specified, and then in the attire and with the equipment specified by current procedures or by a supervisory officer, unless absence is authorized by the member's supervisor. Members shall report in accordance with current department procedures.

In September 13, 2013, in preparation for a different hearing, Schaub reviewed the 151 examples Billings had presented him of schedule adjustments of Schaub's direct reports which Billings claimed were made without prior authorization. He had not previously reviewed the incidents because Nelson was no longer with the department and the other three, Rodriguez, Whelan and Yabe, were not aware of the higher standard of preauthorization that Drozynski had assigned to Billings and Nelson. Schaub acknowledged that he withdrew the preauthorization requirement shortly after he arrived in 2010, replacing it with only proper notification and documentation of changes. In his review, Schaub found 19 instances where there was not an email to him that documented the deviation from an assigned start time. Schaub concluded that it appeared that in the other instances, the officers contacted Billings directly with their schedule changes because he was responsible for managing the schedule at the time.

Termination

While the incidents were occurring that became the basis for

Billings' demotion, the following events also happened. They became the grounds that the employer used to terminate Billings. These events happened in a short period of time, from October 2011 through September, 2012.

In May, 2012, Billings suffered a hand injury and blood-borne pathogen exposure in the line of duty. Due to the injury, he had to be off work until he was allowed to return, by the employer's medical professional, on September 25, 2012, which was the day he was terminated.

Encounters with Randy Johnson

Billings had a few traffic stops involving Randy Johnson previously. Billings stopped Johnson twice on the same day in October, 2002. At that time, Johnson complained about Billings yelling at him and using a loud and aggressive voice. Based on Johnson's complaint in 2002, Billings received counseling and retraining about interpersonal communications and the use of the in-car camera system.

On October 9, 2011, Billings, along with an officer in training (PSO Webb), pulled over Johnson who was driving a pickup truck erratically. (Some documents in evidence place this traffic stop on October 8th.) Johnson told Billings that he had a gun in his pocket; Billings ordered Johnson to put his hands on the dashboard. Johnson moved his right hand toward his pocket. Fast action, shouting and the use of profanity ensued as another officer, PSO Derig, arrived. Johnson moved his hand back and forth between the steering wheel and his pocket. Billings determined to make a kill shot. Billings wrote in his report: I then grabbed Driver/Johnson by the neck and forced his head back against the headrest so I could fire a round downward into his skull and

immediately incapacitate him without the chance of him dodging the round. I felt firing a round into Driver/Johnson's skull provided the best chance of incapacitating him immediately and not unintentionally having the round strike Officer Derig or Officer Webb. I decided to try and get Driver/Johnson to get his hand away from the gun one more time before I shot him." Johnson finally complied with keeping his hands on the steering wheel. Webb recalled that Johnson was screaming.

The officers then got Johnson out of the truck, confiscated the gun and hand-cuffed him. When driving Johnson to jail, Johnson shouted about suing the Town and getting lots of money.

Johnson came into the Public Safety Building the next day to either get his gun back, or to get a receipt that the gun was in police possession. Johnson chatted with two other people who were waiting in the reception area. Billings came out to the counter, on the opposite side of where the three were waiting. In written statements submitted by the two others waiting in the reception area, Johnson was described as being calm and polite; Billings was described as yelling at Johnson to show his hands, then to leave the building or be charged with trespass. Both witnesses confirmed that the Chief was present; one described how the Chief "peeked around the corner."

Johnson asked to speak to the Chief or get a business card to call later. Billings knocked the holder with business cards off the counter, spilling the cards on the floor on the office side of the counter. Johnson did leave the office. In the parking lot, he began talking to some other PSO's. Billings came out and ordered Johnson off the property; Johnson complied.

At the hearing, Billings did not remember anything about the

business cards. He did recall seeing Schaub look around the corner of the reception area, but not get involved.

Johnson filed a formal complaint against Billings related to the October 8, 2011 traffic stop. On December 16, 2011, Johnson filed another complaint against "employees and the City of Steilacoom" for profiling and targeting him, as well as excessive use of force against him by Billings. Schaub initiated an internal investigation against Billings, designated IA 11-07 for excessive use of force, bias profiling and violation of the courtesy policy. Based on Johnson's December 2011 complaint, Schaub started investigations of Webb and Derig, also.

On April 22, 2012, Billings phoned the Chief to tell him that he had two accidental encounters with Johnson on that day. He had seen Johnson, but had no contact with him, in a 7-11 convenience store, in the Arrowhead area outside of the Town, that morning when Billings had gone into get some coffee. Billings told the Chief that later that day, he was again in the Arrowhead neighborhood because it was quiet for doing paperwork. He claimed that he did not know that Johnson lived there; Johnson was outside in his yard when Billings drove by. Johnson filed another formal complaint against Billings alleging intimidation by driving by Johnson's residence, outside of the Town limits, in his marked patrol, and staring him down. Schaub started the investigation into this complaint, designated IA 12-04. He did not believe that Billings needed to find a "quiet area" to write a report because there is not a high call volume in Steilacoom. In addition, the presence of a marked car within the Town's limits would prove a deterrent. It was also assigned to the Fife Police Department for formal investigation due to its relation to IA 11-07.

Later, Billings told the Fife investigating officers that he had

been in the Arrowhead area to check on houses belonging to his brother's mother-in-law and a fellow police officer from the Tacoma department.

When questioned by Schaub, Billings said he was there in the afternoon to get a piece of pizza at the 7-11. On his way back into Steilacoom, Billings claimed to have inadvertent contact seeing Johnson in the street.

New Position -- Fire Operations Chief

Starting in 2009, the Town was able to work with a private ambulance service to station an ambulance at the Steilacoom Fire Station to serve the Town's residents and the surrounding areas of Pierce County. The Mayor and the Council were concerned about the Town's ability to meet the fire suppression and emergency medical response needs of its residents. Several different approaches were discussed. Ultimately, they decided to hire a Fire Operations Chief (FOC) to enhance the fire side of the Department of Public Safety.

The new FOC was to expand and improve the volunteer fire fighter program. The Steilacoom Officers Association (SOA or union) was concerned that some of the duties listed in the FOC's job description were duties currently being performed by the Volunteer Coordinator. At this time, in addition to being a Sergeant/Assistant Fire Chief, Billings was Acting Volunteer Coordinator. The SOA believed that the duties belonged to the bargaining unit and could not be unilaterally removed by the employer. In September, 2011, the parties entered into mediation over the FOC's job description with the assistance of a mediator from the State of Washington's Public Employment Relations Commission.

Billings was a member of the SOA Executive Board and participated in the mediation. The mediation concluded in December with a mutually acceptable list of job duties for the FOC. The agreed to list included: Executive Oversight of Fire/EMT Programs; Development of Volunteer Fire Fighter/EMT Program; Development and Implementation of a "Best Practices" Fire Training Program. The mediated Memorandum of Understanding also recorded, "The Volunteer Coordinator Position stays as is as an assignment with the existing 2.5% premium pay." And, "The Medical Service Officer's premium pay will increase from 1.5% to 2.5% effective January 1, 2012." The Town advertized the FOC position.

Also during this time period, the SOA and the employer were involved in negotiations for a replacement collective bargaining agreement. Billings, as a member of the SOA's executive board, argued against some of the employer's proposals.

In January, 2012, the Mayor appointed Gary McVay, who had been the Chief of the nearby Brown's Point Fire Department, to be the new FOC. Except for the Chief's position and one other, Brown's Point was an all volunteer department. The Mayor met with the Public Safety Department's staff to announce the appointment. He explained that McVay would be in charge of the fire side of the department, second only to Chief Schaub. The Mayor also met individually with both sergeants to explain that he expected the FOC to be superior to all career staff, including the Sergeant/Assistant Fire Chief positions.

Billings was not happy with the creation and filling of the FOC job. Schaub reassigned Billings from his private, corner office, to an office he would share with the other sergeant. Schaub then assigned McVay to Billings' former office. Billings made suggestions to the Chief for other spaces to be used for McVay's

office, including giving up the Chief's conference room.

At the suggestion of a third party, McVay and Billings met off-duty to try to iron out any problems Billings had with McVay. The meeting was tense. McVay interpreted the conversation as Billings warning McVay not to make waves.

On February 22, 2012, McVay responded to an emergency aid call, driving the vehicle Schaub had assigned to him, which was former Chief Drozynski's car. Billings, and other PSO's on duty, also responded. After the incident was over, McVay went into the sergeants' office to discuss how the response went with Sgt. Rodriguez. Billings came into the office, upset that McVay had driven a police car to the incident, since Drozynski's former car had both red and blue lights on it instead of just red lights that are required for fire vehicles. Billings implied several times that McVay was engaged in unlawful actions by trying to illegally impersonate a police officer, or that the public might think that he was a police officer.

McVay testified that he believed that Billings was trying to intimidate him during this confrontation. Rodriguez described it as a tense conversation between professionals who were still trying to work out the relationship between the FOC and the Sergeant/Acting Fire Chief.

Two additional confrontations occurred between the men. One concerned the type of boots that Billings was purchasing for each new volunteer. The other had to do with the identification numbers assigned to officers for reference in the county wide dispatch radio system. Schaub was #1; Billings had been #2. After his hiring, McVay was assigned to be #2; Billings was assigned the number #3. Billings claimed that this was a demotion from his

position as Assistant Fire Chief.

Billings' Complaints

Billings filed other complaints based on events that had occurred at the Department. On Feb 21, 2012 he claimed that Schaub had lost his temper and began yelling profanities at him in front of peers, subordinates and the public. He filed a complaint with the Town against Schaub for creating a hostile work environment. On Feb 24, 2012, he filed a second complaint charging improper governmental action based on McVay's use of the police car when going to the scene of a medical emergency, claiming that Schaub was using his position to allow the department's personnel to violate state law.

Two weeks after he had been demoted on May 8, 2012, Billings filed a formal complaint with the Pierce County Sheriff's Department against Schaub. In it, Billings wrote, "I believe the preponderance of the evidence will clearly show that Director Schaub's actions were retaliatory in nature and that he has been dishonest and negligent during the course of his duties as Director of Public Safety." He ended the complaint with, "It is my hope that a complete and professional internal investigation is conducted into Ron Schaub's actions related to his duties as Director of Public Safety by the Pierce County Sheriff's Department, since Ron Schaub is an employee of Pierce County and he has most likely also violated the Sheriff's Departments policies and procedures as a result of his actions."

The undersheriff responded that she had contacted the Steilacoom Town Administrator and had been advised that there were on-going investigations regarding allegations Billings had brought against Schaub.

Billings replied to the undersheriff, "It is clear the Town of Steilacoom is making no effort to hold Ron Schaub to the professional standard required for all law enforcement officers but I believe the Pierce County Sheriff's Department has the obligation to investigate the matter and take the appropriate action."

March, 2012 Meeting

Chief Schaub, Fire Operations Chief McVay and Billings met on March 23, 2012 about three topics: McVay scheduling PSOs to catch up with Medical Service Officer duties; certain volunteer fire fighter program details; and office keys for McVay. The discussion was intense.

Billings expressed displeasure with how McVay was overriding the way that Billings had scheduled some PSOs, to have them do training instead. McVay told Billings that he would attempt to advise him when he was assigning personnel, but he was under no obligation to ask Billings' permission to do so.

The discussion turned to an upcoming fire academy. The Town had committed to sending six volunteers. McVay learned that five were not aware of the academy. Schaub believed that this breakdown in communication cost the fire academy \$7,000. He pointed out that the Volunteer Coordinator was to shepherd new volunteers through the process. Billings responded that he waited until the background checks had been completed on an applicant before doing anything more. Both Schaub and McVay told Billings that it was the Volunteer Coordinator's responsibility to communicate with the volunteers. Schaub showed Billings the job description of the Volunteer Coordinator, specifically pointing to the duty to coordinate the recruitment and initial processes for new members to join the department.

They then addressed a request Human Resources had made of Billings to confirm if a volunteer qualified for an increase in his final score for civil service hiring as a career staff. Billings had been six days late in responding to the deadline. Schaub recorded that Billings replied "if a couple times your programs fall through the cracks that was not his fault."

The final point of the volunteer program discussed in the meeting was how to deal with two specific applicants. In early March, McVay notified the PSO coordinating background checks on volunteer applicants, to suspend the checks on these two applicants because they had withdrawn. McVay told Billings that one applicant had decided to be a resident at the Gig Harbor Fire Department. McVay conveyed that he knew from working with the other candidate at Brown's Point, that he was dealing with family issues, which caused him to not have enough time to devote to the program. McVay wanted to increase the volunteers' hours commitment to 48 hours a month. Billings want to keep it at 24 hours a month. McVay said he would contact the second applicant to close the loop. Schaub agreed that McVay should make the contact with the applicant.

The third issue of the meeting was about getting keys to the building for McVay. Another officer had ordered the keys, but due to turnover in the department, Billings was the only one left who could sign for them at the store. McVay asked Billings to pick up the keys. Billings felt that he had more important things to do. Billings spoke with the officer who ordered the keys; he told Billings that McVay had told him that he had taken care of it.

Four weeks went by without McVay having keys. McVay eventually took business cards down and had himself and Schaub added as signers. Then McVay picked up the keys himself. Schaub told Billings that it was his responsibility to confirm with McVay that,

in fact, he had his keys; Billings should not have relied on the other PSO.

Both Schaub and McVay confronted Billings about his disrespectful tone during the meeting and his body language. Both men noted that Billings had rolled his eyes at times during the meeting.

After the meeting ended, McVay and Billings moved into the hallway. McVay stated that he was going to schedule the volunteers for shifts. Billings claimed that was his duty. McVay asked if he had been doing that. Billings replied that he let the volunteers schedule themselves. McVay responded that since the Volunteer Coordinator was not scheduling them, he was going to do it for April because he wanted to know when the Town had coverage.

Also on March 23, 2012 Billings filed a grievance alleging that the employer was violating the mediated MOU about the duties that the McVay was performing. The next day, Billings filed a grievance alleging that Schaub was filling staff positions with volunteers instead of offering overtime to PSOs. Billings filed another grievance alleging that Schaub refused to allow him to participate in the shift bid process. Schaub had directed Billings to work the swing shift so that as Sergeant, he would overlap and be able to observe, for evaluation purposes, his squad PSOs on the day shift and evening shift

Shortly after the meeting, Billings received a message from the second applicant asking where he was in the process. Billings contacted the applicant two days after the meeting. Billings assured the candidate that the union would never allow the volunteer program to increase from a 24 hour to a 48 hour commitment. McVay phoned the applicant; he conveyed that it was his plan to increase the program to have volunteers report for 48

hours a month. Later, Schaub called the second applicant himself. The candidate reported that both McVay and Billings were "very passionate" about their positions, but appeared not to see "eye to eye" on the issue. He did not want to get caught in the middle so he contacted McVay on March 26 to suspend his application.

Schaub believed Billings' actions to be diametrically opposed to the policy decisions made during the meeting. As a result of Billings' contacts and misrepresentations to fire volunteer applicants, and his refusal to follow directives related to the Fire Operations Chief, Schaub initiated TA 12-02 against Billings.

Volunteer Fire Fighter Coordinator

Billings was appointed Acting Volunteer Fire Coordinator in March, 2011. The Volunteer Coordinator received additional compensation during the assignment. In January, 2012, Schaub posted a position opening for the Volunteer Fire Fighter Coordinator. Among the duties listed were: "Act as liaison between Career Staff and Volunteers; and Coordinate the recruiting and initial processes for new members to join the department." In April, 2012, Billings applied for the permanent two year assignment.

Schaub Resurrects Earlier Complaints Against Billings

Years earlier, in October, 2010 Billings had an encounter with Jere Bowen who had driven to the public safety building because he believed he was being followed by another driver who was displaying road rage. Bowen complained to Schaub about how Billings handled the incident. Schaub called Billings in to talk about it. At the end of their meeting, Schaub assured Billings that it appeared to be a non-issue.

In the spring of 2012, Schaub phoned Bowan. He then met with Bowan privately in his office. On April 17, 2012, Bowan appeared at a Town Council meeting complaining of Billings bullying behavior.

Michael Smith filed a complaint against Billings on November 10, 2010. Smith had complained that Billings had driven by his residence and "stared" him down. At the time the evidence did not rise to the level of sufficiency so an investigation was not initiated. Due to IA 11-07 and IA 12-04, Schaub reinterviewed Smith, on the same day Schaub terminated Billings.

Recap of Internal Affairs Investigations

Schaub initiated IA 11-07 on January 17, 2012, based on Johnson's formal complaints of excessive use of force; bias profiling; and lack of courtesy.

Schaub initiated IA 12-02 on April 9, 2012, based on Billings' behavior during the March 23, 2012 meeting and his communications with an applicant for the volunteer fire fighter program. That investigation was to look into possible violations of insubordination; unbecoming conduct; unsatisfactory performance; and violation of department rules.

The following IA's were brought while Billings was on leave due to his on the job injury, being May 1, 2012.

Schaub initiated IA 12-04 against Billings June 12, 2012, based on the complaint by Johnson that Billings had driven by his house, which is outside of Steilacoom's jurisdiction, to intimidate him. The investigation was to look into possible violations of rules of conduct; department rules; departures from the truth; intimidation of persons; unbecoming conduct; and unsatisfactory performance.

Schaub instituted IA 12-03 on July 3, 2012 against Billings based on the complaint of Jere Bowen. It alleged violations of policies regarding intimidation of persons and courtesy. Keith Barnes was hired by the employer to conduct the investigation. No final report of IA 12-03 was entered into the record of the arbitration hearing.

Schaub initiated IA 12-05 on September 25, 2012, against Billings based on the complaint filed by Michael Smith November 10, 2010. No conclusion on IA 12-05 was entered into evidence.

(Certain of the internal affairs investigations also listed potential violations of Town of Steilacoom Personnel Regulations. I find that the parties' collective bargaining agreement is controlling over the listed personnel regulations.)

Fife Police Investigations of the Internal Affairs Charges

Schaub asked the Fife Police Department to investigate IA 11-07 and IA 12-04. Lieutenant Tom Thompson of the Fife Police Department led the investigations; he was assisted by Detective Nolta. During their investigation, they interviewed people involved, they reviewed records, reports, and in-car camera video tapes. Their report made a conclusion on each allegation of a violation of policy:

- IA 11-07 (1) Use of excessive force when arresting Johnson on October 9, 2011: UNFOUNDED.
- IA 11-07 (2) Unprofessional communications with Johnson when he came into the Department of Public Safety on October 10, 2011: SUSTAINED.
- IA 11-07 (3) Billings did not follow chain of custody when

confiscated Johnson's driver's license and concealed weapons permit: UNFOUNDED.

- IA 11-07 (4) Violation of Department Rules (Courtesy) Billings refused to assist Johnson when he came into the Department of Public Safety on October 10, 2011, with a reasonable request: SUSTAINED.
- IA 11-07 (5) Billings violated the in-car camera policy during the arresting of Johnson on October 9, 2011: UNFOUNDED.
- IA 11-07 (6) Billings refused to loosen Johnson's handcuffs when he complained during his arrest that they were too tight and causing pain and suffering: UNFOUNDED.
- IA 11-07 (7) Johnson has been harassed by the Steilacoom Police department because of his race and affiliation with a motorcycle club: UNFOUNDED.
- IA 12-04 (1) Billings harassed and intimidated Johnson April 22, 2012 because of Johnson's complaints about him: UNFOUNDED.

Schaub's Conclusions

Schaub gave Billings written notice that he wanted to meet with him on September 7, 2012, for a pre-disciplinary Lauderhill hearing on IA 12-04 and IA 11-07. At the meeting Schaub added IA 12-02. The SOA's attorney, as well as Public Safety Officer Larry Whelan who was the President of the SOA, were also at the meeting. The attorney suggested that at the meeting that they move all three of the IA's forward; Billings agreed. The Chief did so. Billings was still off of work due to his hand injury.

At this meeting, Schaub presented his own conclusions on IA 11-07, IA 12-04 and IA 12-02 in writing to Billings, Emmal and Whelan. It should be noted that Schaub prefaced his report by stating, "Your

performance, behavior and conformance with established policy will be viewed in light of your role as a Public Safety Sergeant" given that the events occurred before Schaub demoted Billings effective May 8, 2012. Schaub's conclusions on each alleged violation were:

- IA 11-07 (1) Potential use of deadly force in the October 9, 2011 traffic stop of Johnson: EXONERATED.
 - IA 11-07 (2) Unsatisfactory performance based upon tactics used in the October 9, 2011 traffic stop of Johnson: SUSTAINED.
 - IA 11-07 (3) Violation of Department Rules (Courtesy) arising from Johnson's trip to the police station on October 10, 2011: SUSTAINED.
 - IA 11-07 (4) Biased based policing when stopping Johnson on October 9, 2011: EXONERATED.
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- IA 12-02 (1) Insubordination for failing to acknowledge FOC McVay's authority and willfully disobeying directions given by McVay and Schaub at the March 23, 2012 meeting: SUSTAINED.
 - IA 12-02 (2) Departures from the truth for claiming that the second applicant had not been removed from the process and claiming not to know the FOC's scope of authority: SUSTAINED.
 - IA 12-02 (3) Failure to perform by not properly or actively manage the volunteer program: SUSTAINED.
 - IA 12-02 (4) Unbecoming conduct by actively undermining authority and working against the mission and values of the agency: SUSTAINED.
 - IA 12-02 (5) Unsatisfactory performance based on unwillingness or inability to perform assigned tasks, including providing proper and timely responses to key personnel in Town and department administration: SUSTAINED.
 - IA 12-02 (6) Violation of department rules by failing to

follow directives on a regular basis: SUSTAINED.

- IA 12-04(1) Violation of policy regarding providing assistance outside of town since Billings admitted that he regularly, for years, had gone in to DuPont and another areas of unincorporated Pierce County, because it is quiet for doing paperwork, even though he had been previously disciplined for going outside of Town limits without specific direction to do so: SUSTAINED.
- IA 12-04(2) Violation of rules of conduct due to Billings' decisions to patrol or at least regularly drive through residential areas outside of the Town limits without official direction or a business purpose for being there: SUSTAINED.
- IA 12-04(3) Violation of department rules based on Billings' admissions to having violated several department policies: SUSTAINED.
- IA 12-04(4) Leaving duty post due to Billings' admission to regularly leaving the Town limits to purchase coffee, check on friends or third parties residences or to find a quiet place to do paperwork: SUSTAINED.
- IA 12-04(5) Departures from the truth based on the investigation into the second Johnson complaint where Billings offered multiple explanations as to why he was in Johnson's neighborhood while stating that he did not know where Johnson lived. Schaub found the explanations not credible since Billings had a multi-year history of traffic contacts with Johnson where his vehicle registration listed his home address: SUSTAINED.
- IA 12-04(6) Intimidation of persons based on Johnson's second complaint that Billings was intentionally driving past his residence: SUSTAINED.
- IA 12-04(7) Unbecoming Conduct based on Schaub's review of the

entire scope of Billings' behavior contained in the three investigations and the negative and detrimental impact it had on the department and law enforcement in general: SUSTAINED.

- IA 12-04(8) Unsatisfactory performance based on Schaub's review of the entire scope of Billings' performance as a Sergeant and a PSO, where he found a consistent pattern of failure or refusal to conform to established work standards and directions from superiors: SUSTAINED.

Billings was placed on Administrative Assignment September 24, 2012, where he received full pay and benefits, but did not perform in an official capacity.

Following the September 7, 2012, Laudermilll hearing and his reviews of the IA 11-07, IS 12-02 and IA 12-04 records and Billings' performance and disciplinary history, Schaub believed that Billings' actions were not a one-time event or an aberration. Schaub concluded that Billings' behavior was so far outside of the scope of the Town and departmental policies, and the mission and values of the department, that termination from employment as a PSO was the appropriate action.

On September 25, 2012, Schaub terminated Billings for violating the following department policies: Use of Force (Unsatisfactory Performance Based Upon Tactics Used); Violation of Department Rules (Courtesy); Insubordination; Unbecoming Conduct; Unsatisfactory Performance; Violation of Department Rules (Providing Assistance Outside of Town); Leaving Duty Post; Compliance with Rules of Conduct; and Intimidation of Persons.

The SOA filed the grievance on October 2, 1012 challenging the termination.

ANALYSIS

Burden of Proof

In disciplinary grievances, the employer has the burden of proof. While a lower "preponderance of the evidence" standard of proof - where a party must establish that it is more likely than not that the factual events are as it asserts -- can be used in certain arbitration cases, I require a "clear and convincing" standard in a permanent demotion or discharge case, since these penalties have severe career and compensation impacts.

Therefore, in the present grievances, the employer must establish by clear and convincing evidence that it had just cause to impose the demotion and later the discharge that are being grieved.

Legal Standards

In 1966, Arbitrator Carroll Daugherty developed seven tests to establish that an employer had just cause to discipline or discharge an employee in *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966). The tests have become the standards in labor arbitrations involving just cause issues. Those standards are:

1. Did the employee have notice that the conduct would result in disciplinary consequences?
2. Was the rule was reasonably related to the work place?
3. Did the employer conduct an investigation to determine the facts?
4. Was the investigation full and fair?
5. Was there substantial evidence that the employee violated rule?

6. Was the rule, and subsequent discipline, applied evenhandedly?
7. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's prior record?

Although each standard must be present, not every standard is disputed. After studying the legal arguments submitted by the parties, it appears that the union is actually only challenging that the employer did not establish two of the just cause standards: Did Billings actually engage in the conduct he is accused of; and are demotion, and the later termination, the appropriate levels of discipline. Therefore, those two will be the standards analyzed in this Award.

Demotion

Schaub demoted Billings because he "... knowingly and willfully violated Town policy by routinely reporting late to work and/or adjusted your schedule from your assigned shift start time without authorization" and "... You acknowledged that you frequently allow your subordinates to knowingly and willfully violate various Town policies, which sets a poor example of expectations for the Department."

Schaub specified that Billings had violated certain SDPS provisions whose pertinent parts I find to be: "Reporting for Duty -- Members shall report for duty at the time and place required by assignment or orders ..."; "Unsatisfactory Performance -- Members shall maintain sufficient competency and assume the responsibilities of their positions. ..."; and "Reporting Absences -- ... Members shall report in accordance with current department procedures."

When he first started as Chief, Schaub and Billings discussed how notice of schedule changes should be communicated to Schaub. They

talked about Drozynski's "wacky" pre-authorization policy. They agreed that Billings only needed to send a text when a change occurred. Soon thereafter, Schaub no longer required the text message. The employer acknowledges that there are significant challenges to keeping career staff on duty at required staffing levels when the department is so understaffed.

The employer claims that at no time did Schaub authorize Billings to make any schedule changes outside of the town's personnel regulations or department policy. It defends the decision to demote Billings on the grounds that he had returned to his prior practice of modifying his start time without prior notice and/or approval from his supervisor or subsequent written notice to his supervisor of such modifications to his schedule.

However, the record establishes that Schaub changed a pre-authorization requirement, to a text notification, to no notification. Schaub saw and texted Billings repeatedly on mornings when Billings' shift bid start time was later at 11:00 AM or noon. It is reasonable to conclude that Schaub knew of, and approved, how Billings adjusted his start time.

The employer appears to put the burden on Billings to come forward to tell Schaub about Drozynski's investigation of his hours and to tell Schaub about the reason for the pre-authorization memo. The employer does require employees to come forward with certain information; past discipline is not one of the requirements. SPSD 16.1.A.a.b "Standard of Conduct -- Members shall promptly report in writing, through the chain of command to the Director, when they are the subject of: arrest, revocation of driving privileges, exercise of police authority when off-duty, filing of civil litigation in connection with their town employment." Past discipline is not listed because logically the employer should know

about prior discipline. Thus, the employer has the burden to keep its records in an orderly manner. Drozynski could have left a transition memo for Schaub about personnel actions or have an orientation time period with Schaub to explain certain practices in the department. The fact that the employer did not require such a transition does not shift the burden to employees to provide the history of all policies. Schaub, himself, changed the procedures for providing notice of schedule changes after observing how the department was running.

It is not unusual for a short-staffed, small department to have constant schedule modifications. When Billings presented 151 incidents from calendar year 2011 where a detective or acting sergeant who reported directly to the Chief modified their work schedule without prior authorization from the Chief, Schaub dismissed them as irrelevant. Schaub responded that "The alleged instances are beyond the scope of this investigation." Schaub's characterization of the 151 incidents as beyond the scope of the investigation is incorrect. Schaub advised Billings to file charges against the other officers if Billings believed they were violating policy. This response completely misses the point. Billings was not submitting them as a basis for complaints against others. He was using them for mitigation. They were supporting evidence of the current practice. Billings supplied the examples to establish that the policy was to allow schedule changes without prior approval. Schaub failed to properly consider the additional facts presented by Billings.

The union argues that Schaub accepted his direct reports to modify their schedules without prior permission. On Schaub's second consideration of the examples, in 2013 - one year after Billings' demotion, he found "only" 19 without prior permission. The employer's dismissal of all but 19 of the 151 examples that

Billings brought ignores what was the practice of the department. Schaub then dismissed the 19 examples because those officers were not subject to the earlier directives from Drozynski. That does not change what was the practice of the department.

The employer argues that Billings demonstrated an absence of leadership skills in knowingly and willfully violating department policy and allowing his subordinate officers to violate policy as well. It emphasizes that Billings admitted to making start time changes without prior approval and without reporting his late starts to his supervisor. Therefore, it argues that Billings must forfeit his opportunity to serve in a leadership position. The employer concludes that the demotion to PSO was fair and appropriate decision in this matter.

However, the employer has to prove that misconduct did in fact occur. The employer failed to meet the burden of proof. Additionally, the failure of the employer to consider the exculpatory facts violated the just cause standard for a full and fair investigation. As the union points out, arbitrators have changed or modified an employer's discipline if mitigating circumstances were ignored. *Elkouri & Elkouri*, Sixth Edition, pp 958 - 962, quoting *Discipline And Discharge In Arbitration*, Brand, BNA Books 1998, & Suppl. 2001.

The employer has not established by clear and convincing evidence, that Billings violated the rules as alleged. He did not violate the Reporting for Duty rule; Schaub changed the practice and he reasonably should have known that Billings was reporting before his bid shift start time. Billings did not violate the Unsatisfactory Performance rule since he assumed the responsibilities of scheduling as directed by Schaub. He did not violate the Reporting

Absences rule since he reported in accordance with current department procedures as established by Schaub.

Termination

Chief Schaub discharged Billings for 16 violations of department policies which Schaub, himself, determined were sustained from three investigations: IA 11-07; IA 12-02; and IA 12-04. Each reason must be examined to determine if the record supports a finding that Billings actually engaged in the conduct.

Unsatisfactory Performance Based upon Tactics Used -

Schaub determined that Billings had shown unsatisfactory performance during the Johnson traffic stop when he reached through the truck's window to grab Johnson by the throat while preparing for a potentially fatal shooting.

The union called Jackson Beard as an expert witness. Beard has been a certified firearms instructor for 10 years. He had reviewed Fife's report. Beard believed that Billings had exercised restraint. However, he could not comment on whether Billings' actions were appropriate because he did not know how Billings had been trained. He did explain that reaching into a car is not taught at the academy now.

The Fife report, based on the evidence available, "could not prove that excess force was used." It did not comment on the tactics used. The union argues that Billings' actions resulted in the safe apprehension of an armed, belligerent and intoxicated driver.

The Chief found that based on department firearms training, sound defensive tactics, and officer safety considerations, reaching

inside the passenger compartment of the truck and grabbing Johnson by the throat represented poor officer safety tactics. He believed that the angle that Billings was holding his gun and having his other hand on Johnson's throat would result in shooting his hand. He reasoned that "shooting at your hand is not something that is taught by our firearms instructor." He concluded that "There was no justifiable reason to grab Mr. Johnson by the throat. This situation either justified the use of deadly force or going 'hands on' and extracting Mr. Johnson from his vehicle."

Since Beard would not affirm Billings' tactics, the Chief's findings are unrefuted. The employer has met its burden of proof that Billings engaged in unsatisfactory performance.

Violation of Department Rules (Courtesy) -

Fife found that Billings should have allowed Johnson to speak to the Chief when Johnson arrived at the office to retrieve his firearm. The Fife report did not comment on the Chief's presence. The union argues that department policy (SDPS 15.4) requires Billings to get contact information; he was not authorized to unilaterally allow Johnson access to the Chief.

I find the policy inapplicable to this situation given the statement from an eye witness that he saw the Chief peak his head around the corner. The Chief was present; he failed to take charge of the situation.

I agree with the witness that Billings acted childishly when he knocked the business cards off the counter. That Billings did not remember anything about the business cards is troubling. More unsettling, though, is that the Chief was present and did not get

involved, even when Johnson was specifically asking to speak to him.

Billings suggested in his testimony that all three (the two waiting in the reception area and Johnson) stuck together because they all had a military background. This is unsubstantiated supposition that does not topple the written witness statements.

The employer argues that Billings' action at the reception counter created the exigency of the situation by his demeanor, words and treatment of Johnson. Further, it claims that he escalated the situation by his interaction with Johnson in the parking lot. However, it was unexplained why the Chief did not take over. In other public sector offices, be it in a school district or a state office, if a member of the public presents him or herself as upset, it would not be unusual or inappropriate for a supervisor to become involved. By his own actions, the Chief makes this situation appear acceptable.

The employer has not met its burden of proof on this charge.

Insubordination -

SDPS 16.1.A.16 Insubordination

The following shall constitute insubordination: (a) failure or deliberate refusal by any member to obey a lawful order given by a ranking member of the department. This would include orders relayed from a supervisor or by an officer of the same or lesser rank; (b) speech or conduct to a superior which is discourteous, abusive, disloyal, profane or threatening.

The employer charged Billings with being insubordinate by his interactions with others about the volunteer fire fighter program. The employer argues that as a sergeant and mid-level manager, Billings should have supported McVay. Instead, it contends, Billings openly expressed his hostility to the new policies he was

duty bound to implement. It claims that Billings made spurious complaints which focused on his resistance to the superiority of the FOC position. He acted against the policy direction from the Council and Mayor. As a manager, the employer reasons that Billings needed to be working to implement the policy changes made by the Mayor and Town Council, not to frustrate them. It offers that a more appropriate action by Billings would have been to request a labor-management committee meeting to clarify these matters. It stresses that rolling his eyes was a way that Billings expressed his contempt.

The record supports a finding that Billings refused to acknowledge McVay's authority over him as a sergeant/assistant fire chief or volunteer coordinator, even though the Mayor met directly with both sergeants to explain McVay's level of authority. Billings resisted changes McVay attempted to implement. He was confrontational, argumentative and disrespectful to McVay.

Billings wanted the FOC position to be filled from within the department; he thought that Whelan should have been appointed. Regardless of his personal feelings toward the creation of the position of Fire Operations Chief, he had an obligation to follow McVay's direction and leadership. The mediated FOC job description clearly indicated that the FOC was the leader of the fire side of the department, superior to all other career staff.

Billings subverted McVay's authority when he told volunteer applicants that the union would never allow the employer to raise the monthly service standard. It is clear that Billings and McVay did not see eye to eye regarding the future volunteer requirements but, as the subordinate, Billings should have supported McVay. Billings argued that the Director of the department had always been the only person who could authorize applicants be eliminated from

the volunteer program. He could not acknowledge McVay's authority. During the investigation into IA 12-02, Billings admitted that he was unclear why he, as Assistant Fire Chief, should be reporting to the Operations Chief and not the department Director.

As the Chief wrote to Billings, "You simply did not accept any authority other than your own." He knew or reasonably should have known exactly what was expected of him. Billings undermined "our authority as the Director and Fire Operations Chief and worked against the mission and values of the agency. You failed to fulfill your responsibilities as a leader, sergeant and volunteer coordinator." The employer established that Billings was insubordinate.

Departures from the Truth -

SDPS 16.1.A.11 Departures From the Truth
Members shall not willfully depart from the truth, under any circumstance, or in giving testimony or in connection with any official duties.

[The employer charged Billings with departures from the truth two times based on two separate IAs.]

The first charge was from Billings' claim that he did not know that after the March 23rd meeting only McVay should contact the two volunteer fire fighter applicants. Schaub heard McVay give Billings clear direction that he was the one to close the loop with the applicants. Billings said he did not know what the direction was from McVay. Schaub concluded that Billings was unable to comprehend or unwilling to follow directions given, so he lied about not knowing the course McVay wanted to take.

The record supports the employer's conclusion that Billings did not like McVay's directions, so he ignored them, only later to deny knowing what they were.

The second charge of untruthfulness is based on Billings saying that he did not know where Johnson lived when he had his second encounter with Johnson on April 22nd. The employer established that Johnson has lived at the 108th street address for three years. Billings had stopped Johnson at least two times prior to his complaint against Billings. The registration Johnson produced each time listed the 108th Street address. Billings testified that on one of the stops, he mis-entered the license plate number; but he did not refute that at one time he would have seen the 108th Street address. Billings was aware of Johnson's truck and motorcycle. Johnson keeps his vehicles in an open garage or in his driveway. The Fife investigation mentioned that to be on 108th Street, it appears that Billings would have to have been purposely driving there when outside of Steilacoom. It is not a street that connected to the 7-11 or a quiet area to park a police car.

Billings gave three different explanations for being on 108th on April 22nd. When he phoned the Chief, he said that he had gotten a piece of pizza at the 7-11 that is right outside Steilacoom, unknowing that it was near Johnson's house. He told the Fife investigators that he was driving past his brother's mother-in-law's house and a former Tacoma Police Officer's house to check on them and just happened to be on the street where Johnson lived. Johnson believed that Billings had starred him down when he drove by the house. Johnson called and complained to Srg. Brown of the Lakewood police department. Brown called the Steilacoom department to talk to Billings. Billings told him he was in Johnson's neighborhood working on an unrelated matter and he inadvertently drove past Johnson's home.

The Chief believed that Billings' stories did not line up; "the truth does not change regardless of how many times it is told." The Chief found that the varied responses were actually indicative of attempts to justify, after-the-fact, conduct that Billings knew to be inappropriate, so he had to lie about why he was on 108th Street.

It is fatal to Billings' defense that he offered different explanations for his presence on 108th Street to different people. It is logical to conclude that his various versions were offered to justify something he knew he should not be doing.

The employer has met its burden of proof on the two charges of departure from the truth.

Failure to Perform -

SDPS 16.1.A.30 Failure to Perform

Members shall not willfully or through cowardice or negligence or insubordination fail to perform the duties of their rank or assignment.

The Chief charged Billings with failure to perform for not properly or actively managing the volunteer program. Billings admitted that he did not schedule volunteers for station time; he put a calendar up and let the volunteers schedule themselves. He did not follow through with the March 2012 fire academy scheduling. This breakdown in communication cost the fire academy money. Five applicants were not even aware of the academy. The Volunteer Coordinator was to shepherd new volunteers through the process. Billings waited until the background checks had been completed on an applicant before doing anything else. This is not correctly communicating with volunteer applicants.

The irony does not fail me that in the same meeting that McVay took over communicating with two volunteer applicants, both Schaub and McVay told Billings that it was the Volunteer Coordinator's responsibility to communicate with the volunteers. Schaub even went as far as showing Billings where the duty was listed in the job description of the Volunteer Coordinator. However, as the FOC, and because he knew both applicants from Brown's Point, McVay justifiably could determine that he would be the one to contact them.

The employer established that Billings failed to perform as the Volunteer Coordinator.

Unbecoming Conduct -

SDPS 16.1.A.37 Unbecoming Conduct

Members shall conduct themselves at all times, both on and off-duty, in such manner as to reflect most favorably on the department. Conduct unbecoming shall include moral turpitude and/or activity that brings the department into disrepute or reflects discredit upon the officer as a member of the department, or that which impairs the operation, efficiency or effectiveness of the department or member.

[The employer charged Billings with unbecoming conduct two times based on two separate IAs.]

Billings was charged with unbecoming conduct for the way he misled volunteer applicants, along with the way he disobeyed his superiors when working as the Volunteer Coordinator. The facts of the conduct are detailed in the background section above.

The second charge of unbecoming conduct was based on Billings' interactions with Johnson. Based on the totality of circumstances, Schaub believed that Billings' purposeful behavior and actions against Johnson brought the department into disrepute and

discredited the profession, reflecting poorly on the members of the department "who daily did their job with honor and integrity."

In Billings' letter of termination, the Chief wrote, "Your continued inability or refusal to move beyond your own personal opinions and desires once policy and operational decision have been made, and directives have been given, seriously hinders Department operations and morale." Again, the facts of this conduct are detailed above. Those facts support the Chief's conclusions that Billings acts as though his own personal opinions on how the department should be run are superior to those with authority over him.

The employer has met its burden to establish Billings' unbecoming conduct.

Unsatisfactory Performance -

SDPS 16.1.A.40 Unsatisfactory Performance
Members shall maintain sufficient competency and assume the responsibilities of their positions. Members shall perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the department. Unsatisfactory performance may be demonstrated by a lack of knowledge of or application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the member's rank, grade or position; failure to take appropriate action on the occasion of a crime, disorder or other condition deserving Public Safety attention; or absence without leave. In addition, unsatisfactory performance includes: repeated poor evaluations or a written record of infractions of rules, regulations, directives or orders of the department.

[The employer charged Billings with unsatisfactory performance two times based on two separate IAs.]

The Chief charged that Billings was unwilling or unable to perform certain assigned tasks, including providing proper and timely responses to key personnel in administration, which impacted Department operations and other operations throughout the Town. The record shows that Billings failed to properly perform the duties and responsibilities as a sergeant and volunteer coordinator. He was reluctant to get the office keys for the FOC. He was late in responding to an email from HR, even when a deadline due date was listed for the response because of a scheduled Civil Service meeting. Billings responded nearly a week after the meeting. Due to his late response the Town was forced to adjust the entry level list at the following month's Civil Service meeting. Similarly, he had been late previously in responding to the Town Administrator who was dealing with a public records request for the training records for Billings and two other officers. Billings' failure to respond placed the Town of a law suit. In his testimony, Billings always had an excuse; he had talked to a third person and assumed that the matter was handled. He consistently failed to identify the appropriate person with whom to communicate to actually resolve the issue.

For the second charge, Schaub found a consistent pattern of failure or refusal to conform to established work standards. The entire record establishes Billings' persistent actions of "failing or refusing" to follow directions. Billings testified that if a directive was put in writing, he always followed it. The job of a police officer/sergeant is packed with various duties. If all directives were required to be put in writing, the operations would grind down to an unacceptable pace. His defense is unacceptable. He also stated that he followed all verbal directives. The problem is that he did not always agree with management about what a directive was, such as having McVay complete the loop with the volunteer applicant.

The employer has met its burden to establish Billings' unsatisfactory performance.

Violation of Department Rules -

SDPS 16.1.A.1 Violations of Department Rules
Members shall obey all lawful orders, departmental policies, procedures or instructions.

[The employer charged Billings with unsatisfactory performance two times based on two separate IAs.]

The entire charge that the Chief wrote for one of these alleged violations is: "You failed to follow directives on a regular basis."

This is too vague to sustain a termination. I am not a fan of piling on allegations. Specific rule violations are evaluated above and below this claim.

The other charge in this category was due to Billings generally not complying with directives from superior officers or other department managers. Again, this is vague. Billings' failure to comply with specific directives are analysed herein individually.

These two vague charges will not be considered in evaluating Billings' discharge.

Providing Assistance Outside of the Town -

On February 22, 2011 Schaub sent out a Memo regarding the Patrol Response Policy. The memo emphasized that the department manual states only three reasons why PSOs would go outside of Town limits: if in fresh pursuit; if working under the Mutual Aid Peace Offices

Powers Act; or if requested by a Pierce County or Washington State Patrol Supervisor.

Billings admitted that he routinely drives outside of the Town's limits, but denied that he did any patrolling. "It's unincorporated Pierce County and I loop around. ... it's just one street over. It's not like I'm any distance. It's quieter there and, you know, I, it's, it's not the first time I've done that ... I drive there routinely, you know, I don't patrol there but I'm only going one street over"

Whelan, who has been with the Department since 1990, testified that when he was first trained, he was told that it was OK to go to the 7-11 in the Arrowhead area outside of the Steilacoom town limits, because Steilacoom citizens go there, too. He testified that officers routinely go out of town to eat if it is within a reasonable distance.

The employer did not establish the connection between Schaub's memo and the officers' practice of going outside the Town's limits for a short distance. There is no record that officers stopped this practice after receiving the memo or that anyone else was disciplined for violating the memo. Whelan testified that driving outside of the geographic boundary is normal and customary.

The employer has not met its burden on this charge of providing assistance out of town.

Compliance with Rules of Conduct -

The Chief wrote in total about this charge: "Under Drozynski you had been previously counseled and disciplined for violating the policy on patrol responses outside of Town. You continued your

pattern of ignoring these rules, even after being placed on notice that the behavior was counter to the mission of the department and expectations placed upon you."

The patrol responses that Drozynski wrote about were where Billings had actually gone to a crime scene. There was no admonishment not to drive to the 7-11. The employer fails on this charge for much the same reasons as the charge immediately above. There is no record that refutes Whelan's testimony that officers have a practice of going one or two blocks outside the Town limits.

The employer has not met its burden on this charge.

Leaving Duty Post -

The Chief brought this charge because Billings admitted to driving past the homes of family members or other law enforcement agency members. He emphasized that Billings' sole obligation is to the citizens of the Town, not those in unincorporated Pierce County: "Without a mutual aid request you have no authority per our policy to respond or patrol outside the Town limits."

This is different than the claimed violations of Providing Assistance Outside of the Town, or Compliance with Rules of Conduct discussed above. The facts do appear to show that Billings, by his own admission, was driving past homes of people he knew and not just following a practice of going one or two blocks out of town.

The employer has met its burden on the charge of Leaving Duty Post.

Intimidation of Persons -

Based on the totality of circumstances, Schaub concluded that Billings intentionally attempted to intimidate Johnson by driving by his residence. Johnson was upset enough to contact another police department for assistance.

The Fife investigators initially thought that it was too big of a coincidence that Billings just happened to drive by Johnson's home, which is on a type of cul-de-sac. After talking with Billings' brother's in-law and the Tacoma officer however, they concluded it would be possible for Billings to pass Johnson's home while on the way to those residences. The Fife investigation concluded that the allegation of Intimidation of Persons was unfounded.

It is unclear what else Schaub considered in the "totality of circumstances." Without those facts, it is difficult to see why the Fife conclusions should be ignored or overturned. The union severely criticizes Schaub's conclusions claiming that when he acted as investigator, witness and decision maker, his actions were biased, inappropriate and inconsistent with just cause. It does not see that Schaub was impartial.

There is no clear and convincing evidence that the employer has met its burden of proof on the charge of Intimidation of Persons.

Conclusion on the Termination

When Schaub was hired, he turned to Billings for help. Billings provided help and guidance. I agree with the employer, though, that at some point Billings seems to have lost perspective on his job responsibilities. He began to freely comment on a wide range of subjects, from the in-car camera system to the fire side of the

department -- needing more boots on the ground rather than a FOC, to the training that council members needed to have to properly serve the Town. A review of the record confirms the employer's claim that in his testimony, Billings used words like "preposterous" and "ridiculous" about directives imposed by department directors or suggestions made by Council, and "perfect" in relation to his training and his performance as a Sergeant.

The union criticizes the employer's use of evidence, in Billings' termination letter, of events not relevant to the discipline, such as the IA's that had not been completed, and allegations from citizens with no written or reliable evidence to support them. It claims that Schaub "grasped at straws in a desperate attempt to manufacture policy violations ... [because] the end justifies the means." It argues that by initiating so many IA's in a very short period of time, Schaub's sole purpose was to intimidate Billings. I agree with the union that intimidation is an inappropriate use of the IA process. However, other employees were subject to IAs, also. A close reading of the termination letter and this Award will show that I only considered the findings that Schaub used, not any mere allegations.

Billings' primary duty was to support and implement town policy as opposed to outwardly advocating for his own personal agenda. The record establishes that Billings has demonstrated his unwillingness or inability to conform his behavior to stated rules and procedures.

Billings tries to shift responsibility away from him and onto others. He had been disciplined for violations of department policy on the use of in-car cameras. He claimed that the system was inferior overall and not worth the trouble it presented. He

did not get the camera fixed in Derig's vehicle for months, even though Derig was on his squad.

The employer contends that Billings is "quite a conspiracy theorist", in the way he testified about his speculation of others working against him. For example, he questioned the two lobby witnesses' veracity claiming that since they were military, they would stick with Johnson, who also had a military background.

Billings demonstrated disrespect for Chief Schaub and FOC McVay. He sent a letter to the Pierce County Undersheriff to complain about Schaub as opposed to letting the Town complete its investigation of Billing's allegation that Schaub was creating a hostile work environment. The employer argues that this was Billings being vindictive by acting in an effort to affect Schaub's employment status with the Sheriff's Department. I agree. It is unclear why Billings could not wait for the Town to finish its investigations into Billings' complaints.

It appears that Billings lost sight of the fact that he worked for the Town. He filed claims including hostile work environment against both Drozynski and Schaub, but were they really because the Chiefs would say no to him or his proposals? Billings repeatedly testified that if the Chief put the directive in writing, he would always follow it. In such a small department, the Chief should not have to put everything in writing to his second in command for police activities.

His disdain for both Schaub and McVay was demonstrated by his testimony at the hearing. Billings admitted that he was opinionated, citing his remarks about the in-car camera system, McVay's qualifications and different ideas about the way the department was being run. Billings clearly does not see the impact

of his attitude. At the same time that he testified that the Mayor, the Chief and McVay were in a "scheme" together, he stated that he thinks that he is "very respectful of authority." He testified that he does "100's of 1,000's of things" for the Town. He was frustrated that he "busts my butt" for the department and the thanks he got was to be fired. He is not recognizing how destructive his attitude is to his performance.

As the employer points out, "The inevitable result of all of this activity is that, despite his training and experience, Billings had grown into ... [a] self serving manipulator of the system and disrespectful and resistant to all who dare to suggest change to the system in place."

In Billings' termination letter, Schaub lead with "It was your responsibility to support the mission and values of the department." Then he found, "There was a common theme in the policy violations of the treatment of other people and the conformance to rules and expectations. Billings demanded respect but was unwilling to extend the same courtesy." I agree. Just considering that charges that the employer proved that Billings did, I find that Billings has forfeited his opportunity to further serve the Town as a Sergeant or officer.

Union Activities

The union argues that Billings' union activity was a substantial motivating factor in the disciplinary actions since nearly every time Billings filed a grievance or asserted a union right, he was retaliated against by Schaub.

The employer counters that Billings used his activities in SOA as both a sword and a shield: From, the union will never allow the

increase in volunteer hours, to Schaub is against me because I file grievances.

The Public Employment Relations Commission prohibits discrimination due to union activities by public employers against their employees. A different legal standard is used in those cases than the standards used to evaluate just cause cases. If Billings believes that he was discriminated against because of his union activities, he should bring that claim in a different forum.

Is Progressive Discipline Appropriate?

ARTICLE 6 -- Discipline and Discharge, of the parties' collective bargaining agreement states, in part, "Disciplinary action may include written reprimand, suspension without pay, reduction in rank, or discharge." It is important to note that the discretionary "may" is used in the language; there is no mandatory requirement for progressive discipline.

The union argues that Billings' record as a Sergeant with no discipline, as well as his length of service, should be considered. As part of that consideration, it contends that he should be given an opportunity to correct his behavior before being dealt the ultimate industrial penalty of termination. The employer admits that after a rough start, Billings changed his behavior enough to be appointed a sergeant; but it advances that he was not able to maintain that compliance. The record supports the employer's contention.

Progressive discipline is a two-way street. An employer uses it to get an employee's attention that the employee has to change his behavior. However, the employee has to show that given the opportunity, he would change. It does not appear that Billings

understands or acknowledges how destructive his attitude is. He admitted in his testimony that his relationship with McVay was "dysfunctional"; but he continued his behavior without stepping up and changing.

Even while he was demoted, albeit this Award has found the demotion was imposed without just cause, he struck out at Schaub by filing a complaint with the county's Sheriff's department. Clearly the demotion did not get Billings' attention. Billings admitted he rolled his eyes at remarks made by either Schaub or McVay at the March, 2012 meeting - "I do that." The record does not show how a lesser punishment would change Billings' attitude.

The union claims that in determining the discipline, the employer treated Billings disparately from other employees. It cites to another PSO who was arrested for a DUI collision while on probation and received a 30 day suspension. A different PSO was looking up personal information on one of the confidential police systems violating law and policy; he was suspended and was not demoted from his position as detective. These both involved one time incidents.

Neither of these examples include such a consistent, pervasive attitude that Billings displays. A lesser punishment is not appropriate. If I were to change his termination to a demotion, he could do damage to the department as a PSO who would continue to challenge the directions.

The discharge is based on the offenses that were proven by clear and convincing evidence. Given the continuum of punishment and Billings' work and disciplinary history, termination is the just and appropriate result.

REMEDY

The employer must make Billings whole, in pay and benefits, for the time that he was unjustly demoted from a Sergeant to a PSO, until his termination.

The parties' collective bargaining agreement at ARTICLE 8.3 directs that, "The losing party, as determined by the arbitrator, shall pay the expenses of the arbitrator." I find that the employer is the losing party in the demotion grievance and the union is the losing party in the termination grievance. Therefore, the parties should share equally in splitting my fees and expenses.

AWARD

Any facts or arguments presented at the hearing or in briefs which are not cited within this Award, I found to be non-persuasive, irrelevant or immaterial. Based on the sworn testimony of the witnesses, the documents admitted into evidence, and the record as a whole, I award:

The grievance concerning the demotion is SUSTAINED.

The grievance concerning the termination is DENIED.

ISSUED in Chehalis, Washington, this 18th day of August, 2014.


KATRINA I. BOEDECKER, Arbitrator

2. Declaration of Service.

properly addressed to the following person:

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And I declare that on January 9th, 2017, a true and correct copy of the above-mentioned document was sent via email to the parties of the record, by me, Laila Z. Possani.

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

Signed at Seattle, King County, Washington this 9th day of January, 2017.


LAILA Z. POSSANI, Legal Assistant