

FILED  
Court of Appeals  
Division II  
State of Washington  
7/3/2019 2:36 PM

NO. 53317-1-II

---

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

---

JEREMY VAHLE, an individual,

Plaintiff/Appellant,

v.

LAKEWOOD, a municipal corporation,

Defendant/Respondent.

---

APPELLANT VAHLE'S OPENING BRIEF

---

JOAN K. MELL, WSBA No. 21319  
Attorney for Appellant Jeremy Vahle  
III BRANCHES LAW, PLLC  
1019 Regents Blvd. Ste. 204  
Fircrest, WA 98466  
[joan@3brancheslaw.com](mailto:joan@3brancheslaw.com)  
253-566-2510 ph  
281-664-4643 fx

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
A.    The trial court erred when granting summary judgment to Lakewood.....	2
B.    The trial court erred when denying partial summary judgment to Officer Vahle.....	2
III. ISSUE STATEMENTS.....	2
A.    Did Lakewood violate merit selection standards as a matter of law when promoting law enforcement officers to sergeant using Rule of Five when the Legislative requirements were Rule of Three and Rule of One?.....	2
1.    When Lakewood approved the collective bargaining agreement (“CBA”) did that equate to Legislative approval of Rule of Five when the CBA was silent as to Rule of Five and Lakewood’s Ordinance required Rule of Three?...2	2
2.    Does Lakewood have an impermissible non-merit based merit selection process where Chief Zaro selected from more than twenty-five percent of eligible candidates each of whom he knew personally and favored over Officer Vahle for impermissible reasons?.....	2
3.    Did Lakewood miscalculate the Veteran’s preference?.....	2

B.	Did Lakewood breach the terms of its employment contract with Officer Vahle?.....	2
C.	Did Lakewood’s Rule of Three ordinance estop it from using Rule of Five?.....	2
D.	Was Lakewood negligent in the enforcement and supervision of civil service?.....	3
E.	Should Officer Vahle recover his attorney’s fees and costs on appeal?.....	3
IV. STATEMENT OF THE CASE.....		3
	<u>Lakewood</u> .....	4
	<u>Civil Service - Merit selection Standards</u> .....	5
	<u>Rule of Three - LMC 2.10.090 (Ordinance 328 Dec. 2003)</u> .....	6
	<u>Rule of ALL - Civil Service Commission March 2004</u> .....	7
	<u>Lakewood Ordinance 674 - Repealed Rule of Three</u> .....	10
	<u>Collective Bargaining Agreement (“CBA”)</u> .....	11
	<u>Trial Court Decision</u> .....	13
V. ARGUMENT.....		16
A.	De Novo Standard of Review.....	16
B.	Lakewood’s Merit Selection Standards - Rule of One and Three.....	16
1.	Local Law Enforcement Promotions Must Be Based On Merit.....	16

2.	Rule of One Merit Selection Standard for Local Police....	16
3.	Lakewood Found Rule of Three Substantially Accomplished The Purpose of Civil Service.....	17
4.	Lakewood Used Rule of Five In Violation of Its Ordinance.....	19
5.	Repeal of Rule of Three Did Not Timely Cure Its Errors..	19
6.	PECBA Has No Pre-emptive Effect.....	24
7.	Lakewood Never Bargained Merit Selection Standards....	28
8.	Lakewood’s Promotions Were Not Merit Based.....	35
9.	Veteran’s Preference Miscalculated.....	38
C.	Lakewood’s Breach of Contract - Promissory Estoppel.....	40
D.	Lakewood’s Negligence.....	45
E.	Attorney’s Fees and Costs On Appeal.....	47
VI.	CONCLUSION.....	48

## TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<i>14 Penn Plaza LLC v. Pyett</i> , 556 U.S. 247, 129 S. Ct. 1456 (2009).....	34
<i>Anderson v. O'Brien</i> , 84 Wn.2d 64, 524 P.2d 390 (1974).....	28
<i>Barry &amp; Barry, Inc. v. State Dept. of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	23
<i>Becker v. Community Health Systems, Inc.</i> , 184 Wn.2d 252, 359 P.3d 746 (2015).....	42
<i>Bellingham Firefighters Local 106 v. City of Bellingham</i> , 15 Wn. App. 662, 665–66, 551 P.2d 142 (1976).....	22
<i>Casebere v. Clark County Civil Service Commission - Sheriff's Office</i> , 21 Wn. App. 73, 584 P.2d 416 (1978).....	25, 35, 46
<i>City of Bremerton v. Widell</i> , 146 Wn.2d 561, 51 P.3d 733 (2002).....	42
<i>City of Spokane v. Spokane Civil Service Commission</i> , 98 Wn. App. 574, 989 P.2d 1245 (1999).....	15, 31
<i>City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n</i> , 117 Wn.2d 655, 818 P.2d 1076 (1991).....	5, 16, 42
<i>Civil Service Com'n of City of Kelso v. City of Kelso</i> , 137 Wn.2d 166, 177, 969 P.2d 474 (1999).....	35
<i>Compare Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36, 94 S. Ct. 1011 (1974).....	34
<i>Copeland Lumber Co. v. Wilkins</i> , 75 Wn.2d 940, 454 P.2d 821 (1969)....	28

<i>Corey v. Pierce County</i> , 154 Wn. App. 752, 225 P.3d 367 (2010).....	43
<i>Crippen v. City of Bellevue</i> , 61 Wn. App. 251, 810 P.2d 50, review denied, 117 Wn.2d 1015, 816 P.2d 1224 (1991).....	22
<i>Doss v. ITT Rayonier, Inc.</i> , 60 Wn. App. 125, 803 P.2d 4 (1991).....	45
<i>Easson v. City of Seattle</i> , 32 Wash. 405, 73 P. 496 (1903).....	16
<i>Elliott v. DOC</i> , 192 Wn. App. 1054 (2016 WL 785268).....	46
<i>Flower v. T.R.A. Industries, Inc.</i> , 127 Wn. App. 13, 111 P.3d 1192 (2005).....	43
<i>Ford v. Trendwest Resorts, Inc.</i> , 146 Wn.2d 146, 43 P.3d 1223 (2002).....	43
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845, 991 P.2d 1182 (2000).....	46
<i>Gogerty v. DOI</i> , 71 Wn.2d 1, 426 P.2d 476 (1967).....	18
<i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995).....	46
<i>Gossage v. State</i> , 112 Wn. App. 412, 49 P.3d 927 (2002).....	39
<i>Greenbank Beach and Boat Club, Inc. v. Bunnery</i> , 168 Wn. App. 517, 280 P.3d 1133 (2012).....	16
<i>Green v. Cowlitz County Civil Service Commission, Cowlitz County</i> , 19 Wn. App. 210, 577 P.2d 141 (1978).....	35, 46
<i>Herriod v. Pierce Co. Public Transp. Benefit Authority Corp.</i> , 90 Wn. App. 468, 957 P.2d 767 (1998).....	46

<i>Imperato v. Wenatchee Valley College,</i> 160 Wn. App. 353, 247 P.3d 816 (2011).....	42
<i>International Ass'n of Fire Fighters, Local 404 v. City of Walla Walla,</i> 90 Wn.2d 828, 586 P.2d 479 (1978).....	22
<i>In re Sehome Park Care Center, Inc.,</i> 127 Wn.2d 774, 903 P.2d 443 (1995).....	26
<i>Judson v. Associated Meats and Seafoods,</i> 32 Wn. App. 794, 651 P.3d 222 (1982).....	26
<i>Kirby v. City of Tacoma,</i> 124 Wn. App. 454, 98 P.3d 827 (2004).....	47
<i>Korslund v. Dyncorp Tri-Cities Services , Inc.,</i> 121 Wn. App. 295, 88 P.3d 966 (2004).....	42
<i>Lundborg v. Keystone Shipping Company,</i> 138 Wn.2d 658, 981 P.2d 854 (1999).....	34
<i>Mikkelsen v. PUD No. 1 of Kittitas County,</i> 189 Wn.2d 516, 404 P.3d 464 (2017).....	43
<i>Mulenex v. Department of Employment Security,</i> 47 Wn. App. 486, 736 P.2d 279 (1987).....	39
<i>Naches Valley School Dist. No. JT3 v. Cruzen,</i> 54 Wn. App. 388, 775 P.2d 960 (1989).....	47
<i>Reynolds v. Kirkland Police Commission,</i> 62 Wn.2d 720, 384 P.2d 819 (1963).....	16, 18
<i>Seattle Police Officers Guild v. City of Seattle,</i> 113 Wn. App. 431, 53 P.3d 1036 (2002).....	36, 37, 38
<i>Seattle Police Officers' Guild v. City of Seattle,</i> 121 Wn. App. 453, 89 P.3d 287 (2004).....	5

<i>Seattle Police Officers Guild v. City of Seattle</i> , 151 Wn.2d 823, 92 P.3d 243 (June 24, 2004)....	6, 11, 18, 22, 24, 36, 37, 43
<i>Skeie v. Mercer Trucking Co., Inc.</i> , 115 Wn. App. 144, 61 P.3d 1207 (2003).....	45
<i>State ex rel. Ausburn v. Seattle</i> , 190 Wash. 222, 67 P.2d 913 (1937).....	24
<i>State ex rel. Olson v. Seattle</i> , 7 Wn.2d 379, 110 P.2d 159 (1941).....	24
<i>State ex rel. Swartout v. Civil Service Commission of City of Spokane</i> , 25 Wn. App. 174, 605 P.2d 796 (1980).....	24
<i>Smith v. Bates Technical College</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000).....	46
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 512, 826 P.2d 664 (1992)...	35, 43
<i>Swinford v. Russ Dunmire Oldsmobile</i> , 82 Wn. App. 401, 918 P.2d 186 (1996).....	35
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	43
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	46
<i>Yakima v. International Ass'n of Fire Fighters</i> , 117 Wn.2d 655, 818 P.2d 1076 (1991).....	26

**STATUTES**

RCW 4.24.510.....	42
RCW 35A.11.020.....	18, 33, 45
RCW 35A.21.040.....	18, 33, 45

RCW 41.04.010.....	39
RCW 41.12.....	5
RCW 41.12.010.....	17
RCW 41.12.040.....	22
RCW 41.12.040(9).....	5
RCW 41.12.050.....	16
RCW 41.12.090.....	42
RCW 41.12.100.....	5, 17, 22
RCW 41.12.170.....	18, 22, 30, 45
RCW 41.12.185.....	22
RCW 41.12.210.....	46
RCW 41.14.060(7).....	6
RCW 41.14.130.....	17, 21
RCW 41.56.....	25
RCW 41.56.030(4).....	26
RCW 41.56.040.....	42
RCW 41.56.905.....	15, 25
RCW 42.12.100.....	44

RCW 42.41.030.....	42
RCW 49.48.030.....	47
RCW 49.60.210.....	42
<b><u>OTHER</u></b>	
<i>City of Anacortes</i> , Decision 5668 (PECB, 1996).....	33
<i>International Ass’n of Fire Fighters, Local 1890 v. Wenatchee</i> , <i>Pub.Empl. Relations Comm’n Dec. 2216</i> PECB (1985).....	26
LMC 2.10.090.....	7, 10, 44
Personnel System Reform Act 2002 Wash. Legis. Serv. Ch. 354 (S.H.B. 1268).....	22
PSCSC Rule 11.05(c)(1).....	11
SHB 1268 (2002); 2002 c 354 § 203 effective July 1, 2004.....	6
SMC 4.08.070(F).....	11, 22
<i>Snohomish County</i> , Decision 8852-A (PECB 2007).....	32, 33
TMC 1.24.050.....	17
P. Stephen DiJulio, <i>Model Civil Service Rules for Washington State Local Governments, 3rd Edition</i> .....	18
<i>Whatcom County</i> , Decision 7288-A (PECB 2002).....	32

## I. INTRODUCTION

Since Lakewood Police Department came into existence, Officer Vahle has served the community with distinction. He has exposed departmental corruption, and he has in this instance advocated for merit selection standards consistent with public policy. His efforts have gone unrewarded internally because Chief Zaro disfavors his advocacy, commenting “once a whistleblower always a whistleblower”. Officer Vahle identified a substantive discrepancy between Lakewood’s code and civil service rules. Lakewood Code required merit based selection on a Rule of Three standard. Lakewood civil service rules had Rule of Five, and the Chief used Rule of Five in contravention to the Code. Lakewood refused to comply with code, and instead repealed its merit standards. The Chief repeatedly bypassed Officer Vahle for promotion to sergeant for reasons related to Officer Vahle’s protected activities. The trial court erroneously dismissed Officer Vahle’s claims for relief relying primarily on *Seattle Police Officer’s Guild v. City of Seattle*, a case that is not dispositive. Rule of Five may not be enforced without legislative

authority and where there is actual evidence of non-merit based decision making. Officer Vahle's claims were dismissed in error.

## II. ASSIGNMENTS OF ERROR

- A. The trial court erred when granting summary judgment to Lakewood.
- B. The trial court erred when denying partial summary judgment to Officer Vahle.

## III. ISSUE STATEMENTS

- A. Did Lakewood violate merit selection standards as a matter of law when promoting law enforcement officers to sergeant using Rule of Five when the Legislative requirements were Rule of Three and Rule of One?
  - 1. When Lakewood approved the collective bargaining agreement ("CBA") did that equate to Legislative approval of Rule of Five when the CBA was silent as to Rule of Five and Lakewood's Ordinance required Rule of Three?
  - 2. Does Lakewood have an impermissible non-merit based merit selection process where Chief Zaro selected from more than twenty-five percent of eligible candidates each of whom he knew personally and favored over Officer Vahle for impermissible reasons?
  - 3. Did Lakewood miscalculate the Veteran's preference?
- B. Did Lakewood breach the terms of its employment contract with Officer Vahle?
- C. Did Lakewood's Rule of Three ordinance estop it from using

Rule of Five?

- D. Was Lakewood negligent in the enforcement and supervision of civil service?
- E. Should Officer Vahle recover his attorney's fees and costs on appeal?

#### IV. STATEMENT OF THE CASE

Law enforcement patrol officer Jeremy Vahle brought this case to rectify Lakewood's disregard of merit based employment practices in contravention to civil service requirements, and to remedy Lakewood's failure to promote him.<sup>1</sup> Lakewood's Civil Service Board refused to hear his case.<sup>2</sup> Lakewood's Police Chief Zaro bypassed Officer Vahle for promotion to sergeant multiple times because, according to the Chief, Officer Vahle chose the wrong battles.<sup>3</sup> Zaro acknowledged Vahle engaged in protected activities Zaro disfavored like seeking redress in this matter, reporting department corruption, and negotiating benefits for union members.<sup>4</sup> Officer Vahle ranked higher on the merit selection lists than

---

<sup>1</sup> CP 1-24 (Complaint); CP 831 - 833 (Vahle Dec).

<sup>2</sup> CP 833 (Vahle Dec.) and CP 609 (Pandrea 10/26/16 Ltr. "Moreover, the Civil Service Board jurisdiction does not extend to alleged violations of City policy").

<sup>3</sup> CP 377-378 (Zaro Dep.).

<sup>4</sup> *Id.*

those Chief Zaro selected.<sup>5</sup> Chief Zaro promoted officers over Vahle who did not have Officer Vahle's history of protected activities.<sup>6</sup> The trial court entered a summary judgment order for Lakewood, rather than Vahle, that dismissed Vahle's claims for declaratory relief, injunctive relief, breach of contract, promissory estoppel, and negligence.<sup>7</sup> Officer Vahle requests reversal of the trial court order, entry of partial summary judgment in his favor, and remand to the trial court on his damages claims.

#### Lakewood

Lakewood created its own police department in 2004.<sup>8</sup> At present, Lakewood budgets for about 100 commissioned officers and is a third the size of Pierce County Sheriff's Department, the agency that had previously provided law enforcement for Lakewood.<sup>9</sup> Lakewood Police Department has a Chief, an Assistant Chief, four Lieutenants, thirteen or fourteen sergeants, eleven to twelve detectives, and about fifty officers.<sup>10</sup>

---

<sup>5</sup> CP 828 - 830 (Vahle Dec.).

<sup>6</sup> CP 827 (Vahle Dec.), CP 649 (McDougal Report Excerpt), CP 510 (Pandrea Dep.).

<sup>7</sup> CP 953 - 956 (Order on SJ).

<sup>8</sup> CP 530 (Zaro Dec.).

<sup>9</sup> CP 340-341 (Zaro Dep.).

<sup>10</sup> CP 343, 346 - 347 (Zaro Dep.).

The sergeants and below are represented by The Lakewood Police Independent Guild ("LPIG").<sup>11</sup>

### Civil Service - Merit selection Standards

Law enforcement officers are civil servants subject to state civil service laws that mandate merit based employment decisions.<sup>12</sup> State civil service laws control where local controls are absent or do not “substantially accomplish” merit standards.<sup>13</sup> State civil service laws for local law enforcement dictate promotion of the highest eligible candidate.<sup>14</sup> The State local civil service standard is Rule of One, meaning the top ranked candidate gets the promotion over those ranked lower on the eligibility list.<sup>15</sup> Despite Rule of One being the legislative dictate for local law enforcement, local jurisdictions have deviated from Rule of One where the local legislative authority has authorized use of a different standard like Rule of Three or Rule of Five in ordinances because RCW 41.12.010 allows local jurisdictions to create their own civil service

---

<sup>11</sup> CP 345 (Zaro Dep. 16).

<sup>12</sup> RCW 41.12.; *City of Yakima v. International Association of Fire Fighters*, 117 Wn.2d 655, 664, 818 P.2d 1076 (1991).

<sup>13</sup> RCW 41.12.100.

<sup>14</sup> RCW 41.12.100 and RCW 41.12.040(9).

<sup>15</sup> *Seattle Police Officers’ Guild v. City of Seattle*, 121 Wn. App. 453, 89 P.3d 287 (2004).

standards that “substantially accomplish” the purposes of the state civil service standards for local law enforcement, and in 2004 the Supreme Court decided that Rule of Five substantially accomplishes state standards when at the time the case was decided there was in statute a merit selection standard as large as Rule of Six for State employees.<sup>16</sup>

In 2002 with state civil service reform, the Legislature repealed the merit selection Rule of Six standard for State employees that took effect in 2004 right after the Supreme Court decided the *Seattle* case.<sup>17</sup> At present, the only statutory merit selection standard for local police departments is Rule of One, which the Legislature did not repeal in 2002 with state civil service reform, or at any time thereafter. Sheriff’s departments like Pierce County use Rule of Three because its state statute expressly authorized Rule of Three.<sup>18</sup> Presumably, Lakewood modeled its Rule of Three ordinance after Pierce County’s Rule of Three when creating its own civil service standards at the time Lakewood became its own police department.

Rule of Three - LMC 2.10.090 (Ordinance 328 Dec. 2003)

---

<sup>16</sup> *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (June 24, 2004).

<sup>17</sup> SHB 1268 (2002); 2002 c 354 § 203 effective July 1, 2004.

<sup>18</sup> RCW 41.14.060(7).

In early December 2003, Lakewood's City Council passed Ordinance 328, establishing its Civil Service Board, and dictating perimeters consistent with State merit standards for promotions.<sup>19</sup> Ordinance 328 set forth in Code a Rule of Three merit selection standard for Lakewood.<sup>20</sup> Alternatively, the Chief could select from 15 percent of the eligible persons.<sup>21</sup> City Attorney Heidi Wachter approved Ordinance 328.<sup>22</sup>

#### Rule of ALL - Civil Service Commission March 2004

Despite Lakewood's own code mandating the Rule of Three merit selection standard, Lakewood created a Civil Service Board that adopted an initial merit selection standard of Rule of All in February of 2004 by Rule.<sup>23</sup> While State Archives had a copy of the original rules, Lakewood never produced them nor did Lakewood produce any meeting minutes affirming adoption of any rules.<sup>24</sup> So the record is silent as to any minutes reflecting a set of rules officially adopted. However, meeting minutes

---

<sup>19</sup> CP 433 (Ord. 328).

<sup>20</sup> LMC 2.10.090.

<sup>21</sup> *Id.*

<sup>22</sup> CP 436 (Ord. 328).

<sup>23</sup> CP 763, 788 (Certification Rule 10.3.2).

<sup>24</sup> CP 604 - 605 (Mell Dec.)

document a discussion about merit selection standards from 2004.<sup>25</sup> Then Director Young explained that Rule of 5 or 3 would be fairer, but that “no matter what in the event of a collective bargaining agreement the number would be less.”<sup>26</sup> The Commission followed Rule of All anyway. City Attorney Heidi Wachter was at that Civil Service meeting, but did not apparently brief the Commission on Lakewood’s code requirements of Rule of Three.<sup>27</sup> Lakewood appointed its leadership team and hired all its officers without following its code requirement of Rule of Three.<sup>28</sup> Lakewood permitted the Police Chief at the time to make appointments and hiring decisions at his discretion, and not based on merit, in derogation of its own Ordinance.<sup>29</sup>

None of the civil service meeting minutes referenced Lakewood’s ordinance that required use of Rule of Three.<sup>30</sup> Commissioner Boyd testified that he was not aware of the local ordinance when the Commission adopted its rules.<sup>31</sup> He first learned about it after Officer

---

<sup>25</sup> CP 636 (March 4, 2004 Civil Service Meeting Minutes).

<sup>26</sup> *Id.*

<sup>27</sup> CP 632, 634. (Civil Service Meeting Minutes).

<sup>28</sup> CP 632.

<sup>29</sup> *Id.*

<sup>30</sup> CP 629 - 637 (Civil Service Minutes).

<sup>31</sup> CP 311 (Boyd Dec.).

Vahle pointed it out on or about October 21, 2016.<sup>32</sup> The Civil Service Commission did not consciously reject Rule of Three knowing Rule of Three was in Lakewood's Code. The Civil Service Commission talked about Rule of Three and Rule of Five, but used Rule of All to staff its entire police department.<sup>33</sup>

The first version of Lakewood's Civil Service Rules provided the following:

“The Secretary certifies to the Appointing Authority the names of all available eligibles through December 31, 2004. Subsequent to December 31, 2004, the Secretary certifies to the Appointing Authority the names of the top five available eligibles.”<sup>34</sup>

Civil Service Rule 10.6 authorized a Rule of Five merit selection standard after the department was staffed beginning in 2005 in direct contravention to City code.<sup>35</sup> Rule of Five allows the Chief to pick from the top five of the eligible list for hiring or promotion for the first position.<sup>36</sup> The higher the standard the more discretion the Chief may exercise.<sup>37</sup> Civil Service Rule 10.6 does not mention any percentage

---

<sup>32</sup> CP 497 - 498 (Vahle Ltr. to Pandrea/Civil Service Commission).

<sup>33</sup> CP 632 (Civil Service Commission Meeting Minutes).

<sup>34</sup> CP 788 (Civil Service Rules 10.3.2).

<sup>35</sup> CP 789 (Civil Service Rule 10.6).

<sup>36</sup> CP 348, 386 (Zaro Dep.).

<sup>37</sup> CP 349 (Zaro Dep.).

standard, like the 15% standard in Lakewood’s ordinance. Civil Service Rule 1.2 requires the Civil Service Commission abide by local ordinances and State law.<sup>38</sup>

### Lakewood Ordinance 674 - Repealed Rule of Three

On October 16, 2017, after Officer Vahle identified the discrepancy between Commission rule and ordinance, Lakewood repealed its Rule of Three mandate, but it did not simultaneously enact Rule of Five or any other merit selection standard.<sup>39</sup> Ordinance 674 repealed language authorizing the Commission to adopt rules different from Rule of One set forth at RCW 41.12.100.<sup>40</sup> Lakewood left in place the language authorizing Commission rule-making, but such language limited Commission rulemaking to regulations “governing the commission in the conduct of its meetings and any other matter over which it has authority.”<sup>41</sup> Lakewood made no findings that Rule of Five “substantially accomplished” merit employment in conformance with RCW 41.12. Thus, Lakewood, unlike

---

<sup>38</sup> CP 440, 451 (Civil Service Rule 1.2, 5.4).

<sup>39</sup> CP 488 (Ordinance 674).

<sup>40</sup> *Id.*, see striking language of LMC 2.10.090: “~~the commission shall have the flexibility to adopt rules different from the express provisions of Chapter 41.12 RCW...~~”

<sup>41</sup> LMC 2.10.090.

other jurisdictions that used Rule of Five, now has no legislative authority to deviate from the state local law enforcement standard of Rule of One.<sup>42</sup>

### Collective Bargaining Agreement (“CBA”)

Lakewood’s law enforcement officers belong to the Lakewood Police Independent Guild (“LPIG”).<sup>43</sup> The very first collective bargaining agreement took effect January 1, 2006, after the Civil Service Rules were formed and while Lakewood’s ordinance mandated use of Rule of Three.<sup>44</sup> Paragraph 4.01 to the CBA has since its inception provided as follows:

**“4.01 Vacancies and Promotions:** Vacancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.”<sup>45</sup>

The CBA has never referenced any merit selection process. While the CBA cross references the civil services rules, the reference is non-specific and is all inclusive of the entire rules. Lakewood and LPIG have never negotiated a merit selection standard.<sup>46</sup> There are no meeting minutes or bargaining records about Rule of All, One, Three, or Five because the

---

<sup>42</sup> See for example, SMC 4.08.070(F) and PSCSC Rule 11.05(c)(1) from *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (June 24, 2004).

<sup>43</sup> CP 530 (Zaro Dec.).

<sup>44</sup> *Id.*

<sup>45</sup> CP 691 (CBA). City Attorney Heidi Wachter approved the CBA, CP 738.

<sup>46</sup> CP 530 (Zaro Dec.).

bargaining team never discussed it.<sup>47</sup> In fact, the civil service rules were not included within the historical files from the negotiations.<sup>48</sup> The civil service rules were created before LPIG even existed. And, the CBA was first developed in 2005 when Rule of Five had not yet been implemented because Lakewood staffed its entire police department using Rule of All in 2004.<sup>49</sup> When LPIG initiated negotiations, the merit selection standard was not on the itemized list of bargaining subjects.<sup>50</sup> Whether the merit selection standard is a proper subject of collective bargaining has never been decided.<sup>51</sup> The CBA does not identify merit selection standards as a mandatory subject of collective bargaining, nor does state statute or any binding PERC decision.<sup>52</sup> In the CBA, management expressly reserved the right to retain all rights and authority to which by law they are entitled and the right to supervise and direct the workforce, establish the qualifications for employment, recruit, hire, fill vacancies and assign employees.<sup>53</sup>

---

<sup>47</sup> CP 856 - 860 (Vahle Dec.).

<sup>48</sup> CP 857 (Vahle Dec.).

<sup>49</sup> CP 859 (Vahle Dec.).

<sup>50</sup> CP 862 - 866 (Julius Ltr. to Mayor).

<sup>51</sup> CP 737 (CBA 23.02).

<sup>52</sup> CP 690 (CBA 3.03).

<sup>53</sup> CP 689 (CBA 3.02).

Lakewood did not provide Ordinance 674 to LPIG for LPIG's consideration. When the Council passed Ordinance 674, LPIG demanded bargaining.<sup>54</sup> The CBA provides that Lakewood must give LPIG twenty days advance notice of any desired change to mandatory subjects of collective bargaining.<sup>55</sup> Lakewood refused to bargain with LPIG over the effect of Ordinance 674.<sup>56</sup> LPIG objected to Rule of Five, but decided to raise the question during contract negotiations on the merits to avoid challenging mid-contract whether Ordinance 674 changed a mandatory subject of collective bargaining.<sup>57</sup> Lakewood took the position that Ordinance 674 did not change merit selection standards, but rather repealed the existing conflict with past practice Rule of Five. LPIG did not agree with Lakewood's position, but rather agreed to disagree pending resolution of this matter, and prospective contract negotiations when the CBA expires.

#### Trial Court Decision

---

<sup>54</sup> CP 833 (Vahle Dec.) and CP 758 (LPIG Ltr. to McDougal), cross referencing Section 3.03 of the CBA that requires 20 days notice of any change to a mandatory subject of bargaining, see CP 690 (Sec. 3.03 CBA).

<sup>55</sup> CP 690 (Sec. 3.03 CBA).

<sup>56</sup> CP 833 (Vahle Dec.).

<sup>57</sup> *Id.*

The trial court summarily dismissed Officer Vahle's claims, denying him partial summary judgment and any civil remedy to address Lakewood's failure to promote him. The trial court admitted the issues before it were novel, and outside the court's experience and knowledge:

“You both know this area much better than I do; and as I said at the beginning of this, I have never considered something like this in any civil service context. So I think the better course for the trial judge is to dismiss the case and let you take it up”.<sup>58</sup>

The trial court also recognized there were factual issues on the damages claims, but dismissed anyway apparently to prevent bifurcation of the issues.<sup>59</sup>

Lakewood prevailed in error because Lakewood argued incorrectly that when Lakewood approved LPIG's CBA, Lakewood took legislative action to establish Rule of Five as Lakewood's merit selection standard.<sup>60</sup> But the CBA did not articulate any merit selection standard, and Lakewood never voted on a CBA knowing the civil service rules cross referenced in the CBA contained among other things a Rule of Five merit selection standard that conflicted with Lakewood's ordinance that

---

<sup>58</sup> RP 03/15/19 at 4, 38-39.

<sup>59</sup> RP 37.

<sup>60</sup> RP at 18, 31-32.

contained a mandatory Rule of Three. Lakewood insisted that the CBA trumped all other laws, citing RCW 41.56.905, wherein CBA terms may control over conflicting statutes, ordinances, or regulations if according to the case Lakewood relied upon, *City of Spokane v. Spokane Civil Service Commission*, the CBA provision was the subject of mandatory collective bargaining.<sup>61</sup> As shown by the record below, the trial court did not find, nor could it find that the merit selection standard was a mandatory subject of collective bargaining or that Lakewood actually bargained for a merit selection standard at all. Officer Vahle urges this Court to reverse the trial court and decide as a matter of law that Lakewood was obligated to use a Rule of Three merit selection standard, which was the standard in Lakewood's ordinance in 2016 and 2017 when he attempted to promote, and thereafter must use Rule of One because there is no other legislative authority other than the state standard. And then, having erroneously used Rule of Five to bypass his selection, and where Chief Zaro actually bypassed him for impermissible reasons, Officer Vahle should be afforded a damages remedy against Lakewood under his breach of contract,

---

<sup>61</sup> CP 60 (Lakewood's Mtn. S.J.), *citing City of Spokane v. Spokane Civil Service Commission*, 98 Wn. App. 574, 580, 989 P.2d 1245 (1999).

promissory estoppel, and negligence theories. His damages claims should be reinstated.

## V. ARGUMENT

### A. De Novo Standard of Review

The standard of review of an order on summary judgment is de novo.<sup>62</sup> The appellate court performs the same inquiry as the trial court.

### B. Lakewood's Merit Selection Standards - Rule of One and Three

#### 1. Local Law Enforcement Promotions Must Be Based On Merit

State statute prohibits local police chiefs from hiring and promoting their favorites: "All appointments to and promotions in the department shall be made solely on merit, efficiency, and fitness..."<sup>63</sup> Cronyism violates state and local public policy.<sup>64</sup> Merit selection standards like Rule of One deter against favoritism.<sup>65</sup>

#### 2. Rule of One Merit Selection Standard for Local Police

---

<sup>62</sup> *Greenbank Beach and Boat Club, Inc. v. Bunnery*, 168 Wn. App. 517, 280 P.3d 1133 (2012).

<sup>63</sup> RCW 41.12.050; CP 360 - 363, 373 (Zaro Dep.).

<sup>64</sup> *Easson v. City of Seattle*, 32 Wash. 405, 73 P. 496 (1903) ("The object of the civil service regulations seems to be to provide a system for the selection of capable officers, uninfluenced by mere personal or political consideration."); *Reynolds v. Kirkland Police Commission*, 62 Wn.2d 720, 725, 384 P.2d 819 (1963); Initiative 207 (State Civil Service Reform).

<sup>65</sup> *City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 818 P.2d 1076 (1991).

Municipal police departments must promote the top candidate identified on an eligibility list.<sup>66</sup> The state merit selection standard for local law enforcement is the most stringent standard:

“Whenever a position in the classified service becomes vacant, the appointing power, if it desires to fill the vacancy, shall make requisition upon the commission for the name and address of a person eligible for appointment thereto. The commission shall certify the name of the person highest on the eligible list for the class to which the vacant position has been allocated, who is willing to accept employment. If there is no appropriate eligible list for the class, the commission shall certify the name of the person standing highest on said list held appropriate for such class. If more than one vacancy is to be filled an additional name shall be certified for each additional vacancy. The appointing power shall forthwith appoint such person to such vacant position.”<sup>67</sup>

By contrast, the statutory standard for counties to hire and promote sheriff’s department deputies is Rule of Three.<sup>68</sup> A Sheriff may pick any one of the top three qualifiers.

### 3. Lakewood Found Rule of Three Substantially Accomplished The Purpose of Civil Service

Local jurisdictions may adopt a charter or regulations that “substantially accomplish the purpose of” civil service.<sup>69</sup> Cities like

---

<sup>66</sup> RCW 41.12.100.

<sup>67</sup> RCW 41.12.100.

<sup>68</sup> RCW 41.14.130. The City of Tacoma uses Rule of Three. TMC 1.24.050.

<sup>69</sup> RCW 41.12.010.

Lakewood have an obligation to “enact appropriate legislation” for carrying into effect civil service to include merit based promotions.<sup>70</sup>

Lakewood may not simply delegate its legislative oversight. Legislative enactment of merit selection standards is a non-delegable legislative function:

“Designation of civil service certification procedures that accomplish the purpose of providing for promotion on the basis of merit is a legislative function, and we will adhere to the legislature’s “benchmark” when considering whether cities’ civil service ordinances have accomplished this purpose.”<sup>71</sup>

Consistent with its Legislative duties, in 2003 Lakewood enacted legislation, Ordinance 328, finding that Rule of Three substantially accomplished the purposes of civil service:

“The commission shall have power to make and adopt such rules and regulations as are necessary to effectuate the purposes of this ordinance and Chapter 41.12 RCW; provided, however, that the commission shall have the flexibility to adopt rules different from the express provisions of Chapter 41.12 RCW which effectuate such purposes; and provided further, that such rules shall include a 12-month probationary period and certification rule of three

---

<sup>70</sup> RCW 41.12.170.

<sup>71</sup> *Seattle Police Officer’s Guild v. City of Seattle*, 151 Wn.2d 823, 837, 92 P.3d 243 (2004); See also, P. Stephen DiJulio, *Model Civil Service Rules for Washington State Local Governments*, 3rd Edition at 70; *Reynolds v. Kirkland Police Commission*, 62 Wn. 2d 720, 384 P.2d 819 (1963); *Gogerty v. DOI*, 71 Wn.2d 1, 426 P.2d 476 (1967); RCW 35A.11.020 and 35A.21.040.

eligible persons or 15 percent of the eligible persons, whichever is greater, notwithstanding RCW 41.12.100.”

#### 4. Lakewood Used Rule of Five In Violation of Its Ordinance

Lakewood failed to follow its own legislative dictates. Lakewood’s Civil Service Commission staffed the entire police department at its inception in 2004 with appointments using a Rule of All. Then the Commission followed a Rule of Five promotional standard beginning January 2005 that it put in rule without deference to the above legislative limitations.

Up until October 16, 2017, Lakewood was obligated by its own code to promote using Rule of Three. In contravention to its code, Lakewood bypassed officer Vahle for promotion to Sergeant using Rule of Five when he ranked number two on the promotional list.<sup>72</sup> Lakewood violated merit based employment standards when bypassing Officer Vahle using Rule of Five in contravention to its own legislative authority.

#### 5. Repeal of Rule of Three Did Not Timely Cure Its Errors

Since October 16, 2017, the only legislative authority for a merit selection standard in Lakewood exists in state statute because Lakewood

---

<sup>72</sup> CP 329 (Vahle Dec.).

repealed its Rule of Three standard in Ordinance 674 without substituting Rule of Five as a merit selection standard that substantially accomplishes merit based employment in Lakewood. When Lakewood passed Ordinance 674, Lakewood could not in good faith find that Rule of Five substantially accomplished merit selection because Lakewood's Police Chief had selected for promotion his favorites consistently as pointed out by Officer Vahle who was bypassed for improper reasons based upon his protected activities.<sup>73</sup> Lakewood's deviation from merit decision making was self evident from its own description of the process. Chief Zaro admitted that he dispensed entirely with the objective ranking system: "I see them all as equally qualified based on the fact that they all possess the necessary qualifications (i.e., years of experience) to serve as sergeant...I see the civil service process as ensuring that any candidate within the top 5 is qualified for the position."<sup>74</sup> In his opinion, rank was irrelevant as if the Civil Service Commission's testing was wholly ineffective in objectively identifying the strongest candidate. Chief Zaro also admitted that he formed personal opinions about every candidate: "The Lakewood

---

<sup>73</sup> CP 329 (Vahle Dec.).

<sup>74</sup> CP 122 (Zaro 02/14/19 Dec.).

police department is ... small enough that I know each commissioned police officer who works **for me.**" (Emphasis added).<sup>75</sup> Chief Zaro testified that he ignored his own feelings, even though it is impossible to do so and he did not do so with Officer Vahle, which violates the whole point of civil service, that is merit selection.<sup>76</sup> By his own choice of words, Zaro revealed that his promotional decisions were not based on merit.

Lakewood never sought to change the state standard for local law enforcement. The State Legislature has never amended RCW 41.12.100 to mirror RCW 41.14.130, the Sheriff's Department statute that authorizes Rule of Three. There have been no successful initiatives to change the Rule of One state standard. When the Legislature repealed the state merit selection standard of Rule of Six in the Personnel System Reform Act in 2002 effective July 2004 so that RCW 41.06.150(2) no

---

<sup>75</sup> *Id.* at CP 123.

<sup>76</sup> CP 649 (Excerpted page 10 Retaliation Investigation Report: "I asked Zaro if he was angry or upset with Vahle.[for questioning a staff person's destruction of records] He said, "yes, that's fair. ...I asked Zaro to tell me how the Sergeant promotional process generally works...Zaro said that none are strangers, so he generally knows their personalities, and has thoughts about what they would be like as Sergeant.")

longer contains the Rule of Six merit selection standard, the local law enforcement standard was not changed.<sup>77</sup>

Lakewood changed its code in response to this litigation, but Lakewood failed to fulfill its legislative duties to enact regulations that would ensure merit selection.<sup>78</sup> No other municipality has deferred to its Civil Service Commission to set merit selection standards.<sup>79</sup> Merit selection standards like Rule of Three are substantive legislative matters. Civil Service Commissions adopt administrative and procedural rules dictating the manner in which promotions shall be made consistent with the provisions of the civil service statute.<sup>80</sup> Civil Service Commissions do not make substantive policy, and may not deviate in rule making from the terms of the statute. The civil service statute sets as a matter of policy Rule of One as the merit selection standard.<sup>81</sup> Absent an alternative

---

<sup>77</sup> Personnel System Reform Act 2002 Wash. Legis. Serv. Ch. 354 (S.H.B. 1268).

<sup>78</sup> RCW 41.12.170.

<sup>79</sup> *International Ass'n of Fire Fighters, Local 404 v. City of Walla Walla*, 90 Wn.2d 828, 831–32, 586 P.2d 479 (1978)(Walla Walla Ordinance No. A-2795); *Crippen v. City of Bellevue*, 61 Wn. App. 251, 257–59, 810 P.2d 50, review denied, 117 Wn.2d 1015, 816 P.2d 1224 (1991)(BCC 3.72.030); *Bellingham Firefighters Local 106 v. City of Bellingham*, 15 Wn. App. 662, 665–66, 551 P.2d 142 (1976)(Bellingham City Charter Provision 7.08); *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (2004)(SMC 4.08.070(F)).

<sup>80</sup> RCW 41.12.040; RCW 41.12.185.

<sup>81</sup> RCW 41.12.100.

legislative authority, the Civil Service Commission had to follow Rule of One.

In Ordinance 674, Lakewood's Council set no standards or guidelines to ensure its Civil Service Commission adopted rules that were consistent with state statutory civil service standards for local law enforcement for a department its size.<sup>82</sup> Lakewood purported to give its Civil Service Board unlimited authority to implement whatever merit selection standards it chose to apply.<sup>83</sup> Lakewood knew that historically, when left to its own discretion, Lakewood's Civil Service Board chose to disregard merit selection standards entirely to staff its whole department with appointees. Thereafter, it chose to use Rule of Five over Rule of Three, even though Rule of Three was the legislative requirement.

Without question Lakewood violated its own merit selection standards when bypassing Officer Vahle for promotion using Rule of Five. Officer Vahle should be granted summary judgment on this point. Lakewood violated its own merit promotion standards.

---

<sup>82</sup> *Barry & Barry, Inc. v. State Dept. of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972).

<sup>83</sup> CP 304 (Lakewood Ordinance 674).

The trial court did not understand that the Civil Service Commission had no authority to disregard the Rule of Three set forth in Lakewood's Ordinance. Civil service rules do not as a matter of law override local code.<sup>84</sup> "A Civil Service Commission cannot, by rule, modify or repeal a provision of the City Charter or enact rules not authorized by the power creating the commission."<sup>85</sup> The majority in the *Seattle Police Officers Guild* case expressly held "[w]e do not approve certification procedures that exceed the number that the legislature has determined accomplish the purpose of providing for promotions on the basis of merit. Thus, this opinion does not give cities the freedom to adopt certification systems that wholly ignore legislative limitations."<sup>86</sup>

#### 6. PECBA Has No Pre-emptive Effect

To avoid this rule of law, Lakewood argued that the Council superceded its Rule of Three when it perfunctorily approved LPIG's CBA without ever referencing Rule of Three or Five. Lakewood cited to RCW

---

<sup>84</sup> *State ex rel. Swartout v. Civil Service Commission of City of Spokane*, 25 Wn. App. 174, 605 P.2d 796 (1980).

<sup>85</sup> *Id.* at 179, citing *State ex rel. Ausburn v. Seattle*, 190 Wash. 222, 237, 67 P.2d 913, 919 (1937); Accord *State ex rel. Olson v. Seattle*, 7 Wn.2d 379, 384, 110 P.2d 159 (1941).

<sup>86</sup> *Seattle Police Officer's Guild*, 151 Wn.2d at Ftnt. 18: "The dissent also contends that this court's validation of the "rule of five" goes further down the "slippery slope," warned of by Chief Justice Wright in his dissent in *Local 404*, 90 Wn.2d at 835, 586 P.2d 479. Dissent at 252."

41.56.905 from the Public Employees Collective Bargaining Act (“PECBA”), which was a red herring. RCW 41.56.905 indicates that the provisions of collective bargaining control over conflicting statutes, ordinances, rules or regulations of a public employer. But, PECBA does not mandate collective bargaining on the number of certified names for vacancies or promotion between municipalities and law enforcement.<sup>87</sup> Nothing in PECBA conflicts with merit selection standards. Whether the legislative body substantially accomplishes the purposes of civil service when selecting Rule of One, Rule of Three or Rule of Five may be reviewed judicially,<sup>88</sup> but not dispensed with contractually.

According to RCW 41.56.100, cities and law enforcement guilds must collectively bargain matters that are not “by ordinance, resolution, or charter” delegated to any civil service commission:

- (1) A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative. However, a public employer is not required to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution, or

---

<sup>87</sup> RCW 41.56.

<sup>88</sup> *Casebere v. Clark County Civil Service Commission - Sheriff's Office*, 21 Wn. App. 73, 584 P.2d 416 (1978).

charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure, and authority to the board created by chapter 41.06 RCW.

“Collective bargaining” means negotiating in good faith “personnel matters, including wages, hours and working conditions.”<sup>89</sup> The statute does not identify every potential mandatory bargaining subject, and cases must be determined on their own merit.<sup>90</sup>

In 1999, the Supreme Court in the *Yakima* case interpreted RCW 41.56.100, commonly known as the “civil service exception”, without following the antecedent rule.<sup>91</sup> If the *Yakima* parties had raised and the Supreme Court had actually applied the antecedent rule, the state personnel board proviso about “similar in scope, structure, and authority” would necessarily apply only to matters delegated to a local personnel board, and not to matters delegated to a local civil service commission. This would mean that matters reserved via legislation to Lakewood’s Civil

---

<sup>89</sup> RCW 41.56.030(4).

<sup>90</sup> *International Ass’n of Fire Fighters, Local 1890 v. Wenatchee, Pub.Empl. Relations Comm’n* Dec. 2216 PECB (1985).

<sup>91</sup> *Yakima v. International Ass’n of Fire Fighters*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991); Code Reviser’s Bill Drafting Guide at 39 and 52, citing *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 903 P.2d 443 (1995); *Judson v. Associated Meats and Seafoods*, 32 Wn. App. 794, 801, 651 P.3d 222 (1982).

Service Commission would not be a mandatory subject of collective bargaining, and Lakewood's argument that the CBA controls would be frivolous. Basic grammar dictates that the absence of a comma after "personnel board" means the qualifying verbiage applies only to the immediately preceding antecedent - personnel board - and not to both civil service commissions and personnel boards. So there would be no need in this case to compare Lakewood's Civil Service Commission to the Washington Personnel Resource Board to ascertain whether or not the exception applies. Despite the antecedent rule, in the *Yakima* case the Supreme Court decided the case without applying the antecedent rule and concluded that Yakima's Civil Service Board was not equal in scope to the State's Personnel Resource Board to rule the exception inapplicable and mandatory collective bargaining rights applied. Yakima was then required to bargain with respect to wages, hours, and other conditions of employment. But, the case does not hold that merit selection standards were a mandatory subject of collective bargaining. The decision concerned five consolidated cases, with one footnote reference to a PERC decision where the issue subject to bargaining was whether individual

members could agree with the Fire Chief to waive the testing requirement to identify qualified candidates for certification. Nothing in the opinion indicated that the number of names certified was a mandatory subject of collective bargaining. Hence the *Yakima* case is not helpful here, and it does not resolve the fact that Lakewood never collectively bargained merit selection standards such that the CBA would trump local ordinance.

#### 7. Lakewood Never Bargained Merit Selection Standards

Long standing rules of statutory construction hold that repeals by implication are not favored.<sup>92</sup> Before a legislative enactment can be found to have been impliedly repealed by a subsequent act, the later legislation must evidently be intended to supersede the prior legislation on the subject.<sup>93</sup> Intent is ascertained from the statutory context as a whole.<sup>94</sup>

The Council did not knowingly substitute the Commission's Rule of Five for its own Rule of Three requirement when approving the CBA. The Council did not even know about the conflict. Neither did the Civil Service Commission.<sup>95</sup> The CBA is silent about merit selection standards.

---

<sup>92</sup> *Copeland Lumber Co. v. Wilkins*, 75 Wn.2d 940, 454 P.2d 821 (1969).

<sup>93</sup> *Id.* at 943.

<sup>94</sup> *Anderson v. O'Brien*, 84 Wn.2d 64, 524 P.2d 390 (1974).

<sup>95</sup> CP 263 (Pandrea Dec.); CP 311 (Boyd Dec.).

The CBA does not even mention a merit selection standard. The civil service rules were not considered in the negotiations of the CBA. The civil service rules contain a broad array of various procedures and protocols specific to promotions so that a general cross reference to follow the entirety of the civil service rules when promoting does not obviously evidence an intent to override or repeal its Rule of Three standard.<sup>96</sup> If it had been, the Council would not have needed to repeal Rule of Three, but it did anyway in Ordinance 674.

And, at the same time the Council repealed the corresponding declaration that Rule of Three “substantially accomplishes” merit employment without finding that Rule of Five “substantially accomplishes” merit employment. Lakewood has never decided that Rule of Five “substantially accomplishes” merit selection, and there is no legislative authority to use it. Lakewood may not presume Rule of Five “substantially accomplishes” the objectives of civil service without so finding where the Council had previously decided that Rule of Three was required to “substantially accomplish” merit selection in Lakewood, and it

---

<sup>96</sup> CP 763 - 804 (Civil Service Rules 2004); CP 438 - 484 (Civil Service Rules)

never explained how Rule of Five would actually accomplish merit selection in Lakewood when it was not.<sup>97</sup>

Presumably, Lakewood intentionally did not find that Rule of Five “substantially accomplishes” merit employment when it repealed Rule of Three in Ordinance 674 because then Lakewood would then have had no excuse for avoiding LPIG’s demand to bargain mid-contract when it was arguing here that merit selection standards are the subject of mandatory collective bargaining. LPIG would have pressed for Rule of One and no less than Rule of Three like Tacoma Police Department and Pierce County Sheriff’s department follow, and Officer Vahle would have prevailed. Lakewood did not even bother to put LPIG on notice that there was a discrepancy between the statute, ordinance, and rule when Lakewood amended its ordinance in 2017.<sup>98</sup> Lakewood’s Collective Bargaining Agreement mandates the City give the LPIG twenty days notice when the City proposes to change a mandatory subject of collective bargaining.<sup>99</sup> When Lakewood introduced Ordinance 674, which deleted the Rule of

---

<sup>97</sup> RCW 41.12.170.

<sup>98</sup> CP 832 (Vahle Dec.)

<sup>99</sup> CP 690 (CBA at 6 ¶ 3.03).

Three or 15% standard, Lakewood did not notify LPIG.<sup>100</sup> Thus, Lakewood did not treat its repeal of Rule of Three or 15% a mandatory subject of collective bargaining even though Lakewood insisted in this action that the standard was a mandatory subject of collective bargaining.<sup>101</sup> Lakewood has never put LPIG on notice of its changes the Commission has made to its civil service rules ever, even though the Commission amended the promotional standards set forth in Rule 10 multiple times, to include various changes.<sup>102</sup>

Lakewood relied predominately on the *Spokane* case for its proposition that the number of names certified is a subject of mandatory bargaining.<sup>103</sup> But the Rule of One was not the subject of bargaining between Spokane and the Guild in that case either. Instead, the subject matter of bargaining was whether the City and Guild could agree to use an outside firm, separate from the Civil Service Commission, to rank the top candidate for certification out of the top twelve scorers. There was no

---

<sup>100</sup> CP 832 (Vahle Dec.); CP 304 - 307 (Ordinance 674).

<sup>101</sup> CP 60 (Lakewood's SJ Mtn.).

<sup>102</sup> CP 832 (Vahle Dec.) The CBA does not contemplate constructive notice, but rather dictates actual twenty day notice. Civil Service meeting notices are not published twenty days in advance of the meeting, and therefore would not provide sufficient constructive notice anyway. CP 756 (Current Title Page Civil Service Rules).

<sup>103</sup> CP 839 (Lakewood Reply In Support of its S.J. Mtn.); *City of Spokane v. Spokane Civil Service Commission*, 98 Wn. App. 574, 989 P.2d 1245 (1999).

claim that the parties could negotiate out of certifying the top name on the list and no more. Lakewood never cited any case where the merit selection standard was a mandatory subject of collective bargaining. Lakewood cited a PECB decision on “past practice” setting criteria for enforcement of “past practices.” To be enforceable, a past practice must be consistent, known to all parties, and mutually accepted.<sup>104</sup> Lakewood’s discrepancy in the number of names to be certified was not consistent. Lakewood’s Chief misapplied Rule of Five without correction by the Civil Service Commission.<sup>105</sup> Rule of Five was not consistent with Ordinance nor Statute. Rule of Three and Five were both adopted before the Guild even existed. The inconsistency was not known to either party, albeit Lakewood and its Commission should have known about it because it authored its own Rules. Finally, Rule of Five was never mutually accepted as the preferred standard. Some PERC decisions Lakewood cited concluded matters of “promotion” were mandatory subjects of bargaining, but there are no decisions holding merit selection standards are

---

<sup>104</sup> CP 61 (Lakewood S.J. Mtn.), citing *Whatcom County*, Decision 7288-A; and *Snohomish County*, Decision 8852-A (PECB 2007).

<sup>105</sup> CP 311 (Boyd Dec.); CP 828 (Vahle Dec.); CP 806 - 819 (Selection Lists Deviating from Rule of Five.)

mandatory subjects of collective bargaining.<sup>106</sup> So even if Lakewood had actually negotiated Rule of Five, which it did not, PECBA would have had no pre-emptive effect because merit selection standards are not as a matter of law a mandatory subject of collective bargaining.

The law recognizes a distinction between personnel procedures subject to negotiation and substantive rights that may not be waived even by contract. Certain rights have a non-negotiable floor. Benefits above the floor may be negotiated, but the parties may not disregard the substantive protection. The number of names certified is a substantive matter of merit that may not be waived by contract. Cities like Lakewood must ensure that its provisions for a merit system comply with any applicable statutes relating to civil service for employees of the city.<sup>107</sup>

The power to establish and maintain civil service, or merit systems, vests in the legislative body of a city.<sup>108</sup> A city may not enact any provisions establishing or respecting a merit system or system of civil service that does not substantially accomplish the same purpose as

---

<sup>106</sup> CP 839 (Lakewood's Reply Br.), citing *City of Anacortes*, Decision 5668 (PECB, 1996); *Snohomish County*, Decision 8852 A (PECB, 2007).

<sup>107</sup> RCW 35A.21.040.

<sup>108</sup> RCW 35A.11.020.

provided by general law in the civil service for law enforcement officers, RCW 41.12. Courts have repeatedly recognized the nonwaivable rights of statutory guarantees. For instance, minimum wage compensation is a guaranteed right not subject to collective bargaining below established statutory rates.<sup>109</sup> In the *Lundborg* case, seamen sought "maintenance" (food and lodging expenses) as required under statute but at a rate at variance with the terms of the CBA. In concluding that the CBA could not trump the statutory rights, the court explained the limits of bargaining:

Likewise, even in the absence of a statutory prohibition against agreements or contracts that waive statutory rights, the United States Supreme Court has long held invalid contracts in violation of the minimum wage and overtime requirements set by the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 1- 9(b): "Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

Other substantive rights have been recognized like an aggrieved employee's right to seek a judicial remedy.<sup>110</sup> Or the right to enforce the

---

<sup>109</sup> *Lundborg v. Keystone Shipping Company*, 138 Wn.2d 658, 981 P.2d 854 (1999).

<sup>110</sup> *Compare Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974) and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009).

contractual obligations of an employee handbook.<sup>111</sup> Fundamental principles like “just cause” and “in good faith and for cause” are substantive rights.<sup>112</sup> Similarly, civil service examinees have a fundamental right to have the Civil Service Commission follow its statutes, rules and regulations.<sup>113</sup> Civil servants have a fundamental right to fairly compete and be fairly considered for employment and promotion - to be judged based upon merit.<sup>114</sup> Lakewood may not negotiate away merit based employment rights like Rule of One. The Police Civil Service System per rule “is administered in accordance with all applicable laws, ordinance and policies...”<sup>115</sup> In the CBA, the City expressly retained its authority to manage its affairs in accordance with the law, which requires it to implement merit standards.<sup>116</sup> Lakewood violated merit selection standards as a matter of law.

#### 8. Lakewood’s Promotions Were Not Merit Based

---

<sup>111</sup> *Swinford v. Russ Dunmire Oldsmobile*, 82 Wn. App. 401, 918 P.2d 186 (1996).

<sup>112</sup> *Civil Service Com’n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 177, 969 P.2d 474 (1999).

<sup>113</sup> *Casebere v. Clark County Civil Service Commission-Sheriff’s Office*, 21 Wn. App. 73, 584 P.2d 416 (1978).

<sup>114</sup> *Green v. Cowlitz County Civil Service Commission, Cowlitz County*, 19 Wn. App. 210, 577 P.2d 141 (1978).

<sup>115</sup> CP 765 (Originating Civil Service Rules at 2 ¶ 1.2).

<sup>116</sup> CP 689 (CBA at 5 ¶ 3.01).

In the *Seattle Police Officers Guild* case, the Supreme Court invalidated the portion of Seattle’s merit selection standard that allowed for promotion from 25% of eligible candidates.<sup>117</sup> The Court determined that the percentage was so large that it necessarily would allow for discretionary promotions not based upon merit.<sup>118</sup> Lakewood’s ordinance allowed for selection from 15% of eligible candidates. However, when Chief Zaro promoted officers to sergeant, Zaro chose from more than 25% of the eligible candidates, which was per se not a merit selection process according to the Seattle case. When the Seattle Police Department uses Rule of Five, the Chief selects from candidates she may not know given the size of the City’s police department and the length of the promotional list. In Lakewood, Chief Zaro has picked his favorites from a 2016 list of eight and a 2017 list of seven.<sup>119</sup> Zaro chose from 62.5% and 71.4% of the candidates, both percentages well in excess of the impermissible 25% invalidated by the Supreme Court in the *Seattle* case.<sup>120</sup> Lakewood argues

---

<sup>117</sup> *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 839, 92 P.3d 243 (2004); *Seattle Police Officers Guild v. City of Seattle*, 113 Wn. App. 431, 439, 53 P.3d 1036 (2002)(“We hold that the rule of 25 percent does not substantially accomplish the purposes of chapter 41.12 RCW”).

<sup>118</sup> *Id.*

<sup>119</sup> CP 430 - 431 (Promotional Lists).

<sup>120</sup> *Seattle Police Officers Guild*, 151 Wn. 2d at 839.

there is no nexus between Rule of Five and the 15% given the disjunctive “or” between the choices. However, a poll taken by the WASPC Chief to which Chief Zaro responded acknowledged a correlation between the choices.<sup>121</sup> Police Chiefs, including Zaro, favor more discretion.<sup>122</sup> Zaro complained about manipulation of merit when he was Guild president.<sup>123</sup> The decision in the *Seattle* case that invalidates 25% effectively curbs the use of short lists to impermissibly expand discretion with any deviation from Rule of One. The *Seattle* court opposed use of 25% where the percentage would necessarily expand the candidate pool in a large venue like Seattle.<sup>124</sup> Having invalidated the percentage due to the expansive effect, the Court held definitively that a choice of among 25% does not “substantially accomplish” merit based civil service.<sup>125</sup> The use of Rule of Five in Lakewood allowed Zaro to pick from well over 25% of the eligible list of candidates where the list was short. Lakewood argues incorrectly that the Seattle courts were silent about “the percentages of

---

<sup>121</sup> CP 613 - 628 (WASPC E-mails with Chief Zaro and Deputy Chief Unfred).

<sup>122</sup> CP 631 (Meeting Minutes); CP 387 (Zaro Dep.).

<sup>123</sup> CP 642 - 645 (Zaro Ltr.).

<sup>124</sup> *Seattle Police Officers Guild*, 151 Wn.2d at 840; *Seattle Police Officers Guild v. City of Seattle*, 113 Wn. App. 431, 439, 53 P.3d 1036 (2002).

<sup>125</sup> *Id.*

names relative to total candidates eligible.” The Supreme Court affirmed Division II’s rationale that too many choices out of the whole number eligible is impermissible:

“We therefore rely on the guidance of *Int’l Ass’n of Fire Fighters* in finding that no historical basis exists for allowing the possibility for such a noticeable increase in discretion. We hold that the rule of 25 percent does not substantially accomplish the purposes of chapter 41.12 RCW.”<sup>126</sup>

Even Rule of Five effectively violated merits standards where the Chief picked from a list of 7 or 8 candidates where he had a choice among way more than half of the candidates. Lakewood failed to ensure merit selection by limiting promotions from less than 25% of the eligible candidates. As a matter of law, Lakewood violated merit selection standards.

#### 9. Veteran’s Preference Miscalculated

Lakewood failed to credit Officer Vahle sufficiently for his Veteran’s preference. State public policy dictates that Veterans receive a preference in hiring and promoting:

“In all competitive examinations, unless otherwise provided in this section, to determine the qualifications of applicants for public

---

<sup>126</sup> *Seattle Police Officer’s Guild v. Seattle*, 113 Wn. App. 431, 439, 53 P.3d 1036 (2002).

offices, positions, or employment, either the state, and all of its political subdivisions and all municipal corporations, or private companies or agencies contracted with by the state to give the competitive examinations shall give a scoring criteria status to all veterans as defined in RCW 41.04.007, by adding to the passing mark, grade or rating only, based upon a possible rating of one hundred points as perfect a percentage in accordance with the following:

(3) Five percent to a veteran who was called to active military service from employment with the state or any of its political subdivisions or municipal corporations. The percentage shall be added to promotional examinations until the first promotion only; ...<sup>127</sup>

Lakewood recognizes its obligation to comply with this preference requirement when making promotional decisions.<sup>128</sup> Officer Vahle qualified for the Veteran's preference for promotions.<sup>129</sup> Officer Vahle understood the correct calculation to require Lakewood to add five percent of the overall points possible on an exam to his score.<sup>130</sup> Officer Vahle's interpretation of the statutory calculation comports with the plain language of the statute: 5% of 100 points as a perfect percentage. Courts shall interpret statutes according to the statute's plain meaning.<sup>131</sup>

---

<sup>127</sup> RCW 41.04.010; *Gossage v. State*, 112 Wn. App. 412, 49 P.3d 927 (2002).

<sup>128</sup> CP 500 (Pandrea Letter Enclosing Veteran's Scoring Criteria).

<sup>129</sup> *Id.* and CP 330 (Vahle Dec.).

<sup>130</sup> CP 330 (Vahle Dec.).

<sup>131</sup> *Mulenex v. Department of Employment Security*, 47 Wn. App. 486, 736 P.2d 279 (1987).

Instead, Lakewood calculated the preference using five percent of Officer Vahle's test score, which resulted in a lower calculation than had Lakewood calculated the preference correctly. Lakewood should use the overall points possible in order to apply the preference equally giving each veteran the same preference points. The calculation should not be calculated based upon individual scores. Lakewood violated the Veteran's preference as a matter of law.

C. Lakewood's Breach of Contract - Promissory Estoppel

Officer Vahle stated a claim for breach of his employment contract, specifically the promise of merit based promotions.<sup>132</sup> He seeks damages because Lakewood bypassed him for impermissible reasons. The undisputed facts show that Chief Zaro held a hostile animus towards Vahle due to his protected activities, and bypassed him for promotion for these reasons.<sup>133</sup> Officer Vahle engaged in various protected activities to include seeking to enforce the Rule of Three.<sup>134</sup> Chief Zaro intentionally expired the eligibility list to avoid selecting Officer Vahle.<sup>135</sup> Lakewood argues

---

<sup>132</sup> CP 19 - 22 (Complaint).

<sup>133</sup> CP 352 - 353 (Zaro Dep.).

<sup>134</sup> CP 497 - 498 (Vahle Ltr. to Pandrea); Officer Vahle also testified in opposition to Ordinance 674.

<sup>135</sup> CP 510 (Pandrea Dep.).

Vahle may not seek redress on a breach of contract theory because no one promised to promote him based upon his high rank.<sup>136</sup> While Rule of Three affords some discretion, an eligible candidate may not be bypassed for impermissible reasons for a candidate lower in rank even within the top three. If Vahle had not ranked number 2, Officer Vahle would have no legitimate claim to promotion because he would not otherwise have been qualified. But Officer Vahle ranked number two.<sup>137</sup> He always performed above standard, and he had commendations for exercising good judgment, even where the rules were not black and white.<sup>138</sup> He did “great at patrol”, and handled complicated incidents, performing “exceptionally well”.<sup>139</sup> Nonetheless, Chief Zaro did not approve of his advocacy.<sup>140</sup> Seeking redress, advocating for union benefits, and reporting police corruption are

---

<sup>136</sup> CP 842 (Lakewood’s Reply Br.).

<sup>137</sup> CP 430 (Police Sergeant Eligibility List).

<sup>138</sup> CP 385 (Zaro Dep.); CP 399 - 428 (Performance Evals); CP 823-824 (E-mails).

<sup>139</sup> CP 384 - 385 (Zaro Dep.).

<sup>140</sup> CP 369, 375, 377 (Zaro Dep.).

all protected activities.<sup>141</sup> Chief Zaro was known to be bypassing Vahle because of his protected activities.<sup>142</sup>

Lakewood insists the only relief for impermissible hiring decisions are administrative either through RCW 42.41.040, whistleblower retaliation, or through PERC as a grievance under the CBA. Lakewood's argument is incorrect. An employee who has suffered whistleblower retaliation has a choice of remedies.<sup>143</sup> With regard to any grievance, Lakewood's Civil Service Commission refused to hear his grievances.<sup>144</sup> PERC typically hears matters involving removal, suspension, demotion, or discharge, not failure to promote claims.<sup>145</sup> Officer Vahle exhausted that administrative option. And, he had the right to elect to file his breach of contract claim in superior court, not with PERC.<sup>146</sup>

---

<sup>141</sup> *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002)(First Amendment guards activities such as speech, ... petitioner for the redress of grievances...Filing grievance, claim form, and lawsuit for merit selection discrepancy); RCW 4.24.510 (Filing grievance on merit selection discrepancy); RCW 42.41.030 (Reporting police corruption - theft of funds, Reporting merit selection standard discrepancy); RCW 41.56.040 (Organizing for Shoe Allowance - Pink Shoes); RCW 49.60.210 (Witness to Discrimination Complaints, Reporting Veteran's preference miscalculation).

<sup>142</sup> CP 562 (Estes Dec.); CP 569 (Moore Dec.); CP 575 (McClelland Dec.).

<sup>143</sup> *Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252, 359 P.3d 746 (2015); *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004).

<sup>144</sup> CP 825 - 826 (Vahle Dec.).

<sup>145</sup> RCW 41.12.090.

<sup>146</sup> *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 361, 247 P.3d 816 (2011), citing *City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 818 P.2d 1076 (1991).

Employees may enforce specific promises that affect their employment rights on a breach of contract theory or alternatively promissory estoppel.<sup>147</sup> A public employee who claims civil service protections may enforce such promises on a promissory estoppel theory.<sup>148</sup> Specific promises made by an employer in writing to specific treatment are enforceable.<sup>149</sup> Where an employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.”<sup>150</sup> Where there is a claim of discrimination or similar unlawful hiring practices in connection with merit promotion standards, a failure to promote claim will survive summary judgment.<sup>151</sup>

---

<sup>147</sup> *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 31, 111 P.3d 1192 (2005).

<sup>148</sup> *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010).

<sup>149</sup> *Mikkelsen v. PUD No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017); *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223 (2002).

<sup>150</sup> *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229, 685 P.2d 1081 (1984); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992).

<sup>151</sup> *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 839, 92 P.3d 243 (2004).

By statute, Lakewood had to promote based upon merit, and not bypass for promotion an individual for improper reasons.<sup>152</sup> Lakewood made the express promise to its employees that promotions would be based upon merit, using a Rule of Three merit selection standard.<sup>153</sup> Lakewood breached that specific promise. Lakewood allowed Chief Zaro to select his favorites from an eligibility list of more than three candidates. Lakewood permitted Chief Zaro to bypass Vahle for the wrong reasons several times from the 2016 eligibility list where he was ranked Number 2.<sup>154</sup> As Zaro testified: “Once a whistleblower, always a whistleblower”; “Jeremy will take on just about any fight that’s out there without a lot of discretion.”; “but I would also expect there to be some discretion in the amount of topics you take on for a big fight.”; “But then it does come back to some the — you know, the black and white rules, which I wasn’t in the military, but my impression is that’s what they are all about are the rules.”; “So maybe I do think that it’s unethical to do this now because it’s

---

<sup>152</sup> RCW 42.12.100.

<sup>153</sup> LMC 2.10.090.

<sup>154</sup> CP 329 (Vahle Dec.); CP 430 - 431 (Police Sergeant Eligibility Lists); CP 352 - 354 (Zaro Dep.); CP 827-828 (Vahle Dec.); CP 566-570 (Moore Dec.); CP 571-576 (McClelland Dec.); CP 559-565 (Estes Dec.).

clearly just on his behalf...”<sup>155</sup> Officer Vahle relied upon the Rule of Three with the expectation of promotion if he ranked within the top three by foregoing work for other departments and through his pursuit of a high rank by studying for the competence examination and participating in the promotional process.<sup>156</sup> Lakewood disregarded merit promotion standards and allowed Chief Zaro to bypass Officer Vahle for improper reasons not based on merit. His breach of contract claims should be reinstated.

#### D. Lakewood’s Negligence

Officer Vahle seeks damages for Lakewood’s negligent enforcement of its merit selection standards, and its failure to supervise its Civil Service Commission and Chief Zaro, allowing them to breach merit selection standards and bypass Officer Vahle for promotion for improper reasons. Negligence claims may be founded on statutory duties.<sup>157</sup> Lakewood was obligated to ensure Lakewood had merit selection standards that were followed.<sup>158</sup> Superior Court has jurisdiction over

---

<sup>155</sup> CP 394-395 (Zaro Dep.); CP 382 (Zaro Dep.); CP 377 (Zaro Dep.); CP 368-370 (Zaro Dep.); CP 376 (Zaro Dep.).

<sup>156</sup> CP 827 (Vahle Dec.), CP 327 (Vahle Dec.).

<sup>157</sup> *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 61 P.3d 1207 (2003); *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991).

<sup>158</sup> RCW 41.12.170; RCW 35A.21.040; RCW 35A.11.020.

merit selection standards.<sup>159</sup> Civil servants have a fundamental right to conformance with civil service requirements.<sup>160</sup> Where an employer fails to supervise its officials, the employee may seek redress for harm suffered that is not otherwise compensable under Worker's Compensation.<sup>161</sup> Lost promotion income is not a worker's compensation benefit, nor does worker's compensation preclude recovery for the emotional insult from having been passed over for improper reasons, like retaliation.<sup>162</sup> Officer Vahle has suffered damage to his reputation, not otherwise recoverable in any other forum. While whistleblower retaliatory conduct less severe than discharge has not been found actionable in the past, a failure to promote grounded on a municipality's failure to follow its statutory dictates that require merit selection standards has never before been considered.<sup>163</sup> A failure to promote in the context of an express statutory violation like

---

<sup>159</sup> RCW 41.12.210.

<sup>160</sup> *Green v. Cowlitz County Civil Service Commission, Cowlitz County*, 19 Wn. App. 210, 577 P.2d 141 (1978); *Casebere v. Clark County Civil Service Commission-Sheriff's Office*, 21 Wn. App. 73, 584 P.2d 416 (1978).

<sup>161</sup> *Herriod v. Pierce Co. Public Transp. Benefit Authority Corp.*, 90 Wn. App. 468, 957 P.2d 767 (1998); *Elliott v. DOC*, 192 Wn. App. 1054 \*10 (2016 WL 785268); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000).

<sup>162</sup> *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

<sup>163</sup> *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997); *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000).

discrimination is an actionable adverse action.<sup>164</sup> Based upon the same rationale, which is upholding express statutory obligations that support the public interest, Lakewood's failure to promote in conformance with merit selection standards should similarly be actionable in negligence where the adverse action is sufficient severe like the failure to promote a civil servant using merit standards. Lakewood's failure to conform with merit selection standards for retaliatory reasons related to Officer Vahle seeking conformance with merit selection standards should be actionable. Otherwise, Lakewood will continue to disregard merit standards and Officer Vahle will never be promoted. Officer Vahle's negligence claims should be reinstated.

E. Attorney's Fees and Costs On Appeal

Officer Vahle should be awarded reasonable attorney's fees and costs on this appeal upon remand and when prevailing on his damages claims. An employee who successfully recovers wages or salary owed to him shall recover attorney's fees and costs.<sup>165</sup> While Officer Vahle has not

---

<sup>164</sup> *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004).

<sup>165</sup> RCW 49.48.030; *Naches Valley School Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 775 P.2d 960 (1989).

yet prevailed on his damages claims, he seeks to preserve his right to recover his fees on appeal upon remand and success on the merits.

## VI. CONCLUSION

For the reasons stated above, the trial court's orders should be reversed, the claims reinstated, partial summary judgment granted to Officer Vahle on his declaratory action in that Lakewood violated its Rule of Three ordinance and merit selection standards. He should be awarded his attorney's fees and costs on appeal.

Dated this 3rd day of July, 2019 at South Lake Tahoe, CA.

III Branches Law, PLLC



---

Joan K. Mell, WSBA No. 21319  
Attorney for Jeremy Vahle

## CERTIFICATE OF SERVICE

I, Joseph Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 3rd day of July, 2019, I caused to be filed and served true and correct copies of the above Appellant Vahle's Opening Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service:

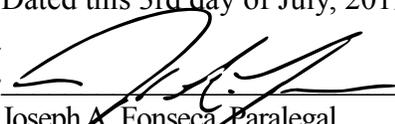
Summit Law Group, PLLC  
Michael Bolasina, WSBA No. 19324  
315 Fifth Avenue South, Suite 1000  
Seattle, WA 98104  
mikeb@summitlaw.com

City of Lakewood  
Eileen McKain, WSBA No. 17792  
6000 Main Street S.W.  
Lakewood, WA 98499  
emckain@cityoflakewood.us

Original E-filed with:  
Washington State Court of Appeals: Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 3rd day of July, 2019 at Fircrest, WA.

  
\_\_\_\_\_  
Joseph A. Fonseca, Paralegal

### III BRANCHES LAW, PLLC

July 03, 2019 - 2:36 PM

#### Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53317-1  
**Appellate Court Case Title:** Jeremy Vahle, Appellant v. Lakewood, Respondent  
**Superior Court Case Number:** 17-2-12665-4

**The following documents have been uploaded:**

- 533171\_Briefs\_20190703143451D2511716\_4995.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was 2019.07.03.Vahle.Opening Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Mikeb@summitlaw.com
- emckain@cityoflakewood.us

**Comments:**

---

Sender Name: Joseph Fonseca - Email: joe@3brancheslaw.com

**Filing on Behalf of:** Joan Kristine Mell - Email: joan@3brancheslaw.com (Alternate Email: )

Address:  
1019 Regents Boulevard, Suite 204  
Fircrest, WA, 98466  
Phone: (253) 566-2510

**Note: The Filing Id is 20190703143451D2511716**