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Division II  
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No. 53317-1-II

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

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JEREMY VAHLE,

Plaintiff/Appellant,

v.

LAKWOOD,

Defendant/Respondent.

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**BRIEF OF RESPONDENT LAKEWOOD**

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## **I. STATEMENT OF THE ISSUES**

1. Did the Superior Court properly dismiss appellant's claim seeking declaratory relief on respondent's use of the Rule of 5?
2. Did the Superior Court properly dismiss appellant's claim seeking damages for breach of contract and promissory estoppel?
3. Did the Superior Court properly dismiss appellant's claim seeking damages for negligence?
4. Did the Superior Court properly dismiss or disregard appellant's claim regarding respondent's calculation of his veteran's preference points?
5. Did the Superior Court properly dismiss or disregard appellant's allegations regarding unlawful retaliation?

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

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

cross-motion seeking partial summary judgment in his favor regarding respondent's use of the Rule of 5 and respondent's calculation of his veteran's preference points. CP 314-325. On March 15, 2019, 2019, the Superior Court granted respondent's motion for summary judgment and denied appellant's motion for partial summary judgment. CP 953-956. On March 21, 2019, appellant filed a notice of appeal. CP 957-964.

**B. Statement of Facts**

**1. Adoption of Commission rules**

Respondent was incorporated as a city in 1996. Initially, respondent contracted with Pierce County for police services. In 2003, respondent decided to form its own police department. On December 31, 2003, respondent's City Council (the "Council") passed Ordinance No. 328 creating a civil service commission (the "Commission") to administer the recruitment and promotional processes for its new police department. CP 297, 299-302. The city manager appointed three residents of respondent to serve as its civil service commissioners (the "commissioners"). CP 310 at ¶ 2.

One of the first tasks of the new commissioners was to write a set of rules by which the Commission would operate. CP 310 at ¶ 3. One of the rules the Commission included was the Rule of 5. CP 310 at ¶ 4. With the Rule of 5, when there is an opening in the police department for

an entry level officer, a lateral officer, or an internal promotion, the police chief can recommend to the city manager any candidate who is No. 1 through No. 5 on the eligibility list. CP 310 at ¶ 4.<sup>1</sup> To select the rule that would apply in respondent's police department, the commissioners gathered civil service rules used by the civil service commissions for other cities. CP 263 at ¶ 6. They found that some cities used the Rule of 3 and others used the Rule of 5. CP 263 at ¶ 6. None used the Rule of 1. CP 263 at ¶ 6.

The commissioners debated whether to adopt the Rule of 3 or Rule of 5 and decided that Rule of 5 was superior. CP 310 at ¶ 7. Given their approved testing process, the commissioners considered everyone who achieved a place on the list to be qualified for a position. CP 310 at ¶ 7. They wanted the police chief to be able to recommend candidates based on attributes that were important for success but would not be reflected in the testing process. CP 310 at ¶ 7. It was the consensus of the commissioners that adopting the Rule of 5 achieved the proper balance between ensuring that the decision was based on merit, and giving the police chief the ability to recommend, from among those qualified, the candidate who was best suited for the open position. CP 310 at ¶ 5. The Commission has

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<sup>1</sup> The Rule of 5 allows the chief to consider additional candidates for recommendation if there is more than one opening to fill at a given time. CP 263 at ¶ 9, CP 272.

consistently used the Rule of 5 from 2004 to the present. CP 310 at ¶ 2.

**2. The council adopts the Rule of 5 by approving CBAs**

In this ordinance, the Council adopted a Rule of 3 for hiring and promotions in the police department. CP 301. As mentioned above, the Commission subsequently adopted a Rule of 5 for hiring and promotion in the police department; the Commission acted without knowing of a contrary provision in Ordinance 328t. CP 310 at ¶ 4, CP 311 at ¶ 12.

On September 5, 2006, the Council approved the initial collective bargaining agreement (“CBA”) between respondent and the Lakewood Police Independent Guild (“LPIG”). CP 527. At Article 4.01, the initial CBA states that “vacancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.” CP 530 at ¶ 3, 535. Thus, the initial CBA specifically adopts the rule set forth in respondent’s civil service rules (*i.e.*, the Rule of 5) for promotions. CP 530 at ¶ 4. There have been six collective bargaining agreements that have been executed between respondent and “LPIG” between 2006 and the present: (a) January 1, 2006 to December 31, 2008, (b) January 1, 2009 to December 31, 2009, (c) January 1, 2010 to December 31, 2010, (d) January 1, 2011 to December 31, 2012, (e) January 1, 2013 to December 31, 2015, and (f) January 1, 2016 to December 31, 2020. CP 527 at ¶ 3. Each of these CBAs included the following provision at

Article 4.01:

Vacancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.

CP 530 at ¶¶ 3, 5; 535, 538, 541, 544, 547, and 550. The members of LPIG approved each CBA before it was presented to the City; the Council approved each CBA between respondent and the LPIG at an open public meeting. CP 527 at ¶ 3.

The LPIG has never appeared before the Commission and requested that it change the Rule of 5, as set forth in its rules at § 10.6. CP 86 at ll. 4-10, CP 272. Nor has LPIG brought it up in contract negotiations. CP 123 at ¶ 11. According to appellant, LPIG has decided to table the issue and raise it in the upcoming contract negotiations for a contract that would not take effect until January 2021. CP 85 at ll. 12-23, 87 at ll. 15-17.

**3. Promotions are made from the list approved by the Commission**

The police chief can request that the Commission create a list if there is a current opening or a prospective future opening, and no current list to make recommendations from. CP 311 at ¶ 10. The Commission authorizes and approves a testing process for the creation of a list. CP 311 at ¶ 10. The Commission relies upon its secretary/examiner to administer the testing and bring it a list of qualified candidates, in order, who passed

all the testing and earned a spot on the list. CP 311 at ¶ 11. The Commission then certifies the list. CP 311 at ¶ 11. The list is published so everyone can see who is on it, and a copy is given to the police chief for when there are openings to fill. CP 311 at ¶ 11. The Commission is informed when there is an opening to fill, when the police chief has made a recommendation from the list, and when the city manager has made a hiring or promotional decision based on the police chief's recommendation. CP 311 at ¶ 11.

If the chief has an opening to fill, he or she must first seek authorization from respondent's human resources director and then the city manager to fill it. CP 122 at ¶ 5. Once that authorization is granted, he or she may recommend any candidate from the top 5 candidates on the list, based on whoever he or she believes is the best candidate for the open position. CP 122 at ¶ 5. It is the city manager who makes the actual decision on who to hire or promote. CP 122 at ¶ 5.

Michael Zaro has been respondent's police chief since April 2015. CP 122 at ¶ 1. When Chief Zaro views the list of the top five candidates for an opening, he does not consider No. 1 on the list to be more qualified than No. 3 or No. 5. CP 122 at ¶ 6. He sees them all as equally qualified based on the fact that they all possess the necessary qualifications (*i.e.*, years of experience) to serve, and all passed the required tests with

sufficient knowledge and competency to be included within the top five places on the list. CP 122 at ¶ 6. Whether a candidate is No. 1 or No. 5 on the list has no bearing on his decision on who should receive his recommendation. CP 122 at ¶ 6. Respondent's police department is large enough to have many qualified candidates for promotional positions, and small enough that Chief Zaro knows each commissioned police officer who works for him. CP 122 at ¶ 7. In making recommendations for promotion, Chief Zaro considers such factors as the applicant's performance history, conduct history, disciplinary history, use of judgment, and demonstrated possession of supervisory skills. CP 122 at ¶ 7. He does not consider his personal feelings about a candidate or criteria that would be unlawful, such as protected class status or protected activity CP 122 at ¶ 7.

**4. Appellant is not selected for promotion to sergeant**

In late 2015, appellant tested to be on a list for promotion to sergeant. On January 7, 2016, after the testing process was complete, the Commission certified a list of eight employees eligible for promotion in order of their final scores. CP 263 at ¶ 7, 267. Appellant was No. 2 on the list. CP 263 at ¶ 7, 267. The police department had two openings at the time. On January 16, 2016, Chief Zaro recommended Brian Markert

(No. 1) and then Jeff Paynter (No. 6).<sup>2</sup> CP 123 at ¶ 12. On July 11, 2016, Chief Zaro recommended Peter Johnson (No. 5). CP 124 at ¶ 12. On August 2, 2016, Chief Zaro recommended Ken Devaney (No. 3). CP 124 at ¶ 12. On August 22, 2016, Chief Zaro recommended Jeremy Prater (No. 7).<sup>3</sup> CP 124 at ¶ 12. This is all the promotions that Chief Zaro recommended off the list. Chief Zaro did not recommend appellant (No. 2), or Shawn Noble (No. 4), or Darrell Moore (No. 8). CP 124 at ¶ 12.

Appellant has no knowledge of the criteria used by Chief Zaro to recommend candidates off the list. CP 94 at ll. 2-6. Yet it is appellant's position that he was a better candidate for promotion than everyone on the eligibility list other than Brian Markert. CP 97 at ll. 9-13, CP 98 at ll. 10-16, CP 99 at ll. 25 to CP 100 at ll. 2, CP 101 at ll. 8-10. Chief Zaro holds a different opinion. All of the candidates who received promotions off the January 7, 2016 list were experienced officers who had been with the respondent's police department since its creation in 2004. CP 124 at ¶ 13. All had excellent performance evaluations and were well regarded by their

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<sup>2</sup> As mentioned above, Chief Zaro could consider No. 6 if he had more than one opening at the time. CP 272. Alternatively, Jeff Painter would have moved up to No. 5 immediately after Chief Zaro promoted Brian Markert (No. 1).

<sup>3</sup> By the time he was promoted, Jeremy Prater had moved up to No. 3 on the list due to prior promotions off the same list. CP 267.

peers. CP 124 at ¶ 13. All had clean disciplinary histories. CP 124 at ¶ 13. Chief Zaro was not friends with nor did he socialize outside of work with any of them. CP 124 at ¶ 13. Chief Zaro made each recommendation without regard to their placement within the top five on the list because he believed they each possessed the experience, judgment, and supervisory skill necessary to lead. CP 124 at ¶ 13.

Unlike the officers who were promoted, Chief Zaro had reservations about appellant's judgment, maturity, and ability to lead. CP 124 at ¶ 14. For example, appellant had been disciplined for getting involved with a victim of domestic violence while he was simultaneously involved in the arrest and prosecution of her former boyfriend. CP 124 at ¶ 14. He also found that appellant had trouble with exercising discretion when there is no bright line rule telling him what to do. CP 124 at ¶ 14. Chief Zaro also had questions about appellant's judgment, an example of which was when appellant wore pink shoes while on patrol. CP 124 at ¶ 14. According to appellant, several union members wanted the union's negotiations team to include a boot allowance among their contract demands. The union president at the time refused, and the union never sought a boot allowance in negotiations. CP 104 at l. 12 to CP 106 at l. 19, CP 110 at ll. 5-7. In the course of discussing the boot allowance issue with the union president and Eric Bell, another union officer,

appellant and Mr. Bell entered into a bet. Appellant testified:

And I said, well, if they are not going to tell us what we can wear and it's not going to be paid for, then I can just come into work in high heels. And Eric said, "That would be hilarious. I will buy you dinner if you could come to work in high heels."

And I said, "Well, walking in high heels doesn't sound like something I can do successfully, so what if I wear something obnoxious, something that's definitely not the norm for footwear? What will that get me?"

And he said, "That would get you a standard lunch," I believe.

CP 106 at l. 14 to CP 107 at l. 1. The union president overheard this discussion and told respondent: "You cannot do that. You are going to get into trouble." CP 107 at ll. 11-12. Appellant disagreed because there was nothing in policy dictating what kind of shoes he could wear. CP 107 at ll. 13-15.<sup>4</sup>

On the first day after the bet, appellant slipped on pink shoes mid-shift for amusement of Off. Bell, and then demanded his lunch. CP 108 at ll. 2-13. Off. Bell countered that appellant must wear the pink shoes for an entire shift to cash in on the bet. CP 108 at ll. 14-17. The next day, appellant reported to work in his pink shoes. After his sergeant directed

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<sup>4</sup> According to appellant, the union's attorney agreed with him, and told appellant about an officer at another city who wore sandals and was expressly told not to. When the officer showed up the next day wearing only a sandal, the union's attorney stated he could not be disciplined for insubordination because he was not wearing sandals. CP 111 at ll. 1-9. Appellant agreed that the officer could not be disciplined.

him to change back into boots, appellant could not do so because he only had the pink shoes he wore to work that day. CP 108 at l. 21 to CP 109 at l. 17. Nor could appellant be sent home to change because his shift was at minimum staffing levels. CP 109 at ll. 10-16. The union president reported appellant and he was sent to see Chief Zaro. CP 112 at ll. 4-7. Appellant explained to Chief Zaro his belief that he could wear pink shoes on patrol because there was no policy saying he could not wear pink shoes on patrol. CP 112, l. 23 to CP 113, l. 6. According to appellant, an incredulous Chief Zaro responded as follows:

Policy cannot cover everything. Should policy say that you can't wear a little cap with a propeller on top?

CP 113 at ll. 7-14. When Chief Zaro was looking for the next sergeant, he was looking for candidates who would model good behavior and good judgment for their subordinates. CP 124 at ¶ 14. He was not looking for the candidate who thinks he can wear pink shoes, which appellant agreed was outrageously unprofessional attire for a patrol officer, just because there is no rule expressly prohibiting it. CP 124 at ¶ 14.

**5. Appellant raises issues regarding respondent's use of the Rule of 5**

Mary Pandrea is the secretary/chief examiner of the Commission. CP 262 ¶ 1. On October 21, 2016, Ms. Pandrea received a letter from appellant complaining that Chief Zaro passed him over in favor of other

candidates with higher numbers on the list. CP 263 at ¶ 8, CP 269-270. He also complained that it was inappropriate for the Commission to use the Rule of 5 based on a Washington State statute, a Washington Supreme Court decision, and City Ordinance No. 328. CP 263 at ¶ 8, CP 269-270. Appellant's letter was the first notice to Ms. Pandrea, the Commission, and the police chief that there was a potential conflict between the civil service rules, which cite the Rule of 5, and City Ordinance No. 328, which cited a Rule of 3. CP 263 at ¶ 9, CP 311 at ¶ 13; CP 123 at ¶ 10. Appellant testified that he was unaware of anyone knowing about the potential conflict before he raised it on October 21, 2016. CP 88 at ll. 1-12.

Respondent has consistently followed the civil service rules, which call out the Rule of 5, since their initial adoption in 2004. CP 263 at ¶ 9, CP 311 at ¶ 8; CP 123 at ¶ 11. The civil service rules require any objection to any promotional decision be made within 10 days of the decision. CP 274. Ms. Pandrea responded to appellant's letter by informing him that his objection to any of the promotional decisions made off the list was untimely under the civil service rules. CP 263 at ¶ 10, CP 274.

On August 28, 2017, appellant emailed Ms. Pandrea a letter seeking a hearing because the Commission announced it would be using

the Rule of 5 in connection with the creation of a new eligibility list. CP 263 at ¶ 13, CP 278. Ms. Pandrea responded that the Commission would continue to use the Rule of 5. CP 264 at ¶ 19, CP 292.

On October 16, 2017, the Council voted in open public session to pass Ordinance No. 674, which amended Ordinance No. 328 and resolved any potential conflict between respondent's ordinances and its civil service rules. CP 297 at ¶ 3. Ordinance No. 674 deleted references to the Rule of 3 in Lakewood Municipal Code 2.10.090, and instead adopted the rule chosen by the Commission. CP 304. The enactment of Ordinance 674 brought respondent's ordinance, civil service rule, and CBA provision into harmony on the use of the Rule of 5. CP 138, 272, 304. Prior to the vote on Ordinance No. 674, appellant and his attorney addressed the City Council and encouraged them not to pass it. CP 83 at l. 19 to CP 84 at l. 21.

**6. Appellant raises issues regarding whistleblower retaliation**

On September 6, 2016, appellant met with Mary McDougal, respondent's human resources director, and gave her a letter dated September 2, 2016. CP 204 at ¶ 2. In the letter, appellant claimed he was passed over for promotion due to whistleblowing activity protected by the Local Government Whistleblower Act, RCW 41.40. Appellant identified as his whistleblowing activity the following: (a) he reported illegal actions

of Skeeter Manos, a fellow former officer, in 2012, and (b) he participated as a witness in an investigation done by an outside investigator, Kathy Weber, on a race discrimination complaint by Phil Davis, a former police officer. CP 204 at ¶ 2. Ms. McDougal reported the complaint to the city manager and he assigned her to conduct the investigation. CP 204 at ¶ 3.

On October 5, 2016, Ms. McDougal issued her investigation report. CP 204 at ¶ 6. She concluded that the reason why appellant was passed over for promotion was not causally connected to his reporting Skeeter Manos. In fact, appellant's actions in exposing Skeeter Manos were lauded by command staff, including then Chief Farrar and Assistant Chief Zaro. CP 204 at ¶ 6, CP 124 at ¶ 17; CP 102 at l. 6 to CP 103 at l. 18. Nor was the failure to promote causally connected to appellant's statements to Ms. Weber during her investigation. First, appellant told Ms. Weber that he did not believe or credit Mr. Davis's claim of race discrimination against the City. CP 204 at ¶ 5; CP 221-222. Although appellant told Ms. Weber his concerns about how the investigator on his case (for pursuing a relationship with a victim of domestic violence) was overly aggressive, and how the police department had favorites who got away with conduct others did not, these responses of his were not in support of Mr. Davis's claim of race discrimination. Ms. McDougal also found there was no indication that anyone in the Lakewood police

department had read Ms. Weber's investigation report or knew what appellant said to her. CP 204 at ¶ 4. Chief Zaro had no knowledge of appellant's statements to Ms. Weber until after appellant was passed over for the promotions in 2016 and made his whistleblower complaint to Ms. McDougal in September 2016. CP 204 at ¶ 4; CP 125 at ¶ 18. Appellant testified that he has no knowledge of Chief Zaro or anyone else speaking to Ms. Weber or reviewing Ms. Weber's report prior to the promotional decisions being made. CP 79 at l. 19 to CP 80 at l. 13.

Ms. McDougal's investigation also revealed that it was commonplace for the police chief, whether it was Chief Zaro or the chiefs before him, to recommend candidates for promotion out of the order set forth on the eligibility list. CP 204 at ¶ 6. Appellant concedes that Chief Zaro and previous police chiefs have repeatedly recommended candidates out of order, and skipped over candidates who were lower on the list. CP 89 at l. 21 to CP 93 at l. 21. Appellant is not aware of any chief just taking the candidate with the lowest number, and was never told that promotional recommendations were ever made that way. CP 94 at l. 16 to CP 94 at l. 12.

As referenced above, appellant made his complaint to the City under RCW 42.41.040, the local whistleblower statute. CP 205 at ¶ 7. If appellant was not satisfied with Ms. McDougal's conclusions, he could

have requested that respondent request a hearing examiner from the State of Washington for further proceedings. CP 205 at ¶ 7. Appellant did not request such a hearing. CP 205 at ¶ 7. Appellant expressly acknowledged that he had the right to request a hearing but chose not to, thereby ending the process. CP 269. After providing her report to appellant, Ms. McDougal received a call and then an email from appellant complimenting her on the work she did as investigator and calling her investigation “thorough and fair.” CP 205 at ¶ 8, CP 241; CP 81 at ll. 12-24.

**7. Appellant raises issues regarding calculation of his veteran’s preference points**

Because appellant is a veteran, Ms. Pandrea, the secretary/examiner of the Commission, added an additional 5% to his examination score in compliance with RCW 41.04.010 and the City’s civil service rule § 9.1.1(a). CP 552 at ¶ 4. On December 11, 2017, appellant sent Ms. Pandrea a letter objecting to her calculation and asserting that an additional 5 points, and not 5%, should be added to his score. CP 264 at ¶ 18, CP 290.

Ms. Pandrea researched how veteran’s preference points should be calculated. CP 552 at ¶ 3. Because the statutory language spoke in terms of adding five or ten percent to the scores, she understood that to mean that the Commission should increase the veteran’s score by five or ten

percent of the score. She did not interpret the statutory language to mean that she should give the veteran an additional five or ten points regardless of what their score was. She reasoned that if additional points was what the legislature intended, it could have simply used “5 points” or “10 points” on a perfect score of 100 instead of using percents. CP 552 at ¶ 4.

In her research, Ms. Pandrea also looked up the issue on the Municipal Research and Services Center website. CP 552 at ¶ 5.

Information on that website supported her interpretation of the statute.

The website stated:

The percentage, which varies with the category of veteran, is based “upon a possible rating of one hundred points as perfect.” Under this scheme, for example, a veteran entitled to a 10% scoring criteria who scores a passing grade of 80 out of a possible 100 would receive an additional 8 points for a total score of 88.

CP 552 at ¶ 5, CP 556. Ms. Pandrea also called other cities, including the Cities of Tacoma, Puyallup, Federal Way, and Olympia, to see how they did the calculation, and they reported that their interpretation of the statute was the same as hers. CP 552 at ¶ 6. Based on her research, the Commission rejected appellant’s demand to receive 5 points rather than 5% added to his score. CP 553 at ¶ 8.

### **III. ARGUMENT**

Appellant’s complaint contains three claims against respondent. In the first claim, appellant seeks declaratory and injunctive relief regarding the

Rule of 5 that the Commission adopted in 2004, the Council adopted in 2006, and that respondent has used since the creation of the police department. Appellant argues that respondent, and other municipal police departments, must use the Rule of 1 to fill openings. In the second claim, appellant seeks damages on a theory of breach of contract/promissory estoppel because appellant was not promoted. In the third claim, appellant seeks damages for negligence because he was not promoted. Appellant also makes factual allegations regarding unlawful retaliation and miscalculation of his veteran's preference points, but did not include claims or seek relief in his complaint based on these allegations. Appellant's attorney acknowledged that appellant made no claim for unlawful retaliation at oral argument. RP 33 at ll. 7-8.

**A. The Superior Court Correctly Dismissed Appellant's Claim for Declaratory Relief Based on Respondent's Use of the Rule of 5**

**1. The Washington Supreme Court has already decided this issue in respondent's favor**

Appellant argues that respondent's use of any rule other than the Rule of 1 does not satisfy the statutory purposes of civil service. The Washington Supreme Court has already decided this issue in respondent's favor. The civil service statutes, including RCW 41.12, *et al.* (which applies to municipal police departments) were broadly intended "to replace the spoils system with a merits system." *Seattle Police Officers*

*Guild v. City of Seattle*, 151 Wn.2d 823, 831 (2004). The Court explained that a “merits system” is one that requires a public official to hire, promote, and discharge employees based on merit rather than political affiliation, religion, favoritism, or race. *Id.* RCW 41.12.100 sets forth the Rule of 1 as the prototype method for filling vacancies. However, the statute expressly authorized cities to enact their own local “charters or resolutions” provided the charters or resolutions “substantially accomplish” the purposes of the statute. RCW 41.12.010.

The Court has held that the Rule of 1 is not necessary to substantially accomplish the statutory intent. The Court stated:

While the statute adopts the ‘Rule of One’ for the statutory system, we do not find the legislature’s preference for that provision to be of such overriding concern that it is essential under RCW 41.08.

*International Ass’n. of Firefighters, AFL-CIO, Local 404 v. City of Walla Walla*, 90 Wn.2d 828, 586 P.2d 479 (1978) (approving the city’s use of the Rule of 3 for firefighters); *see also*, *Bellingham Firefighters Local 106 v. City of Bellingham*, 15 Wn. App. 662, 666, 551 P.2d 142 (1976) (same). In *City of Walla Walla*, the plaintiff/union argued that all discretion must be removed from the appointing authority to substantially accomplish the purpose of merit based decisions. *Walla Walla*, 90 Wn.2d at 832. The Court disagreed, concluding:

We cannot agree that the legislature intended to eliminate *all* discretion from the decision-making process. RCW 41.08.100 [firefighters] provides for a probationary period of appointment “to enable the appointing power to exercise a choice in filling of positions.

*Id.*

In *Seattle Police Officers Guild*, plaintiffs challenged Seattle’s use of the Rule of 5 combined with a percentage based rule. In that case, candidates on the list were eligible to be selected for promotion if they were in “the top twenty-five (25) percent of the eligible register, or the top (5) candidates, which number is larger.” Thus, if there were 100 candidates on the list, anyone in the top 25 could be chosen. If there were 10 candidates on the list, anyone in the top 5 could be chosen. The union and individual officers who had been passed over challenged Seattle’s rule as failing to accomplish the purpose of RCW 41.12. First, the Court affirmed the Court of Appeals’ decision striking the portion of Seattle’s rule allowing promotion of the top 25%. The Court of Appeals held:

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

*Seattle Police Officers Guild v. City of Seattle*, 113 Wn. App. 431, 439

(2002). The Court then endorsed the Rule of 5 for all municipal police departments. The Court stated:

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

*Seattle Police Officers Guild*, 151 Wn.2d at 836-837 (emphasis supplied.)

The Court’s holding expressly referenced all Washington cities, and not just Seattle. There are no subsequent decisions that overrule, distinguish, or limit the Court’s decision in the *Seattle Police Officers Guild* case.

**2. The Washington Supreme Court has rejected percentages as a mechanism to limit discretion**

Appellant misinterprets the holding of *Seattle Police Officers Guild* to allow the Rule of 5 only when there are at least 20 names on the list. For example, respondent’s 2016 list for sergeant had 8 names on it. According to appellant, the chief could recommend from the top 5 or the top 25% (meaning 2), whichever is less. There is no support for appellant’s theory to be found in the *Seattle Police Officers Guild’s*

decision or any other decision. In *Seattle Police Officers Guild*, the Court examined 12 different certification lists requested by the chief from the period of 1995-2000 to fill 86 promotional vacancies. 151 Wn.2d at 828. Each of these certification lists was based on the Rule of 5. *Id.* At no point did the Court examine the total percentage of certified names relative to those eligible for placement on the list. *Id.* Presumably, if the Court was concerned about the percentage of names relative to total candidates eligible, the Court would have included such a limitation in its holding. It did not. In addition, the Court's rejection of the rule of 25% was based on a lack of any authority or history that justified a percentage based rule, not on any concern that the percentage was too high. *Id.* at 839. What the Court clearly held is this: for cities, the Rule of 5 is acceptable, and a percentage based calculation allowing the top 25% is not. Contrary to what appellant believes, there is no interaction between the two tests.

Appellant implies that respondent is too small of a police department to use the Rule of 5. There are approximately 250 city police departments in Washington State, and respondent's police department (100 officers) is within the top 20 in size. CP 122 at ¶ 1. Appellant acknowledges that RCW 41.14.030 specifies a Rule of 3 for recruitment and promotions in county sheriff's departments. The population of

respondent (60,000) would place it in the middle of the population for Washington's 39 counties. If the Legislature is content with counties such as Garfield (population 2,000), Columbia (population 4,000) and Wahkiakum (population 4,500) using the Rule of 3, there is no reasonable argument that respondent is too small to use the Rule of 5.

Appellant mischaracterizes respondent's practice as the "Rule of All," suggesting that the police chief can recommend for an open position any commissioned officer in the police department. In fact, respondent has used the Rule of 5 since the police department was formed in 2004. Appellant's argument misrepresents the important role of the Commission in regulating the promotional process by (a) requiring a certain experience level before a commissioned officer can test for a position on the list, and (b) conducting a series of tests, interviews and other evaluative techniques that applicants must pass in order to obtain a place on the list. Appellant assumes that there must be at least 20 names on the list before the Rule of 5 works to ensure promotions based on merit. In reality, the Commission ensures that any officer whose name is on the list is qualified for the promotion. As addressed above, appellant's attempt to limit the police chief's recommendation to a percentage of the list was rejected by the Court in *Seattle Police Officers Guild*.

**3. *Seattle Police Officers Guild* has not been legislatively overruled**

Appellant also argues that *Seattle Police Officers Guild* has been legislatively overruled. While appellant is correct that the Rule of 7 was eliminated from the civil service statute applicable to state employees (RCW 41.06.150), the legislative reforms were broadly aimed at simplifying the civil service rules, not eliminating any perceived problems with the Rule of 7. The former civil service rules had been in place more than four decades. In 2002, Washington’s Legislature enacted the Personnel System Reform Act (the “Act”), authorizing the state to reform its civil service system.

As part of this streamlining process, RCW 41.06.150 was completely overhauled, removing the Rule of 7 and instead directing the Director of Financial Management to “adopt rules, consistent with the purposes and provisions of this chapter and with the best standards of personnel administration,” regarding certification, examinations, and appointments. Although the amended statute no longer required the State to use a Rule of 7, which was upheld by the Court in *Seattle Police Officers Guild*, it allowed the State the flexibility to keep the Rule of 7 or adopt a different rule. The Final Bill Report summarizes the impact of the Act as follows:

Effective July 1, 2004, the authority to adopt civil services

rules, including rules pertaining to job classification and layoff criteria, are transferred from the WPRB [Washington Personnel Resources Board] to the DOP [Department of Personnel]. Certain rules, including rules pertaining to discipline, leave, and hours of work, may be superseded by collective bargaining agreements. **The “Rule of 7” and layoffs by seniority are no longer required.**

CP 492 (emphasis supplied). Neither layoffs by seniority nor the Rule of 7 were abolished by the Act; they were simply not required if the DOP decided to adopt a different rule for the future.

In sum, nothing in the Act invalidated the holding from *Seattle Police Officers Guild*. If Washington’s Legislature took exception to the holding of *Seattle Police Officers Guild*, they had the perfect opportunity to revise the civil service statute applicable to city police when they passed the Act in 2002, but took no such action. “The legislature is presumed to be familiar with past judicial interpretations of statutes, including appellate court decisions.” *State v. Stalker*, 152 Wn. App. 805, 812-13 (2009). Moreover, at least one court following enactment of the Act has upheld the Rule of 5 citing *Seattle Police Officers Guild*. See *LaBrec v. City of Seattle*, 135 Wn. App. 1028 (2006) (unpublished) (holding the PSCSC examination process substantially fulfilled the civil service laws by using the Rule of 5 for lieutenant promotions).

**4. There has been repeated legislative action by respondent’s Council adopting the Rule of 5**

Appellant first argues that the Rule of 5 must be adopted by the

Council and not the Commission. There is no support for appellant's position. Indeed, RCW 41.12.040 specifically allocates to the Commission very broad responsibilities for establishing how the civil service system shall operate. RCW 41.12.040 states:

It shall be the duty of the civil service commission:

(1) To make suitable rules and regulations not inconsistent with the provisions of this chapter. Such rules and regulations shall provide in detail the manner in which examinations may be held, and appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges shall be made, and may also provide for any other matters connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of this chapter, or which may be found to be in the interest of good personnel administration. Such rules and regulations may be changed from time to time. The rules and regulations and any amendments thereof shall be printed, mimeographed, or multigraphed for free public distribution. Such rules and regulations may be changed from time to time;

Even assuming appellant's argument had merit, the Council has repeatedly adopted the Rule of 5 for respondent's use. As referenced above, the Council passed Ordinance No. 328 in 2003 that called for the Rule of 3. Unaware of this, in 2004, the Commission drafted rules that called for the Rule of 5. Subsequently, there have been six CBAs that have been executed between respondent and the LPIG beginning in 2006, each of which has included the following provision at Article 4.01:

Vacancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.

The Council approved each CBA between respondent and the LPIG at an open public meeting. Thus, beginning in 2006, respondent's Council replaced the Rule of 3 in Ordinance No. 328 with the Rule of 5, as set forth in the Commission's rules and in accordance with Article 14.01 of the CBA.

Appellant argues that the provisions of a CBA cannot supersede an ordinance. This is legally incorrect. Washington law expressly recognizes the superiority of the CBA when its provisions conflict with an ordinance.

RCW 41.56.905 applies to uniform personnel and states:

The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015 [port districts], if any provision of this chapter conflicts with any other statute, **ordinance**, rule or regulation of any public employer, the provisions of this chapter shall control.

RCW 41.56.905 (emphasis supplied). "The Legislature intended [the PECBA] to be construed liberally and to supersede other statutes and rules governing public employment." *City of Spokane v. Spokane Civil Service Comm'n*, 98 Wn. App. 574, 580 (1999). In *City of Spokane*, the city and the police union reached an agreement through collective bargaining to change the process for promotion to sergeant. The civil service

commission refused to recognize the change, and the city sued. First, the court recognized that changes in promotional procedures was a mandatory subjects of bargaining. 98 Wn. App. at 580. The court, applying RCW 41.56.905, concluded that “the terms of the [collective bargaining] Agreement control.” *Id.* at 584. The court stated: “[t]he purpose of the Act is not served if a city complies with its obligation to collectively bargain, only to have the civil service commission refuse to abide by the collective bargaining agreement. The intent of the [PECBA] requires the Commission’s actions here to be prohibited.” *Id.* at 584.

Although this case involves an ordinance rather than a rule of a civil service commission, the analysis of the impact of RCW 41.56.905 is the same. Indeed, this is an easier case to apply RCW 41.56.905 on the facts, because it involves the Council agreeing to a CBA provision that overrules a provision in a previous ordinance from the Council. Respondent’s Commission rules, which specify use of the Rule of 5, are incorporated by reference in the CBA, and therefore prevail over the conflicting Rule of 3 originally specified in Ordinance 328. Neither the City, nor LPIG, nor appellant has the power to unilaterally supersede the CBA and insist the Rule of 3 (or the Rule of 1) be followed.

Appellant argues that Article 4.01 should not have any legal effect because it was never bargained. Appellant does not dispute that Article

4.01 appears in every CBA executed between respondent and LPIG from 2006 to the present. It is appellant's position that since there is no evidence that Article 4.10 was expressly negotiated between the parties, it is void and unenforceable. Under black letter Washington law, "clear and unambiguous contracts are enforced as written." *Gifford Indus., Inc. v. Truer*, 180 Wn. App. 1003, \*2 (2014). A contract term is deemed ambiguous only when "its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce County Med. Bureau*, 80 Wn. App. 416, 421 (1996). However, courts "will not read ambiguity into an unambiguous contract." *Gifford Indus.*, 180 Wn. App. at \*2. Likewise, courts "avoid interpreting statutes and contracts in ways that lead to absurd results." *Hartford Fire Ins. Company v. Columbia State Bank*, 183 Wn. App. 599, 608 (2014). To avoid such absurdity, there is a strong presumption that parties to a contract intended for each part of a contract to have some meaning. "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective. A court will not read ambiguity into a contract where it can be avoided." *GMAC v. Everett Chevrolet*, 179 Wn. App. 126, 134 (2014) (internal citations omitted).

The first principle of contract interpretation is to consider the plain

language of the agreement, without consideration of other evidence such as bargaining history or past practice. The established principles of contract interpretation would be turned on their head if a party to a contract could argue that a longstanding, repeatedly included contract provision was void simply because one party to the CBA never sought to exclude it, change it, or even address it during the bargaining process.

**5. Respondent and LPIG cannot deviate from the Rule of 5 without bargaining**

“The parties’ collective bargaining obligations require that the *status quo* be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement.” *City of Edmonds*, Decision 8798-A (PECB, 2005). “The *status quo* is defined both by the parties’ collective bargaining agreement and by established past practice.” *Pierce County*, Decision 11818 (PECB, 2013). A past practice is a course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (citing *City of Pasco*, Decision 4197-A (PECB, 1994)). To be an established past practice, the practice must be consistent, known to all parties, and mutually accepted. *Whatcom County*, Decision 7288-A; *Snohomish County*, Decision 8852-A (PECB, 2007).

In *City of Anacortes*, Decision 5668 (PECB, 1996), the union filed an unfair labor practice against the City of Anacortes, claiming the City violated longstanding past practice when it unilaterally added a physical agility test to the examination for the position of lieutenant. The City, which had established a civil service commission and adopted its own civil service rules, argued it had the management right to revise its rules without needing to bargain with the union. PERC disagreed, ruling the City was bound by past practice, and could only add a physical agility test to its civil service rules after completing its RCW 41.56 bargaining obligation. *Id.* As a remedy, PERC ordered the City to refrain from using physical agility testing for future promotions until bargaining the issue with the union as required by RCW 41.56. *See also Snohomish County*, Decision 8852-A (PECB, 2007) (recognizing a binding past practice may exist with regard to civil service promotional lists).

Here, respondent's use of the Rule of 5 for promotional opportunities is an established past practice. For the past 15 years, respondent has consistently used the Rule of 5 for promotions. In *City of Spokane v. Spokane Civil Service Comm'n.*, 98 Wn. App. 574, 580 (1999), the court held that procedures governing promotional practices are mandatory subjects of bargaining that cannot be changed by the employer without bargaining with the union first. Thus, even without a provision in

the CBA that references the Rule of 5, respondent cannot unilaterally switch to a Rule of 1 or Rule of 3 without bargaining the issue first.

Appellant cites *Yakima v. Int'l Ass'n. of Firefighters*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991). Appellant's attempt to explain or distinguish the holding in is incomprehensible. In that case, the Court held that the city committed an unfair labor practice by not bargaining changes to the civil service commission rules when those changes governed mandatory subjects of bargaining. 117 Wn.2d at 673. Appellant appears to argue that because the Court never addressed in that case whether promotional practices were a mandatory subject of bargaining, other cases that did hold expressly that can be disregarded.

Appellant argues that the respondent adoption of Ordinance No. 674 changed a past practice on a mandatory subject of bargaining without bargaining. As referenced above, respondent had consistently used the Rule of 5 for hiring and promotion its police department for fourteen years when the Council passed Ordinance No. 674. After Ordinance No. 674 was passed, respondent continued to use the Rule of 5. What Ordinance No. 674 did was cure a conflict between Ordinance No. 328 on one side, and CBA Article 4.01, Civil Service Rule Section 10.6, and an established past practice on the other.

Here, respondent's use of the Rule of 5 for promotional

opportunities has been the *status quo* and meets the legal standard of a past practice because it has been consistent, known to the parties, and mutually accepted. Respondent therefore cannot deviate from the Rule of 5 until it bargains the issues with the LPIG, something that neither party has done. In sum, appellant cannot unilaterally change the Rule of 5, set forth in the civil service rules, because the City and LPIG bargained to use whatever is in the civil service rules to fill vacancies and promotions. The terms of the CBA has primacy over whatever Ordinance 328 says or, in this case, used to say.

**B. The Superior Court Correctly Dismissed Appellant's Claims Based on Breach of Contract and Promissory Estoppel.**

Appellant alleges that respondent is liable for a breach of contract and for promissory estoppel when it failed to promote him to the position of sergeant. Washington law has rejected both contract and estoppel claims in the context of a civil service commission dispute. In *Weber v. State*, 78 Wn. App. 607, 898 P.2d 345 (1995), plaintiff, a state employee covered by RCW 41.06, sued his government employer on breach of contract and estoppel theories, claiming that it had breached its contract to hire him at a particular pay rate, thereby causing him to leave his current employer to accept the position. When he arrived, he discovered that he was being paid at a lower rate than what he was expressly promised. He alleged that oral statements to him regarding his pay level could form the

basis for a breach of contract and estoppel claim. The court rejected both, stating as to the breach of contract claim: “In Washington, terms and conditions of public employment are controlled by statute, not by contract.” 78 Wn. App. at 610 (citing *Washington Fed’n. of State Employees v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984); *Greig v. Metzler*, 33 Wn. App. 223, 653 P.2d 1346). As to the estoppel claim, the court held:

However, just as contract law may not be used to circumvent the civil service law, neither may the doctrine of equitable estoppel. The court in *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) stated “courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. We agree.

*Id.* at 611.

Assuming Washington law did recognize either claim, both claims fail for separate reasons. Appellant has no contract with respondent that respondent is capable of breaching. Appellant does not identify any contract that is the basis for his breach of contract claim. The only potentially relevant contract is the CBA between respondent and LPIG. For three reasons, appellant is not a party to the CBA; only respondent and LPIG are parties that can claim breach. Second, the CBA sets forth a grievance procedure that is the exclusive recourse for alleged breaches.

Third, in the CBA, the parties agreed at Article 4.01 that “[v]acancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.” The Commission’s rules specify a Rule of 5.

As to the promissory estoppel claim, appellant does not even allege a clear and definite promise by respondent necessary to form the basis for this claim. *Peebles v. Rodland Toyota, Inc.*, 143 Wn. App. 1059 (2008) (*King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1984); *Shaw v. Housing Auth. Of City of Walla Walla*, 75 Wn. App. 755, 761, 880 P.2d 1006 (1994)). Appellant asserts that adoption of a merit based civil service system was a de facto promise to him that he would be promoted on the basis of merit, and that he relied upon this de facto promise when he remained employed by respondent. This is not an actionable promise that can be sued upon on a promissory estoppel claim. What appellant received, as “promised,” was a spot on the eligibility list for promotion based on his test scores. What appellant never received was a promise that he would be promoted simply because he was next on the list. Appellant expressly acknowledged this lack of a promise in his testimony. CP 95 at l. 22 to CP 96 at l. 12. Appellant also acknowledged that it was the practice of Chief Zaro and the police chiefs before him to skip over candidates on the list in favor of other candidates who had lower scores. CP 89 at l. 21 to CP 93 at l. 21. Appellant is not aware of any chief just

taking the candidate with the lowest number, and was never told that promotional recommendations were ever made that way. CP 94 at l. 16 to CP 94 at l. 12. Appellant's promissory estoppel claim fails because there was no promise that he would be promoted because he was next on the list. Nor is such a practice necessary for respondent to fulfill any commitment to a merit-based promotion system.

**C. The Superior Court Correctly Dismissed Appellant's Claims Based on Negligence.**

Appellant asserts that respondent is liable for negligence on two theories: (a) failing to enforce merit selection standards, and (b) failing to supervise the Commission and Chief Zaro and allowing them to bypass appellant for improper reasons. First, Washington law does not entertain negligence claims that are premised upon alleged violations of the civil service process. In *Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 237 (1998), plaintiff sued her former government employer in Superior Court for constructive discharge. Defendant argued that her common law claim was not cognizable because she was subject to civil service protections. The court agreed, stating:

If a discharge is wrongful because it constitutes a breach, the claimant generally must utilize the procedures and remedies incorporated within the contract (or, in the case of public employment, within the statutorily-controlled employment relationship), if such procedures were intended to be exclusive. Civil service employment is controlled by the civil service statutes as now existing or

hereafter amended, subject to Washington Constitution Article 1, Section 23. *The Legislature intended that those statutes and regulations to be the exclusive remedy for breach.* Accordingly, a claimant suing for breach of an employment relationship controlled by the civil service statutes and regulations must exhaust the procedures and remedies set forth herein.

92 Wn. App. at 263-64 (emphasis supplied).<sup>5</sup>

Second, appellant's claims of negligent supervision are taken out of the context in which negligent supervision claims are properly brought. The elements of a negligent supervision claim, as recognized in Washington, are (a) an employee acted outside the scope of his employment, (b) the employee presented a risk of harm to other employees, (c) the employer knew or should have known of the risk, and (d) the employer's failure to supervise was the proximate cause of injury to other employees. *Briggs v. Nova Services*, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006). Here, appellant alleges that Chief Zaro failed to make a merit-based decision when he did not select appellant over the other candidates in the top 5 on the eligibility list. Appellant's evidence that respondent did not operate a merit-based system is nothing more than the fact he was not recommended for promotion despite his greater over

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<sup>5</sup> The *Riccobono* court recognized an exception for claims alleging violations of the Washington Law Against Discrimination, RCW 49.60. 92 Wn. App. at 264. This exception is discussed below.

those who were. This is, pure and simple, not properly pursued as a negligence claim. Chief Zaro was acting within the scope of his employment when he chose who to recommend for promotion. This is instead a statutory claim that, for the reasons set forth below, Washington courts have wisely refused to entertain (lest they be deluged with candidates who were passed over and sincerely believe they were better qualified than the candidate who was selected).

Third, appellant's claims for negligence fail for the same reasons as his claim for breach of contract and promissory estoppel. Regardless of how appellant seeks to cloak this claim, in terms of statutory violations, contract violations, or negligence, there is no Washington court to date which has been willing to sift through the qualifications of the candidates who made the list and tell the decision maker which one he or she should have gotten the job or promotion. The strongest rejection of such claims came in the *Seattle Police Officers Guild* case, where the Court stated:

Lastly, [plaintiff] argues that even if the City's "rule of five" is permitted under RCW 41.12.010, the City was not entitled to summary judgment. But absent a claim of discrimination or similar unlawful hiring practices, [plaintiff's] allegation that the Chief unlawfully failed to promote him under the "rule of five" will never survive summary judgment. In each instance, he "would have joined at least four others on the list for each appointment, more where multiple positions were being reviewed." *Seattle Police Officers Guild*, 113 Wn. App. at 440. As the Court of Appeals aptly reasoned, Chief Stamper "could

*always* select one of the other candidates on the list.” *Id.* (emphasis added). Accordingly, the trial court properly granted summary judgment of dismissal.

151 Wn. 2d at 837. What the Court held is clear—if the decision maker chooses a candidate in the top 5, a claim premised on an allegation that another a candidate in the top 5 had “more merit” or deserved the position more “will never survive summary judgment.”

Similarly, in *Side v. City of Cheney*, 37 Wn. App. 199, 679 P.2d 402 (1984), a police officer sued after he was No. 1 on a list for sergeant and No. 3 on the list was promoted instead of him. Like appellant in this case, he asserted that he was more qualified (but had been passed over because he was a political opponent of the mayor’s). The Superior Court ruled in the employee’s favor. The Court of Appeals reversed, expressing unwillingness to delve into the decision-making process to determine who was the best qualified. The court stated:

When it forwarded the names of the top three candidates to the appointing authority, the Commission certified all three were qualified for the position of sergeant. The Mayor had the right, within legal limits, to appoint any one of the three candidates. A showing Officer Side received better evaluations or test results would not prove he was passed over for political reasons. Therefore, we hold the Commission did not abuse its discretion or improperly restrict cross examination when it denied Officer Side access to the files.

37 Wn. App. at 200.

Appellant’s breach of contract, promissory estoppel, and

negligence claims are attempts to make an end run around the settled law that courts will not weigh one Top 5 candidate's qualifications against another. His blanket assertion that respondent does not operate a merit-based selection system is meritless given the testimony and evidence that the Commission screens applicants for minimum experience and qualifications, tests to ensure that only qualified candidates receive a spot on the list, and then ensures that any candidate selected is within the top 5. These are the components of a merit-based selection system, and they were all present in here.

**D. The Superior Court Correctly Disregarded Appellant's Claims Based on Whistleblower Retaliation.**

Before addressing the substance of appellant's claims, respondent points out that appellant's brief attributes quotes to Chief Zaro that are so blatantly taken out of context that they can only be described as an attempt to mislead the court. For example, on page 1 of appellant's brief, appellant quotes Chief Zaro as commenting, "once a whistleblower, always a whistleblower," as if this status somehow motivated Chief Zaro not to promote appellant. Here is the actual testimony of Chief Zaro:

Q Is Jeremy Vahle a whistleblower?

A Well—

Mr. Bolasina: Objection, calls for a legal conclusion.

The witness: I don't know what the legal definition of that,

if once a whistleblower, always a whistleblower, but he certainly was in the Skeeter Manos case.

By Ms. Mell: And do you harbor any resentment over Officer Vahle's conduct related to that.

A Absolutely not.

CP 394 at l. 24 to CP 395 at l. 6. Appellant's counsel has structured her brief to make it very difficult to know what is actually in the record to support her factual assertions. The record, including appellant's own testimony, reveals no evidence that Chief Zaro was motivated by appellant's actual or alleged whistleblower activity.

Appellant cites facts regarding alleged retaliation in his complaint but does not make any claim for violation of RCW 49.60 or other antidiscrimination statutes. Appellant acknowledged at oral argument that she was not pursuing any claims for unlawful retaliation. Because appellant has not sought relief on a claim for unlawful retaliation, the Superior Court was correct in concluding that no such claim should be entertained.

If the court agrees to consider a claim for unlawful retaliation, appellant has factual and/or legal obstacles that are fatal to pursuing such a claim. There are three types of retaliation claims that appellant's allegations refer to. First, as recognized by *Seattle Police Officers Guild*, appellant may have a claim if he were passed over for promotion due to

“discrimination or similar unlawful hiring practices.” 151 Wn.2d at 839. RCW 49.60.210 protects employees who oppose practices that are in violation of Washington Law Against Discrimination, such as unlawful discrimination or harassment. Generally, in order to prove unlawful retaliation, plaintiff must prove that (a) he engaged in protected activity, (b) he suffered adverse consequence, and (c) the protected activity was a substantial factor in the decision not to promote him. *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991). Second, Washington has also recognized a common law right not be subjected to retaliation for engaging in union activity. However, this right is limited to claims for wrongful termination. *Smith v. Bates Tech. College*, 139 Wn.2d 793, 991 P.2d 1135 (2000). For other claims arising from alleged anti-union animus, appellant must litigate his claims before the Public Employment Relations Commission (“PERC”) through its administrative process before pursuing them in court. *Id.* Third, the Local Government Whistleblower Act, RCW 41.40, protects employees from suffering retaliation for their whistleblowing activity, though employees must adhere to the administrative process set forth in the statute when seeking relief. *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.2d 134 (2013), *review denied*, 177 Wn.2d 1018, 304 P.3d 114 (2013).

Appellant asserts that three incidents of protected activity resulted

in Chief Zaro not recommending him for promotion. The first involved a coworker named Skeeter Manos. In 2012, appellant came forward with information that resulted in the arrest and prosecution of Skeeter Manos. There is no evidence that appellant's alleged protected activity was causally connected to Chief Zaro's not recommending him for promotion. In fact, Chief Zaro was grateful for appellant's investigation and uncovering of information. Even if it were causally connected, appellant cannot pursue his claim in this court. By coming forward, appellant engaged in protected activity under the local government whistleblower protection act, RCW 42.41.040. On September 6, 2016, appellant filed a complaint with respondent under RCW 42.41.040 and asserted that he lost out on promotion due to his whistleblower actions involving Skeeter Manos. On October 5, 2016, Ms. McDougal issued her investigation report finding that no retaliation occurred. If appellant sought further relief on this claim, he was obligated to timely request a hearing to be conducted by an administrative law judge with the State's Office of Administrative Hearings. RCW 42.41.040(4). If appellant was unhappy with the results of the hearing, he could then seek judicial review. RCW 42.41.040(9). Appellant consciously forewent further proceedings available to him under Washington law. In a letter dated October 21, 2016, appellant wrote:

I filed a Whistleblower Retaliation complaint with Human Resources which was investigated by Mary McDougal. The investigation determined Whistleblower Retaliation was not the reason for my denial of promotion. I was provided notice of the finding on October 6, 2016 and today is the last day I am allowed to file for a hearing before an administrative law judge. I will not be requesting a hearing so this will be the end of that process.

CP 269.

In *Woodbury*, the court dismissed a claim from an employee who sought to pursue a whistleblower retaliation claim in superior court rather than through the process mandated by statute. The court stated:

The issue in those cases was whether the applicable statutory scheme could be considered an exclusive remedy that required dismissal of the plaintiff's wrongful discharge claims. But, *Woodbury* does not have an alternative claim. He does not have a common law tort claim, because there is no common law tort for disciplinary action less severe than termination. And, as already discussed, he does not have a claim under Washington's law against discrimination. *Woodbury* had a choice between accepting the decision of the mayor or requesting an administrative hearing. He did not have a choice between two distinct actions: one before an administrative law judge and one in Superior Court.

292 P.2d at 136 (internal citations omitted).

The second incident involved a former coworker named Phil Davis. In 2013, probationary officer Phil Davis, an African American officer, claimed race discrimination when he was being considered for termination for having a sexual relationship with an underage girl. The investigator, Kathy Weber, interviewed appellant, a Caucasian officer,

because he was disciplined less severely for pursuing a relationship with a domestic violence victim. When appellant spoke to Ms. Weber, he clearly stated his belief that the City did not commit race discrimination in its treatment of Off. Davis. Appellant then told Ms. Weber that the investigator assigned to investigate him regarding the domestic violence victim was overly harsh and aggressive while investigating appellant, and complained that the police department played favorites (for reasons other than race).

For three reasons, appellant's speaking to Ms. Weber as a witness in the Davis claim cannot be pursued as protective activity in this lawsuit. First, appellant did not engage in any oppositional activity under RCW 49.60.210 when he refuted Off. Davis' claim that race was a factor in his discipline. It is, of course, not opposition activity to support one's employer against an employee who is claiming unlawful discrimination. Second, there is no credible evidence that anyone involved in the 2016 promotional decisions affecting appellant had any idea what appellant had said to Ms. Weber as a witness in her investigation. Third, to the extent that appellant's complaints about his own harsh treatment or favoritism within the department meet the definition of whistleblowing activity protected by RCW 41.40, appellant cannot proceed with such a claim in superior court because he consciously decided, after receiving

Ms. McDougal's investigation report, not to pursue this claim in the forum Washington law made available to him. *Woodbury v. City of Seattle*, 292 P.2d at 136.

Third, appellant attempts to portray his wearing of pink shoes as union activity. As discussed above, absent a claim for wrongful termination, appellant is limited to administrative remedies through PERC if he believes he was denied promotion due to anti-union animus. *Smith v. Bates Tech. College*, 139 Wn.2d 793, 991 P.2d 1135 (2000). Moreover, no reasonable juror could conclude that appellant was engaged in protected activity. As appellant concedes, LPIG never raised the issue of a boot allowance as part of its negotiations; if there was an issue, it played out among the LPIG members and was never a dispute with management. More importantly, appellant's own testimony about the incident demonstrates what it really was. Appellant engaged in outrageous behavior to win a bet with a fellow officer. When he discussed the wearing of pink shoes with Chief Zaro, he stated his opinion that he could wear pink shoes because no policy prohibited wearing pink shoes. Based on advice appellant received and believed, he could also wear a single sandal after being directed not to wear sandals. Any reasonable person would conclude, as Chief Zaro did, that appellant has issues with exercising good judgment and is not the best candidate for a position in

leadership.

When making promotional recommendations off the 2016 list, Chief Zaro promoted four candidates on the list who had higher places on the list than appellant. Each of these candidates, like appellant, had been an officer with the department since it formed in 2004. Each of these four candidates had stellar performance histories and, unlike appellant, no disciplinary history as an employee. Appellant was not the only candidate skipped over, either on this list or on previous lists by Chief Zaro or previous chiefs. Chief Zaro recommended the promotion of these candidates because he believed they possessed the qualities and experience he was looking for in the position of sergeant. He did not consider appellant unqualified, but not as qualified as them for the positions he was filling. While appellant may feel indignation at not being selected, Chief Zaro's decision not to recommend him for promotion simply did not violate any of his legal rights.

**E. The Superior Court Correctly Dismissed Appellant's Claims Based on the Calculation of his Veteran's Preference Points.**

In its motion for partial summary judgment which was denied by the Superior Court, appellant sought declaratory judgment on whether the Commission properly calculated his veteran's preference points.

Appellant did not seek declaratory relief in his complaint on the proper manner to calculate veteran's preference points. The Superior Court heard

no oral argument on this issue before denying appellant's motion for partial summary judgment. It is respondent's position that this issue is not properly before this court.

If the court considers this claim, it is respondent's position that appellant's veteran's preference points were calculated correctly. The Commission added an additional 5% percent to appellant's score. Appellant asserts that the Commission should have added an additional five points. To illustrate the difference, if appellant's score was 80 points prior to the addition of veteran's preference points, appellant asserts that he should have had a final score of 85 points (80 plus 5); the Commission would give him a final score of 84 points (80 + 5%).<sup>6</sup>

RCW 41.04.010 provides, in relevant part:

In all competitive examinations . . . to determine the qualifications of applicants for public offices . . . all municipal corporations . . . shall give a scoring criteria status to all veterans as . . . 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**

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<sup>6</sup> Respondent notes that the difference in how appellant's points were calculated would not have impacted the outcome here. With the final score he was given by the Commission, appellant was always in the top 5 and eligible to be selected each time a sergeant's position became available. This is not a case where the final score, as calculated by appellant, would make him eligible for promotion when he otherwise was not eligible.

***percentage shall be added*** to promotional examinations until the first promotion only.

(Emphasis supplied). As described above, Ms. Pandrea added an additional 5% rather than 5 points based on her reading of the statutory language, her research on the Municipal Research and Services Center website, and her calls to other cities to see how they were calculating the veteran's preference.

Respondent could find no case law that addresses how the calculation should be made. This appears to be an issue of first impression for the court. However, when interpreting a statute, the court first attempts to effectuate the plain meaning of the words used by the legislature, examining each provision in relation to others in search of a consistent construction of the whole. *Advanced Silicon v. Grant County*, 156 Wn.2d 84, 89-90, 123 P.3d 294 (2005). The court should consult outside sources and apply the rules of statutory construction only if the statute is ambiguous, meaning that it is susceptible to more than one reasonable interpretation. *State Dept. of Trans. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982); *Harmon v. Dept. of Soc. and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

Here, the statutory language is not ambiguous. The legislature directed that veterans shall receive an additional five *percent* and that "the

*percentage* shall be added to promotional examinations . . . .” According to the Oxford English dictionary, percentage means “any proportion or share in relation to a whole.” What the statute clearly requires is that a 5% proportion be added to the applicant’s score. If respondent’s interpretation were correct, the legislature would have substituted the term “points” for “percent” and “percentage” throughout. The statutory reference to “based upon a possible rating of one hundred points as perfect” defines how the percentage calculation is to be made; it does not transform the percentage calculation into a set amount of points regardless of the veteran’s score. If the court addresses this issue, respondent asks that the court declare that the Commission’s calculation was correct.

#### IV. CONCLUSION

For the foregoing reasons, respondent requests that the Court of Appeals affirm the orders of the Superior Court.

DATED this 23<sup>rd</sup> day of August, 2019.

Respectfully submitted,

SUMMIT LAW GROUP PLLC  
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**CERTIFICATE OF SERVICE**

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

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