

FILED
Court of Appeals
Division II
State of Washington
10/23/2019 3:05 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 OFFICER VAHLE'S REPLY BRIEF

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I. SUMMARY OF REPLY

Lakewood does not have a merit system for civil service promotions and it calculates veteran's preference points incorrectly. Officer Vahle asks this Court to fix those problems, and reinstate his damages claims so Lakewood may properly promote and compensate him.

Lakewood's Rule of Three ordinance should have meant Rule of Five was unenforceable because the rule was promulgated in excess of the Commission's authority. Despite the requisite Rule of Three certification standard in code, Chief Zaro promoted his favorites using Rule of Five from a list of merely eight eligibles without correction. Lakewood clings unconvincingly to the City Council's pro forma approval of the LPIG CBA as its legislative authority for Rule of Five. But, Rule of Five and civil service merit standards were never referenced in the CBA and Lakewood did not expressly overrule Rule of Three by its pro forma approval of the CBA. Lakewood attempted to reconcile this problem, but did so ineffectively. After bypassing Officer Vahle repeatedly, Lakewood expressly repealed Rule of Three by Ordinance without codifying Rule of

Five or sufficient eligibility lists. Now Lakewood has no legislative authority to use Rule of Five, yet continues to defer to it anyway.

Lakewood explains it “wanted the police chief to be able to recommend candidates based on attributes that were important to success but would not be reflected in the testing process”, which evidences its disregard of merit standards. By design, a merit testing process for promotion ranks objectively the top candidates for selection, but Lakewood did nothing to perfect its process and instead allowed promotion of popular choices regardless of rank. Rule of Five only works as a merit selection standard where the municipality has a list of at least 20 eligible candidates, and does not work where there is a short list of candidates.

Lakewood’s disregard of civil service and improper veterans’ preference calculations must be corrected. The trial court’s order of dismissal should be reversed. This Court should prohibit Lakewood’s use of Rule of Five, require Veterans’ percentages to be based on total points, and remand the damages claims to the trial court for adjudication on the merits.

II. FACTS

Lakewood's 2003 civil service enabling Ordinance 328 included a Rule of Three certification requirement, and expressly limited its commission's authority to adopt rules different from that standard.¹ In its brief, Lakewood gives short shrift to this substantive element of Lakewood's Civil Service enabling act.² Instead, Lakewood highlights its Civil Service Commission's Rule 10.6 on certification that references Rule of Five.³ While Rule of Five does appear in rule, Lakewood never produced any proof of an affirmative vote by the Commission formally and effectively adopting Rule of Five.⁴ Thus, there is no record that Rule of Five was ever adequately adopted even by Lakewood's Civil Service Commission to have any binding effect. The Commission never knew

¹ CP 435 (Ordinance 328, see at Appendix A), LMC 2.10.090.

² Resp. Br. at 4.

³ CP 469 (Civil Service Rules, see at Appendix D).

⁴ Lakewood relied solely on the Declaration of Mary Pandrea who was not present in 2004 and who attached a copy of current rules, not the rules in the form originally adopted. Lakewood never offered any meeting minutes. Officer Vahle produced meeting minutes he obtained from State Archives that do not reflect adoption of any specific rules. CP 604-605; CP 632 (Commission 01/23/04 Minutes "rule of all was agreed to...")(The minutes reflect discussion of draft rules and no motion for adoption or vote); 630-631 (Commission 1/16/04 Minutes)(Draft rules discussed); CP 636 - 637 (Commission 3/04/04 Minutes)("Rule of All" discussion, "defer any recommended modifications to the CSC Rules until the next meeting..."). Officer Vahle also produced a copy of what is purportedly the Civil Service Rules from 2004, obtained from State Archives. CP 763 with Rule 10.3 on "Certification" at CP 788 that have no signatures indicating formal adoption. See at Appendix C.

about the Rule of Three ordinance when proposing its Rule of Five.⁵ Lakewood's enforcement of Rule of Five over Rule of Three was inconsistent with the ordinance and with civil service rules that limited the authority of the Civil Service Commission to conform with local and state laws.⁶

Meeting minutes indicate that the earliest version of the Civil Service Rules, whether formally adopted or not, initially authorized Rule of All with a delayed effective date for Rule of Five:

“10.3.2 NUMBER. 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.”⁷

Rule of Five was not the procedure used to staff the department, and was not a consistent past practice.⁸ The Commission actually opted to disregard all merit selection standards when staffing the department.⁹

⁵ CP 263 (Pandrea Dec.).

⁶ CP 765 (2004 Rules) & CP 440 (Current Rules)(“1.1 The rules are promulgated under the authority granted by Chapter 41.12 RCW, Civil Service for City Police, and City ordinance.” and “1.2 SCOPE AND PURPOSE. These rules govern the continuing administration of the Civil Service System of the City of Lakewood. Their purpose is to assume that the Police Civil Service System is administered in accordance with all applicable laws, ordinances and policies ...”).

⁷ CP 788 (2004 Rules).

⁸ CP 631 (Commission 1/30/04 Mtg. Minutes).

⁹ *Id.*

Lakewood prevailed upon the trial court and now attempts again on appeal to perpetuate non-merit promotions because the only certification standards Lakewood has are those the Commission opts to follow since the Council repealed Rule of Three in October of 2017.¹⁰ The State Legislature has never repealed Rule of One and certification standards that “substantially accomplish” merit promotions are a legislative mandate.¹¹ Lakewood argues predominately under the *Seattle* case that it does not have to prove it has a merit system so long as Rule of Five is the standard, even where there is no legislative approval of that certification standard.¹² Under the *Seattle* rationale, Rule of Five only works where a municipality has a list of at least twenty eligible candidates, otherwise a selection from more than twenty-five percent is per se not a merit system.¹³ There is simply too much room for subjective discretion where the Chief can pick

¹⁰ CP 486 - 489 (Ord. 674); RP 03/15/19 at 39; Resp. Br. at 21.

¹¹ RCW 41.12.100.

¹² Resp. Br.

¹³ *Seattle Police Officers Guild v. City of Seattle*, 113 Wn. App. 431, 439, 53 P.3d 1036 (2002); *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 839, 92 P.3d 243 (2004).

his known favorites or bypass a candidate like Officer Vahle for the wrong reasons.¹⁴

Lakewood points out the City Council approved multiple CBAs citing to a provision deep within the contract: “Vacancies shall be filled and promotions made in accordance with Lakewood Civil Service Rules.”¹⁵ Lakewood then characterized the CBA approval as a legislative override of Rule of Three even though Lakewood admits LPIG, the Chief, Commission, and the Council did not know about the discrepancy.¹⁶ The Council did not knowingly repeal Rule of Three until Ordinance 674 after the Chief bypassed Officer Vahle multiple times and requested a new list of eligibles.¹⁷ Presumably, every time Lakewood’s Councilmembers approved the CBA they expected the Commissions’ Rules to conform with its code and legislative findings. Lakewood offered no evidence that its Council repealed Rule of Three in favor of Rule of Five. When Lakewood finally repealed Rule of Three in Ordinance 674, Lakewood did not

¹⁴ See *Dissent, Seattle Police Officers Guild*, 151 Wn.2d at 841. See also, CP 508, Pandrea deposition explaining how Chief Zaro asked her to create a new list when Officer Vahle was on the list as one of three candidates because he was not satisfied with his choices.

¹⁵ CP 691 (2016 CBA).

¹⁶ CP 123 (Zaro Dec.); CP 311 (Boyd Dec.); CP 832, 856 - 860 (Vahle Decs.).

¹⁷ CP 36 (Answer) and CP 508.

approve Rule of Five.¹⁸ There are no legislative findings that Rule of Five substantially accomplished merit promotions in Lakewood. In every instance with Officer Vahle, Chief Zaro bypassed him while Lakewood's code reflected Council's decision that Rule of Three, not Five, substantially accomplished merit promotions in conformance with State statute.¹⁹

In the *Seattle* case, the complaining officer did not know why the Chief would not promote him.²⁰ Here, Lakewood claims Chief Zaro made no unlawful promotion decisions and held no personal biases.²¹ The record does not support its characterization. Chief Zaro bypassed Officer Vahle for reasons related to his protected status and activities.²²

Chief Zaro complained that Officer Vahle had a "situational ethics issue", meaning Officer Vahle waited until the Rule of Five adversely effected him and then filed a lawsuit.²³ Obviously, Officer Vahle had no

¹⁸ CP 488 (Ord. 674, see at Appendix B).

¹⁹ LMC 2.10.090, CP 488 (Ord. 674).

²⁰ *Seattle Police Officers Guild*, 151 Wn.2d at 828.

²¹ Resp. Br. at 47,

²² CP 327 (Vahle Dec.); CP 559 - 565 (Estes Dec.); CP 566 - 570 (Moore Dec.) ; CP 571-576 (McClelland Dec.).

²³ CP 100-101 (Zaro Dep.).

standing to challenge Rule of Five until it was used against him in contravention to code.

Apparently, Chief Zaro expected Officer Vahle to exercise “some discretion in the amount of topics you take on for a big fight.”²⁴ He wanted him to “choose his battles”.²⁵ Chief Zaro admits one reason for bypassing Officer Vahle was his decision to wear pink shoes, which related to Vahle’s playful efforts to challenge the absence of a footwear allowance.²⁶ Chief Zaro also thought Officer Vahle’s advocacy as Guild President was overzealous. As one example, Zaro said Officer Vahle should not have grieved a guild member’s discipline regarding smoking.²⁷ Additionally, Chief Zaro knew Officer Vahle to be an unpopular whistleblower: “once a whistleblower always a whistleblower” for revealing theft of charitable funds by an officer.²⁸ He was also a witness to a discrimination complaint.²⁹ Chief Zaro complained that Officer

²⁴ CP 116 (Zaro Dep.).

²⁵ CP 116 (Zaro Dep.).

²⁶ CP 56 - 61 (Zaro Dep.).

²⁷ CP 117 (Zaro Dep.).

²⁸ CP 198 - 199 (Zaro Dep.).

²⁹ CP 32 (Answer).

Vahle's military background made him too "black-and-white" regarding rules.³⁰

As to Officer Vahle's actual performance, Chief Zaro testified that Officer Vahle "does great patrol work" and handled some "very complicated incidents, to include a train derailment, and he's performed exceptionally well."³¹ According to Chief Zaro, Officer Vahle always performed "at or above standard."³² His performance evaluations and awards show he was an effective leader who knew how to exercise good judgment.³³ This included reporting his own mistakes and accepting disciplinary action in a situation where he gave a ride to a domestic violence victim that upset her alleged abuser.³⁴ Prior to Officer Vahle challenging Lakewood's civil service violations, his employment history was nearly pristine. Since filing, Chief Zaro has written up Officer Vahle repeatedly for nonsense complaints.³⁵ Chief Zaro can effectively lower an officer's rank for promotion by formalizing complaints against the officer,

³⁰ CP 125 - 131 (Zaro Dep.).

³¹ CP 147 -148 (Zaro Dep.).

³² CP 148 (Zaro Dep.), CP 398 - 428 (Performance Evaluations).

³³ CP 398 - 428 (Performance Evaluations); CP 822 - 824.

³⁴ CP 826 (Vahle Dec.)

³⁵ CP 826 - 827 (Vahle Dec.)

while refusing write-ups or formal action on his favored candidates, which was his reputation.³⁶

All of the officers Chief Zaro promoted had histories of far more egregious behavior than Lakewood attributes to Officer Vahle.³⁷ And, none of them engaged in the kind of oppositional protected activities that Officer Vahle engaged in.

Lakewood attempts to put a favorable spin on Chief Zaro's self-serving criticisms of Officer Vahle, but Officer Vahle disputes the characterization of the Chief's rationale as proper, leaving issues of fact for trial on the damages theories of this case.

Lakewood incorrectly frames Officer Vahle's case as one where he contends he was a "better candidate" and entitled to be promoted over others.³⁸ While he was a well qualified candidate, Officer Vahle's actionable criticisms are that Chief Zaro bypassed him for his protected activities, and Lakewood allowed Zaro to disregard established and promised merit standards, specifically Rule of Three that would have

³⁶ CP 327 (Vahle Dec.); CP 559 - 565 (Estes Dec.); CP 566 - 570 (Moore Dec.) ; CP 571-576 (McClelland Dec.).

³⁷ CP 828 - 829 (Vahle Dec.).

³⁸ Resp. Br. at 8.

resulted in his promotion if followed. Chief Zaro could not have selected those officers ranked 5 and 6 before selecting the next promotion from officers ranked 2 or 3 but he did just that. Officer Vahle ranked 2.³⁹ Chief Zaro did not use Rule of Three when Rule of Three was mandated by Ordinance, and the fact that Rule of Five was in the civil service rules did not resolve the discrepancy, nor did the Council's approval of the CBA.

Lakewood should have enforced Rule of Three because Lakewood never authorized the Civil Service Commission to set its own certification standard in contravention to local code. Despite the apparent controlling Rule of Three in ordinance, Lakewood ignored Officer Vahle's complaint and refused him any administrative remedy on jurisdictional grounds: "[t]he Civil Service Board jurisdiction does not extend to the alleged violations of City policy."⁴⁰ His only available relief was judicially. The trial court erred when dismissing this case.

III. ARGUMENT

A. Lakewood's Non-Merit System Violated Civil Service

³⁹ CP 430 (Eligibility List).

⁴⁰ CP 497 (Vahle Complaint); CP 609 (10/26/16 Pandrea Ltr. to Off. Vahle), CP 34 (Answer at 3.59).

Lakewood fails to recognize favoritism by its City officials violates civil service and is impermissible.⁴¹ Lakewood's success in this matter depends upon this Court upholding Rule of Five in the face of a local ordinance mandating Rule of Three and the state mandating Rule of One and where the Chief's reasons for not promoting Officer Vahle were impermissibly based on his protected activities. The single case Lakewood relied upon, *Seattle Police Officers Guild v. City of Seattle*, does not favor Lakewood:

“[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 certifications systems that wholly ignore legislative limitations.”⁴²

This Court may not endorse Rule of Five in a local jurisdiction that expressly provided that Rule of Three or less than 15% of eligibles was required to “substantially accomplish” the purposes of state mandated

⁴¹ “[i]n essence, the civil service system was designated to replace the spoils system with a merit system” *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d at 831, citing *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 664, 818 P.2d 1076 (1991); *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.”).

⁴² *Seattle Police Officer's Guild*, 151 Wn.2d at Ftnt. 18.

civil service for local law enforcement.⁴³ Lakewood’s civil service ordinance should have been controlling and enforced because it was approved legislatively:

“The 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.⁴⁴

Where a City prescribes the method of appointment of employees by ordinance, the ordinance is exclusive and must be observed by the civil service commission.⁴⁵

Certification requirements are a “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 the the legislature’s “benchmark” when considering whether cities’ civil service ordinances have accomplished this purpose.”⁴⁶

Lakewood digresses claiming a pre-emptive effect of its CBA even though merit certification standards like Rule of Three are not a mandatory subject of collective bargaining. Lakewood fails to identify any case

⁴³ LMC 2.10.090, CP 488 (Ord. 674).

⁴⁴ *State ex rel. Swartout v. Civil Service Commission of City of Spokane*, 25 Wn. App. 174, 179, 605 P.2d 796 (1980); *State ex rel. Olson v. City of Seattle*, 7 Wn.2d 379, 384, 110 P.2d 159 (1941); *See, Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008) (An agency does not have the power to promulgate rules that amend or change legislative enactments.).

⁴⁵ *Larson v. Civil Service Com’n of City of Everett*, 175 Wn. 687, 28 P.2d 289 (1934).

⁴⁶ *Seattle Police Officers Guild*, 151 Wn.2d at 837.

holding certification standards like Rule of Three are a mandatory subject of collective bargaining. Rule of One is the statutory standard per state statute. The collective bargaining statutes do not identify certification standards as a mandatory subject of collective bargaining and there are no PERC decisions holding certification standards are a mandatory subject of collective bargaining.⁴⁷ Rule of One, Three, or Five is a non-waivable non-negotiable legislative dictate, like “just cause” or minimum wages, that provides a floor below which the parties may not negotiate. Certification standards do not equate to non-statutory promotional procedures that may be mandatory subjects of collective bargaining.

In practice, Lakewood never collectively bargained Rule of Three or Rule of Five, and did not treat certification standards as negotiable. In fact, Lakewood passed Ordinance 674, repealing Rule of Three without collective bargaining, indicating the merit standard was not the subject of mandatory collective bargaining or Lakewood would have been required to give LPIG notice of the proposed repeal, but it did not.⁴⁸ In Ordinance 674, Lakewood did not substitute Rule of Five for its Rule of Three, but

⁴⁷ RCW 41.56.

⁴⁸ CP 832 (Vahle Dec.).

rather impermissibly delegated its legislative function to the Commission without setting any certification standard. The Commission now purportedly has the power to revert to Rule of ALL, the non - merit standard it applied when creating its department.

Lakewood's preemption or "primacy" argument disregards Civil Service Rules that expressly prohibited action by the Commission that conflicted with Ordinance.⁴⁹ By its own rules, the Commission acted beyond the scope of its authority when permitting Rule of Five by rule where local ordinance dictated Rule of Three. Lakewood may not ignore the Commission's conduct in excess of its authority.

If the Commission had no power to act, Lakewood could not cure the Commission's improper conduct after the fact or retroactively through general approval of a CBA that was silent about the conflict. An ordinance may not be repealed nor superceded without an express intent to do so.⁵⁰ Implied repeals are disfavored.⁵¹ Lakewood ignored the cases cited by Officer Vahle, and failed to explain how the CBA was an express

⁴⁹ CP 440 (Civil Service Rules Authority and Scope).

⁵⁰ See App. Br. at 28, citing *Copeland Lumber Co. v. Wilkins*, 75 Wn.2d 940, 454 P.2d 821 (1969) and *Anderson v. O'Brien*, 84 Wn.2d 64, 524 P.2d 390 (1974).

⁵¹ *Gross v. City of Lynnwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978).

repeal of Rule of Three. Per the plain language of the CBA that makes no reference to the conflict, the purported repeal by CBA was not express, and had no pre-emptive effect.

B. Rule of Five Promotions From A Short List Not Merit Selection

Under the *Seattle* case where a local jurisdiction has legislatively adopted a Rule of Five standard, the courts will consider that standard to “substantially accomplish civil service” where use of such a standard has not resulted in favoritism nor selection from less than 25% of eligible candidates. The *Seattle* court was very clear that there was no evidence in that case about improper reasons for bypassing the complainant for promotion; he did not know why he was not promoted. The court did hold that selection of candidates from more than 25% of eligible candidates was not a merit decision.

Lakewood insists Officer Vahle is mistaken to link the percentage standard with Rule of Five. The Supreme Court upheld Rule of Five as a merit standard while affirming that twenty-five percent of eligibles was not a merit standard. The two standards must be analyzed together not distinctly to accomplish merit promotions.

A distinguishing factual point from the *Seattle* case is that the Supreme Court was not deciding that Seattle could promote from a list of five eligibles where there were only eight qualified candidates like this Court must consider. The *Seattle* facts were such that Rule of Five in Seattle involved a list of presumably more than twenty eligible candidates where certification of five names was within 25% of the eligible list. Here Rule of Five violated the ordinance, and selection from five of its eight total candidates far exceeded 25% of the eligibles. Zaro picked from 71% of the candidates when he picked No. 6, and from 63% when he picked No. 5. The only way Rule of Five could possibly meet merit standards would be in those situations like in Seattle where the list of eligibles included more than twenty candidates. Reading the criteria together, and applying the opinion in its entirety is the only way to uphold a uniform merit standard, which the trial court failed to do. The negative implication of the trial court's decision is that merit may be dispensed with entirely by using short lists. Lakewood's Chief then can promote his favorites, which was exactly what he has been doing.

The ramifications of favoritism should not be taken lightly by this Court. Chief Zaro's first pick for promotion was his co-defendant from the *Thomas* case wherein the court upheld a multi-million dollar wrongful death verdict against Zaro and his number one candidate.⁵² Officer Vahle had no such negative history of deadly and unjustified use of force violations during his long tenure with the department.

Chief Zaro knew everyone on the list and was intentionally bypassing Officer Vahle for impermissible reasons, which is the actionable offense in addition to disregarding Rule of Three. In face of the conflict between ordinance and rule, Lakewood did nothing to ensure that its officers qualified for promotional opportunities based upon their performance on the civil service exam. Instead, it repealed its Rule of Three after the fact, delegating exclusive authority to its Civil Service Board purportedly retroactively to follow whatever standards it chose to enforce or promulgate.⁵³ Lakewood knew by past practice this included staffing the entire department using Rule of ALL historically.⁵⁴ The Civil

⁵² *Thomas v. Cannon*, 289 F.Supp. 3d 1182 (W.D. Wash. Jan. 30, 2018).

⁵³ The Court in *Seattle* explained that the City's system "ensures that officers qualify for promotional opportunities based on their performance on the civil service exam." *Seattle*, 151 Wn.2d at 834.

⁵⁴ CP 830-831 (Vahle Dec.).

Service Commission and Lakewood never consistently enforced its own rules, including Rule of Five.⁵⁵ Exam performance or merit became secondary to serving at the pleasure of the Chief who was selecting from a certified list that was not limited to the top three candidates. His list was not even limited to the top five candidates. Chief Zaro picked from a list of eight in 2016 that included all candidates who passed the test.

The trial court erred when adopting Lakewood's faulty expansion of the holding in *Seattle* to this case. Lakewood parsed the opinion for verbiage it favored while ignoring the substantive merits of the decision. Importantly, the only legislative authority for Rule of Five came from state statutory standards allowing Rule of Six since repealed.⁵⁶ Thus, the *Seattle* case is not on all fours here now where there is no legislative authority for any certification standards, including Rule of Five.

Lakewood argues erroneously that the Supreme Court's holding in the *Seattle* case binds all Cities for all times under all set of facts.⁵⁷ Not so, legally nor factually. There is no collateral estoppel effect on non-

⁵⁵ CP 859 (Vahle Dec.) and CP 828 (Vahle Dec.).

⁵⁶ CP 491; SHB 1268 (2002); 2002 c 354 Sec. 203.

⁵⁷ Resp. Br. at 21.

parties.⁵⁸ And, there is no estoppel where a determinative issue was not litigated in the prior proceeding. In *Seattle*, the Supreme Court considered a legislatively adopted Rule of Five where the list was large, not Rule of Three, and there was no conflict between ordinance and rule. This case presents circumstances post repeal of the State’s rule of six standard that necessitates reconsideration of Rule of Five that conflicted with the City’s own ordinance in the context of a smaller jurisdiction using a short list.

C. Lakewood’s Erroneous Veteran’s Calculation

Officer Vahle argues for a Veteran’s calculation that uniformly advantages all Veterans equally like the federal standard.⁵⁹ Lakewood discriminated among veterans by calculating the percentage using individual test scores rather than the total possible points. Lakewood’s interpretation does not comport with the plain language of the statute. RCW 41.04.010 requires “all veterans” receive 5% of 100 points, or whatever the maximum points are for the examination. This percentage is added to the exam score so that each veteran receives the same percentage.

⁵⁸ *Beagles v. Seattle First Nat. Bank*, 25 Wn. App. 925, 610 P.2d 962 (1980); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992).

⁵⁹ 5 U.S.C. § 3309; <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/>; <https://www.military.com/benefits/veteran-benefits/veterans-employment-preference-points.html>; <https://www.fedshirevets.gov/job-seekers/veterans-preference/#content>.

All veterans should be equally advantaged.⁶⁰ The correct calculation for veterans' preferences is 5% of the total possible points, 5 where possible points total 100 or 10 where possible points total 200, etc.

D. Breach of Contract and Negligence Claims Must Be Tried

On summary judgment the facts must be interpreted in Officer Vahle's favor.⁶¹ The facts in dispute precluded dismissal.

With regard to breach of contract, Lakewood promised Officer Vahle promotion based on merit. Lakewood disregarded its express promises that he would be selected for promotion from a list of three. And, Lakewood allowed the Chief to bypass Officer Vahle for impermissible reasons that violated his protected rights. Chief Zaro's improper animus is at issue and must be resolved by the trier of fact on the record.⁶² Lakewood's specific promises of merit promotion are enforceable in contract through specific performance or damages.⁶³ Whether or not Lakewood performed and whether not it could cure its

⁶⁰ https://www.eeoc.gov/policy/docs/veterans_preference.html

⁶¹ *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001).

⁶² *City of Vancouver v. State Public Employment Relations Com'n*, 180 Wn. App. 333, 325 P.3d 213 (2014); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 864 P.2d 937 (1994).

⁶³ *DC Farms, LLC v. Conagrra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 317 P.3d 543 (2014).

failed performance are issues of fact for a jury.⁶⁴ Lakewood has not shown that Chief Zaro could have promoted others despite the breach. In round two, Officer Vahle should have been the only choice because any other choice on that short list would have resulted in a non-merit decision from more than 25% of eligibles.

With regard to Lakewood's negligence, Lakewood not only failed to use Rule of Three, but Lakewood allowed its Civil Service Commission to use Rule of All and Rule of Five in excess of the Commission's authority. And, Lakewood failed to curtail Chief Zaro's animus towards Officer Vahle's protected activities. Whether an employer engages in adverse employment actions is a question for the jury.⁶⁵ This Court may not decide Chief Zaro's motivations were proper, despite the substantive imperfections in the process, without invading the province of the jury. This is not a dispute about Officer Vahle's superior credentials, but rather Lakewood's failure to fulfill its statutory duties regarding merit promotions. According to the excerpted citation from the *Seattle* case included in Lakewood's brief, a failure to promote for impermissible

⁶⁴ *Id.*

⁶⁵ *Boyd v. State, DSHS*, 187 Wn. App. 1, 349 P.3d 864 (2015).

reasons is actionable.⁶⁶ Lakewood is incorrect when claiming retaliation for engaging in union activities must be pursued as a grievance or through PERC. An employee may pursue alternative theories like negligence outside of PERC.⁶⁷ The Civil Service Commission refused to hear his claims administratively, leaving him no alternative remedies. Genuine issues of material fact preclude summary judgment on the damages claims.

E. Lakewood's Arguments On Claims Not Pled Should Be Ignored

Lakewood criticizes Officer Vahle's choice of damages remedies, suggesting other theories are more apt while arguing such theories are nonetheless unsupportable. Lakewood's violations of merit standards wherein Chief Zaro failed to promote Officer Vahle for impermissible reasons may be actionable in contract or negligence. Lakewood has not cited any authority to the contrary. Officer Vahle selected breach of contract and negligence as his damage theories, not discrimination under RCW 49.60 and not whistleblower retaliation under RCW 42.41.

⁶⁶ Lakewood's Resp. Br. at 38, citing *Seattle*, "But absent a claim of discrimination or similar unlawful hiring practices..." Here there are specific allegations that Chief Zaro had an impermissible animus towards Officer Vahle based upon his protected activities.

⁶⁷ *Billings v Town of Steilacoom*, 2 Wn. App. 2d 1, 408 P.3d 1123 (2017).

Lakewood's analysis of these two other statutory claims that were never pled should be disregarded as superfluous.

IV. CONCLUSION

For the reasons set forth above, the trial court's order of dismissal should be reversed, and Officer Vahle's damages claims remanded to the trial court. This Court should enter an order declaring Lakewood's use of Rule of Five improper and enjoining Lakewood from future use of Rule of Five improperly and from miscalculating veteran's preferences.

Dated this 23rd day of October, 2019 at Fircrest, WA.

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 23rd day of October, 2019, I caused to be filed and served true and correct copies of the above Appellant Vahle's Reply Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service:

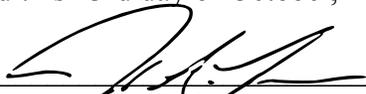
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Original E-filed with:
Washington State Court of Appeals: Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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

Dated this 23rd day of October, 2019 at Fircrest, WA.



Joseph A. Fonseca, Paralegal

APPENDIX A

commissioner resides.

02.10.040 Terms.

The term of office of the commissioners shall be for six years, except that the first three commissioners shall be appointed for different terms, as follows: One to serve for a period of two years, one to serve for a period of four years, one to serve for a period of six years.

02.10.050 Removal.

Any commissioner or alternate commissioner may be removed from office for incompetency, incompatibility, dereliction of duty, malfeasance in office, or other good cause; provided, however, that no commissioner or alternate commissioner shall be removed until (1) charges have been filed, in writing; (2) the commissioner or alternate commissioner has been personally served with a written notice of charges against him or her and with a notice of hearing; and (3) after a full hearing has been convened before the Lakewood city council. The charging party in all such actions shall be the city manager. Should any commissioner or alternate commissioner resign from, or be removed from office, then the city manager shall appoint a successor to that position for the remainder of the unexpired term.

02.10.060 Proceedings - Quorum.

(a) Two commissioners shall constitute a quorum and the votes of two commissioners shall be sufficient for the decision of all matters and the transaction of all business to be decided or transacted by the commission.

(b) Alternate commissioners shall have the right to participate in the debate and the deliberations of the commission on the regular business of the commission. Alternate commissioners shall not be part of the commission quorum and shall not move action or vote on matters coming before the commission, except as provided in subsection (c) of this section.

(c) In the event a commissioner is disqualified from participation or otherwise unable to participate in a hearing on employee discipline, an alternate commissioner shall be appointed by the commission chair to serve in the place of the absent commissioner. The alternate commissioner shall be entitled to participate fully in such proceedings, and is authorized to vote on the action before the commission.

02.10.070 General powers and duties.

The commission shall have the powers and duties as set forth in Chapter 41.12 RCW, except as provided herein. The commissioners shall devote due time and attention to the performance of their specified duties.

02.10.080 Secretary-chief examiner.

The secretary-chief examiner authorized by RCW 41.12.040 shall be appointed by the commission from among qualified city employees selected and recommended by the city manager.

02.10.090 Rules and regulations.

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 a certification rule of three eligible persons or 15 percent of the eligible persons, whichever is greater, notwithstanding RCW 41.12.100. The commission shall also have the power to make rules and regulations governing the commission in the conduct of its meetings and any other matter over which it has authority. In promotional testing the commission shall not grant service credit or priority for length of service in city employment.

Section 2. Severability. If any portion of this Ordinance or its application to any person or circumstances is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances shall not be affected.

Section 3. Effective Date. That this Ordinance shall be in full force and effect five (5) days after publication of the Ordinance Summary.

APPENDIX B

Should any commissioner or alternate commissioner resign from, or be removed from office, then the city manager shall appoint a successor to that position for the remainder of the unexpired term.

~~2.10.060 Proceedings—Quorum.~~

~~a. Two commissioners shall constitute a quorum and the votes of two commissioners shall be sufficient for the decision of all matters and the transaction of all business to be decided or transacted by the commission.~~

~~b. Alternate commissioners shall have the right to participate in the debate and the deliberations of the commission on the regular business of the commission. Alternate commissioners shall not be part of the commission quorum and shall not move action or vote on matters coming before the commission, except as provided in subsection (c) of this section.~~

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Section 2. Severability. If any portion of this Ordinance or its application to any person or circumstances is held invalid, the remainder of the Ordinance or the application of the

EXHIBIT C

10. CERTIFICATION AND APPOINTMENT.
- 10.1 **GENERAL PROVISIONS.** Vacancies in the classified Civil Service are filled by temporary appointment, reinstatement, promotional appointment, assignment, original appointment, transfer, reduction, or demotion. In the absence of an appropriate register, the Secretary may authorize a provisional appointment.
- 10.2 **REQUEST FOR CERTIFICATION.** Whenever the Appointing Authority wishes to fill a vacancy, it submits a request for certification to the Secretary. **The request shall show the number of positions or vacancies to be filled and the class title.**
- 10.3 **CERTIFICATION**
- 10.3.1 **ELIGIBLE REGISTER.** Certification to fill a vacancy is made by the Civil service from the register available for the position.
- 10.3.2 **NUMBER.** 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.
- 10.3.3 **MULTIPLE VACANCIES.** If two or more vacancies are to be filled, all vacancies are filled from the list certified by the Secretary of all available eligibles, through December 31, 2004. Subsequent to December 31, 2004, if two or more vacancies are to be filled, the Secretary certifies to the Appointing Authority for the first vacancy, the names of the top five available eligibles and an additional three names for each concurrent vacancy thereafter. (ie: for two vacancies, the top eight names of available eligibles would be certified to the Appointing Authority; for three vacancies, eleven, and so on).
- 10.3.4 **APPLICATION/EXAMINATION.** The application and the examination papers of a certified eligible must be available for inspection by the Appointing Authority.
- 10.4 **DEFERMENT OF CERTIFICATION.** The Secretary may defer certification of an eligible upon the eligible's written request with satisfactory reason therefor. Such deferment will thereafter prevent certification of such eligible until the next vacancy occurring after the eligible has notified the Secretary in writing that he/she desires to be returned to the register, and the Secretary has approved such return.
- 10.5 **DURATION OF CERTIFICATION.** Certification is in effect for thirty (30) days from its date of issuance. The Appointing Authority must file with the Secretary a report of any appointment from such certification. Upon request, the Secretary may extend such certification for additional thirty (30) day periods. Expiration of eligibility does not cancel the validity of a certification.

APPENDIX D

- 10.5 DEFERMENT OF APPOINTMENT. The appointing authority may defer appointment of an eligible upon the eligible's written request with satisfactory reason. Deferment will postpone appointment of such eligible until the next vacancy occurring after the eligible has notified the Secretary in writing and with the appointing authority's approval of such appointment.
- 10.6 RULE OF FIVE. The Secretary presents to the Chief or his/her designee the names of the top five available eligibles from the appropriate certified eligibility list for one vacancy.
- 10.6.1 MULTIPLE VACANCIES. If two or more vacancies are to be filled, the Secretary presents to the Chief or his/her designee for the first vacancy, the names of the top five available eligibles and an additional three names for each concurrent vacancy thereafter. (ie: for two vacancies, the top eight names of available eligibles would be presented to the Appointing Authority; for three vacancies, eleven, and so on).
- 10.7 PROVISIONAL APPOINTMENT.
- 10.7.1 WITHOUT REGISTER. When there is no suitable eligible register from which certification can be made, the Chief may make a provisional appointment. A provisional appointment may be made for up to twelve (12) months and may be extended.
- 10.7.2 WITH REGISTER. All provisional employment in a class must cease at the earliest possible date and may not exceed thirty (30) days from the date of notice that a proper eligible register for such class is available. The Secretary may grant an extension upon written request by the Chief or his/her designee if such extension will not cause the provisional appointment to exceed twelve (12) months.

III BRANCHES LAW, PLLC

October 23, 2019 - 3:05 PM

Transmittal Information

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