

No. 348482

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN INGERSOLL,

Appellant,

v.

CITY OF MATTAWA,

Respondent.

ON APPEAL FROM GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell

APPELLANT'S REPLY BRIEF
(CORRECTED)

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I. SUMMARY OF REPLY ARGUMENT

Respondent City of Mattawa devotes the majority of its brief to a factual history the Mattawa Civil Service Commission found did not support the mayor's allegations and that is thus not germane to the Commission's ultimate findings. The City impugns John Ingersoll's character in an attempt to distract this Court from the constitutional and statutory flaws in the Commission's decision. But that decision, which affirmed the mayor's termination decision, did not afford former Mattawa police officer Ingersoll due process and did not comply with RCW 41.12.090.

In upholding the termination, the Commission violated Ingersoll's due-process rights by considering matters not raised before the hearing, such as faulting Ingersoll for denying wrongdoing and for his purported conduct during the hearing. And the Commission ultimately upheld the termination based on Ingersoll's supposed mental unfitness, even though the mayor never charged Ingersoll with mental unfitness.

In addition, the Commission's decision is arbitrary and capricious under RCW 41.12.090 because the Commission's consideration of the conduct underlying the seven misconduct allegations it dismissed as a basis to find mental unfitness is internally inconsistent. And because no evidence supports at least one finding, the Commission's decision is arbitrary and capricious as a whole and cannot stand.

This Court should reverse the superior court's order and remand to the Mattawa Civil Service Commission with directions to reinstate Ingersoll and award him back pay.

II. REPLY ARGUMENT

A. The Commission's decision affirming the mayor's decision to fire Ingersoll because he was mentally unfit for duty as a police officer denied Ingersoll due process.

1. The Commission's finding that faulted Ingersoll for "totally denying any wrongdoing" as a defense to the mayor's charges against him at the hearing denied Ingersoll due process.

Ingersoll had a constitutional right to "present his side of the story" as a defense to the mayor's charges. *Danielson v. City of Seattle*, 108 Wn.2d 788, 798, 742 P.2d 717 (1987) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). The City offers no response to Ingersoll's argument that the Commission—by faulting Ingersoll for presenting a defense denying any wrongdoing at the hearing—denied him due process. App. Br. 21–22 (citing cases); CP 9. Ingersoll was prejudiced because there is no way to know what value the Commission placed on this finding, and nowhere does the Commission state that each finding independently supports its decision. This error alone requires reversal. *See In re Marriage of Leslie*, 112 Wn.2d 612, 617–18, 772 P.2d 1013 (1989) (concluding that the denial of procedural due process voids the decision under review).

2. The Commission’s finding that Ingersoll’s purported conduct during the hearing supported termination denied Ingersoll due process.

Due process requires that a civil-service employee know the precise grounds of his discharge and thus have a fair opportunity “to meet the charges with witnesses and evidence.” *Luellen v. City of Aberdeen*, 20 Wn.2d 594, 607, 148 P.2d 849 (1944), *overruled on other grounds by Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985). The “fundamental right to notice require[s] that the commission’s inquiry be limited to an investigation of the reasons given for discharge” in the charging document. *Deering v. City of Seattle*, 10 Wn. App. 832, 837, 520 P.2d 638 (1974).

The Commission here could not properly consider Ingersoll’s purported conduct at the hearing to support the mayor’s termination decision or otherwise corroborate its findings. The Commission’s duty to investigate the mayor’s termination decision was limited to the reasons disclosed in that decision. Stated differently, the Commission’s investigation was confined to the charges the mayor asserted. *See* RCW 41.12.040(4); RCW 41.12.090; *Matter of Smith*, 30 Wn. App. 943, 946–47, 639 P.2d 779 (1982); *Deering*, 10 Wn. App. at 837. The Commission, as the trier of fact, had the authority to make credibility determinations and weigh the evidence. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 803–04, 320 P.3d 130 (2014). But the Commission’s finding faulting Ingersoll’s

conduct during the hearing went beyond that authority and denied Ingersoll due process.

The City claims any prior notice was impossible because the Commission lacked a crystal ball to presage Ingersoll's behavior at the hearing and, in any event, the Commission could not "disregard its observations." Resp. Br. 40–41. But due process requires that Ingersoll know before the hearing the precise basis of his discharge. *Luellen*, 20 Wn.2d at 607.

The City cites *In re Disciplinary Proceeding against Ferguson*, 170 Wn.2d 916, 246 P.3d 1236 (2011), for the proposition that a decision maker may consider the aggrieved person's conduct at the hearing. Resp. Br. 40–41. *Ferguson* is inapposite. In *Ferguson*, the court held that the hearing officer in a lawyer-discipline matter, after determining the lawyer committed the charged misconduct, could consider under American Bar Association Standards the lawyer's lack of remorse and hostile and obstructive demeanor during the hearing in determining the appropriate sanction for her misconduct. *Id.* at 939–46. The pertinent issue was not whether misconduct occurred but the appropriate sanction to impose *after* the hearing officer had already found misconduct. Unlike the Commission here, the hearing officer did not consider the conduct at the hearing as additional misconduct warranting a sanction.¹ This would be akin to

¹ The sentencing phase of a criminal trial provides an apt analogy. At sentencing, the trier of fact may consider a host of factors that would not have been relevant to guilt or innocence during the trial. *See generally*

allowing a jury to find a criminal defendant guilty of a crime based on acts committed at the trial—a clear denial of due process.

But this is exactly what the Commission did in faulting Ingersoll for his purported conduct during the hearing unrelated to the mayor’s charges. The appropriate sanction, termination, was not at issue; it was fixed. The precise issue here was if misconduct occurred or unfitness existed—not the appropriate sanction for the alleged misconduct or unfitness. Because the Commission used Ingersoll’s purported conduct during the hearing to support the mayor’s termination decision, the Commission denied Ingersoll due process.

RCW 41.12.090 confirms that a civil-service commission may not consider a fired employee’s conduct at the hearing to support termination. A civil-service commission is charged with investigating if the discharge “*was or was not made* for political or religious reasons and *was or was not made* in good faith for cause.” RCW 41.12.090 (emphasis added). The scope of a civil-service commission’s authority is limited and “confined to the content of those charges” brought by the appointing authority. *Smith*, 30 Wn. App. at 947. That backward-looking review is necessarily confined to the reasons given in the appointing power’s charging document. *See* RCW 41.12.040(4); RCW 41.12.090. The commission “shall not consider . . . any

RCW 9.94A.535 (aggravating and mitigating circumstances that the court and the trier of fact may consider in imposing a sentence outside the standard sentence range). *Compare* RCW 9.94A.535, *with Ferguson*, 170 Wn.2d at 941–46 (considering “aggravating and mitigating factors” under American Bar Association Standards in determining the appropriate sanction for a lawyer’s misconduct).

basis for disciplinary action not previously presented to the employee.” P. Stephen DiJulio, *Model Civil Service Rules for Washington State Local Governments*, at 107 (18.03.05) (3d ed. 2006). Nor may the commission “conduct a de novo hearing into the facts and circumstances surrounding the discharge of a civil service employee and make its own determination whether the employee should be terminated.” *Smith*, 30 Wn. App. at 946 (rejecting the argument that a civil-service commission’s decision may be based “upon reasons uncovered by the Commission during its own investigation of the [appointing power’s] charges.”).² The Commission may not “sift through collateral matters relating to the [mayor’s] charges to find its own reasons for discharging [Ingersoll].” *Id.* (holding that the civil-service commission must confine its investigation to the reasons set forth as grounds for discharge).

The Commission exceeded its authority when it expressly based its decision on conduct it purportedly observed during its investigation of the mayor’s charges. For instance, the Commission found Ingersoll’s conduct at the hearing, which purportedly showed “an immaturity and inconsistency regarding [his] ability to control [his] actions and emotions,” to support the mayor’s termination decision. CP 9. Not only is this finding arbitrary and

² See, e.g., *Easson v. City of Seattle*, 32 Wash. 405, 413, 73 P. 496 (1903) (concluding that the civil-service commission’s role was to investigate the reasons given by the appointing power for discharge); *Deering*, 10 Wn. App. at 837 (requiring under due process that a civil-service “commission’s inquiry be limited to an investigation of the reasons given for discharge.”); *City of Wenatchee v. Berg*, 1 Wn. App. 354, 357–60, 461 P.2d 563 (1969) (limiting its investigation inquiry to the content of the appointing power’s charging document).

capricious as a matter of law because no evidence supports it, but the Commission denied Ingersoll due process by faulting him for conduct that purportedly occurred during the hearing to support its decision to affirm the mayor's termination decision. *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 821, 420 P.2d 704 (1966).

3. Even if the Commission could consider Ingersoll's purported conduct during the hearing and his testimony denying any wrongdoing as competent evidence, Ingersoll was never notified the Commission might use such evidence to support the mayor's termination decision.

To satisfy due process, a discharged employee must know in advance of the hearing the precise basis of the discharge. *Porter v. Civil Serv. Comm'n of Spokane*, 12 Wn. App. 767, 773, 532 P.2d 296 (1975). The Commission never notified Ingersoll that it might use his purported conduct during the hearing and his testimony denying any wrongdoing as evidence to support the mayor's termination decision. *Luellen*, 20 Wn.2d at 607 (reversing decision by civil-service commission firing police officer; absent knowledge of the specific charges and the opportunity "to meet the charges with witnesses and evidence," termination was "illegal and of no force of effect."). The Commission's finding that faulted Ingersoll's testimony denying any wrongdoing and his purported conduct during the hearing manifestly violated his due-process rights to present a defense and to notice and an opportunity to be heard. *See States v. Anderson*, 364 N.W.2d 38, 40 (Neb. 1985) (stating in the civil-service context that "an administrative hearing should be less a game of blindman's buff [than] a

fair contest with the basic issues and facts disclosed to the fullest practicable extent.”).

4. The Commission’s decision affirming the mayor’s decision to terminate Ingersoll for mental unfitness, when the mayor never charged Ingersoll with mental unfitness, denied Ingersoll due process.

The mayor fired Ingersoll for alleged misconduct the Commission later dismissed as unproven. Ingersoll was never charged with or given advance notice of the specific grounds for termination—mental unfitness for duty (CP 3326 (X.2.E))—that the Commission ultimately found, based solely on Dr. Mays’ hearsay fitness-for-duty report, to affirm the mayor’s termination decision. Thus, the Commission’s decision to uphold the mayor’s termination decision on a ground that the mayor never charged violated Ingersoll’s due-process right to prepare a defense and exceeded the Commission’s investigative authority under RCW 41.12.040(4) and RCW 41.12.090. The Commission was not free to find its own reasons, distinct from the mayor’s, to support termination. *See State ex rel. Savin v. City of Seattle*, 65 Wash. 645, 648, 118 P. 821 (1911) (“The appointing power cannot remove an officer upon one ground, and have the removal sustained upon a ground separate and distinct from that relied upon by the removing officer.”); *Smith*, 30 Wn. App. at 944–46 (reversing commission decision upholding dismissal of employee for flashing badge to intimidate driver in

nearby vehicle when employee had been charged with pointing pistol at the driver and lying about it).³ This error requires reversal.

B. The Commission’s decision affirming the mayor’s decision to fire Ingersoll because he was mentally unfit for duty is arbitrary and capricious as a matter of law.

1. The Commission’s decision as a whole is arbitrary and capricious.

Misstating the proper standard of review, the City insists that Ingersoll waived any challenge to the Commission’s findings for having failed to assign error to them. But this Court “do[es] not separately review findings of fact or conclusions of law” from a commission’s decision. *Goding v. Civil Serv. Comm’n of King County*, 192 Wn. App. 270, 290, 366 P.3d 1 (2015). Rather, this Court reviews “the commission’s decision as a whole” to determine if the commission duly considered all the evidence presented at the hearing. *Id.* at 290–91 (citing *Perry*, 69 Wn.2d at 821).

³ See, e.g., *Murray v. Murphy*, 247 N.E.2d 143, 147–48 (N.Y. 1969) (reversing commissioner’s dismissal of police officers for corruption when they had been charged with failing to properly investigate and the corruption charge had been rejected by commissioner); *Carlson v. Ariz. State Pers. Bd.*, 153 P.3d 1055, 1061–62 (Ariz. Ct. App. 2007) (reversing personnel board’s decision for upholding dismissal based on conduct never alleged before the post-termination hearing; the lack of notice violated the employee’s due-process right); *McCall v. Goldbaum*, 863 S.W.2d 640, 642–43 (Mo. Ct. App. 1993) (reversing personnel board’s decision to uphold employing agency’s dismissal of employee for neglect, sexual abuse, and consumption of alcohol while on duty when board’s decision was based on finding employee did not consume alcohol on premises but engaged in abusive or improper treatment toward residents and made no finding on the sexual-abuse charge); *Brixey v. Pers. Advisory Bd.*, 607 S.W.2d 825, 827 (Mo. Ct. App. 1980) (reversing dismissal of teacher for being late to work, excessive absences, improper discipline, and undermining morale when notice of intent to dismiss made generalized charge of failure to perform job).

Nor does Ingersoll assign error to or otherwise challenge the sufficiency of the evidence supporting the findings because “neither the superior court nor this court can consider the weight or sufficiency of the evidence” on appeal. *Perry*, 69 Wn.2d at 819.

2. The Commission’s finding that faulted Ingersoll’s purported conduct at the hearing is arbitrary and capricious.

A finding made without evidence to support it is, as a matter of law, arbitrary. *Perry*, 69 Wn.2d at 821; *Goding*, 192 Wn. App. at 291. Because no evidence supports the finding that Ingersoll made “comments during witness testimony” or “stare[d] down citizens” at the hearing (CP 9; RP (6/16/2016) 57), it is arbitrary and capricious.

In response, the City asks this Court effectively to take judicial notice of the Commission’s finding about Ingersoll’s purported conduct at the hearing. *See* Resp. Br. 17 n.4. Attempting to recreate the record of the hearing from whole cloth on appeal, the City claims “Ingersoll roamed about the hearing chambers in an effort to intimidate persons within, particularly those scheduled to testify.” *Id.* (citing CP 1875–76). Review of the hearing transcript reveals that the City’s counsel asked if Ingersoll “could stay seated at the party chair” because apparently “folks in the audience” did not “feel comfortable with him.” CP 1875. To accuse Ingersoll of intimidating witnesses at the hearing is particularly egregious,

especially when no evidence supports such a bald accusation.⁴ Nor does the record support that those persons purportedly intimidated were “scheduled to testify.” Resp. Br. 17 n.4.

The City cites no authority that this Court may take judicial notice of adjudicative facts that are neither generally known nor capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b). Had Ingersoll commented during witness testimony, attempted to stare down witnesses, and roamed about the hearing chambers in an effort to intimidate persons, as the City’s counsel claims happened, the City’s counsel could have made an oral record to support the argument he now makes on appeal. But this Court should not relieve the City’s counsel of his duty to make an adequate record of purported conduct below to support the mayor’s termination decision. This Court should reject the City’s attempt to have this Court recreate a record for it of Ingersoll’s purported conduct at the hearing.

⁴ Ingersoll objects to this material, and it should be stricken from the City’s brief. Ingersoll understands that at least some members of this Court abhor motions to strike, and to “save[] time and resources of the parties and the court without diminishing the quality of the decision-making process,” Ingersoll trusts this Court will not consider evidence unsupported by the record. *In re Marriage of Rostrom*, 184 Wn. App. 744, 764, 339 P.3d 185 (2014); *see also Admasu v. Port of Seattle*, 185 Wn. App. 23, 41 n.49, 340 P.3d 873 (2014) (Verellen, C.J.) (denying appellants’ motion to strike portions of an amicus brief and refusing to consider matters outside the record).

3. The finding that Ingersoll was mentally unfit for duty based solely on Dr. Mays' hearsay fitness-for-duty report is arbitrary and capricious.

Contrary to the City's assertions (Resp. Br. 36–37, 39), Ingersoll did not offer Dr. Mays' fitness-for-duty report into evidence. The City introduced that report into the administrative record at the hearing through Chief Turley. CP 1931; CP 2255 (City's Ex. III-1).⁵ Ingersoll's counsel promptly conducted voir dire (CP 1931–33),⁶ after which he objected to questioning Chief Turley further about the report. CP 1935–36, 2002. Ingersoll properly preserved his challenge to the Commission's consideration of Dr. Mays' hearsay fitness-for-duty report below. CP 1936.

Ingersoll does not challenge the weight the Commission gave Dr. Mays' fitness-for-duty report but challenges the Commission's decision as a whole, which encompasses every one of its findings. Dr. Mays did not testify at the hearing. No witness corroborated his unsubstantiated hearsay report that the Commission improvidently considered, which expressly infected all but one of the Commission's findings. CP 10 (FF 2–4). Nor did any evidence support the Commission's decision that Ingersoll was mentally unfit for duty. *See McDaniel v. State, Dep't of Social & Health Servs.*, 51 Wn. App. 893, 897, 756 P.2d 143 (1988) (stating that “some testimonial evidence should be presented corroborating the investigative

⁵ Admittedly, Ingersoll listed Dr. Mays' report as a possible exhibit to introduce into evidence at the hearing. CP 2257 (Ex. 41). Listing Dr. Mays' report as a possible exhibit did not waive any objection to it.

⁶ A “voir dire” examination is a “preliminary examination to test the competence of a witness or evidence.” BLACK'S LAW DICTIONARY 1805 (10th ed. 2014).

report[] in order to avoid reliance solely on hearsay and conjecture.”). Further, the materials relied on and reviewed by Dr. Mays in his report were the same materials that the Commission found to lack sufficient evidence to support the mayor’s charges. And Dr. Mays never concluded in his report that Ingersoll was unfit for duty. Thus, the finding that Ingersoll was mentally unfit based only on Dr. Mays’ hearsay report is arbitrary and capricious as a matter of law.

4. The Commission’s decision is arbitrary and capricious as a whole because it is expressly based on at least one finding that is unsupported by any evidence.

The Commission’s decision is arbitrary and capricious as a whole because no evidence supports at least one finding. CP 9 (FF 1); *Goding*, 192 Wn. App. at 291. Nowhere does the Commission’s decision state that each finding independently supports the decision. As a result, this Court must presume that each finding was essential to that decision. Thus, to the extent this Court concludes at least one finding is arbitrary and capricious as a matter of law, the Commission’s decision as a whole cannot stand.

5. The Commission is not free to consider an officer’s entire employment record in determining if the cumulative effect of an officer’s misconduct warrants discharge.

The City claims, citing an Iowa Supreme Court decision, that a civil-service commission may consider the cumulative effect of an officer’s disciplinary record in reviewing the appointing power’s termination decision. Resp. Br. 35–36 (citing *Civil Serv. Comm’n of Coralville v. Johnson*, 653 N.W.2d 533 (Iowa 2002)). In *Johnson*, a city police officer

was fired in part for a lengthy disciplinary history that the commission considered in its termination hearing. 653 N.W.2d at 543 (stating that the officer was “no stranger when it c[ame] to misdeeds in his official capacity as a police officer[.]” with several reprimands, a warning letter, and a prior discharge from another police department). In those incidents, the police department had given the officer due process, entitling him to notice and an opportunity to tell his story. *Id.*

Unlike the police officer in *Johnson*, Ingersoll had no disciplinary history and had never before been allowed to present his side of the story in the prior incidents used by the Commission as so-called “background evidence” of misconduct to support the mayor’s termination decision.⁷ And the Commission dismissed much of the so-called “background evidence” for insufficient evidence. CP 9. *Johnson* is not Washington law. But even if this Court considered *Johnson*, no Washington court has held or stated in dicta that a civil-service commission may consider cumulatively an employee’s entire employment file, which contains no disciplinary history, in determining if alleged misconduct warrants discharge. *Johnson* does not apply under these facts, and this Court should not consider it as binding or persuasive precedent.

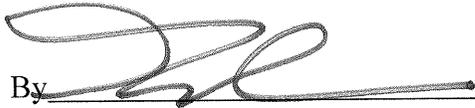
⁷ Contrary to the City’s assertion on appeal, the Commission never found that “Ingersoll lied on his job application.” Resp. Br. 36. The Commission found that insufficient evidence supported the mayor’s allegation that Ingersoll lied on his application to the Mattawa Police Department. CP 9. Nor did the Commission rely on Ingersoll’s purported act of lying on his job application as grounds for dismissal. And the Mattawa Police Department never disciplined Ingersoll for purportedly lying on his employment application.

III. CONCLUSION

The Commission denied Ingersoll due process, and its decision as a whole is arbitrary and capricious as a matter of law. Thus, its decision is void, and the City is not entitled to a rehearing on remand. This Court should reverse the Commission's decision affirming the mayor's termination decision and remand to the Commission with directions for full reinstatement and an award of back pay from the effective date of his discharge.

Respectfully submitted: August 25, 2017.

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By  _____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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