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No. 65632-5-I

2010 JUN 10 10:10 AM

CLERK OF SUPERIOR COURT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ERIC WERNER,

Appellant,

v.

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT

Respondent,

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Appeal from the Superior Court of Washington
for King County
(Cause No. 10-2-07645-0 SEA)

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The heart of this appeal is whether the Public Safety Civil Service Commission or the Superior Court is in the best position to decide which public safety discipline cases are comparable to one another. The governing statute recognizes the Commission's expertise in giving it wide discretion to reverse or modify disciplinary actions. In *City of Seattle v. City of Seattle, Public Safety Civil Service Commission*,¹ this Court held that the Commission has discretion to decide the appropriate legal standard, i.e., the relevant factors to use when making discipline decisions. Logically, the Commission also has authority to make factual determinations, such as what discipline cases are comparable. Respondent argues that the Commission should be prevented from comparing this case to other cases because of the specific label used by the SPD for the misconduct. But that decision of what label or charge to make against an officer is unreviewable and is made by unknown persons within the SPD using undisclosed factors. If Respondent's argument is accepted, then the Commission's statutory authority to review discipline cases would be severely undermined.

¹ 155 Wn. App. 878, 230 P.3d 640 (2010) (hereinafter referred to as "*Roberson*", the name of the officer involved).

II. REBUTTAL TO RESPONDENT'S STATEMENT OF THE CASE

At each stage, Respondent's factual contentions have become increasingly hyperbolic and exaggerated. At first, the decision-maker, Police Chief Diaz, testified to the Commission that the decision to terminate Officer Werner was "agonizing"; that Officer Werner presented "a very difficult case," and "it wasn't easy" (AR 983, tr. 226:15; AR 986, tr. 238). Respondent now try to portray Officer Werner as a serial liar whose termination was the only rational result. These allegations if other alleged misconduct is not relevant here and threaten to distract from the narrow issue facing this Court: whether the Superior Court erroneously set aside the Commission's finding that other discipline cases were comparable to Officer Werner's case.

Before addressing a few of the exaggerations and factual inaccuracies, it is important to reiterate certain undisputed points:

(1) Respondent terminated Officer Werner for a single dishonest statement – his failure to disclose that he struck a suspect during a struggle.

(2) Other allegations of dishonesty by Officer Werner were not relied on by the City as the basis for termination. Respondent incorrectly asserts that these other instances were important to a finding that Werner

was intentionally dishonest in the one instance for which he was terminated. This is belied by the City's own decision-maker, Chief Diaz, who made his decision without reference to those other allegations at all.²

(3) The Commission decided that Officer Werner's termination was too harsh in light of the evidence presented.

(4) The Superior Court disagreed with the Commission, finding that the Commission did not act on the basis of "substantial evidence" simply because the comparable discipline cases presented to the Commission were too different because of the SPD's formal labels.

Appellant should briefly respond to Respondent's lengthy attack on Officer Werner's character. For instance, Respondent argues that Werner did not report himself to the Seattle Police Department and that he continues to deny responsibility for his actions. In fact, Officer Werner was the person who reported his own misconduct -- first to the Snohomish County Sheriff's office and then to the City of Seattle. Respondent concedes that he told Snohomish County himself but then argues that his self-report to the City of Seattle happened only after a notice of investigation was mailed out. But his self-report was on July 4, 2007 -- a

² When asked by the City Attorney on direct examination how he reached his decision about Officer Werner's intent, Chief Diaz explained simply that Officer Werner admitted his intent by using the word "lie" when describing his own conduct. (AR 984, tr. 230:16-231:4) Chief Diaz was frank and candid in that respect. He did not try to "pile on" by reference to other alleged lies, as the City Attorney attempt to do now.

national holiday when no mail could have been delivered to him; in addition, he testified that he did not receive the notice until July 5. AR 1034, Tr. p. 427.

In addition to his frank admission to the Snohomish County Sheriff, he testified before the Commission that he reported his misconduct to the City "because I couldn't just sit on and live with the information I had. . . . I needed to make the record straight." AR 1034, Tr. p. 427:5-7.

Next, Respondent attacks Officer Werner through improper methods, unsupported by the record, describing how Officer Werner allegedly showed the Commission the part of his hand he used to strike the suspect. (Respondent's Brief, pp. 7-8). Respondent essentially presents improper "testimony by counsel" to allege a contradiction exists between how Officer Werner testified before the Commission and how he testified in the internal investigation. Neither contention is supported by evidence in the record.

Respondent's allegations of other acts of dishonesty do not bear on the ultimate issue before this Court and, therefore, this brief will not address. It bears pointing out, however, that for two days before the Commission, all of the facts were presented through witnesses and through documentary evidence. Based on that evidence, the

Commissioners, including a retired Police Chief, decided to reverse the termination of Officer Werner. It strains credibility to suggest that the Commission would have reversed the termination if Respondent's portrayal of the case was fair and balanced. Recall that Chief Diaz described the case as "agonizing" and "very difficult." (AR 983, tr. 226:15; AR 986, tr. 238). Respondent now try to portray Officer Werner as a serial liar whose case was a slam dunk. Through the fog of Respondent's hyperbolic description of the case, the key issue emerges: whether Superior Court erred in rejecting the Commission's finding on what discipline cases were comparable to Officer Werner's case. In other words, was there substantial evidence to support the Commission's decision? The answer is "yes."

III. REBUTTAL TO RESPONDENT'S ARGUMENTS

A. The Standard of Review Is Highly Deferential To The Agency Factfinder.

The substantial evidence standard is "highly deferential" to the agency factfinder. *See ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812 (1995). A reviewing court views "the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Davidson v. Kitsap County*, 86 Wn. App. 673, 680 (1997). This Court has

cautioned against courts substituting its judgment for the agency or weighing evidence. *Id.* In reversing the Superior Court’s writ of certiorari of an administrative agency’s findings, this Court in *Davidson* reiterated that judicial review of an agency’s factfinding is “a process that necessarily entails acceptance of the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Id.* at 680.

Respondent’s attempt to distinguish *Roberson* also fails. *Roberson* establishes that the Commission has the authority to select the appropriate legal standard (i.e., the appropriate factors to use and whether to use the Daugherty Test). The City attempts to distinguish *Roberson* by arguing that the City did not challenge the factual findings in that case whereas, here, it challenges those findings. The Commission’s interpretation of law, such as a decision to apply the Daugherty Test, is entitled to less deference by a reviewing court than its factual determinations. But the City argues the opposite, which contravenes both law and logic.

This Court held that the statute confers “wide discretion” on the Commission to apply factors it deemed appropriate, whether deriving from arbitration cases examining “just cause” or from other precedents.³ In

³ *Roberson*, 155 Wn. App. at 891.

pertinent part, the Court of Appeals in *Roberson* framed the issue and its holding as follows:

[T]he essential question here is whether, in an area where the legislative bodies have not defined their terms, the body appointed to administer the statute has discretion to do so. We believe it does, so long as its determination is reasonable, and we cannot say that adoption of the stricter test [the Daugherty Test] is not reasonable.

Whatever be the effect of the Commission's test on res judicata analysis, we do not read *Kelso* as requiring the Commission to adopt any particular test, and we see nothing in the legislation to assist the Commission in determining whether "in good faith for cause" is more like "just cause" in the labor arena or "just cause" in private employment.⁴

In light of the Commission's broad discretion and expertise, it has the authority determine which discipline cases involving public safety officers are of comparable seriousness.

On this appeal, Respondent claims that it has challenged the Commission's fact findings, which distinguishes this case from *Roberson*. At the same time, Respondent also argues that it challenges a legal conclusion that the discipline cases were not comparable to Officer Werner's case. Despite these contradictory and confusing arguments, the point is that the Commission made fact findings on the factual similarities between Officer Werner's situation and the other misconduct by police

⁴ *Roberson*, 155 Wn. App. at 891.

officers. (Section II.B.1. below provides the legal authorities that this is an issue of fact). Respondent's argument is that the courts should review the Commission's fact finding with less deference than its legal conclusions. *Roberson* establishes the Commission's wide discretion to interpret the legal standard. There is no reason in logic or in law to conclude that its discretion should be less in the factfinding arena.

The Commission's factual determination of what discipline cases are "comparable" should not have been second-guessed by the Superior Court. The Commission is an expert agency on these types of discipline decision and police misconduct cases. It is "the body appointed to administer the statute (and) has discretion to do so." *Id.* at 891.

B. The Commission Properly Considered Comparable Cases.

The crux of Respondent's argument (and the Superior Court's decision) is that the Commission was not reasonable in finding that other discipline cases were comparable to Officer Werner's situation. The Superior Court set aside the Commission's findings because the comparator cases did not involve formal charges of "dishonesty." This relies on a technical consideration of the formal charges made by the City Police Department rather than the nature of the misconduct by the officer.

The Commission heard testimony for two days and determined that the other discipline cases were comparable because the officers had engaged in dishonesty – regardless of the fact they were not technically charged with dishonesty. The charging decision, made internally by the SPD, is not controlling on the Commission. Respondent had ample opportunity to explain why officers in the comparable cases were not charged with dishonesty, even though the internal investigation had found that the officers had been untruthful in the investigation. Respondent declined to give any insight or explanation about the charging decision.

1. Comparability Is A Question of Fact.

Respondent incorrectly argues, without any authority, that a determination about the factual comparability of discipline cases is not a question of fact. That is wrong, as two recent Ninth Circuit decisions elucidate. *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010); *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1125-26 (9th Cir.2009).⁵ In *Hawn*, the court reiterated that whether two

⁵ Numerous other authorities also establish this. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) citing *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir.2001) (“When plaintiffs seek to draw inferences of discrimination by showing that they were ‘similarly situated in all material respects’ to the individuals to whom they compare themselves, their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances.”); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir.1988) (stating that in a disparate treatment case the fact that other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony as long as their acts were of comparable seriousness).

employees are comparable is a question of fact and a determination of their similarity is “a fact-intensive inquiry.” *Id.*, 615 F.3d at 1157. In *Nicholson*, the court concluded that a female pilot, who had deficient communication and cooperation skills, was similarly situated to male pilots, who had very different deficiencies (in their technical piloting skills), because both types of deficiencies could be addressed through retraining. The distinctions between the two types of performance deficiencies was “not material for purposes of determining whether the male pilots were ‘similarly situated’.” *Id.* at 1126.

Courts focus on the nature of the misconduct, rather than whether the two employees violated the same rule: “Reasonableness is the touchstone, and recognizing that the plaintiff’s case and the comparison cases...need not be perfect replicas.”⁶

In the present case, the argument is even stronger for deference to the Commission on this factual inquiry.⁷ The Commission, unlike a civil jury, is an expert agency as well as the trier of fact.

⁶ *Ricks v. Riverwood Int’l Corp.*, 38 F.3d 1016, 1019 (8th Cir.1994) (employing comparable seriousness standard); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir.1999) (explaining that “[r]easonableness is the touchstone” and recognizing that “the plaintiff’s case and the comparison cases ... need not be perfect replicas”).

⁷ Respondent argues this was a legal conclusion because the Commission included this analysis in a section entitled, “Conclusions of Law.” Once again, Respondent exalts form over substance, arguing that a label is controlling. That is incorrect. This Court must decide whether these were factual findings or legal conclusions, regardless of the section title.

The Superior Court erred when it weighed the evidence and substituted its judgment of what is a comparable discipline case. The Superior Court disregarded the Commission's factual determination that the City failed to prove consistency in discipline. The Superior Court decided that the comparable discipline cases were not comparable because "none of the cited cases involved a sustained finding of intentional dishonesty in an investigation using force." CP 275-277. The Commission, however, found that the cases were comparable because they involved dishonesty and other forms of serious misconduct.

2. Respondent's Complain That The Comparable Disciplinary Cases Presented To The Commission Lacked Sufficient Detail.

Respondent has the audacity to complain that evidence was insufficiently detailed when it was the sole party in possession of all such details. The comparable cases allegedly lack sufficient detail about "why SPD characterized the officers' misconduct in any particular way, e.g., as excessive force, dishonesty, conduct unbecoming, or any other form of misconduct." (Respondent's Brief, p. 18). Respondent complains that the Commission was not given access to information to which only the Respondent had access!

Respondent is correct in one respect: we have no idea why the SPD charges some officers with dishonesty and others with charges such

as causing a false arrest to be made through a false statement, which is what happened in the “third” comparator case cited by the Commission. These internal charging decisions are unreviewable and secretive.

The “third” comparator case cited by the Commission is a perfect example of the mysterious and uneven charging process. This officer, for some unarticulated reason, was not charged with dishonesty. The SPD’s own internal investigation reveals serious misconduct by an officer who: (1) intentionally shot at a civilian, while yelling, “I’m going to kill you!”; and (2) lied about it. (AR 906-911) (Complete copy of the report is attached as Appendix A to this Reply Brief.) The officer’s lie was on the critical point of whether she had accidentally or intentionally fired her weapon at the civilian. It found that her false report caused the false arrest of the civilian because the arrest was based on the officer’s “misstatement of facts.” AR 910 (last full paragraph on page). The internal investigation went on to find in no uncertain terms: “Her response and actions are clearly deceptive and destroy her credibility.” AR 910 (first paragraph). The investigator sustained all of the charges brought against the officer, which included, “Violation of Rules/Regs/Laws: False Report/False Arrest.” AR 908. The SPD investigator also commented that the officer’s misconduct was a felony. *Id.* (fifth paragraph down from the top)(“Investigator Proudfoot correctly points out that this was not a gun

cleaning incident at home but a felony, . . .and the discharge of a weapon on the street which could have injured a citizen and/or innocent bystander(s).”)

The Superior Court failed to view this case in the light most favorable to the Commission’s factual determination. It disregarded the Commission’s expertise and set aside its factual determination because of the City Police Department’s unexplained and unjustified decision not to charge this officer with “dishonesty.” The Commission rejected that hyper technical basis on which to distinguish this discipline case and found that this conduct was of comparable seriousness.

This same discipline case is grossly mischaracterized by Respondent’s brief, which needs to be addressed. Respondent asserts that this officer took responsibility for her actions, unlike Officer Werner. That is not true. First, the SPD’s own internal investigation states: "The named officer accepts no responsibility for her actions." (AR 908)(second to last bullet point from the bottom). Second, Officer Werner did take responsibility for his actions (as discussed above on p. 4). Respondent also makes a blatantly false representation that the officer’s conduct was distinguishable from Officer Werner's because of her “mitigating medical factors.” There is no evidence of any medical factors whatsoever. Respondent cites to AR 985 (Tr. 235), which is a totally unrelated portion

of the transcript, involving the psychologist's evaluation of Officer Werner. Nowhere in the City's own records is there even a hint of a "mitigating medical factor" concerning the officer who lied in this "third" comparator case analyzed by the Commission.

Respondent also argues that the "fourth comparator" case cited by the Commission was not of comparable seriousness and, therefore, was not competent evidence. That is also wrong. There, an officer used excessive force and then lied about it. The SPD's own investigation established that the officer lied under oath during the official investigation by denying the use of "any force on the subject." AR 914 (last paragraph) (Complete copy of the SPD's investigation is attached as Appendix B to this brief) (emphasis added). Three witnesses completely contradicted the officer's denial, including a neutral witness who, "observed the entire encounter . . . he observed the named employee hit the subject's head against a car and then grab the subject's hair and jerked the head back two or three times." *Id.* (third paragraph from bottom). The Department found that this witness' testimony was both "credible and compelling." AR 915. This was very serious misconduct, as the Respondent admits in its brief, albeit in making a point about Officer Werner: "Dishonesty in a use of force testifying scenario is more serious than any other scenario involving police dishonesty." (Respondent's Brief, p. 13) The City punished this

officer for using excessive force and for his untruthful statements under oath in an investigation by suspending him for one single day. AR 912. The Commission found that this was further evidence of uneven discipline. The Superior Court erred in failing to view this case in the light most favorable to the Commission's findings, as required by the appropriate standard of review.

The Commission was not unreasonable in looking deeper than the City's technical labeling of various misconduct. Respondent asks this Court to undermine the Commission's oversight powers and to give the City unfettered discretion to decide what is comparable. The City wants to dictate to the Commission which discipline cases are comparable by selecting a particular label. When the City wants to terminate an officer, it uses the label "dishonesty" but when it wants to suspend, it uses a different label. As Shakespeare noted, "a rose by any other name would smell just as sweet."

3. Respondent Misplaces Reliance On The Fact That A Different Decision-Maker Was Involved In Other Discipline Cases Because This Is Not An Intentional Discrimination Claim.

When seeking to prove intentional employment discrimination, courts sometimes require evidence that the same supervisor was involved in the plaintiff's case and in any cases offered as comparables. That is

where the discriminatory intent of the supervisor is a necessary part of the plaintiff's case. That is not applicable here because Appellant is not trying to prove that Chief Diaz harbored a discriminatory animus against a particular protected group. Instead, the relevant inquiry for the Commission is whether there is a lack of even-handedness by the City as a whole – regardless of who the decision-maker is or was.

Respondent makes a reasonable-sounding policy argument that Chief Diaz should not be limited by the poor decisions made by his predecessors. Chief Diaz, however, has never said that. Instead of testifying that he disagreed with those comparator cases and that he wishes to embark on a new direction, the City has merely tried to distinguish those other cases. In other words, there is nothing in the record to support Respondent's argument on this point.

4. No Constitutional Issues Are Raised By This Appeal.

Appellant does not follow Respondent's contention about constitutional issues. Appellant does not argue for a "one size fits all" approach. Instead, Appellant argues that the Commission should carefully look at all of the facts involved in a misconduct case, including whether the discipline imposed was even-handed. Appellant agrees that medical

mitigating factors and all other relevant factors should be considered by the Commission.

In the case at bar, the Superior Court erroneously disregarded the teachings of *Roberson*, and substituted its judgment for that of the Commission. The Superior Court did this by weighing the evidence and finding that the comparable discipline cases were not comparable enough. *Roberson* does not allow this.

Finally, Respondent raises the final “red herring” of the collective bargaining agreement, citing to its presumption of termination for officer dishonesty. The Commission has repeatedly stated that it lacks authority to interpret or effectuate the collective bargaining agreement. In fact, the Commission rejected Appellant’s arguments that it should analyze the case under the CBA’s definition of dishonesty, which requires materiality.

C. If This Court Agrees With Respondent, It Should Instruct The Superior Court To Remand To The Commission To Require A "Clear Preponderance" Standard Of Proof In The City's Case Against Appellant.

Although the Superior Court should be reversed for the reasons explained above, there is another issue if this Court affirms the Superior Court – what quantum of proof should the Commission require in a termination case. The Commission rejected Appellant’s argument that the clear preponderance of evidence standard should apply and used a mere

preponderance of evidence standard. This is supported by numerous authorities.

One decision aptly explains:

[I]t seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval . . . should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused.

Kroger Co., 25 LA 906, 908 (Smith, 1955) (emphasis added) (cited in Elkouri & Elkouri, *How Arbitration Works*, p. 951).

Other decisions also apply a slight variant, but a rigorous standard of proof nonetheless: “the arbitrator must be **completely** convinced that the employee was guilty.”⁸ Some arbitrators have even required evidence *beyond a reasonable doubt*.⁹

Even the City’s Human Resources Director, Mark McCarty, could not make an argument for a lesser quantum of proof. Upon questioning by a Commissioner during the *Mahoney* hearing, he stated:

⁸ *Columbia Presbyterian Hosp.*, 79 LA 24, 27 (Spencer, 1982).

⁹ Hill and Sinicropi, EVIDENCE IN ARBITRATION, 32-36 (1987, 2d Ed.); FAIRWEATHERS PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 200-04 (1991 3d Ed.) (Schoonhoven Editor).

I've never really thought about dishonesty being less than a termination case. And a termination case is going to be clear and convincing. . . . [I]f we're talking about cases that don't involve a dishonesty finding, I think the burden of proof is less on management.

(Tab 5, Tr., p. 583-584)

Importantly, the Washington State Supreme Court has held that the preponderance of evidence standard is **too low** a burden of proof where reputational harm is at stake. The Court held that a state agency must go beyond a mere preponderance where a professional license and reputation is at issue. *Nguyen v. State*.¹⁰ The court explained:

The intermediate clear preponderance standard is required in a variety of civil situations "to protect particularly important individual interests," that is those interests more important than the interest against erroneous imposition of a mere money judgment. Examples of such proceedings include involuntary mental illness commitment, fraud, "some quasi criminal wrong doing by the defendant" as well as the risk of having ones "reputation tarnished erroneously." Medical disciplinary proceedings fit triply within this intermediate category because they (1) involve much more than a mere money judgment, (2) are quasi-criminal, and (3) also potentially tarnish one's reputation.¹¹

That is exactly the case here, which is why the Commission should have applied a "clear preponderance standard" to the City's case against Officer Werner. As in *Nguyen*, he faces much more than a mere money judgment – he is currently "unemployable" due to this case. This will

¹¹144 Wn.2d 516, 525, 29 P.3d 689 (2001).

stigmatize him and will follow him in any career he pursues from this point forward. Given the press coverage of this case, the power of the internet allows any prospective employer to read about Officer Werner and the City's termination of his employment for "dishonesty."

Respondent argues that Appellant's position is contradictory: we argue that the courts should completely defer to the Commission and, yet, we complain that the Commission erred in deciding the correct legal standard. Appellant's arguments are made in the alternative. First, we argue that *Roberson* means that the courts must defer to the Commission. Second, if this court disagrees with that and wishes to become more active in its judicial review of the Commission, then it should decide the quantum of proof issue.

The Supreme Court's decision in the *Kitsap County* case supports the view that the appropriate quantum of proof is heightened when termination for alleged misconduct is at issue. Before reaching the Supreme Court, the Court of Appeals, Division II, ruled that the arbitrator's decision should be reversed. *See Kitsap Co. Deputy Sheriff's Guild v. Kitsap Co.*, 140 Wn. App. 516 (2007). The Court of Appeals noted at the outset: "The arbitrator agreed that LaFrance (the deputy) had repeatedly been untruthful but decided that Kitsap County could not establish by clear and convincing evidence that termination was the proper

form of discipline." *Id.* at 517. The County argued that the correct quantum of proof was "preponderance of the evidence" but the arbitrator disagreed, finding that "the applicable burden of proof was clear, cogent, and convincing evidence, rather than a preponderance of the evidence, as the County urged." *Id.* at 519. The Court of Appeals did not disturb the clear and convincing standard of the just cause analysis; rather, it held that public policy should prevent reinstatement of an officer found to have been dishonest. The Washington Supreme Court reinstated the arbitrator's ruling.

If this case is remanded to the Commission, a "clear preponderance" or "clear and convincing" quantum of proof should apply.

D. Werner Did Not Waive Any Claim But Argues That A Remand Should Include Guidance On Whether The City Proved Dishonesty As The Respondent Defines That Term.

As with the preceding section, this is an alternative argument, made only if this Court wishes to sustain the reversal of the Commission on the grounds stated by the Superior Court. Appellant will stand on his opening brief on this issue.

E. The Commission Is Not Barred From Using Any Particular Test, Including The So-Called Daugherty Test.

Respondent make a confusing and illogical argument about the way to reconcile *Roberson* and *Kelso*. This Court in *Roberson* could have

easily explained that the Commission cannot rely exclusively on the seven factors from the Daugherty Test. It did not and the City did not move for reconsideration or petition the Supreme Court for review of *Roberson* to "reconcile" that decision with *Kelso*.

More importantly, Respondent's argument about public safety is an insult to the integrity of the commissioners who include a sworn police officer, a retired Police Chief and a retired Superior Court Judge. The implication that public safety was ignored is inaccurate. The Commission expressly considered that Officer Werner was a very good and well respected officer of the SPD, with an "unblemished record" for a period of eight years, prior to being charged with dishonesty. CP 42, lines 10-14.

Moreover, the Washington Supreme Court's decision in *Kitsap County Sherriff's Guild v. Kitsap County*¹² disposes of any public policy arguments that the Commission was required to uphold Officer Werner's termination.

After hearing all of the evidence through live testimony, the Commission concluded, that Officer Werner's conduct warranted discipline, but not termination.

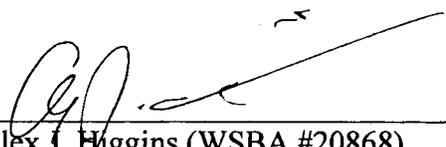
¹² 167 Wn.2d 428, 219 P.3d 675(2009).

IV. CONCLUSION

In conclusion, the Commission – not the Superior Court – has the authority to oversee discipline of public safety officers in the City of Seattle. Under the relevant city ordinance, the Commission is empowered to affirm, reverse, or modify a disciplinary order imposed by the City against any public safety officer.¹³ The Commission’s expertise in this area is entitled to deference. In addition, its decisions are reviewed by the courts under the highly deferential “substantial evidence” standard. In this case, the Superior Court failed to correctly apply that standard and, instead, substituted its judgment for that of the Commission. Reversal is required and the Commission’s decision in this case must stand.

DATED this 8th day of November, 2010.

LAW OFFICES OF ALEX J. HIGGINS

By: 

Alex J. Higgins (WSBA #20868)
Attorneys for Appellant Eric Werner

¹³ SMC 4.08.100.

CERTIFICATE OF SERVICE

I, Alex J. Higgins, a resident of the County of King, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I caused a true and correct copy of the foregoing, to be served on the following in the manner indicated:

Court of Appeals
Division I
One Union Square
600 University Street
Seattle, WA 98101

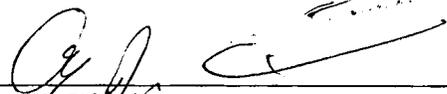
Hand-Delivered

Peter S. Holmes
Amy Lowen
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124

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COURT OF APPEALS
DIVISION ONE
NOV 08 2010

DATED this 8th day of November, 2010.



Alex J. Higgins

APPENDIX A

A-12

SEATTLE POLICE DEPARTMENT MEMORANDUM

TO: A/Captain Mike Washburn
North Precinct Commander
FROM: Captain Neil Low
OPA-IS Commander
SUBJECT: Proposed Disposition: OPA-IS 05-0054
DATE 10/25/05

REQUESTED BEFORE MAY 1

This action is taken pursuant to SPD Manual section 1.121 (old SPD manual section 1.09.080) and the SPOG contract.

ACTION:

The attached IS-OPA investigation has been completed with a proposed disposition of SUSTAINED for each allegation. If you concur with the proposed disposition(s), note that on this memo and return the entire packet to IS-OPA. If you do not concur, please contact me directly. In either case, your response is due within 10 calendar days from the date of this memorandum.

IS-OPA Case Number: 05-0054
Employee: [Redacted]
Allegation(s): CUBO -Remarks-1.029 (Policy)
Violation of Rules/Regs/Laws
Reporting Discharge of Firearm
Unauthorized Weapon
Complainant: [Redacted]
Subject: [Redacted]
Incident Date: 3/17/05
Date Classified: 3/18/05
Date Completed: 10/01/05
180-Day Expiration Date (SPOG): 11/27/05

SUMMARY OF ALLEGATION(S):

It is alleged that the named officer brought discredit on herself and the Seattle Police Department because of the following misconduct issues, which were reviewed by the King County Prosecutor, an Inquiry Judge, and the Seattle City Attorney:

- 1.) While off-duty, the employee became involved in a disturbance, made threats to kill, and mishandled her firearm.
2.) The named employee made false/misleading statements to responding police officers investigating an alleged assault. When asked if she heard a gunshot or if she was armed, the named officer replied, "No."
3.) The named employee failed to take appropriate action by delaying her reporting of an alleged "accidental discharge" of her firearm.

4.) The named employee is alleged to have carried and/or utilized an unauthorized off-duty weapon during this incident.

ANALYSIS:

After careful review and consideration, I support my findings based on the following facts:

CONDUCT UNBECOMING AN OFFICER: Disturbance with firearm, threats to kill, and discharging firearm:

- The evidence shows that Officer [REDACTED] was in the area of 12th and East Pike with her [REDACTED]. [REDACTED] was also in the area panhandling passersby for change. [REDACTED] asked [REDACTED] and [REDACTED] for money; they declined. The encounter turned physical. [REDACTED] struck [REDACTED] on the head with a partially full juice bottle and then fled. [REDACTED] pursued him and pulled a revolver from her purse during the chase. She dropped the weapon and picked it up. Somehow a shot was fired from the gun.
- [REDACTED] was aware a shot had been fired, but he was not hit. He continued running.
- [REDACTED] flagged down Officer [REDACTED] verbally identified herself as a police officer, and advised she was chasing a suspect. Prior to contacting [REDACTED], [REDACTED] saw [REDACTED] running down the street, but he did not know she was a deputy. Before he came to the corner, he heard a shot. He turned the corner to check on the shot and immediately saw [REDACTED] who flagged him down. [REDACTED] left [REDACTED] and contacted [REDACTED].
- Subject [REDACTED] told [REDACTED] that he had been panhandling, two women attacked him, and then one shot at him. [REDACTED] repeated the story to Sgt. [REDACTED].
- Officer [REDACTED] says that besides asking [REDACTED], he also asked Officer [REDACTED] if she had heard any gunshots, and she denied that she had. He followed by asking if she had a firearm on her, and she said, "No." Officer [REDACTED] offered that there might be a potential gunshot wound victim or property damage somewhere, and this should be checked out. [REDACTED] still did not advise of the shooting. She opened her hands up and pulled open her coat (like she had nothing to hide).
- Officer [REDACTED] arrived and identified [REDACTED] as the person who had assaulted her and [REDACTED] became upset at the way the officers were handling [REDACTED], who was not under arrest. Sgt. [REDACTED] asked [REDACTED] if she was "packing," and she said, "No." [REDACTED] continued to be upset and wanted to know why [REDACTED] wasn't in custody. [REDACTED] was soon taken into custody.
- Deputy [REDACTED] arrived and identified herself. She denied that she was armed, and she was patted down for weapons. Officers asked [REDACTED] if she heard a gunshot, and she said she had not.
- Sgt. [REDACTED] called on-duty Lieutenant Sim Tamayo in the North Precinct and advised him of the circumstances.
- Sgt. [REDACTED] asked [REDACTED] and [REDACTED] if they were in condition to drive or wanted a ride home. They consented to his driving them home, ostensibly because they were upset, not necessarily because they were impaired by alcohol. The officers described [REDACTED] as not intoxicated. Sgt. [REDACTED] did not make additional inquiries on the ride home but reminded [REDACTED] and [REDACTED] that Lt. Tamayo was on-duty in the North Precinct. Later, Lt. Tamayo told Sgt. [REDACTED] that [REDACTED] contacted a SPOG representative in the North Precinct to report a Negligent Discharge of Firearm.

- Per SPOG contract, Sgt. Nelson in Homicide was tasked with investigating this incident for criminal charges. Officer ██████ declined to give him a statement. The King County Prosecutor declined to file charges either against ██████ or against ██████. They recommended the case be presented to the City Attorney for possible charges of "Making a False or Misleading Statement to Public Officials (False Report)." The City Attorney declined to file charges.
- Named Officer ██████ reported to Officer ██████ that subject ██████ approached her and ██████ for money, then crowded them. ██████ attributes a derogatory comment about lesbians to ██████. When they tried to squeeze past ██████ ██████ alleges he said, "You fucking dyke bitches," and struck ██████ with a bottle. ██████ chased the fleeing ██████ but could not keep up.
- Sgt. Proudfoot interviewed ██████, who was in custody and apparently unaware that ██████ and ██████ were sworn officers. ██████ said he was about to ask the women for money, when they started coming at him angrily; ██████ the more aggressive. When they were upon him, ██████ swung the bottle and hit ██████ somewhere around the head. He fled with ██████ chasing him and yelling, "I'm going to kill you." ██████ who's maintaining a 25-30 foot advantage, hears something drop. He turns to see ██████ pick something up and then hears a "loud boom." ██████ said that after the shot he heard ██████ say again that she was going to kill him. ██████ denied calling the women "bitches, dykes, or lesbians."
- Lt. Tamayo states ██████ contacted him and told him that because of the stress of the situation it only became clear to her when she got home that her gun had accidentally discharged. Given the efforts the sergeant and officers went through to determine if shots had been fired and if she were carrying a weapon, this is an incredible excuse. She adds that after dropping the weapon, she picked it up and it went off. This defies credibility and takes no responsibility for the weapon's discharge.
- ██████ says she did not recall ██████ use derogatory language toward her or ██████
- Named Officer ██████ states she carried the revolver in her purse. She acknowledges she has never qualified with the revolver. She states she pulled the weapon because she thought ██████ whom she was chasing, might have an accomplice. ██████ acknowledges that she called ██████ a coward and told him to come back (She didn't identify herself as a police officer and ██████ didn't know she was a police officer even after he was booked; so why would he stop and come back?) ██████ said she grabbed the gun hard when she picked it up, and it fired as ██████ went around a corner. ██████ said she wasn't sure she had fired the revolver. She put the gun in her coat pocket as Officer ██████ arrived on scene. (Why?) ██████ said she understood Sgt. ██████ question about "packing," but she was concerned about ██████ well being (Evasive). ██████ said that when she got home she contacted Sgt. Rich O'Neill (SPOG) and then Lt. Tamayo.
- In response to SPOG representatives question, ██████ acknowledged she knew the manual and that she wasn't to report her accidental discharge to anyone outside of her chain-of-command. This appears to conflict with her earlier statement that she had formulated a plan on the ride home to call her SPOG representative (apparently for advice).

VIOLATION OF RULES/REGS/LAWS: Assault with firearm/discharge of firearm; False Report/False arrest.

- The named officer says that after she dropped her gun and picked it up, it went off, as if the discharge was accidental. ██████ not only cannot explain how such an accidental discharge would have taken place, in theory. She accepts no responsibility for her actions.
- Subject states that as ██████ chased him she yelled, "I'm going to kill you," before and after the gunshot.

- [REDACTED] caused [REDACTED] to be arrested for a felony and booked into jail, when the evidence indicates [REDACTED] initiated the attack on [REDACTED] [REDACTED] defended himself and struck [REDACTED]

FAILURE TO TAKE APPROPRIATE ACTION/REPORTING DISCHARGE OF FIREARM:

- Officer [REDACTED] says that besides asking [REDACTED], he also asked Officer [REDACTED] if she had heard any gunshots, and she denied that she had. He followed by asking if she had a firearm on her, and she said, "No." Officer [REDACTED] offered that there might be a potential gunshot wound victim or property damage somewhere, and this should be checked out. [REDACTED] still did not advise of the shooting. She opened her hands up and pulled open her coat (like she had nothing to hide).
- Officer [REDACTED] denied to Officer [REDACTED] that she heard gunshots.
- Sgt. [REDACTED] asked [REDACTED] if she heard a gunshot or was "packing," and [REDACTED] appeared surprised and shocked, saying, "No, I'm not." Sgt. [REDACTED] also heard [REDACTED] ask [REDACTED] if she had her firearm, and she said she didn't. [REDACTED] also asked, "Are you sure?" and [REDACTED] answered that she was sure.
- During the ride home, Sgt. [REDACTED] said [REDACTED] leaned forward and asked if there were any surveillance cameras operating in the area.
- Through her SPOG representative, [REDACTED] agreed to his question that she was concerned to report the "accidental discharge" only to her chain-of-command.

UNAUTHORIZED WEAPON:

- Named officer [REDACTED] last qualified with her Glock 27 at an off-duty weapon qualification in September of 2002. She has never qualified with a revolver. The .38 revolver in question is registered to [REDACTED]
- [REDACTED] is not qualified or authorized to carry a .38 caliber revolver off duty.
- [REDACTED] states she carried the revolver in her purse and has never qualified with it. She is aware of the policy requiring she qualify with any weapon she carries off-duty.

CONCLUSION:

The evidence in this case supports that named officer [REDACTED] and her [REDACTED] encountered subject [REDACTED] on the sidewalk, while [REDACTED] was seeking spare change. [REDACTED] says [REDACTED] was belligerent and called them names, including: "bitches, dykes, and lesbians," and when they tried to step by him he struck [REDACTED] with a bottle. [REDACTED] on the other hand, says that he was about to approach [REDACTED] and [REDACTED] they came at him angrily, and he swung the juice bottle at them in self-defense, connecting with [REDACTED] head. He then fled, with [REDACTED] in pursuit. [REDACTED], who didn't know the women were police officers, said he heard [REDACTED] yell she was going to kill him. He heard her drop something and turned to see her picking up a knife or gun. Then he heard a gunshot and [REDACTED] say again that she was going to kill him.

[REDACTED] flags down a patrol car and reports an assault (Malicious Harassment) incident, naming [REDACTED] and her as victims and the yet to be identified [REDACTED] as the suspect. [REDACTED] does not disclose that firearm discharge, whether accidental or deliberate. After officers contact [REDACTED], he reports that it was the women who attacked,

4. chased, and shot at him. Two different officers and a sergeant each approach [REDACTED] and ask about shots being fired and if she's packing. [REDACTED] tells them "No" and holds up her hands and opens her jacket like she's unarmed. Her response and actions are clearly deceptive and destroy her credibility.

[REDACTED] sticks to her version that [REDACTED] was the aggressor, and he is arrested. [REDACTED] states, however, that she doesn't recall [REDACTED] calling them "bitches, dykes, or lesbians."

[REDACTED] states that (although she didn't identify herself as a police officer) she called [REDACTED] a coward and yelled for him to come back. This is not the tone of someone who is afraid.

5. Sgt. [REDACTED] notes that [REDACTED] is angry with the officers for investigating this incident rather than merely accepting her word as an officer for what happened, implying that it is because she and her partner are lesbians. This was manipulative behavior on her part, as she tried to steer the investigation to an outcome beneficial to her.

6. [REDACTED] argument, as put forth by her SPOG representative, that she was concerned with only reporting this "A.D." (accidental discharge) to her chain-of-command per SPD manual is not credible. Investigator Proudfoot correctly points out that this was not a gun cleaning incident at home but a felony, Malicious Harassment incident involving [REDACTED] a foot pursuit, and the discharge of a weapon on the street, which could have injured a citizen and/or innocent bystander(s).

7. Subject [REDACTED] version of the incident is the more credible, and that is troubling. It means that [REDACTED] and [REDACTED] initiated contact with [REDACTED], and he responded by defending himself, striking [REDACTED] with the bottle that was in his hand. [REDACTED] then chased him, while yelling "I'm going to kill you." She then took her gun out and fired it. Although she claims it was an accidental discharge, the evidence supports that it was not accidental, since the credible subject reports that [REDACTED] again repeated the threat to kill him.

[REDACTED] then denied that there was a shooting or that she was carrying a firearm. She caused [REDACTED] to be arrested and booked into jail for a crime that did not occur and he did not commit, at least as [REDACTED] described it. I understand that Sgt. Nelson arranged [REDACTED] release.

1. Named officer [REDACTED] acted in a manner that brought discredit to herself and the Department. This matter was brought before an Inquiry Judge, the County Prosecutor, and the City Attorney. Evidence supports that Officer [REDACTED] caused subject [REDACTED] to suffer an assault on the street, followed by his wrongful arrest and booking into jail. CUBO: SUSTAINED.

2. Evidence supports that named officer [REDACTED] discharged her firearm while chasing subject [REDACTED], who was defending himself from assault. Before and after the shooting she yelled, "I'm going to kill you." She acknowledges that she called him a coward and yelled for him to come back. The preponderance of evidence tends to support that she shot at him and did not have an accidental discharge. When officers, who investigated the *Malicious Harassment* and *Shots Fired* incident(s) they on-viewed, inquired about the shooting, [REDACTED] denied it and pretended she was not armed. The officers were concerned that an innocent citizen/bystander could have been struck by her discharge, and without her cooperation they could not adequately explore it.

8. Evidence shows that [REDACTED] also caused a report to be filed that resulted in [REDACTED]'s arrest. A preponderance of evidence supports that this report is based on a misstatement of facts. Violation of Rules/Regs/Laws: SUSTAINED.

9. Evidence supports that named officer [REDACTED] also failed to report discharging her firearm in a timely manner. It was not until after she got a ride home and after she asked Sgt. [REDACTED] if there might be cameras in the area did she

report the discharge. Her first call after she got home was to "my SPOG representative" and not the Watch Commander. By then, she and [REDACTED] were clear of the scene, as was subject [REDACTED], the suspect or victim of this assault. The scene could no longer be contained, secured, or processed. Report Discharge of Firearm: SUSTAINED.

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Evidence supports that named officer [REDACTED] acknowledges she carries her partner's revolver and has not qualified to carry it off-duty. Unauthorized Weapon: SUSTAINED.

PROPOSED DISPOSITION:

Please take note of information supporting the allegation(s) and information not supporting the allegation(s). Your complete review of the contents of this file should assist you in determining your finding.

Employee: [REDACTED]

Allegation 1: CUBO: SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Allegation 2: Violation of Rules/Regs/Laws: SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Allegation 3: Fail to Report Firearm Discharge: SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Allegation 4: Unauthorized Weapon: SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Section Commander

DATE

00911

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APPENDIX B

A-3

12(a)

Seattle Police Department DISCIPLINARY ACTION REPORT		I.I.S. FILE NUMBER 04-0049	
RANK/TITLE Police Officer	NAME	SERIAL NUMBER	UNIT
SUSTAINED ALLEGATION(S): Unnecessary Force [Seattle Police Manual 1.145]			
SPECIFICATION: On February 7, 2004, you and other officers responded to a call of a noise disturbance. You arrested an individual when he failed to follow your direction to leave. In doing so, you pulled the arrestee's hair and hit his head against a vehicle. Although the arrestee was not seriously injured and did not require any medical treatment, his actions did not warrant such use of force.			
PROPOSED DISCIPLINARY ACTION: Suspension without pay for one nine-hour day.			
FINAL DISPOSITION: Suspension without pay for one nine-hour day. You may forfeit accrued vacation time in lieu of serving the nine hour suspension.			
DATE October 15, 2004	BY ORDER OF <i>[Signature]</i> CHIEF OF POLICE		

A.PEAL OF FINAL DISPOSITION

POLICE OFFICERS: Public Safety Civil Service Commission

Employee must file written demand within ten (10) days of a suspension, demotion or discharge for a hearing to determine whether the decision to suspend, demote or discharge was made in good faith for cause. SMC 4.08.100

DISCIPLINARY REVIEW BOARD: For employees represented by SPOG, the Disciplinary Review Board (DRB) may be an alternative appeal process for suspensions, demotions, terminations, or transfers, identified by the City as disciplinary in nature. Consult your collective bargaining agreement or SPOG representative to determine eligibility, notice periods, and details of the process. The DRB is available as an alternative only, and not in addition to an appeal to the Public Safety Civil Service Commission.

CIVILIAN EMPLOYEES: Civil Service Commission

To appeal, employee must file statement with commission within twenty (20) days of date of personal delivery or delivery to employee's address of notice to employee of a demotion, suspension or termination. Note: Twenty (20) days begins to run on the third day after the date of mailing if notice is mailed. SMC 4.04.230

Represented Civilian Employees: Grievance and arbitration may be an alternative appeal process. Consult the applicable contract or a union representative to determine availability, notice periods, and details of process. Binding arbitration is available as an alternative only and not in addition to an appeal to the Civil Service Commission. SMC 4.04.260C

DISTRIBUTION: BUREAU COMMANDER, I.I.S., ACCUSED, PERSONNEL DIVISION

FORM 1.20 CS 21.558 REV.3/97

EXHIBIT NO. 7.....

00912

SEATTLE POLICE DEPARTMENT MEMORANDUM

TO Captain Jim Pryor
Southwest Precinct Commander

DATE 8-11-04

FROM Captain Mark Evenson *ME*
Investigation Section - OPA

SUBJECT Proposed Disposition - IS OPA Case # 04-0049

This action is taken pursuant to SPD Manual section 1.121 (old SPD manual section 1.09.080) and the SPOG contract.

ACTION:

The attached IS-OPA investigation has been completed with *proposed dispositions* of SUSTAINED for Unnecessary Force and NOT SUSTAINED for [REDACTED]. If you concur with the *proposed disposition(s)*, note that on this memo and return the entire packet to IS-OPA. If you do not concur, please contact me directly. **In either case, your response is due within 10 calendar days from the date of this memorandum.**

IS-OPA Case Number: 04-0049

Employee: SABAY, Roberto Y. #5472
Allegation(s): Unnecessary Force - 1.145 (Policy)
[REDACTED]

Complainant: Alderson-Gamble, Zane
Subject: Same
Incident Date: 2/7/04
Date Classified: 3/23/04
Date Completed: 8/5/04
180-Day Expiration Date (SPOG): 9/18/04

SUMMARY OF ALLEGATION(S):

It is alleged that the named employee bent the subject over and pushed his face into a vehicle, pulled his hair and grabbed him by his throat. [REDACTED]

ANALYSIS:

After careful review and consideration, I support my recommendation based on the following facts:

- This is a difficult analysis because there are a number of civilian and officer witnesses who only observed bits and pieces of the encounter between the named employee and the subject.

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- It appears that no other officers observed the actual arrest encounter between the subject and named employee. Witness officers [REDACTED] and [REDACTED] were busy moving people out of the area and did not observe the arrest or escort. Officers [REDACTED] and [REDACTED] only observed part of the escort to the patrol car and did not see the named employee use any force. [REDACTED] took the subject from the named employee and placed him into the patrol car. Sgt. [REDACTED] only observed the subject when he was already at the patrol car. None of the officers heard the named employee make any derogatory statements.
- Officer [REDACTED] states that the subject placed his handcuffs in front of him. [REDACTED] pulled him from the vehicle to place the cuffs behind him. [REDACTED] states that the subject was uncooperative and tried to spit on him. [REDACTED] states that he bent the subject over the patrol car and used his forearm to pin him down to keep control of the subject. [REDACTED] states that he adjusted the cuffs and placed him back in the car without incident.
- Witness [REDACTED] was one of the neighbors who called police to report the loud party. [REDACTED] only observed part of the subject's encounter with officers. He did not observe the subject's arrest and only observed the subject hiding behind a vehicle and part of the subject's escort to the patrol car. He observed nothing unusual. [REDACTED] states that he heard one of the officers state that the subject was "Clothes-Hanged" implying that the subject was taken down with a straight arm. There are no other references to this in the entire case.
- Witnesses [REDACTED], [REDACTED] and [REDACTED] know the subject and were also attending the party. Each of them spoke with the subject after the incident. Witness [REDACTED] did not observe much but stated that he did see an officer pull the subject's hair. Witness [REDACTED] observed officers escorting and pushing the subject toward the patrol car. Fischer states that she heard the subject say that his hair had been pulled.
- Witness [REDACTED]'s statement seems contaminated and off the mark. [REDACTED] states that he observed the named employee slam the subject's face into the "patrol car" but wasn't sure if his face made contact. There is no other information to indicate that any force was applied at the patrol car. [REDACTED] is either confused or may be referring to officer [REDACTED]'s hold during the handcuff adjustment. [REDACTED] did not observe the subject's hair being pulled. [REDACTED] In my opinion, [REDACTED]'s statement was greatly influenced by his conversations with the subject after the incident.
- Witness [REDACTED] lives next door to where the party was located and does not know the subject. [REDACTED] states that he observed the entire encounter between the named employee and the subject and felt the named employee's actions were excessive. [REDACTED] states that from his window, he observed the named employee hit the subject's head against a car and then grab the subject's hair and jerked the subject's head back two or three times. [REDACTED] left a note for the subject stating that he did not like the way he was treated by the police and to contact him.
- Other than the subject, no one else mentions anything about the subject being grabbed by the throat. However, the booking photos do show what appears to be some faint fingerprint marks on the right side of the subject's neck.
- The named employee denies using any force on the subject.

CONCLUSION:

The evidence indicates that the only people who observed the subject's initial arrest was the subject, the named employee and witness [REDACTED]. Though the subject and witness [REDACTED] did speak to each other prior to their statements to OPA, I find witness [REDACTED]'s statement credible and compelling. Of all the witnesses, [REDACTED] is the most independent and the one most likely to have observed the entire encounter from his location. [REDACTED] proactively sought out the subject based on his observations of the arrest. The subject's responses to questions seem reasonable and honest. Witnesses [REDACTED] and [REDACTED] provide some information that corroborates the subject's allegation of hair pulling. The booking photos do show possible fingerprint marks on the subject's neck. The preponderance of evidence does support that the named employee, more likely than not, used some force when he arrested the subject including hair pulling and hitting the subject's head against a vehicle, and that the subject's actions did not warrant such force. Based on this conclusion, I recommend a finding of SUSTAINED for Unnecessary Force.

I do not believe there is enough evidence to prove or disprove by the preponderance of evidence that the named employee made the alleged derogatory remarks. I recommend a finding of NOT SUSTAINED for CUBO-Remarks.

PROPOSED DISPOSITION:

Please take note of information supporting the allegation(s) and information not supporting the allegation(s). Your complete review of the contents of this file should assist you in determining your finding.

Employee: [REDACTED] # [REDACTED]

Allegation: Unnecessary Force SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Allegation(s): CUBO-Remarks NOT SUSTAINED

_____ CONCUR _____ DO NOT CONCUR

Section Commander DATE