

65632-5

65632-5

No. 65632-5-I

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

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ERIC WERNER,

*Appellant/Plaintiff*

v.

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT

*Respondent, Defendant*

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

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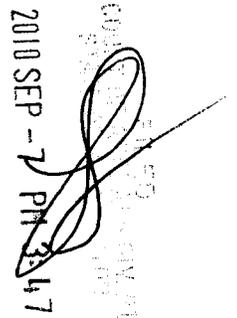
**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

Seattle Police Officer Eric Werner (“Officer Werner”) appeals the Superior Court’s order to overturn the Seattle Public Safety Civil Service Commission (the “Commission”), which had previously modified the discipline imposed by the City of Seattle (“City”). The Commission modified the discipline after holding a two-day hearing, with testimony from numerous witnesses. It ultimately concluded that Officer Werner should be suspended for 30 days, rather than lose his job as a police officer, as the City had desired. The Superior Court, on a writ of certiorari filed by the City, decided that termination was more appropriate discipline.

In doing so, the Superior Court improperly substituted its judgment for that of the Commission – the sole entity authorized by statute to oversee discipline imposed on public safety officers in the City of Seattle. The Commission was specifically created to review and modify as appropriate disciplinary actions taken against public safety employees. Under the relevant city ordinance, the Commission is empowered to affirm, reverse, or modify a disciplinary order.<sup>1</sup>

At the hearing before the Commission, Officer Werner acknowledged that he failed to accurately report his conduct during an

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<sup>1</sup> SMC 4.08.100

arrest in 2007. Specifically, during an investigation about his use of a taser, Officer Werner neglected to include a hand strike he used before using the taser. Officer Werner, and the internal investigation, was focused on the use of the taser – which is what the suspect had complained about. When asked if he used any other force or struck the suspect, Officer Werner answered in the negative. Later, Officer Werner self-reported this mistake to the City. Based on this admission, the City discharged Officer Werner for that “dishonesty.”

The Commission ultimately found that Officer Werner had been dishonest but that termination was not the appropriate discipline. The Commission considered the entirety of the testimony and record, among other things, the City’s discipline imposed on other officers accused of comparable misconduct and who were not fired.

The Superior Court disagreed with this result, seizing on the Commission’s analysis of comparable cases. Considering only the paper record, hearing none of the witnesses, and not having any of the expertise of the Commission, the Superior Court engaged in an overly-technical review of police officer misconduct cases, finding distinguishing features in order to conclude they were not factually comparable. In doing so, the Superior Court improperly substituted its judgment and the fact-finding of the Commission. The Superior Court ruling contravenes the controlling

authority from this Court of Appeals which establishes that the Commission -- not the court -- is the ultimate arbiter of employee discipline. *City of Seattle v. City of Seattle, Public Safety Civil Service Commission*.<sup>2</sup> In that case, this Court explained that courts should defer to the Commission on its mandate to oversee discipline cases, holding that the “the city charter, and indirectly the state legislature, bestowed upon the Commission, not the court, the authority to implement the 1978 ordinance and accomplish the purposes of chapter 41.12 RCW.”<sup>3</sup> The *Roberson* case thus establishes that the Commission has the power to make discipline decisions and that the courts should not sit as a super-personnel board to second-guess the Commission.

Because the Superior Court disregarded the teachings of *Roberson* and inappropriately substituted its judgment for that of the Commission, its Order should be reversed and the Commission's determination of the appropriate discipline should be reinstated.

## **II. ASSIGNMENTS OF ERROR**

2.1 The Superior Court, acting as an appellate court, erroneously substituted its judgment for that of the Commission,

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<sup>2</sup> 155 Wash.App. 878, 230 P.3d 640 (2010) (hereinafter referred to as “*Roberson*”, the name of the officer involved).

<sup>3</sup> *Id.*, 155 Wash.App. at 893 (emphasis added).

infringing on the statutory authority of the Commission and the deference required by controlling precedent.

2.2 The Superior Court erroneously determined that it could reject the factual bases for the Commission's decision under the "substantial evidence" standard of review, even though the analysis of what is a comparable discipline cases is a question of fact that the Commission must resolve as part of its fact-finding as an expert agency and the trier of fact.

2.3 Even assuming that the Superior Court did not err in either point above, the Superior Court erred by failing to remand to the Commission for further proceedings and further erred by failing to require the City to prove its case on remand by a "clear preponderance" of the evidence and to prove that Officer Werner engaged in "dishonesty" as that term is narrowly defined by the City.

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

##### **1. Officer Werner Appeals His Termination to the Public Safety Civil Service Commission**

Officer Werner was terminated by the Seattle Police Department for his mis-statement during an internal investigation that he did not hit a suspect who he had admittedly "tased." CABR 00873. Officer Werner

appealed the discharge to the Commission, which held a two-day evidentiary hearing, followed by extensive briefing by the parties. The City argued that it had proven that the termination was made "in good faith for cause." The Commission found otherwise, holding that the termination of Officer Werner was "an inappropriate form of punishment given the facts and circumstances of this case." CP 35-46, at 41, Lines 5-6. The Commission considered the entirety of the evidence, including Officer Werner's eight years of outstanding performance as an officer on the force as well as other discipline cases of comparable seriousness within the City's police force. CP 35-45; CABR 00875-00903 (Officer Werner's commendations, performance review, and letters written to the Commission in his support). On the latter point, the Commission made a factual determination that "there is evidence that employees in past cases involving dishonesty either received no suspension of duties or only temporary suspension of duties." CP 35-46, at 41, Lines 11-13. It went on to find: "to date, no other employee has been terminated based on dishonesty... The majority concludes that the evidence does not support the Department even-handedly applied its rules." CP 35-46, at 41, Lines 21-22.

Ultimately, the Commission modified Officer Werner's discipline from a termination to an unpaid suspension of 30 days. CP 35-46, at 43, Lines 1-3.

## **2. The Department Sought a Writ of Certiorari in Superior Court**

The Department sought a writ of certiorari to reverse the following findings of the Commission: (1) termination was an inappropriate and excessive form of punishment; (2) the Department did not apply its rules even-handedly; and (3) termination was unfair in relation to Werner's offense of dishonesty. CP 8-34 (City's Opening Brief in the Superior Court).

After the parties briefed the merits, the Superior Court heard oral argument; no live testimony was presented. CP 274.

The Superior Court issued its Order on June 10, 2010, reversing the Commission's decision to modify the discipline of Officer Werner and ordering the termination of his employment. CP 275-277. The Court concluded that the Commission's fact findings on comparable discipline cases was not supported by substantial evidence because "none of the cited cases involve a sustained finding of intentional dishonesty in an investigation regarding use of force." CP 275-277, at 276, Lines 19-20. Officer Werner filed a timely appeal in this Court.

## **B. Statement of Facts**

Officer Werner joined the Seattle Police Force in 2000. He was a law and justice major at Central Washington University. CABR 01030 (Tr. p.413; Lines 15-16). He was a highly-regarded officer, who was considered a leader in his precinct. CABR 00999-01000. His precinct in Southeast Seattle was one of the most challenging. *Id.* He worked third watch, which is the 7:00 p.m. to 4:00 a.m. shift or 7:30 p.m. to 4:30 a.m. shift. *Id.* Officer Werner's Sergeant, Bill Waltz, spoke highly of him as "one of the hardest working and most ethical officers I have ever had the privilege of working with and I hate the thought of SPD losing a man of his integrity." CABR 00879.

On the night of August 11, 2007, Officer Werner responded to a call to investigate a possible car prowl. CABR 00758. Another officer, Officer Stewart, also responded. *Id.* When Officer Werner arrived, he saw Officer Stewart struggling with the suspect on the ground. *Id.* Officer Werner told the suspect to "quit resisting." *Id.* He joined the struggle, striking the suspect with his hand. When the suspect failed to cooperate, Officer Werner used a taser to subdue him. *Id.* Following the incident, Officer Werner completed a report which fully disclosed the use of the taser, but neglected to mention that he had first attempted to subdue the suspect with lesser force -- a hand strike. *Id.*

The suspect complained that the taser should not have been used. CABR 336-338, 1023. There was no complaint that Officer Werner had struck him. CABR 00988, p. 246: 4-12. The Police Department's Office of Public Accountability ("OPA-IIS") interviewed Officer Werner about his use of the taser. CABR 633-642. The investigator asked many questions about the tasing. *Id.* When he asked if any other force was used, such as hitting or punching, Officer Werner said no. CABR 636, 639-641.

Approximately six months after giving that statement to OPA-IIS, Officer Werner applied for employment with the Snohomish County Sheriff's Office ("SCSO"). CABR 00822-00849. When asked if he had ever been untruthful during an internal investigation, Officer Werner admitted that he had been untruthful in that internal investigation. *Id.* He offered the following explanation on his application:

On the use of force complaint, I struck the subject in the face....During an IIS interview, I stated that there was incidental contact with the suspect. I did this because I did not want myself or others to get in trouble, and I believed that it did not have an impact on the outcome...because the complaint was about tasing the suspect, which I was honest about. This was the only time that I have not been truthful in an interview and it will not happen again."

CABR 00848.

Officer Werner then reported that to the City. As a result of his disclosure, the City of Seattle OPA-IIS initiated an investigation. CABR

00510-00526. That investigation concluded that Officer Werner had intentionally lied during the internal investigation. CABR 00743-00752. Based exclusively on that single act of dishonesty, the Chief of Police decided to terminate his employment. CABR 00873. After Officer Werner appealed that decision, the City has tried to “pile on” allegations of additional misconduct in an effort to justify its decision -- none of which was relied on at the time and, therefore, is totally irrelevant.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Standard of Review**

Review of the Superior Court's decision on the writ of certiorari is *de novo*.<sup>4</sup> No deference is given to the Superior Court when it reviews a paper record from an administrative hearing.<sup>5</sup> By contrast, the Commission's decision on the appropriate discipline is entitled to great judicial deference, as explained below. When a court reviews decisions made by this expert agency, that review is “limited to determining whether

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<sup>4</sup> *Hilltop Terrace Ass'n v. Island Cy.*, 126 Wn.2d 22, 29, 891 P.2d (1995).

<sup>5</sup> *Gaines v. State Dept. of Employment Sec.*, 140 Wn.App. 791, 796-97, 166 P.3d 1257 (2007) citing *Washington Cedar and Supply Co. Inc. v. Dep't of Labor and Ind.*, 137 Wn.App. 592, 598, 154 P.3d 287 (2007) (Whether the law is correctly applied to the facts as found by the agency is a question of law that courts review *de novo*).

the Commission ‘acted arbitrarily, capriciously, or upon an inherently wrong basis.’”<sup>6</sup>

**B. The Commission Has Wide Discretion When Deciding Whether to Modify the City’s Discipline -- the Superior Court Failed to Defer to the Commission’s Expertise**

The Commission is authorized to review whether the City’s Police Department disciplined an officer “in good faith for cause.” In making that determination, the Commission has consistently employed a seven-factor analysis, the so-called “Daugherty Test”.<sup>7</sup> Earlier this year, this Court of Appeals approved use of the Daugherty Test by the Commission, explaining that the Commission has the power to choose the legal test and how to apply it.<sup>8</sup>

Part of the Daugherty Test involves the Commission’s factual review of whether the City has been consistent in comparable discipline

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<sup>6</sup> *City of Seattle v. City of Seattle, Public Safety Civil Service Commission*, 155 Wash.App. 878, 893, 230 P.3d 640 (2010) (“*Roberson*”) (citing, *Butner v. Pasco*, 39 Wash.App. 408, 411, 693 P.2d 733 (1985) (To make this determination, appellate courts independently review the administrative record, independent of the trial court’s findings)).

<sup>7</sup> The “Daugherty Test,” as it was “articulated by labor arbitrator Carroll R. Daugherty in 1964, is now widely used to guide arbitrations in collective bargaining agreements.” *Roberson*, 155 Wash.App. at 887-888. The seven factors include: “(1) the employee had notice that his or her conduct would result in disciplinary consequences; (2) the rule was reasonable; (3) the employer investigated to determine whether the rule was in fact violated; (4) the investigation was fair; (5) the employer’s decision-maker had substantial evidence that the employee violated the rule as charged; (6) the employer applies its rules even-handedly; and (7) the discipline administered was fair in relation to the nature of the offense and imposed with regard to the employees past work record.” *Id.*

<sup>8</sup> *Roberson*, 155 Wash.App. at 891.

decisions.<sup>9</sup> In the present case, the Commission heard two days of live testimony on the nature of Officer Werner's misconduct, the nature of other discipline cases, and Officer Werner's eight years of excellent performance as a police officer. This led the Commission to conclude that termination was not the appropriate discipline, explaining that the City did not even-handedly applied its rules. CP 35-45. The Commission therefore modified the discipline to thirty days unpaid suspension (the maximum allowable suspension). CP 35-45, at 41. The Commission's expert determination and fact-finding on officer discipline should not have been disturbed by the Superior Court.

The *Roberson* case is clearly the leading precedent, which must be carefully considered. In that case, the Commission reduced an officer's suspension from thirty days to seven. The City challenged that modification, arguing that the Commission's use of the Daugherty Test was an error of law. The underlying statute provides for the Commission to review whether the discipline was imposed by the City in "good faith for cause."<sup>10</sup> The City argued that *Baldwin v. Sisters of Providence in Washington, Inc.*,<sup>11</sup> defines "cause" for purposes of Washington

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<sup>9</sup> *Id.* at 889.

<sup>10</sup> *Id.*

<sup>11</sup> 112 Wash.2d 127, 769 P.2d 298 (1989).

employment law. That decision requires an employer merely to show an objectively reasonable belief that the evidence established misconduct. The Court of Appeals disagreed that the Commission had erred, concluding that while two different legal standards exist, it is for the Commission, “as the body appointed to administer the statute, to decide which test to apply” in defining “cause.”<sup>12</sup> Although the Daugherty Test was different, it was not an unreasonable choice according to the court. The court reasoned that the Commission had broad power to make the difficult decisions relating to officer discipline; the enabling ordinance “explicitly states that the Commission may modify the discipline, and the statute confers wide discretion upon the Commission under its authority.”<sup>13</sup> The Court of Appeals went on to explain that courts do not have the authority to modify the Commission or to second-guess its judgment: “the city charter, and indirectly the state legislature, bestowed upon the Commission, not the court, the authority to implement the 1978 ordinance and accomplish the purposes of chapter 41.12 RCW.”<sup>14</sup> (Emphasis added).

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<sup>12</sup> *Roberson*, 155 Wash. App. at 888-891.

<sup>13</sup> *Id.* at 891.

<sup>14</sup> *Id.*

Thus, *Roberson* establishes two critical points. First, the Commission is entitled to decide the legal standard and the relevant criteria used to define "good faith for cause". The Commission is empowered to select the Daugherty Test even though it may substantially diverge from the definition of "cause" found in Washington case law.

The second critical point established by *Roberson* is that the Commission's determination on whether to modify the same is essentially non-reviewable by the courts. It gives the power to the Commission, "not the courts," to make those difficult decisions within its statutory authority and expertise.<sup>15</sup>

In the case at bar, the Superior Court erroneously disregarded the teachings of *Roberson*, and substituted its judgment for that of the Commission.

As *Roberson* instructs, the enabling ordinance, SMC 4.08.100, is the starting point. SMC 4.08.100 expressly provides that the Commission should determine in an appeal whether the discipline imposed was made in "good faith for cause," and if it determines that it was not "in good faith for cause," it may modify the discipline.

**SMC 4.08.100 Tenure of Employment – Removal for Cause**

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<sup>15</sup> *Id.*

The hearing shall be confined to the determination of the question of whether such removal, suspension, demotion, or discharge was made in good faith for cause. After such hearing, the Commission may affirm the action of the appointing authority, or if it shall find that the action was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such a person was removed, suspended, demoted, or discharged. The Commission upon such hearing, in lieu of affirming the removal, may modify the order of removal, suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30) days, and subsequent restoration to duty, or demotion in classification, grade or pay. The findings of the Commission shall be certified in writing by the appointing authority, and shall be forthwith enforced by such officer.

The Commission must interpret and apply the facts of the case to the undefined terms, "good faith for cause". In doing so, the Commission has consistently referenced the seven factors identified in Koven and Smith, *Just Cause: The Seven Tests* (2d ed. 1992), which is an oft-cited and leading treatise on the subject of how to interpret the meaning of the term "cause" in the labor field.

In Officer Werner's case, the City made the exact same arguments rejected in *Roberson*. In its brief before the Superior Court, the Department argued that the Commission should not have relied on the Daugherty Test: "the Commission's adoption of and strict adherence to

the standard used by labor arbitrators is not supported by law.”<sup>16</sup> The City also argued that the Commission misapplied the Daugherty Test by relying too heavily on two factors: “the Commission reduced Werner’s discipline based solely on two ‘factors’ of the seven factor test...the Commission’s reliance on arbitration law is not in keeping with the civil service statute or Washington law.”<sup>17</sup> These arguments failed in *Roberson* and they fail here as well. In 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.<sup>18</sup>

In short, in light of the Commission’s broad discretion and expertise, it has the power to decide whether the discipline should stand or be modified. The Superior Court ignored that required deference and

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<sup>16</sup> CP 8-35, Department’s Opening Brief, p. 17, lines 11-12.

<sup>17</sup> *Id.* at p. 16, lines 15-18.

<sup>18</sup> *Roberson*, 155 Wash. App. at 891.

decided the case without proper consideration of the principles enunciated in *Roberson*.

The Superior Court attempted to avoid *Roberson* by attacking the factual findings, rather than the legal standard used. But the Commission's factual findings are entitled to even more deference than its determination of what legal standard to employ. Ignoring that, the Superior Court weighed the evidence and found that the discipline cases were not comparable enough for the court's liking. *Roberson* does not allow this. As explained below, the decision of what is "comparable" is a factual determination and the Commission was both the expert agency and the trier of fact.

**C. The Superior Court Erred in Failing to Give The Superior Court Erred in Failing to Give the Commission Deference as the Expert Agency and the Trier of Fact on Which Other Discipline Cases were Comparable**

*Roberson* establishes that the Commission has the authority to select the appropriate legal standard (the Daugherty Test). Therefore, a fortiori, the Commission has the power to weigh evidence, make findings and decide how to apply those factors to the testimony received. Indeed, the Commission's legal decisions, such as whether to apply the Daugherty Test, are entitled to less deference than its factual determinations. The

Superior Court, however, made the opposite determination, giving no weight to the Commission's factual findings. The Superior Court re-evaluated the Commission's finding that Officer Werner was not treated consistently in relation to other, comparable misconduct cases and imposed its own definition of what is "comparable". That was error.

The Commission was authorized to make findings such as what other discipline matters were sufficiently comparable to be significant.

The Superior Court violated several well-settled principles: (1) that courts give due deference to an expert agency's interpretation of the statute it implements<sup>19</sup>; and (2) that the tribunal hearing the live testimony is in the best position to make factual findings.<sup>20</sup>

As such, the Commission's 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

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<sup>19</sup> In addition to the *Roberson* case cited throughout this brief, see also, *Spain v. Employment Sec. Dept.*, 164 Wn.2d 252, 185 P.3d 1188 (2008) (In reviewing Employment Security's interpretation of the statute and its definition of "good cause," the Court stated "due deference is given to the agency's interpretation of the statutes it implements." However, when a statute can be reasonably interpreted in multiple ways because it is ambiguous, courts may turn to extrinsic evidence of legislative intent.). Quoting *Overton v. Economic Assistance Authority*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981): "Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review.").

<sup>20</sup> *Gaines v. State Dept. of Employment Sec.*, 140 Wn.App. 791, 796-97, 166 P.3d 1257 (2007)

decision and police misconduct cases. Thus, it is entitled to wide deference on such factual findings.

The Superior Court erroneously concluded that the Commission was constrained in determining comparability by the label given by the employer for the type of misconduct. It held that other discipline cases were not comparable enough because they did not involve the label of "dishonesty," even though the Commission found that they involved officer dishonesty. The Commission was able to see through the label and consider the nature of the misconduct. That was entirely appropriate.

What is "comparable" discipline case is a question of fact.<sup>21</sup>

Under an imperfect analogy from employment discrimination case law, the term "comparable seriousness" is sometimes used when analyzing proof of disparate treatment. This does not involve exactitude in the type of misconduct.<sup>22</sup> Instead, the focus is on the nature of the misconduct,

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<sup>21</sup> *McDonnell Douglas v. Green*, 411 U.S. 792, 804 (1973) (If such co-workers are alleged to have committed acts "of comparable seriousness," then they may be proper comparators to a Plaintiff.); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976).

<sup>22</sup> *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 488 (8<sup>th</sup> Cir. 1998); see also, e.g. *Smith v. Oakland Scavenger Co.* 127 F.3d 1106 (9<sup>th</sup> Cir. 1997); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (2003) (The Ninth Circuit Court of Appeals has held that "individuals are similarly situated when they have similar jobs and display similar conduct."); *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654 (2002) (Ninth Circuit Court of Appeals citing *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir.2001) explaining "minimal showing necessary to establish co-workers were similarly situated". *McGuinness* holds that "an employee 'must be similarly situated in all material respects'-not in all respects." *McGuinness*, at 53. "A plaintiff is not obligated to show disparate treatment of an identically situated employee." *Id.*, at 54.)

rather than whether the two employees violated the same rule.<sup>23</sup> As one federal court of appeals has explained: “Reasonableness is the touchstone, and recognizing that the plaintiff’s case and the comparison cases... need not be perfect replicas.”<sup>24</sup>

The leading case in Washington regarding the issue of “comparable seriousness” in the employment discrimination context is *Johnson v. DSHS*.<sup>25</sup> In that case, the plaintiff attempted to prove discrimination by reference to a comparator who committed another serious offense but who was not terminated. The Washington Court of Appeals in *Johnson* cited to a Seventh Circuit case, *Hiatt v. Rockwell Int'l Corp.*<sup>26</sup> In that case, the court was more explicit that “Plaintiffs are free to

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<sup>23</sup> *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).

<sup>24</sup> *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”).

<sup>25</sup> 80 Wn. App. 212, 230, 907 P.2d 1223 (1996).

<sup>26</sup> 26 F.3d 761 (7th Cir.1994).

compare similar conduct, focusing more on the nature of the misconduct rather than on specific company rules."<sup>27</sup>

In more recent decisions, the Seventh Circuit has further explained this rule. For instance, in *Humphries v. CBOS West, Inc.*<sup>28</sup>, the court reaffirmed that "an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity."<sup>29</sup> The court held that case law does not provide any "magic formula" but mandates a "common-sense factual inquiry - essentially, are there enough common features between the individuals to allow a meaningful comparison?"<sup>30</sup> Instructing lower courts that the rule of comparability is not an "unyielding, inflexible requirement," the court of appeals observed that "distinctions can always be found in . . . the nature of the alleged transgressions."<sup>31</sup>

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<sup>27</sup> *Id.*, at 770.

<sup>28</sup> 474 F.3d 387 (7th Cir. 2007).

<sup>29</sup> *Id.*, at 405 (citing, *inter alia*, *Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir.2006) (the comparator's actions had the same "essence of the charges" against plaintiff)).

<sup>30</sup> *Id.* (citing *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382-83 (7th Cir.2000)).

<sup>31</sup> *Id.*

Another Seventh Circuit case further explains the rule adopted in Washington. In *Ezell v. Potter*<sup>32</sup>, the plaintiff was fired for taking lunch breaks beyond the allotted time and then charging the employer for overtime on that same day. In attempting to prove disparate treatment, the plaintiff pointed to another employee who had engaged in what he argued was comparable misconduct – he had lost certified mail.<sup>33</sup> The district court rejected that comparator, but the Seventh Circuit reversed, explaining that the plaintiff need not produce a comparator "who committed exactly the same infraction and was treated more favorably."<sup>34</sup> The court reasoned that losing mail could be equally serious and, at a minimum, it raised an issue of fact.<sup>35</sup>

In short, the most important principle is that the trier of fact must decide what is a comparator under the circumstances. In the present case, where an expert agency is also the trier of fact, the argument is even stronger that deference must be made to the Commission on this factual inquiry.

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<sup>32</sup> 400 F.3d 1041, 1049-50 (7th Cir.2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 1050.

<sup>35</sup> *Id.*

The Superior Court erred when it weighed the evidence and substituted its judgment on what is a comparable discipline case. The Commission found that the other discipline was comparable because the situations involved dishonesty and other forms of serious, comparable misconduct. The Commission is not constrained by the City Police Department's label and its internal decision, subject to unknown factors, not to bring formal dishonesty charges. The Commission correctly reasoned that it is not up to the City to determine what is comparable -- that is the function of the Commission in overseeing the City.

In light of its expertise in reviewing these types of discipline decisions, the Commission held that the City did not even-handedly applied its rules. In addition to the Commission's own expertise and awareness of other discipline cases, the following discipline cases were specifically presented to the Commission at the hearing:

(1) An officer was found to have lied about whether she intentionally discharged her firearm during an off-duty altercation with an unarmed civilian. CP 35-46, at 41, CABR 00905-00911. There was overwhelming evidence that this officer had been deceptive to other officers on the scene. Also, the OPA-IIS investigator acknowledged that this was felonious conduct by the officer. *Id.* However, the Department only suspended this officer for 15 days. *Id.* (The Superior Court found

that because this officer was not formally charged with "dishonesty", this cannot be comparable misconduct.)

(2) An officer, only after he learned of an investigation by a local police department, admitted that, while he was off duty, he purposefully discharged his service weapon as a “ploy” to check on a neighbor, and did not make sure that no one was harmed by the errant bullet from his weapon.” This officer was not suspended, but received a disciplinary transfer with no loss of pay. CP 35-46, at 41.

(3) An officer was not even suspended when a patrol car’s video camera contradicted the reason he gave to investigators for why he fired shots at a stolen car, hitting the back of the headrest. CP 35-46, at 41.

(4) An officer's denial of excessive force was contradicted by three witnesses, one of whom was completely neutral and found very credible by the OPA-IIS. CP 35-46, at 41, CABR 00912-00915. These witnesses confirmed that the officer hit the subject’s head against a car and then grabbed the subject’s hair and jerked the head back two or three times. *Id.* The Department disciplined this officer who apparently did not tell the truth during the OPA-IIS investigation with a one day suspension. *Id.*

(5) An officer who was called to a nightclub to investigate a reported assault, met the alleged victim, escorted her in a patrol car to the station (without telling anyone), took the rest of his shift off, and took the

woman home and had sex with her. CP 35-46, at 41, CABR 00904. The woman's boyfriend complained that this officer had taken advantage of this obviously and "extremely intoxicated" woman. This behavior by an officer did not result in termination.

(6) Another officer was heard by several witnesses calling another man a "fucking Mexican," at a Mexican restaurant in Tacoma. CABR 00918-00919. The officer denied making such a statement in the OPA-IIS investigation. But the investigation concluded that the officer did make the alleged statement, implicitly finding that the officer was dishonest in the investigation. *Id.* The City only imposed a written reprimand on this officer despite his dishonest responses to the investigator coupled with his highly inappropriate behavior. *Id.*

The City will undoubtedly attack all of these comparators to draw distinctions. While there will always be some distinctions among discipline cases, the Commission is the body empowered to decide whether these distinctions were significant. It was not the Superior Court's decision. Moreover, even if the City successfully distinguishes some of the above cases, a single comparator is sufficient; "numerosity is not required."<sup>36</sup>

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<sup>36</sup> See, e.g., *Goodwin*, 442 F.3d at 619; *Ezell*, 400 F.3d at 1050.

While the misconduct by other officers does not excuse Officer Werner's misconduct, it is within the Commission's authority to determine that the City cannot decide what is comparable misconduct by giving labels to the nature of the offense. Therefore, the Superior Court erred in stripping the Commission of its authority to consider the evidence before it.

**D. The Superior Court Erroneously Failed to Remand the Case to the Commission for Further Proceedings, Including Application of a Higher Quantum of Proof**

**1. The Superior Court Erroneously Concluded that the Proper Quantum of Proof Was a Mere Preponderance Instead of Clear and Convincing Evidence**

Even if the Superior Court had a legitimate basis to reverse the Commission on any of the grounds discussed above, it should have remanded the case to the Commission for further consideration. Among other things, the Superior Court should have remanded for consideration of the case under a clear and convincing standard or a "clear preponderance" quantum of proof. Arbitrators generally agree that clear and convincing evidence of serious misconduct must be presented by an employer. 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.”<sup>37</sup> Some arbitrators have even required evidence *beyond a reasonable doubt*.<sup>38</sup>

The Washington Supreme Court's decision in the *Kitsap County* case<sup>39</sup> supports the view that the appropriate quantum of proof is heightened when termination for alleged misconduct is at issue. In that case, the Court of Appeals, Division II, ruled that the arbitrator's decision should be reversed. 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.”<sup>40</sup> The County argued that the correct quantum of proof was “preponderance

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<sup>37</sup>*Columbia Presbyterian Hosp.*, 79 LA 24, 27 (Spencer, 1982).

<sup>38</sup>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).

<sup>39</sup>*Kitsap Co Deputy Sheriff's Guild v. Kitsap Co.*, 140 Wash.App. 516 (2007).

<sup>40</sup>*Id.* at 517 (emphasis added).

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." <sup>41</sup> Additionally, the Court of Appeals observed that the arbitrator had applied the seven factors of just cause (the Daugherty Test).<sup>42</sup>

The Court of Appeals did not disturb the clear and convincing standard of the just cause analysis; rather, it held that public policy should disallow reinstatement of an officer found to have been dishonest. The Washington Supreme Court accepted review of the Court of Appeals' decision and reinstated the arbitrator's ruling, allowing the officer to return to work. The Court also did not disturb the arbitrator's use of the "clear and convincing evidence" standard and use of the seven-part test for determining just cause.

Even the Police Department'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:

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

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<sup>41</sup>*Id.* at 519.

<sup>42</sup> *Id.*

that don't involve a dishonesty finding, I think the burden of proof is less on management.

CABR 00922, pp. 583-84.

Further, numerous arbitration decisions apply the seven-part test of just cause but also require clear and convincing evidence of the employee's misconduct to be presented at the hearing.<sup>43</sup> As the *Elkouri* treatise notes, with citations to numerous decisions: The clear and convincing standard is applied . . . where the offense of which the employee is accused is seriously criminal, especially opprobrious, or shameful so as to stigmatize the employee and likely to prevent the employee from obtaining other employment."

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

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<sup>43</sup> Some cases use the term "substantial evidence" in articulating the seven-part test for just cause. That is confusing because it suggests a much lower quantum of proof than either "preponderance of the evidence" or "clear and convincing evidence." The better way to articulate the seven-part test is by reference to "sufficient evidence" or "proof" of misconduct, thereby leaving the precise quantum of proof for determination by reference to the CBA or decisional law. See, e.g., *Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546*, 113 Ohio St.3d 291, 293 865 N.E.2d 31 (Ohio 2007) ("substantial evidence or proof that the employee was guilty as charged") The U.S. Supreme Court also uses the term "evidence" instead of the misleading term "substantial evidence". *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 108 S.Ct. 364, n.5 (1987).

beyond a mere preponderance where a professional license and reputation is at issue. *Nguyen v. State*<sup>44</sup>, 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.<sup>45</sup>

That is exactly the case here, which is why the Commission should have applied, at a minimum, the “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 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.” Alternatively, in light of this well-established arbitration principle under the Daugherty Test, the Commission should have required the City to prove Officer Werner's alleged “dishonesty” by clear and

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<sup>45</sup>144 Wn.2d 516, 525, 29 P.3d 689 (2001).

convincing evidence. This is inexorably tied to the narrow definition of “dishonesty” which the Commission failed to apply in this case, as explained below.

**2. The Superior Court Also Erred in Failing to Address Whether the City Had Met the City’s Own Definition of Dishonesty, Which Requires Materiality**

The Superior Court also erred in failing to consider whether the Commission properly analyzed whether Officer Werner had committed "dishonesty" as that term is narrowly defined by the City. While the Commission found that Officer Werner was intentionally dishonest, it did not make a finding as to whether the dishonesty was on a material fact, which is required by the City’s own definition. The relevant definition provides that dishonesty must relate to a material fact: "intentionally providing false information which the officer knows is false, or intentionally providing incomplete responses to specific questions, regarding facts that are material to the investigation." CABR 00859 [emphasis added]. (We are not objecting to the imposition of discipline on Officer Werner for unprofessionalism or conduct unbecoming an officer or some other violation but we only object to whether his conduct fits within the narrow definition of “dishonesty” – the basis for the City’s termination.)

The City's termination of Officer Werner was based solely on his "dishonesty." At the hearing, the City focused on proving Officer Werner's intent. It presented no evidence that Officer Werner's mis-statement was on a "material fact." Indeed, Chief Diaz frankly acknowledged that if Officer Werner had remembered striking the suspect and had disclosed this fact, it would not have made any difference to the Department's investigation. CABR 00988, p. 246:15-21. The suspect initiated a complaint about being tased and never complained about being struck. Indeed, the Department has never re-opened the case even after Officer Werner reported his mis-statement. It is clear that any mis-statement was not material to the investigation.

The City's sole basis for terminating Officer Werner is found in its Disciplinary Action Report ("DAR"), which relies on a single instance of alleged dishonesty in an interview concerning the tasing of a suspect. CABR 00873. Therefore, the only factual issue is whether Officer Werner committed "dishonesty" in that interview. The definition of dishonesty found in the 2007-2010 CBA was the only one presented to the Commission. It was signed and in effect well before the City held its *Loudermill* hearings and made its decision to terminate Officer Werner.<sup>46</sup>

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<sup>46</sup> By way of background, this definition of dishonesty came about because the City asked for clarification of its right to terminate police officers for dishonesty. It asked for a

In fact, the only relevant policy on dishonesty submitted by the City defers to the CBA on all matters of employee discipline. CABR 00778 (p. 5 of 9, provides: "Sustained allegations of dishonesty . . . may be grounds for termination subject to the provisions of the applicable collective bargaining agreement.") This policy is "subject to" and does not override the CBA's definition of dishonesty.

Under the CBA, City also agreed that it must prove dishonesty by "clear and convincing evidence." That means that it must clearly and convincingly prove both essential elements of the definition: intentionality and materiality.

As for the issue of "materiality", Washington courts have consistently defined a material fact as one which affects the outcome.<sup>47</sup> The term "material fact" is most commonly used in civil litigation on a motion for summary judgment. Through that procedure, a defendant seeks to have the plaintiff's claims dismissed because there is not a dispute as to

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presumption of termination for dishonesty during bargaining of the 2007-10 CBA. In response, the Police Guild asked for a clear definition of dishonesty. If there is a different definition of dishonesty applicable to this case, the City has never cited it to Officer Werner or the Guild.

<sup>47</sup> *Ruff v. County of King*, 125 Wash.2d 697, 703 (1995) ("A material fact is of such a nature that it affects the outcome of the litigation."); *Eriks v. Denver*, 118 Wash.2d 451, 456 824 P.2d 1027 (1992) ("A material fact is a fact upon which the outcome of the action depends.").

any "material fact" that a jury would need to determine at trial.<sup>48</sup> The term "material fact" is a fact that makes a difference to the ultimate outcome.

In the present context, the City has conceded that its OPA-IIS investigation was not affected in any way by Officer Werner's denial of striking the suspect. CABR 00988, p. 246:15-21. It had no effect whatsoever on the outcome of the investigation. The question about him striking the suspect was an isolated question out of a hundred questions -- most of which were about the tasing. Put in context, it was not a significant point. The suspect never complained about any hand strike and only focused on the tasing. As proof of its lack of materiality, the investigation was never re-opened and all of the force used on the suspect was deemed justified by the City. Because tasing was deemed justified, therefore, the use of lesser force, such as a hand strike, was also justified. The particulars about the lesser force used was not material to the investigation. Not a single witness from the City could explain how it even might have affected the outcome.

The City could only argue that an officer does not get to decide what is or is not material -- he must answer truthfully. We agree with that

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<sup>48</sup> Therefore, some courts have used different wording to define a "material fact": whether a fact "might" affect the outcome of the suit. The less definite term "might" is used only because the court is preserving its neutrality as to the ultimate outcome of what a jury "might" find. Therefore, some courts use the term "might" to reference what "might" happen in a future trial to sway the jury as to the outcome.

principle. An officer should face discipline for answering questions untruthfully, even if not on a material fact. That discipline, however, must be premised on unprofessional behavior, conduct unbecoming of an officer, or some violation other than dishonesty as a defined term.

**V. CONCLUSION**

For the reasons set out above, Officer Werner respectfully request that the Court of Appeals uphold the Commission and reverse the Superior Court's erroneous second-guessing of the Commission's modification of Officer Werner's discipline.

DATED this 7<sup>th</sup> day of September, 2010.

LAW OFFICES OF ALEX J. HIGGINS

By:  

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**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:

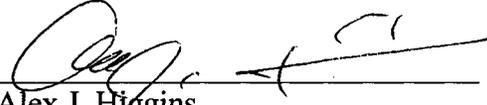
Court of Appeals  
Division I  
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Seattle, WA 98101

Hand-Delivered

Peter S. Holmes  
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P.O. Box 94769  
Seattle, WA 98124

Hand-Delivered

DATED this 7<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
Alex J. Higgins