

66120-5

66120-5

66120-5-I
No. 661205-5-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ROGER L. SKINNER

Appellant

v.

CITY OF MEDINA , *et al*

Respondents

SKINNER'S BRIEF ON APPEAL

William J. Murphy
WSBA No. 19002
Attorney for Appellant

Law Office of William J. Murphy
P.O. Box 4781
Rollingbay, WA 98061
(206) 842-4810 (phone)
(206) 238-6905 (fax)

2018 OCT 28 AM 8:44
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ORIGINAL

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 2

D. SUMMARY OF ARGUMENT 6

E. ARGUMENT 8

 1. STANDARD OF REVIEW 8

 2. DID THE SUPERIOR COURT, IN EXERCISING ITS APPELLATE CAPACITY PURSUANT TO RCW 41.12.090, ACT OUTSIDE ITS STATUTORY AUTHORITY IN ORDERING A SECOND *DE NOVO* CIVIL SERVICE COMMISSION HEARING? 9

 a. Superior Courts Acting In An Appellate Capacity Have Only Such Authority As Expressly Granted By Statute;The Express And Specific Language Of RCW 41.12.090 Does Not Grant The Court The Authority To Order A *De Novo* Hearing..... 9

 b. The Legislature Did Not Intend For The Superior Court To Have The Authority To Order A *De Novo* Hearing In Civil Service Commission Appeals. 10

 3. DID THE SUPERIOR COURT FAIL TO COMPLY WITH THE STATUTORY REQUIREMENT OF RCW 41.12.090 BECAUSE IT DID NOT CONFINE ITS DETERMINATION TO WHETHER THE TERMINATION OF SKINNER’S EMPLOYMENT WAS OR WAS NOT IN GOOD FAITH FOR CAUSE AS REQUIRED BY THE EXPRESS LANGUAGE OF THE STATUTE? 13

 4. DOES MEDINA’S FAILURE TO COMPLY WITH ITS LEGAL OBLIGATIONS UNDER RCW 4.12.090, TO CREATE, PRESERVE AND TRANSMIT A CERTIFIED RECORD, REQUIRE THAT SKINNER’S APPEAL BE SUSTAINED? 14

a. The Transcript Provided By Medina Is Missing From 35% to 42% Of The Testimony Given In This Case, Including That Of Key Witnesses	14
b. There Is No Evidence In The Record That The Primary Witness Against Skinner Was Ever Sworn In As Required By Law; Her Testimony Should Be Excluded. The Affidavit Of Medina’s Counsel, Prepared Four Years After The Hearing, Is Not Admissible In These Proceedings.	177
5. THE COMMISSION BASED ITS DECISION IN PART ON ALLEGATIONS DIFFERENT FROM THOSE PUT FORTH BY THE CITY AS THE BASIS FOR THE TERMINATION OF SKINNER’S EMPLOYMENT. FINDINGS 5.11, 5.12, 5.13.1, 5.15, 5.16 AND 5.17 PROVE THAT THE COMMISSION CONSIDERED EVIDENCE BEYOND THE SCOPE OF THE ALLEGATIONS AGAINST ROGER SKINNER	19
6. DOES THE RECORD LACK SUFFICIENT EVIDENCE TO SUPPORT THE TERMINATION OF SKINNER’S EMPLOYMENT SUCH THAT HIS APPEAL MUST BE SUSTAINED?	21
a. There Is No Evidence In The Record Of The Allegations Made Against Skinner Which Served As The Basis For His Termination	21
b. The Documentary Evidence Before The Commission Was Never Properly Admitted And Should Be Stricken..	23
c. The Civil Service Commission’s Findings 5.4, 5.5 and 5.6 Are Not Supported By The Record.....	30
d. The City’s Lack of Good Faith Is Also Evidenced By Its Failure to Abide By Its Own Rules Regarding Progressive Discipline And The Need To Provide A Warning Letter To Skinner	31
F. CONCLUSION	33

TABLE OF AUTHORITIES

CASES

<i>Benavides v. Civil Service Commission of City of Selah</i> , 26 Wn.App. 531, 613 P.2d 807 (Wash.App. Div. 3 1980).....	15
<i>City of Spokane v. Rothwell</i> , 166 Wn.2d 872, 876 (2009).....	8
<i>Deschenes v. King County</i> , 83 Wash.2d 714, 716 (1974).....	9
<i>Eiden v. Snohomish Cy. v. Civil Service Comm'n</i> , 13 Wn.App. 32,37 (Div. 1 1975).....	18
<i>Griffith v. City of Bellevue</i> , 130 W.2d 189, 197 (1996).....	10, 13
<i>Guillen v. Contreras</i> at pg. 7, (WASC 82531-9, September 9 2010).....	10
<i>Helland v. King County Civil Service Commission</i> , 84 Wn.2d 858, 865 (1975) ..	8
<i>In re the Matter of the Discharge of Leon C. Smith</i> , 30 Wn.App. 943 (Div. 2 1982).....	20
<i>Miller v. City of Tacoma</i> , 61 Wn.2d 374, 390 (1963)	8
<i>Nickerson v. City of Anacortes</i> , 45 Wn.App. 432, 439 (Div. 1 1986).....	18
<i>Nirk v. Kent Civil Serv. Comm'n</i> , 30 Wn.App. 214, 633 P.2d 118 (Div. 1 1981) review denied, 96 W.2d 1023 (1981).....	17
<i>Pool v. City of Omak</i>	15
<i>Skinner v. Medina</i> , 168 Wn.2d 845 (2010).....	7, 8, 12
<i>State ex rel. Dawes v. Washington State Highway Commission</i> , 63 Wn.2d 34, 40 (1963)	8
<i>State ex rel. Oregon-Washington Railroad and Navigation Co. v. Walla Walla County</i> , 5 Wn.2d 95 (1940)	9
<i>State ex rel. Perry v. City of Seattle</i> , 69 Wn.2d 816, 821 (1966)	8
<i>State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall</i> , 42 W.2d 885, 891 (1953)	9
<i>State v. Jackson</i> , 137 Wn.2d 712, 724, 976 P.2d 1229 (1999).....	11
<i>Stone v. Chelan County Sheriff's Dep't</i> , 110 Wn.2d 806, 810 (1988)	12, 16
<i>United Parcel Serv. Inc. v. Dep't of Revenue</i> , 102 Wn.2d 355, 362, 687 P.2d 186 (1984).....	11

STATUTES

APA at RCW 34.05.562(2)(a).....	12
LUPA at RCW 36.70C.120	11

RULES

Medina Civil Service Rule 17.01	31
Medina Police Department Code 26.1.4 III	31, 32
Rule 18.23(a) of the Civil Service Rules of the City of Medina	26, 27
Rule 18.23(e) of the Civil Service Rules of the City of Medina	23

A. ASSIGNMENTS OF ERROR

The trial court erred in:

1. Deciding that RCW 4.12.090 authorized the Court to order a second *de novo* hearing by the Civil Service Commission;
2. Failing to decide, in accordance with the requirements of RCW 4.12.090, whether the decision of the Civil Service Commission was or was not made in good faith for cause

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court, exercising its appellate capacity pursuant to RCW 41.12.090, act outside its statutory authority in ordering a second *de novo* Civil Service Commission hearing?
2. Did the Superior Court fail to comply with the statutory requirement of RCW 41.12.090 because it did not determine whether the termination of Skinner's employment was or was not in good faith for cause as required by the express language of the statute?
3. Does Medina's failure to comply with its legal obligations under RCW 4.12.090 require that Skinner's appeal be sustained?

4. Did the Medina Civil Service Commission improperly consider matters other than those cited by the City as the basis for the termination of Skinner's employment thereby requiring that Skinner's appeal be sustained?
5. Does the record lack sufficient evidence to support the termination of Skinner's employment such that his appeal must be sustained?

C. STATEMENT OF THE CASE

Appellant Roger Skinner served the City of Medina as a respected member of its police department for over 15 years, rising to the rank of lieutenant. Roger Skinner served the City and its citizens faithfully for over a decade and a half, during which time he consistently received "exceeds standards" in performance appraisals. CP 1.

Skinner had served the City of Medina for over thirteen years when Jeffrey Chen became Chief of Police at Medina in 2004 . Despite Skinner's exemplary performance over a period of fifteen years, he was abruptly terminated by City of Medina Police Chief Jeffrey Chen on February 15, 2006. *ROP*, Transcript at 104; CP1.

Skinner believes the termination was based, in part, in retaliation for Skinner's disclosure of improper remarks made by the Chief of Police. *ROP*, Transcript at 163. Testimony in the partial transcript provided by

Medina also shows that Skinner was terminated based, in part, on a shortage of office space at Medina City Hall. *ROP*, Transcript at 100.

According to Medina, the termination of Skinner's employment was based on statements made against Skinner, by Skinner's co-employees, alleging that Skinner made two comments; one simply repeating what the Chief of Police had said about the low level of staff skills and another regarding Skinner's concern that there were not more people in management of Asian descent. *ROP*, Part A, Tab 5, pgs 1-2. Skinner contends that he was mis-quoted and that any statements made by him were mis-construed. *ROP*, Transcript at 163-164. In any event, the record before the court does not contain evidence supporting these allegations.

RCW 41.12.090 imposes upon the Medina Civil Service Commission, the legal obligation to create and forward to the court for review, a certified transcript of the proceedings before the Commission. See Exhibit A. The Civil Service Commission decided not to retain a court reporter for the proceedings and was thus unable to produce a complete certified transcript for review. Instead it provided a transcript missing 35% to 40% of the proceeding. *ROP*, Dec. of Shelly M. Hoyt, CCR Regarding Preparation of Transcript, pgs. 1-2. The testimony provided in the record does not support the charges made against Skinner.

The Civil Service Commission hearing in this matter began at 9:27 a.m. and concluded at 5:09 p.m. on August 4 2006, a duration of 7 hours and 42 minutes. *Id.* at Exhibit 2. The transcript of the hearing, derived from an audio recording, contains 42 distinct instances of missing testimony; a total of 2 hours, 40 minutes and 28 seconds of missing testimony. *Id.* Thus, the City has omitted at least 35% of the testimony in this case.¹ *Id.* In addition to the missing testimony noted above, the recording has four other gaps, not indicated on the court reporter's declaration, from 10:22:33 a.m. (hr:mins:secs) to 10:37:55 a.m., from 11:30:26 a.m. to 11:38:58 a.m., from 2:36:39 p.m. to 2:45:20 p.m., and from 3:16:29 p.m. to 3:24:02 p.m. *ROP*, Transcript at pgs. 28, 59, 132, 150; CP 6. These gaps total to an additional aggregate gap of over 38 minutes, not indicated in the declaration of the court reporter. In each of these instances, the court reporter who transcribed the recording stated in the transcript that the hearing was in recess but this was simply an assumption on her part. *Id.* She was not present at the proceedings.

¹ The court reporter's declaration evidences a 43 minute 40 second gap at mid-day. She surmises that part of this gap may have included lunch but states "there is no way for me to tell when and for how long." The transcript itself, shows the gap commencing in the midst of testimony and resuming again in the midst of testimony so there is, in fact, no way to accurately determine what occurred during that gap. Even assuming a 30 minute lunch break, however, there remains well over two hours of missing testimony, providing the court with less than 70% of the testimony taken that day. *ROP*, Declaration of Shelly M. Hoyt CCR Re Preparation of Transcript, Exhibit 2.

The record provided by the City also does not contain evidence that the documents upon which the Commission relied upon were ever properly offered or admitted as evidence.

Furthermore, the Commission's Findings and Conclusions contain Findings about matters that were not the stated basis for Skinner's termination. *ROP*, Part A, Tab 6 at ¶¶ 5.11, 5.12, 5.13.1, 5.15, 5.16, and 5.17.

Finally, in its Memorandum Opinion, the superior court below did not enter the determination required by RCW 41.12.090. CP 60-66. In its' Memorandum Opinion, the court noted the following, among other things:

1.4. There are significant gaps in the record involving the testimony of 3 key witnesses: Brianna Beckley, Doug Schultz and Petitioner Roger Skinner. CP 62.

1.5. Ms. Beckley was one of the complainants in the underlying internal investigation conducted by Mr. Doug Schultz under the direction of Medina Chief of Police Jeffrey Chen. . . . CP 62.

1.6. There is a 49 minute 49 second gap in the record of the testimony of Doug Schultz, city manager for the city of Medina who undertook the investigation of the allegations which resulted in the termination of employment of Roger Skinner. (citation to record omitted). CP 62.

1.7. The record of Mr. Skinner’s testimony reveals gaps of 50 minutes 30 seconds . . . CP 62.

Oddly, the court attempted to minimize some of the other missing testimony by saying “While there record gaps in other witnesses’ testimony, these gaps are of seconds or less than six minutes and do not appear significant.” (Memorandum Opinion at 1.8). CP 63. To put that statement in context, it may take as little time as three to five seconds to make an objection and receive a ruling.

The Court’s Memorandum Opinion failed to address substantial arguments put forth by Skinner including that exhibits were not properly admitted into evidence and that the Civil Service Commission considered matters outside the proper scope of the hearing. These issues did not require a transcript to resolve, yet the trial court simply ignored them in its Memorandum Opinion. CP 60-66.

D. SUMMARY OF ARGUMENT

RCW 41.12.090, the civil service statute applicable to city police departments, sets forth specific legal obligations. In the case of a terminated police officer, as in the matter at hand, the statute imposes obligations on the police officer, the city and the superior court (in the case of an appeal to the superior court).

Skinner fully complied with the obligations imposed upon him. Nevertheless, the City of Medina subjected him to a lengthy appellate process to no avail. See *Skinner v. Medina*, 168 Wn.2d 845 (2010).

Despite its insistence that Skinner strictly comply with the requirements of RCW 41.12.090, the City now argues that it should not be subject to the same level of scrutiny with respect to the obligations imposed upon it by that statute.

The City was obliged by statute to create, preserve and produce a verbatim transcript of the Civil Service Commission proceedings. It failed to do so. Furthermore, the City's Civil Service Commission improperly entered an order upholding the termination, based in part on grounds other than those put forth by the Chief of Police as the basis for the termination of Skinner's employment. The Civil Service Commission also based its order, in part, on documents that were not properly admitted as evidence. Due to the lack of a complete record, Skinner challenges all of the Findings of the Medina Civil Service Commission.

Finally, the superior court, acting in its appellate capacity, disregarded the limitations imposed on its authority by ordering a *de novo* Civil Service Commission hearing and by failing to make the determination required by statute.

E. ARGUMENT

1. STANDARD OF REVIEW

Skinner's appeal asks the court to interpret RCW 4.12.090 and the rules of the Medina Civil Service Commission. The appellate court reviews these questions of law *de novo*. *Skinner v. Medina*, 168 W.2d 845, 849 (2010) citing *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876 (2009). This court is not required to accord any deference to the superior court's interpretation of RCW 41.12.090.

With respect to reviewing the action of the Civil Service Commission, an appellate court independently examines the administrative record, exclusive of the trial court's findings. *Butner v. Pasco*, 39 Wn.App. 408, 411 (Div. 3 1985). The basis for review is whether the Commission "acted arbitrarily, capriciously, or upon an inherently wrong basis." *State ex rel. Perry v. Seattle*, 69 Wash.2d 816(1966). However, "a finding of fact made without evidence to support it and a conclusion based upon such a finding is arbitrary." *Helland v. King County Civil Service Commission*, 84 Wn.2d 858, 865 (1975), *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 821 (1966), *Miller v. City of Tacoma*, 61 Wn.2d 374, 390 (1963) and *State ex rel. Dawes v. Washington State Highway Commission*, 63 Wn.2d 34, 40 (1963), all citing *State ex*

rel. Tidewater-Shaver Barge Lines v. Kuykendall, 42 W.2d 885, 891 (1953). Furthermore, “if findings are not based upon the evidence, the presumption of their correctness does not remedy the deficiency or absence of evidence to sustain them.” *Id.* citing *State ex rel. Oregon-Washington Railroad and Navigation Co. v. Walla Walla County*, 5 Wn.2d 95 (1940).

In the matter at hand, the record is grossly deficient and the record lacks the evidence needed to support the Findings set forth in the Commission’s Order. Thus, by law, the Commission’s decision is arbitrary and cannot be sustained.

2. DID THE SUPERIOR COURT, IN EXERCISING ITS APPELLATE CAPACITY PURSUANT TO RCW 41.12.090, ACT OUTSIDE ITS STATUTORY AUTHORITY IN ORDERING A SECOND *DE NOVO* CIVIL SERVICE COMMISSION HEARING?

a. Superior Courts Acting In An Appellate Capacity Have Only Such Authority As Expressly Granted By Statute; The Express And Specific Language Of RCW 41.12.090 Does Not Grant The Court The Authority To Order A *De Novo* Hearing

Although a Superior Court may exercise a broad range of powers in cases brought pursuant to its general jurisdiction, when a superior court is acting as an appellate tribunal it has only such jurisdiction as specifically provided by the applicable statute. *Deschenes v. King County*, 83 Wash.2d 714, 716 (1974). Further, such power “can be exercised only under the

limitations and circumstances prescribed by the statute.” *Griffith v. City of Bellevue*, 130 W.2d 189, 197 (1996). In this case, the Court is acting in its appellate capacity, pursuant to RCW 41.12.090, and therefore it must respect the limitations imposed by that statute. RCW 41.12.090 does not provide for a *de novo* hearing.

RCW 41.12.090 (Exhibit A) provides, in pertinent part:

PROVIDED, HOWEVER, That such hearing [in the superior court] shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause . . . (emphasis added)

The express language of the statute, that the hearing “shall be confined” clearly limits the court’s authority to that specifically set forth in the statute. Specifically, the legislature did not grant the court the authority to order a re-hearing at the Civil Service Commission.

b. The Legislature Did Not Intend For The Superior Court To Have The Authority To Order A *De Novo* Hearing In Civil Service Commission Appeals.

"It is an 'elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" *Guillen v. Contreras* at pg. 7, (WASC 82531-9, September 9 2010) citing *State v. Jackson*, 137 Wn.2d

712, 724, 976 P.2d 1229 (1999) (quoting *United Parcel Serv. Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)).

Prior to its most recent enactment of the civil service statute, RCW 41.12.090, in 2007 (attached as Exhibit A), the Washington State Legislature enacted other laws, the Land Use Petition Act (enacted in 2005) and the Administrative Procedures Act (enacted in 1988). Both of these other statutes confer appellate authority upon the Superior Court and both expressly include language allowing a superior court to order a *de novo* hearing to remedy an inadequate record. The Legislature did not include such language when enacting the Civil Service Commission Act and, therefore, the legislature did not intend the superior court to have authority to order a new hearing in civil service commission appeals.

The Land Use Petition Act (LUPA) (attached as Exhibit B) provides the Superior Court with appellate authority to review administrative land use actions. The LUPA, at RCW 36.70C.120, specifically provides the circumstances under which a Superior Court can order a new hearing to supplement the record. No such language exists in the civil service statutes.

The Administrative Procedures Act (APA)²(attached as Exhibit C), at RCW Chapter 34.05.562(2)(a) , also allows the Superior Court, acting in its appellate capacity, to remand for a new hearing in the event of an inadequate record in cases based on the APA. No such language exists in the civil service statutes.

Because the civil service statute, at RCW Chapter 41.12, does not provide the Superior Court with authority to order a rehearing, while such authority is specifically granted in LUPA and APA cases, it is clear that the legislature intended not to provide the court with the authority to order a rehearing in appeals from civil service commissions.

Furthermore, a decision allowing the superior court to order *de novo* hearings in civil service commission cases would render the specific remand language in the LUPA and the APA superfluous. Statutes should not be construed in a manner which renders legislative language meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810 (1988) .

² Note that this Court has already held that the Administrative Procedures Act does not apply to this case. *Skinner v. Medina* , 146 Wn.App. 171, 176 (Div. 1 2008). *Medina*, itself, agrees that the APA is inapplicable here - "Moreover the legislature specifically excluded local civil service commissions from coverage under the APA." Brief of *Medina*, August 18, 2008 at pg. 5

For these reasons, the order of the superior court below, remanding this matter for a *de novo* civil service commission hearing, is without authority and should be reversed.

3. **DID THE SUPERIOR COURT FAIL TO COMPLY WITH THE STATUTORY REQUIREMENT OF RCW 41.12.090 BECAUSE IT DID NOT DETERMINE WHETHER THE TERMINATION OF SKINNER’S EMPLOYMENT WAS OR WAS NOT IN GOOD FAITH FOR CAUSE AS REQUIRED BY THE EXPRESS LANGUAGE OF THE STATUTE?**

As noted above, the superior court acting in its appellate capacity must exercise its authority “only under the limitations and circumstances prescribed by the statute.” *Griffith v. City of Bellevue*, 130 W.2d 189, 197 (1996). RCW 41.12.090 expressly limits the court with the following language:

PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause . . . (emphasis added)

The express language of the statute indicates that the court’s action is confined i.e., the court is limited in what it can do. The statute then goes on to describe that limitation – the court must make a determination, it does not have the authority to hand over that responsibility to another. Finally, the statute specifies the two possible outcomes available to the

court in making its determination. The Court is directed by RCW 41.12.090 to determine whether the removal (i.e., the termination of Skinner's employment):

1) was or

2) was not

made in good faith for cause. The court has no other option under the express language of the statute. It may not abdicate its duties to the Civil Service Commission.

In this case, the superior court failed to make the determination required by statute. It simply avoided making any determination and therefore, the court failed to comply with the requirements of RCW 41.12.090. Since the Court below failed to comply with RCW 41.12.090, its decision should be reversed.

4. DOES MEDINA'S FAILURE TO COMPLY WITH ITS LEGAL OBLIGATIONS UNDER RCW 4.12.090, TO CREATE, PRESERVE AND TRANSMIT A CERTIFIED RECORD, REQUIRE THAT SKINNER'S APPEAL BE SUSTAINED?

a. The Transcript Provided By Medina Is Missing From 35% to 42% Of The Testimony Given In This Case, Including That Of Key Witnesses

Medina has failed to comply with its legal obligation to create, preserve and transmit to the reviewing court, a certified record of the proceedings below. The hearing at the Civil Service Commission began at

9:27 a.m. and concluded at 5:09 p.m. on August 4, 2006 (over 4 years ago), a duration of 7 hours and 42 minutes. However, because Medina failed to retain a court reporter for these proceedings, as required by law, its “certified transcript” is missing at least 2 hours 40 minutes of the proceedings and perhaps as much as 3 hours and 18 minutes of the hearing. In other words, anywhere from 35% to 42% of the hearing is unavailable for review.

RCW 41.12.090 requires of Medina:

The commission shall, within ten days after the filing of such notice [of appeal], make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner (emphasis added)

The Washington State Court of Appeals has held that a city is obligated to provide a court reporter to satisfy this requirement.

“A court reporter must be present at the civil service commission hearing, regardless of whether an appeal is taken.” *Benavides v. Civil Service Commission of City of Selah*, 26 Wn.App. 531, 613 P.2d 807 (Wash.App. Div. 3 1980). “The city is responsible for the court reporter's attendance fee for the civil service hearings.” *Pool v. City of Omak*, 36 Wn.App. 844, 678 P.2d 343 (Wash.App. Div. 3 1984).

Here, Medina did not have a court reporter present and, as a consequence, it was not able to provide a complete verbatim transcript to

the Superior Court. Medina's failure to comply with its legal obligations should not serve to give it the right to impose a second, *de novo*, hearing on Skinner. Due to the lack of a complete record, Skinner challenges all of the Civil Service Commission Findings.

This Court might also consider the effect of a decision allowing Medina to avoid its legal obligation to create, preserve and produce a verbatim transcript. If Medina is allowed to simply ignore the requirements of the statute, only to be told to hold a second hearing, then the statutory requirement becomes meaningless. Statutes should not be construed in a manner which renders legislative language meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810 (1988). Municipalities throughout the state will begin to not comply with the statute knowing that they will be allowed to impose an additional hearing on affected employees. This would place an undue burden on the employees in favor of the municipalities, an outcome certainly not intended by the legislature.

b. There Is No Evidence In The Record That The Primary Witness Against Skinner Was Ever Sworn In As Required By Law; Her Testimony Should Be Excluded. The Affidavit Of Medina's Counsel, Prepared Four Years After The Hearing, Is Not Admissible In These Proceedings.

The failure to swear-in witnesses appearing before a civil service commission violates an officer's due process rights entitling him to reinstatement. *Nirk v. Kent Civil Serv. Comm'n*, 30 Wn.App. 214, 633 P.2d 118 (Div. 1 1981) review denied, 96 W.2d 1023 (1981). The Court, in *Nirk*, considered the issue of whether witnesses at a civil service commission hearing regarding a police officer's discharge must be sworn in. The Court held that the failure to swear witnesses appearing before the commission violated the officer's due process rights. Based on this issue, the Court reversed the decision of the civil service commission.

In this case, there is no evidence in the record that Ms. Beckley, the City's primary witness against Roger Skinner, was ever sworn in prior to her giving testimony. Because of this omission and the importance of her testimony, the City has failed to provide Roger Skinner with the due process of law owed to him. This, alone, is sufficient cause to reverse the decision of the Civil Service Commission.

Additionally, at page 145 of the transcript, after another gap in the record, testimony is provided by an "Unidentified Witness." Not only is

this witness unidentified, there is nothing in the record to indicate that this witness was ever sworn in. From the transcript it appears that up to 5 minutes and 8 seconds of this unsworn witness's testimony is not in the record. While it does not appear in the record, this missing testimony, like all of the missing testimony in this case, is unavailable to this Court or to Skinner for review.

At the superior court, Medina attempted to enter into evidence an affidavit of counsel attesting to the fact that Ms. Beckley was sworn in. First, such an affidavit is not properly admissible in these proceedings. A Court's review of the administrative decision of the Civil Service Commission must be made in a summary manner, based solely on the record developed at the Civil Service Commission. Superior Court review of a decision of a civil service commission is limited to the record before the Commission. *Nickerson v. City of Anacortes*, 45 Wn.App. 432, 439 (Div. 1 1986) citing *Eiden v. Snohomish Cy. v. Civil Service Comm'n*, 13 Wn.App. 32,37 (Div. 1 1975). The affidavit of Medina's counsel, prepared some four years after the hearing, is obviously not part of the record before the commission and should be stricken.

Because the record contains no evidence that the City's primary witness against Skinner was ever sworn in, her testimony should be stricken from the record.

Interestingly enough, even though both of these issues were fully briefed and argued at the superior court, the memorandum opinion of the court below is silent on these issues.

5. THE COMMISSION BASED ITS DECISION IN PART ON ALLEGATIONS DIFFERENT FROM THOSE PUT FORTH BY THE CITY AS THE BASIS FOR THE TERMINATION OF SKINNER'S EMPLOYMENT. FINDINGS 5.11, 5.12, 5.13.1, 5.15, 5.16 AND 5.17 PROVE THAT THE COMMISSION IMPROPERLY CONSIDERED EVIDENCE BEYOND THE SCOPE OF THE ALLEGATIONS AGAINST ROGER SKINNER.

The City's Pre-Hearing Statement (*ROP*, Part A, Tab 5, at pages 1-2) and its memo regarding the Loudermill Hearing (*ROP*, Part B, Tab 16) make clear that the sole basis for terminating Roger Skinner were two specific statements he was alleged to have made to Ms. Beckley and Ms. Crum.

Despite this very limited basis for discharging Roger Skinner, the Commission entered findings related to past performance (5.11), training opportunities (5.12), Mr. Skinner's "discontent" (5.13.1), the Commissions "expectations" regarding Skinner's communications and responsibility for employee morale (5.16) and their observations about his apparent lack of remorse (5.17). The Commission's consideration of these matters was inappropriate as none of these issues were the stated basis of the termination of Mr. Skinner.

A civil service commission may not uphold the discharge of a police officer for reasons other than those advanced by the City through its

Chief of Police. *In re the Matter of the Discharge of Leon C. Smith*, 30 Wn.App. 943 (Div. 2 1982). In *Smith*, the Court addressed the issue of “whether the Commission is empowered to set forth its own reasons for discharging an employee.” Id at 946. The Court held “Although the Commission is vested with discretionary power to determine whether the charges brought by the appointing power are sufficient grounds for dismissal, the exercise of this power is confined to the content of those charges.” Id at 947. It further held that a civil service commission operating pursuant to RCW 41.14.120³ must confine its inquiry to those reasons set forth by the appointing power. It may investigate those reasons but it may not substitute reasons of its own, as it did here. The trial court correctly held this action to be *ultra vires*.” Id. at 948.

In its Findings and Conclusions *ROP*, Part A, Tab 6, the Commission entered findings including the following excerpts:

¶ 5.11 “Employee is not viewed as a “go to” manager among Department personnel.”

¶ 5.12 “Employee [made] efforts to seek the position of Chief at the City of Newport, Washington”

¶ 5.13.1 “From the record before the Commission, it is evident that Employee did not readily accept the initiatives and efforts implemented by the Chief. . . the record of Employee’s discontent and search for other jobs is clear”

³ RCW 41.14.120 is the civil service commission statute applicable to Sheriff offices and their deputies. The statute at issue here, RCW 4.12.090, is the same statutory scheme applicable to City Police Departments.

¶ 5.16 “The Commission would expect that an employee with that standing [i.e., a lieutenant] would have sufficient knowledge of requirements for behavior and conduct.”

¶ 5.17 “the Commission finds no evidence of remorse or recognition of the impropriety of the conduct.”

The Commission thereafter, in its Conclusions, stated that the termination of Skinner’s employment was “in good faith for cause” without specifically basing this determination upon any particular Finding or combination of Findings.

Because the Commission considered matters other than those presented by the City as reasons for his discharge, and because the Commission affirmed the City’s termination decision without specifically citing a basis for the termination after discussing those other Findings, it must be presumed that the Commission’s Order was based, at least in part, on matters that should not have been considered. Therefore, the decision of the Civil Service Commission should be reversed.

6. Does The Record Lack Sufficient Evidence To Support The Termination Of Skinner’s Employment Such That His Appeal Must Be Sustained?

a. There Is No Evidence In The Record Of The Allegations Made Against Skinner Which Served As The Basis For His Termination

Even if the testimony of Ms. Beckley had been rendered as sworn testimony, there is not a single word in her recorded testimony to support

the findings against Roger Skinner. Nowhere in her transcribed testimony is there any statement that Skinner made the statements attributed to him. Given that she is the primary witness against Roger Skinner, this absence of testimony provides another compelling reason to reverse the decision of the commission. The exhibits, even if admissible (which Skinner does not concede), include a memo purportedly from Ms. Beckley to Acting Chief Dan Yourkoski. The memo is not signed by Ms. Beckley and at no point in her testimony does she admit to writing the memo. Certainly there is no testimony in the record wherein she testifies to its truthfulness.

Similarly, Ms. Linda Crum, the only other witness to the statements allegedly made by Skinner that supposedly justified his termination, provides no testimony supporting those allegations. Ms. Crum, at one point in her testimony, acknowledges writing the memo presented to the Commission as Exhibit 2, but she states she was “directed” to write the memo by Dan Yourkoski who was, according to Ms. Crum’s testimony, “acting chief at the time.” Even if it were admissible evidence, Crum’s memo is not signed by her. Further, at no point in her testimony does she testify that Skinner made the statements attributed to him. She does not even testify that the statements she made in the memo were true.

There is simply no testimonial evidence in the record, from the only witnesses who supposedly heard the comments attributed to Skinner, supporting the allegations made against Skinner.

b. The Documentary Evidence Before The Commission Was Never Properly Admitted And Should Be Stricken.

As an initial matter, Rule 18.23(e) of the Civil Service Rules of the City of Medina Washington provides:

Parties are encouraged to stipulate to the admissibility of documentary exhibits. To further this end, parties will make request of other parties for such stipulation no later than three (3) days in advance of the hearing, barring unusual circumstances. The party of whom the request is made shall respond no later than one (1) day prior to the hearing.

There is nothing to indicate the existence of any “unusual circumstances” in this case. As is clear from the record, the City’s attorney did not provide copies of the City’s exhibits to Skinner’s counsel until after the hearing had commenced. *ROP*, Transcript, pgs. 10-11. Therefore, Skinner was unable to stipulate to the admissibility of the documentary exhibits as contemplated by the Commission’s own rules.

The hearing did apparently recess as Skinner’s attorney reviewed the documents with the thought of stipulating to their admissibility, if possible. The record evidences the following colloquy between Skinner’s attorney (Ms. Sampson) and the hearing examiner (Mr. DiJulio):

MR. DIJULIO[to Mr. Rubstello]: That's fine. You can present them now. Obviously, they will be subject to individual consideration for admission.

MS. SAMPSON: Mr. Dijulio, what I would like to do, if I may, is perhaps just even go off the record for five minutes to let me look at these documents. There are 20 of them. Most, I have seen. I would just like to verify that they are authentic and relevant, and I will stipulate to as many as I can. That would probably expedite matters.

MR. DIJULIO: Okay. We will go off the record for five minutes.
(Discussion off the record.)

ROP, Transcript, pg 11

Clearly, Ms. Sampson's statement is a statement of intent, not of stipulation. She indicates that she has not reviewed the exhibits and needs time to do so. She states that she is unable to stipulate to any admission without first reviewing the documents, off the record.

The proceedings do then go off the record but nowhere later in the transcript does Ms. Sampson agree to stipulate to anything, much less the admission of the exhibits. In fact, quite the opposite occurs when the hearing recommences. Skinner's attorney objects to two exhibits in particular and the hearing examiner proceeds to set forth the rules for admission of the remaining documents. The record reflects the following:

MR. DIJULIO: . . . the witnesses or exhibits are identified only for that purpose and have not been admitted. Any reason we cannot proceed at this time?

MS. SAMPSON: No reason not to proceed.

I will state an objection to Exhibit No. 12, which is a letter that I wrote to Wayne Tanaka before discipline was imposed upon Mr. Skinner. This is in the nature of a compromise and is generally not admissible in a hearing.

I also object to the use of Exhibit No. 13, which is city manager Schulze's complaint to Skinner complaining about the contents of the letter between Mr. Tanaka and me.

MR. DIJULIO: Okay. We will deal with those when we get to them.

MS. ODERMAT: Steve, Pete seems to think that we need to indicate for the record that we are back in session after a five-minute recess. Is that . . .?

So Ms. Sampson is objecting to Exhibits 12 and 13?

MS. SAMSPON: Correct.

MS. ODERMAT: Mr. DiJulio, does that mean that we disregard those exhibits or have some discussion about that?

MR. DIJULIO: We will ignore all of the exhibits, frankly, until they are –

MS. ODERMAT: Okay.

MR. DIJULIO: -- offered and admitted. She is just noting at this point – her objections in advance to those two.

Okay. Mr. Rubstello, you are – you can make your opening statements. You can use the podium, or you can do it from your seat, which ever you prefer.

ROP, Transcript, pgs 11-13

The hearing examiner thus indicates his understanding that Skinner's attorney was not stipulating to the admissibility of the exhibits. By inference (because Medina did not create a record), it is apparent that Skinner's attorney did not stipulate to any document's admissibility and may have had objections to the admissibility of any of the documents. Unfortunately, because Medina failed in its obligation to have a court reporter present, the record does not reflect what Skinner's attorney did say. However, given the statements made by the hearing examiner, Skinner's attorney had no reason to state any other objections. She had just been informed that all exhibits would be individually considered when offered for admission. Further, the hearing examiner did not permit

Skinner's attorney to assert any other objections at that time – he immediately directed the City's attorney to begin with his opening statement.

Skinner was in the position of having to consider the admissibility of each document as it was being presented and offered. As is clear from the record, however, at no time were the documentary exhibits "offered" for admission so that counsel for Skinner could voice any objections to the admission of such documents into evidence.

Rule 18.23(a) of the Civil Service Rules of the City of Medina (emphasis added) does provide that:

Subject to the other provisions of these rules, all competent and relevant evidence shall be admissible. In passing upon the admissibility of evidence, the Commission shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings in the superior courts of the State of Washington.

This rule allows the Commission leeway to with regard to the admissibility of evidence, that is, whether the proposed evidence is admissible under considerations of relevancy or hearsay, for example. The rule, however, does not provide the Commission with leeway regarding the procedure required to actually admit a document into evidence. That is, a foundation must be shown, the document offered into evidence and an opportunity provided for opposing counsel to object to the admissibility of the offered evidence. These required steps were simply ignored at the hearing.

Furthermore, even if Rule 18.23(a) is interpreted to allow the Commission the ability to ignore these procedural steps, the hearing examiner repeatedly stated, with regard to the admission of documentary exhibits in this case, that such documents would be subject to individual consideration for admission. Excerpting from the record:

MR. DIJULIO: That's fine. You can present them now. Obviously they will be subject to individual consideration for admission.

ROP, Transcript, pg. 11

MR. DIJULIO: Okay. We will deal with those [objections made by Skinner's attorney] when we get to them.

ROP, Transcript, pg. 12

MS. ODERMAT: Mr. DiJulio, does that mean that we disregard those exhibits or have some discussion about that?

MR. DIJULIO: We will ignore all of the exhibits, frankly, until they are –

MS. ODERMAT: Okay.

MR. DIJULIO: -- offered and admitted. She is just noting at this point – her objections in advance to those two.

ROP, Transcript, pgs 12-13.

Thus, the hearing examiner stated that the documentary evidence would be subject to individual consideration for admission; objections would be considered when the documents were offered for admission; and that “we will ignore all of the exhibits, frankly, until they are . . . offered and admitted.”

Regardless of how Rule 18.23(a) may be interpreted for Medina Civil Service Commission hearings in general, for the purpose of this

hearing, the hearing examiner made clear that the procedure of offer, objection and decision would be required for each individual document. Skinner and his counsel had the right to rely on the procedure announced by Mr. DiJulio and they did so.

Nowhere in the limited transcript provided by Medina is there any evidence that Medina offered its exhibits “subject to individual consideration for admission” as required by the hearing examiner. Nowhere in the limited transcript is there any evidence of individual offer, objection and decision regarding admissibility. At the conclusion of the City’s case, the following exchange occurred:

MR. RUBSTELLO: Just to be sure, I think I have gone through all of the exhibits.

MR. DIJULIO: Well, all of the exhibits are –

MR. RUBSTELLO: Authenticated.

MR. DIJULIO: -- admitted except for 12 and 13, which are under reservation.

MR. RUBSTELLO: All right, okay.

UNIDENTIFIED SPEAKER: So at this point the City rests?

MR. RUBSTELLO: Yes.

Ms. Sampson, attorney for Skinner, then says, in the record

MS. SAMPSON: We will bring in our next witness.

ROP, Transcript, pg 142-143

First, the record does not indicate that Mr. Rubstello ever offered the City’ exhibits for consideration. Mr. Rubstello merely suggested that

the documents were “authenticated” and Mr. DiJulio immediately interrupted and said they were admitted. Skinner’s attorney had no part in this conversation.

It was improper for Mr. DiJulio and Mr. Rubstello to change the procedure for admission of documentary evidence without the agreement of Mr. Skinner’s attorney. Mr. Skinner’s attorney never agreed to this change of procedure; indeed, she was never asked for any input at all about the change in the previously announced procedure or any objections she may have had to the individual exhibits.

Even if the substantial change in procedure was ignored, the conversation between the City’s attorney and the hearing examiner above apparently excludes Skinner’s attorney. The hearing examiner never asks Skinner’s attorney about any other objections she may have and the transcript does not otherwise indicate that Skinner’s attorney was aware of the conversation between Mr. Rubstello and the hearing examiner. Indeed, an “unidentified speaker”⁴ interjects a question about the proceedings in general before the transcript indicates any response from Skinner’s attorney. There is simply no clear indication that Ms. Sampson was aware the documents had been offered and admitted and, certainly,

⁴ Skinner’s counsel has since reviewed the audio recording upon which the transcript was based. The voice of the “Unidentified Speaker” was, without a doubt, that of a male; the “Unidentified Speaker” was certainly not Ms. Sampson.

there is no evidence that she agreed to a change in the previously announced rule that all exhibits would be individually considered for admission.

c. The Civil Service Commission's Findings 5.4, 5.5 and 5.6 Are Not Supported By The Record

Findings 5.4, 5.5 and 5.6 Of the Civil Service Commission's Findings, Conclusions and Order (Record, Part A, Tab 6) are not supported by any admissible evidence in the record. The partial testimony of Briana Buckley and Linda Crum in the transcript simply does not support the claim that Roger Skinner made any inappropriate statements justifying termination of his employment. Further, there is no admissible documentary evidence to support such findings. The Commission's reliance on unsigned memos not verified by the testimony of either Beckley or Crum constitutes reversible error.

Reading the record, as it was provided to this Court and to Mr. Skinner, simply provides no evidence to rebut. One of the most damaging aspects of the missing testimony is that it prevents Mr. Skinner from presenting to this Court any of the exculpatory comments made by Ms. Beckley and Ms. Crum.

The City's Pre-Hearing Statement (*ROP*, Part A, Tab 5, at pages 1-2), and the City's own memo regarding the Loudermill Hearing for Skinner (*ROP*, Part B, Tab 16) makes clear that the sole basis for terminating Roger Skinner was the two statements he was alleged to have made to Ms. Beckley and Ms. Crum. Given that the veracity of these

allegations is not supported by their testimony, Mr. Skinner's termination cannot be supported and the decision of the Civil Service Commission is reversible on this basis as well.

d. The City's Lack of Good Faith Is Also Evidenced By Its Failure to Abide By Its Own Rules Regarding Progressive Discipline And The Need To Provide A Warning Letter To Skinner

The City's own rules require that it provide employees with a warning letter (Medina Civil Service Rule 17.01, attached as Exhibit D) and progressive discipline (Medina Police Department Code 26.1.4 III, attached as Exhibit E) prior to termination. Medina failed to abide by these rules in its termination of Skinner's employment thereby demonstrating Medina's lack of good faith in the process leading to Skinner's termination.

Rule 17.01 provides that a warning letter is not required only in cases of "theft, gross insubordination and/or drunkenness on duty, and/or issues of parallel magnitude." To suggest that the two verbal statements allegedly made by Mr. Skinner rise to the level of gross insubordination is not credible on its face. In fact, neither the City or the Commission has ever directly taken this position. Furthermore, the City first knew of the alleged transgression in late October 2005 but did not even place Mr. Skinner on Administrative Leave with pay until February 1, 2006, over three months later. Certainly if the allegations against Mr. Skinner rose to the level of "theft, gross insubordination and/or drunkenness on duty, and/or issues of parallel magnitude," the City would have been compelled

to place him on administrative leave with pay immediately in late October or early November 2005. The fact that the City allowed Mr. Skinner to continue to perform his duties to protect and serve the citizens of the City of Medina, and continued to allow him to interact with other employees of the City, for over three months after the alleged statements were made clearly demonstrates that the City did not consider that the allegations rose to the level of gross insubordination or “issues of parallel magnitude.” Consequently, the City was obligated to provide Mr. Skinner with a warning letter as a first step and impose further discipline only if Mr. Skinner failed to heed the conditions of the warning letter. The City failed to do so.

Police Department Code 26.1.4 III sets forth a process of progressive discipline. Dismissal under the Police Department Code requires “misconduct [so] serious that continued employment is no longer appropriate or a continuing pattern of behavior involving repeated serious or very serious misconduct.” PDC 26.1.4.III.A.5.

As discussed above, the fact that the City allowed Skinner to continue his official duties and continue to interact with the citizens of Medina and other members of the Medina Police Department for three months belies any notion that the City considered the alleged misconduct “so serious that continued employment is no longer appropriate.” The two alleged statements were purportedly made during the same period of time so that the allegations cannot be considered a “continuing pattern” or “repeated serious or very serious” misconduct.

In fact, the City's failure to implement progressive discipline, as required by its own rules was not a decision made based upon the seriousness of the allegations against Mr. Skinner, rather it was apparently made because the City offices were too small. In his testimony, Medina City Manager Doug Schulze testified as follows:

Q (Mr. Rubstello – attorney for the City of Medina): Was the size of your department and its space, somewhat confined quarters, were those a factor at all in your determination with – discussion with Chief Chen to discharge rather than demote –

A (Mr. Schulze, Medina City Manager): Yes, it was.

Q: -- Mr. Skinner?

A: Yes, it was.

ROP, Transcript at 100.

The limited size of the City's physical facilities do not excuse its failure to impose progressive discipline on Mr. Skinner. This failure demonstrates that the City was not discharging Mr. Skinner based on good faith cause but rather as a matter of convenience. This is yet further evidence of the lack of good faith in the City's termination of Skinner's employment.

F. CONCLUSION

The City of Medina failed to comply with its statutory obligation to create, preserve and produce a verbatim transcript. Even if a complete transcript had been produced, the record indicates that the documents submitted by the City in this matter were not properly entered into evidence. Furthermore, the Civil Service Commission acted *ultra vires* by considering factors other than those put forth by the City as the basis for

Skinner's termination. Finally, the trial court, acting in its appellate capacity, failed to respect the statutory limitations on its authority as it did not make the determination required by statute but, instead, ordered a remand to the Civil Service Commission, an order for which no authority exists.

In light of the foregoing, Skinner respectfully requests this Court to remand this matter back to King County Superior Court, directing the Superior Court to enter an order sustaining Skinner's appeal and awarding him back pay and other compensation due him as a consequence of Medina's termination of his employment in violation of RCW 4.12.090.

Respectfully submitted this 27th day of October, 2010



William J. Murphy
WSBA No. 19002
Attorney for Appellant

EXHIBIT A
RCW 41.12.090
The Civil Service Commission Statute

Archive

Washington Statutes**Title 41. Public employment, civil service, and pensions****Chapter 41.12. Civil service for city police***Current through 2010SP1 Legislation***§ 41.12.090. Procedure for removal, suspension, demotion or discharge - Investigation - Hearing - Appeal**

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended, demoted or discharged except for cause, and only upon written accusation of the appointing power, or any citizen or taxpayer; a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended, demoted or discharged may within ten days from the time of his or her removal, suspension, demotion or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal, suspension, demotion or discharge was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may affirm the removal, or if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or 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 person was removed, suspended, demoted or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. The commission upon such investigation, in lieu of affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay; the findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be had by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his or her defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days after the filing of such notice, make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner: PROVIDED, HOWEVER, That such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

History. 2007 c 218 § 14; 1937 c 13 § 9; RRS § 9558a-9.

EXHIBIT B
RCW 36.70C.120
The LUPA

Archive

Washington Statutes**Title 36. Counties****Chapter 36.70C. Judicial review of land use decisions**

Current through 2010SP1 Legislation

§ 36.70C.120. Scope of review - Discovery

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

(5) The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. If any party, or anyone acting on behalf of any party, requests records under chapter 42.56 RCW relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take such request into account in fashioning an equitable discovery order under this section.

History. 2005 c 274 § 273; 1995 c 347 § 713.

Note:

Part headings not law -- Effective date -- 2005 c 274: See RCW 42.56.901 and 42.56.902.

Archive

EXHIBIT C
RCW34.05.562
The APA

Archive

Washington Statutes

Title 34. Administrative law

Chapter 34.05. Administrative Procedure Act

Part V. JUDICIAL REVIEW AND CIVIL ENFORCEMENT

Current through 2010SP1 Legislation

§ 34.05.562. New evidence taken by court or agency

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

History. 1988 c 288 § 514.

Archive

EXHIBIT D
Medina Civil Service Rule 17.01

17. DISCIPLINE AND DISCHARGE

17.01 SUSPENSION--DISCHARGE

- a. A department head may suspend a subordinate, with or without pay, for a period not to exceed thirty (30) days for good cause.
- b. A department head may discharge a subordinate for good cause, but in respect to discharge or suspension shall give at least one (1) warning letter of the complaint against such employee to the employee in writing and a copy of the same to the union, except that no warning letter need be given to an employee before he/she is discharged or suspended if the cause of such discharge or suspension is for theft, gross insubordination and/or drunkenness on duty, and/or issues of parallel magnitude. Warning letters to be considered as valid, shall be issued within thirty (30) days after the occurrence or knowledge of the occurrence of the violation claimed by the department head in such warning letter.
- c. Warning letters shall be immediately removed from the employee's personnel file in the event that the complaint is determined to be unfounded.
- d. Disputes regarding this section shall be handled through the Union grievance procedure for employees who are Union members, and through the Civil Service Commission for non-Union employees.

17.03 DEMOTION

- a. Demotion of an employee to a lower class for good cause may be made by the department head.
- b. An employee so demoted shall lose all rights to the higher class.
- c. If the employee has not had previous standing in the lower class, such demotion shall not displace any other regular employee or any probationer. The Secretary shall be satisfied as to the ability of such demoted employee to perform the duties of the lower class and shall require the completion of a probationary period.

17.05 DISCIPLINE--JUST CAUSE--ILLUSTRATED. The following are declared to illustrate adequate cause for discipline; discipline may be made for any other good cause:

- a. Incompetence, inefficiency, or inattention to, or dereliction of duty;

EXHIBIT E
Medina Police Dept. Code 26.1.4 III

- III. Discipline will generally be administered in a progressive fashion (i.e., from minimal to maximum). This does not mean that all discipline will start from the lowest level in every instance. Discipline may be issued at a higher level. The seriousness of the incident will dictate at what level of the progressive discipline continuum the incident will fall. The following will all be taken into consideration in the administration of discipline; the seriousness of the incident, the circumstances surrounding the incident, the employee's past disciplinary records, the employee's past work performance, the overall negative impact on the organization the incident caused, and the prognosis for future similar problems.
- A. Upon conclusion of an investigation, if it is apparent that an employee is guilty of a rule violation, and disciplinary action is appropriate, discipline will be administered as follows:
1. **Counseling/Training** - If the employee misconduct is minor, consisting of only a minor procedural mistake or inappropriate judgment, employees, as a general rule, will be counseled or given appropriate training. Counseling/training is not considered discipline.
 - a. Not to exceed three repetitions within a one year period for the same violation.
 - b. Must be documented by the supervisor and retained by the supervisor for a minimum of one evaluation period.
 - c. Not considered a formal reprimand.
 - d. The Lieutenant shall be responsible for developing and conducting in-service training for Police Department employees designed to further their knowledge and understanding of proper and effective police methods and techniques. The training should foster positive and constructive techniques for improving employee productivity, effectiveness and morale. The Department may mandate remedial training for employees found to be deficient in some necessary skills.
 2. **Written Reprimand** - If the employee misconduct is serious, part of a continuing pattern of behavior involving repeated minor misconduct / mistakes, or there are more than three repetitions within a one year period for the same violation, employees as a general rule will be issued a written reprimand. Written reprimands will contain charges (what rules have been violated) and specifications (description of the