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No. 711571

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

ROGER L. SKINNER

Appellant

v.

CITY OF MEDINA
Respondent

SKINNER'S BRIEF ON APPEAL

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A. ASSIGNMENTS OF ERROR

The trial court erred in:

1. Granting Medina's Application for Writ of Review;
2. Deciding the merits of the appeal without affording Skinner the opportunity to brief the issues on appeal; and
3. Overturning the decision of the Medina Civil Service Commission with respect to the back pay component of the award to Skinner.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient basis to grant the Writ of Review?
2. Was Skinner deprived of due process by the lower court deciding the merits of the appeal without affording Skinner the opportunity to brief the issues?
3. Did the Medina Civil Service Commission have the authority to award Skinner back pay?

C. STATEMENT OF THE CASE

After fifteen years of service with the Medina City Police Department, Lt. Roger Skinner was terminated in February 2006. CP 9 at 3.1 Skinner timely appealed his dismissal to the Medina Civil Service Commission (the Commission). CP 9 at 3.2. On December 21, 2012, after several years of legal proceedings, the Commission entered its Findings, Conclusions and Order. CP 8 through CP 21. The Commission determined that Skinner had violated certain police department standards but it also determined that the department had violated its own Code of Conduct which required the application of progressive discipline. CP 17 through CP 19. The Commission ordered that the discharge of Lt. Skinner be set aside and that he be reinstated and awarded back pay.[1] CP 20 at 6.1, CP 21 at 6.3

The City did not seek review of the order of reinstatement – its application for a Writ of Review, dated February 14, 2013, is expressly limited to the issue of whether or not the Medina Civil Service Commission was empowered to award back pay to Skinner. CP 3 at 4.3 and 4.4.

[1] The Commission also ordered a sixty-day unpaid suspension and a demotion to the rank of patrol officer but these are not at issue in this appeal. CP 21 at 6.3

The Superior Court signed its Memorandum Opinion on July 25, 2013, over five months after Medina filed its application (CP 68 through CP 72). The Court did not apprise the parties of its decision or enter the decision into the Court's file until October 1, 2013, seven and one half months after the application was filed and two months after the decision was originally signed. CP 73.

In its Order (CP 68 to CP 72), the Court did not analyze or give any consideration to the standard of review applicable to a Superior Court decision to grant a Writ of Review. The Superior Court instead omitted this critical step and embarked on a *sua sponte* analysis of the applicable civil service statute to determine the merits of the appeal, avoiding any deference to the Commission and Skinner's right to brief the merits. In this manner, the Court improperly overturned the Commission's back pay award to Skinner. CP 72.

D. SUMMARY OF ARGUMENT

Medina filed an application for a Writ of Review, arguing that the Civil Service Commission, by allowing a back pay award, exceeded its authority in interpreting the Civil Service Statutes. The Superior Court did not comply with the statutory procedures or apply the applicable standard

of review in its consideration of Medina's Application for a Writ of Review. Instead, the Superior Court leap-frogged right into the merits of the appeal and nullified a significant aspect of the decision of the Civil Service Commission. The Court did not comply with RCW 7.16.040 or provide Skinner the opportunity to brief the merits of the appeal. Even if the Superior Court had followed appropriate procedures before addressing the merits of the appeal, its decision is contrary to established law that decisions of a civil service commission are afforded deference, as is its interpretation of the civil service statutes, unless the commission acts contrary to law, which is not the case in this matter. A broad array of precedent supports the Commission's back pay award. For these reasons, the Superior Court Memorandum Opinion dated July 25, 2012 and the Order's contained therein should be reversed and vacated.

E. ARGUMENT

1. Standard of Review

There are three standards of review applicable to this appeal. First is the standard of review to be applied by this Court in reviewing the decision of the Superior Court below; the second is the standard of review applied to an application for a Writ of Review; the third is the standard of review applied to reviewing decisions of a civil service commission.

The Washington Supreme Court has clearly and consistently stated the standard to be applied when this Court reviews the decision below: "The superior court's decision to issue a writ is reviewed de novo." *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wash.2d 782, 788, 903 P.2d 986 (1995); *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 (2010).

The Washington Supreme Court has also addressed the standard of review that the Superior Court and this Court should apply when considering an application for a statutory writ of review:

> The legislature has established factors governing whether a writ of review should issue. *See* RCW 7.16.040. Two independent prongs must be satisfied before a court can grant a statutory writ of review. The writ shall issue when an inferior tribunal has (1) exceeded its authority *or* acted illegally, and (2) no appeal or any plain, speedy, and adequate remedy at law exists. Unless both elements are present, the superior court has no jurisdiction for review.

(emphasis added, citation omitted). *Holifield* at 240. The Court went on to clarify that the term "acted illegally" means that:

> an inferior tribunal, board or officer (1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of the party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the revisory jurisdiction of an appellate court.

Holifield at 244-45.

Finally, the standard of review applicable to review of civil service commission decisions has also been addressed by Washington courts. In *City of Seattle v. Werner*, 163 Wn. App 899 (Div. 1 2011), this Court, citing *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29-30, 891 P.2d 29 (1995), held:

> The correct appellate standard of review of a commission's decision under a writ of review is controlled by RCW 7.16.120. Hilltop, 126 Wn.2d at 29. Under RCW 7 .16.120, we review de novo whether the decision below was contrary to law and whether the factual determinations are supported by substantial evidence. Hilltop, 126 Wn.2d at 29. Substantial evidence is the existence of a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hilltop, 126 Wn.2d at 34. Under this standard, an appellate court is not to substitute its own judgment for that of the fact finder. Hilltop, 126Wn.2d at 34.

In this case, Medina has expressly not appealed the factual determinations of the civil service commission. Its appeal relates solely to whether the civil service commission's decision was contrary to law, a matter which a Court rules on *de novo* but only if the standard of review applicable to statutory writs is first satisfied. Furthermore, even if the Court has *de novo* authority to review, a civil service commission's interpretation of civil service law is entitled to deference. *Crippen v. Bellevue*, 61 Wn. App. 251, 259 (Div. 1 1991).

2. There Was Not A Sufficient Basis to Grant the Writ Of Review

In accordance with *Holifield*:

> The writ shall issue when an inferior tribunal has (1) exceeded its authority or acted illegally, and (2) no appeal or any plain, speedy, and adequate remedy at law exists. Unless both elements are present, the superior court has no jurisdiction for review.

(Emphasis added). *Holifield* at 240.

In this case, neither of the elements is present and the Writ of Review should not have been granted.

Putting aside, for the moment, the issue of "illegality" under the first prong of the test, the City of Medina has standard appeal rights provided by RCW 2.06.030 and the Rules of Appellate Procedure. Those provide a "plain, speedy and adequate remedy at law". Because of this, Medina cannot satisfy the second prong of the test and, therefore, was not entitled to relief through a statutory writ of review.

The adequate remedy at law, authorized by RCW 2.06.030 and the Rules of Appellate Procedure, provide Medina with a right to appeal the final judgment in this case. As of now, there is a civil service commission order but that has not been reduced to judgment because a hearing is required to determine the type and amount of damages to which Skinner is entitled pursuant to the Order of the Commission. When a final judgment

is (finally) entered in this case, it may present several questions for review:

1. Is the civil service commission decision supported by substantial evidence?
2. Is the back pay award "legal"?
3. Is Skinner entitled to double damages in accordance with RCW 49.52.070?
4. Is Skinner entitled to attorney's fees based on his claim for wages owed in accordance with RCW 49.48.030?
5. Factually, is the amount of the award supported by the evidence offered by the expert economic witnesses?
6. Other issues?

Allowing Medina to proceed under a Writ of Review is a waste of judicial resources because Medina will have the opportunity to appear again before this court to argue about the back pay issue and other issues that may arise upon entry of a final judgment. Because Medina has adequate appeal rights, the second prong of the requirements of RCW 7.16.040, as explained by the *Holifield* court, has not been satisfied. Therefore, a Writ of Review should not have been granted by the Superior Court. If the Superior Court was without authority to grant the Writ, then the balance of its opinion has no foundation. For this reason alone, the Superior Court's Opinion and the Orders contained therein should be reversed and vacated.

In addition to the foregoing, in order to properly grant a statutory Writ of Review, the Superior Court had to determine that the Commission

exceeded its authority or that its decision was illegal. The Commission was well within its statutory authority (jurisdiction) to modify the discipline imposed by Medina – that is precisely the power granted to it by RCW 4.12.090 (at CP39). The Commission did not exceed its authority. As argued below, the back pay award is supported by statutory and case law and, therefore, is not "illegal". Thus, the first prong of the standard for issuance of a statutory writ of review has also not been satisfied.

Both statutory requirements of RCW 7.16.040 must be met to support the grant of a Writ of Review. In this case neither element was satisfied; the Writ should not have been granted and the lower court's Opinion and the Orders contained therein should be reversed and vacated.

3. Even If The Superior Court Had Grounds To Issue The Writ Of Review, It Proceeded In A Manner Contrary To Law Thereby Preventing Skinner From Properly Briefing The Merits Of The Issues On Appeal

The statutes authorizing Writs of Appeal contemplate that the issuance of the Writ is the first step of the appeal process. The applicable statutes are as follows:

> **RCW 7.16.060**
> **Writ, to whom directed.**
> The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal the clerk, if there be one, must return the writ with the transcript required.

RCW 7.16.070
Contents of writ.
The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

RCW 7.16.100
Service of writ.
The writ may be served as follows, except where different directions respecting the mode of service thereof are given by the court granting it:

(1) Where it is directed to a person or persons by name or by his or her official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is directed, or upon the corporation, in the same manner as a summons.

(2) Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk.

The Superior Court did not issue a Writ of Review in this case; rather it "granted" the Writ of Review and summarily decided the merits of the appeal. Contrary to the procedure envisioned by the above statutes, the Superior Court decided the merits of the appeal without the benefit of a certified record. Its decision was based on a copy of the Civil Service Commission decision provided by the respondent Medina. This Court is likewise burdened; it is being asked to decide this case based on clerk's papers certified by the Superior Court however that trial court certification is tainted because the "certified clerk's papers" include a portion of the

record of the Civil Service Commission; a record that was never properly certified.

What should have happened, and what Skinner reasonably expected, was that the Court would make a decision solely on the application for the Writ. RCW 7.16.070, using mandatory language, states that the Writ must be directed to the party that controls the record of proceedings. In this case, there is no Writ – simply a decision on the merits of the appeal. If the Court had properly granted the Writ, then the Court would have directed the inferior tribunal to deliver a certified record and directed the party seeking review (Medina) to apply to the clerk of the Court for a case schedule. Even if the appeal had been decided on a summary judgment calendar, that would have provided Skinner with at least a 28-day briefing schedule, not the 10-day schedule set out in Medina's Application for Writ of Review. Furthermore, Skinner would have had the opportunity to brief the merits of the appeal, separate and apart from his arguments opposing the application for a Writ of Review. If proper procedures had been followed by the Superior Court, Medina would have submitted a brief to the reviewing judge, followed by a response from Skinner and a reply from Medina, all after the Writ had been granted. None of that happened here and Skinner has been prejudiced

by the Superior Court's failure to allow him the opportunity to properly brief the merits of this appeal.

4. Even If The Superior Court Had Properly Granted A Writ Of Review, And Properly Allowed Skinner To Brief The Merits Of The Appeal, The Lower Court's Decision On The Merits Is Contrary To Law

[T]he judiciary's role in reviewing action taken by the [Civil Service] Commission is severely limited. *Greig v. Metzler*, 33 Wn.App. 223, 226 (Div. 2 1982). This statement summarizes the cautious approach that the Court should undertake when reviewing the actions of a civil service commission, an apolitical body of citizens appointed to oversee employment decisions concerning its first responders. These unpaid local citizens were given broad authority by the legislature so that internal politics and other political considerations would not interfere with the orderly and effective management of emergency responders. *Civil Service, Introduction*, Municipal Research Services Center of WA, (www.mrsc.org/subjects/personnel/civserv.aspx).

Our appellate court has repeatedly held that a local civil service commission's interpretation of the civil service law is entitled to deference by a court. *Crippen, et. al v. The City of Bellevue, et. al*, 61 Wn.App. 251, 260 (Div. 1 1991); *Pool v. Omak*, 36 Wn.App 844, 848 (Div. 3 1984). If RCW 41.12.090 is subject to more than one interpretation, the

interpretation of the Civil Service Commission should be afforded deference by this Court.

RCW 41.12.090 reads, in pertinent part:

> 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.

In the CSC Order, the Medina Civil Service Commission decided that in lieu of discharge, it would modify the order of discharge by directing a suspension, without pay, for a given period (February 16 to April 16, 2006) with subsequent restoration to duty with a demotion in classification grade or pay and awarding back pay. The CSC Order is entirely consistent with the statutory language of RCW 41.12.090 quoted above. There is nothing in the statute that prohibits the action taken by the Commission.

If the Commission violated an express provision of the statute, the Court could find that the Commission acted illegally. However, to the extent the Court engages in the subjective exercise of inferring legislative intent to support its finding of illegality, the Court is not granting sufficient deference to the Commission.

In its effort to infer legislative intent, the Court analyzed two sentences in a way that suggested an ambiguity that needed to be resolved. However those two sentences can be read in a harmonious and complementary manner that does not suggest an ambiguity. The rules of statutory construction require an approach that first attempts to harmonize the statute as a whole. "We look first to the plain language of the provisions at issue; and we strive to read them harmoniously to give effect to all, avoiding an incongruous reading potentially nullifying other provisions." *Chinn v. City of Spokane*, 293 P.3d 401, 404 (Wash. App. Div. 2 2013). "Where one provision treats a subject in general terms and another treats the same subject in a more detailed way, the specific prevails over the general absent a contrary legislative intent." Id.

The first sentence analyzed by the Court provides:

> If [the Commission] 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 Court contrasts that sentence with the following:

> 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.

These two sentences can be read "harmoniously to give effect to all". The first sentence provides the civil service commission with a roadmap in the specific instance where it finds that the discipline "was made for political or religious reasons, or was not made in good faith for cause." In that specific case, the sentence first quoted above mandates reinstatement. Because the legislature mandated reinstatement in that case, it was compelled to clarify to the Civil Service Commission that back pay was nevertheless discretionary.

The second sentence quoted above provides the civil service commission with a roadmap if it decides some discipline is warranted but disagrees with the precise discipline imposed by the appointing authority. In that case, the legislature was not mandating reinstatement; it was providing the civil service commission with the authority to craft a disciplinary remedy appropriate to the particular circumstances. Because the legislature is not mandating reinstatement in this scenario, it had no need to tell the civil service commission about the discretionary nature of the back pay award; that discretion is implicit.

Because these two provisions are focused on entirely different situations and can be read together in a harmonious manner, it is improper to contrast the two in order to suggest an ambiguity.

In this case, because the Commission decided some degree of discipline was warranted, it followed the direction of the second sentence. This sentence provides a much broader range of options to the Commission, in particular because of its use of the word "modify." The appellate court has recognized that the word modify provides the Commission with a broad grant of authority:

> The statute [RCW 41.12.090] does not define "modify." The term is defined in Black's Law Dictionary (5th ed. 1979): To alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease.

Pool v. City of Omak, 36 Wn.App. 844, 848 (Div. 3 1984).

In a later case, the appellate court held that the grant to the Civil Service Commission to modify the discipline imposed by the appointing power included within it, the authority to either increase or decrease the severity of the discipline.

> Pool v. Omak, 36 Wash.App. 844, 678 P.2d 343 (1984), is dispositive of the sheriff's claim the commission exceeded its authority. There this court held that RCW 41.12.090, containing language virtually identical to RCW 41.14.110, allows the commission discretion to modify a disciplinary decision of a police chief by imposing a stricter penalty than the one imposed by the chief. Conversely, the authority to modify carries with its

> discretion to decrease the penalty. The result dictated by Pool is further supported by cases analyzing city charters which were instituted Before RCW 41.14.110, but which contained similar language. State ex rel. Perry v. Seattle, 69 Wash.2d 816, 820, 420 P.2d 704 (1966); State ex rel. Perry v. Seattle, 62 Wash.2d 891, 892, 384 P.2d 874 (1963); State ex rel. Wolcott v. Boyington, 110 Wash. 622, 626, 188 P. 777 (1920). See also Deering v. Seattle, 10 Wash.App. 832, 836, 520 P.2d 638 (1974).

Erickson v. Spokane County Civil Service Com'n, 39 Wn.App. 271 (Div. 3 1984).

Despite years of published opinions concerning modification of discipline by Civil Service Commissions, there is not one case that supports the notion that the Civil Service Commission is prohibited from awarding back pay when imposing alternative discipline. In fact, case law suggests the opposite. In *Snoqualmie Police Association v. City of Snoqualmie*, 165 Wn.App. 895 (Div. 1 2012), the City discharged a police sergeant in 2007. He appealed to an arbitrator who returned him to duty, imposing a 60-day suspension without pay, demoted him from sergeant to police officer and awarded him back pay. The parallels to the case at hand are striking. The court ordered the case remanded in part because it was not clear which wage rate applied to the award of back pay. However, neither party nor the appellate court suggested that back pay was improper. While the *Snoqualmie* case concerned an arbitrator's award it is unreasonable to conclude that these similarly situated individuals (in time, place and rank) should receive such disparate treatment.

Furthermore, the Court's interpretation of RCW 41.12.090 to infer that the Commission's back pay award was illegal is contrary to case law in this state concerning the award of back pay in cases of non-police wrongful discharge.

> In a recent case, the Washington Supreme Court modified the employment-at-will doctrine, holding that the doctrine is subject to certain exceptions based on an employment agreement, applicable employer policy or regulations, public policy, or the fact that the employee gave consideration in addition to the contemplated services. *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 233, 685 P.2d 1081 (1984). One effect of the court's holding in St. Regis was to create a cause of action for wrongful discharge in the state of Washington. In the case before us, the basis for the trial court's finding of wrongful discharge concerns the public policy exception to the employment- at-will doctrine. The trial court's finding of wrongful discharge has not been appealed, and thus is a verity. See Sherwood v. Bellevue Dodge, Inc., 35 Wash.App. 741, 669 P.2d1258 (1983). As previously noted, the tort of wrongful discharge is new in Washington State. The posture of the St. Regis case was that of summary judgment, and the case was sent back for trial without dealing with the issue of damages. Thus, this court must look to federal cases and cases from other jurisdictions for persuasive authority. Most jurisdictions that have ruled on the issue of damages recoverable for wrongful discharge of an at-will employee have taken the position that the employee is entitled to recover back pay, which represents the amount the employee would have earned from the time of discharge until he finds new employment or is reinstated. Annot. 44 A.L.R.4th 1131 (1986). The general purpose of a damage award in a wrongful discharge case is to make the employee whole. Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45L.Ed.2d 280 (1975) (analysis of damage award in employer-employee discrimination suit). The injured party is to be placed in the situation he would have occupied if the wrongful conduct had not been committed.

(Emphasis added). *Hayes v. Trulock*, 51 Wn.App. 795 (Div. 1 1988)

The Court in *Hayes* upheld the award of back pay in wrongful discharge cases, even absent a statutory provision requiring such an award. *See also, Kloss v. Honeywell*, 77 Wn.App 294 (Div. 1 1995) (affirming back pay award after breach of employment contract). It is logically inconsistent for back pay to be available for wrongly discharged employees under common law while not allowing such an award for wrongly discharged first responders pursuant to a civil service statute that was created to protect the rights of civil service workers.

Because the Commission's decision was not illegal, the Writ of Review should not have been granted. Even if there was a basis to grant the Writ of Review, and proper procedures had been followed, the result of an ensuing appeal should be to uphold the Commission's authority to award back pay.

F. CONCLUSION

As discussed above, Medina has a plain, speedy and adequate remedy at law – its right to appeal the final judgment in this matter. Further, precedent establishes that the CSC Order is not illegal. Either of these reasons is sufficient to deny the application for a Writ of Review in

this case. Because the Writ should not have been granted, the remainder of the Court's Opinion is without foundation. Even if a Writ of Review were proper, the Commission's decision to award back pay is well within its authority and that decision should not be disturbed. Skinner respectfully requests the Memorandum Opinion dated July 25, 2013 and entered on October 1, 2013, and the Orders contained therein, be vacated in their entirety.

Respectfully submitted this 26th day of January, 2014

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